Mental Capacity Bill 2014

1. This written submission expands on some of the points made by the author during the roundtable event of the National Assembly's Ad hoc Committee on the Mental Capacity Bill which occurred on the 29 June 2015 in relation to Lasting and Enduring Powers (LPAs & EPAs). The author does not propose to cover whether the is compliant with the UN Convention on the Rights of People with Disabilities (UNCRPD), as those working on the Bill are aware of the legal debate, and the author will not add anything more meaningful that what has already been said in debates.

General comment

2. The author is mindful that the system of LPAs proposed, based on the system contained in the Mental Capacity Act 2005 which applies to England and Wales will need to be robust and cost effective. Safeguards need to be proportionate and targeted to identified risk. It may also be worth considering the cost of implementation, as a system which proposes numerous options and safeguards, will result in higher administrative costs. The same processes will need to be in place whether one person makes an LPA or the entire population. This was not considered adequately by those implementing the capacity legislation in England and Wales and resulted in significant delays and complaints, which to an extent remain inherent in the system. Furthermore the LPA prescribed forms 2007, 2009 and 2015 applicable to England and Wales are very long and result in a heavy paper trail for all involved.

3. England and Wales has a population of over 56 million[1] and to date over 1 million LPAs have been registered.[2] This equates to 1.78% of the population. Scotland which has a different system, but a population of just under 5.3 million. The Scottish Public Guardian has registered 55,527 powers.[3] This equates to 1.047% of the population. Scotland's legislation has been in force for 15 years and the Mental Capacity Act 2005 has been in force for 8 years. On this basis, it would be envisaged that between 1-2% of Northern Ireland's population of 1.8 million would make a LPA. The average length of time to register an LPA is between 9- 10 weeks. Scotland has also experienced significant delays in the registration process of their powers, which were taking 24 weeks for manual submissions as of last year.[4]

4. The author is aware that the Law Society of Northern Ireland would like to retain EPAs. This has two main shortcomings; the first is that they are limited to property and affairs, so a new type of power would need to be created for health and welfare decision making and second an

[1] 2011 Census
[2] OPG annual report 2014.
[3] OPG Scotland performance data for 2014/15.
[4] OPG Scotland website news September 2014.

unregistered power cannot be investigated by the Public Guardian: a vital part of the safeguarding model of LPAs.

5. Until LPAs came into force in England and Wales there were very few EPAs which were revoked because of the attorney's inappropriate behaviour, but since 2007, there has been a steady growth in investigations by the Public Guardian and applications for the removal of errant attorneys. This would not have occurred without the role and function of the Public Guardian and his office. Whist the numbers are relatively low in comparison to the number of powers made, publicity serves as a deterrent for prospective errant attorneys and aids advisers in understanding how best to advise donors and educate and inform attorneys.

6. As such, the author would favour LPAs, unless EPAss could be registered as part of their creation. This is a vital and effective safeguard post registration.

7. It is the author's opinion that one of the so called 'safeguards' in the LPAs system could be removed, which would streamline the process. This would require those responsible for the Bill to make amendments, which the author appreciates, given the time commitment already put in and the time scale for the passing of the legislation will create pressure.

8. Safeguarding occurs at different points in the LPA regime:

    (i) At creation, particularly the role of the Certificate Provider and registration.
    (ii) After registration- when the attorney becomes more informed of how he should act. Attorneys will need to be provided with good quality information early on in the process. According to the 'Nudge theory'[5] 98% of attorneys will act appropriately if provided with information as to how they are to act early on in the process. This has not occurred in England and Wales and might explain the increase in investigations and removals. **Guidance must be available for the attorney, which is focused and easily accessible.**
    (ii) During the attorneyship- by investigation and removal of any errant attorney.

9. If (ii) above is robust, it should result in less investigations and removals during the attorneyship.

[5] Nudge Theory is usually credited to Richard Thaler, Professor of Behavioural Science and Economics at the University of Chicago Booth School of Business and Daniel Kahneman, an American psychologist. See also "Nudge: Improving Decisions About Health, Wealth, and Happiness", by Thaler and legal scholar, Cass R. Sunstein, published in 2008. Research by the Scottish Public Guardian highlights that 98% of people will do the right thing if told of how they should act early in the process.

Guidance for the Certificate Provider must be available and easily accessible

10. The Certificate Provider's role is considered an important safeguard, but to be effective the person must understand that he must do more than merely counter - signing the donor's signature. Guidance must be available and easily accessible. This is a criticism within the English and Welsh system, where guidance is contained in general guidance for the donor, only available in one document, contained in a zip file on the Gov.uk web site.

The certificate provider should see the donor sign and also be a witness

11. The donor must have mental capacity at the time of executing the power as required in the certificate, which provides that in the opinion of the certificate provider, <u>at the time when the donor executes</u> the instrument:

    (i) *The donor understands the purpose of the instrument and the scope of the authority conferred,*

    (ii) *that no fraud or undue pressure is being used to induce the donor to create a LPA of Attorney, and*

    (iii) *that there is nothing else that would prevent a LPA of Attorney from being created by the instrument* (Sch 4, para 2(e) MC Bill).

12. Although it does not expressly require that the certificate provider is present when the donor signs, the statement in the power is worded in the present tense, and complies with clause 3 of the Bill, with the effect that capacity is time specific i.e. the donor must have had capacity at the time he signed and not when the certificate provider signs his part of the LPA (if later). It is common in England and Wales for the Certificate Provider to sign days, weeks and even months after the donor has signed. The certificate provider should only be concerned with the period of time when the donor signed the power and not a later period where he sees the donor for the purpose of completing the certificate. This may be an issue for those with fluctuating capacity where the donor has already signed.

13. The opinion is not confined to capacity but extends to undue pressure and fraud. Without the certificate provider being there at the point of execution, it may not provide the intended safeguard. How would a certificate provider know whether the donor had been subject to duress or undue pressure to get the power signed if he were not there when it was executed? Speaking alone with the donor after the document has been signed is not really an effective way of preventing abuse, if the abuse has already occurred.

14. To avoid undermining this safeguard, the Bill should expressly provide that the Certificate Provider must see the donor execute the power. The author would suggest that the certificate provider should also act as a witness, which would reduce the length of the prescribed form.

Get rid of pre- registration notification entirely

15. Notification of the impeding registration of a LPA follows the approach to the objections to EPAs, where objections can be made before the power is registered. This premise is flawed, as the LPA regime is very different to the EPA regime.

(i) The objector of an EPA is a prescribed family member and will be able to challenge registration on slightly different and wider grounds, in particular, that the attorney is unsuitable. By contrast, the LPA regime allows the donor not to choose anyone to be notified, or select someone who is unlikely to object. This calls into question the function of the notification process in these sorts of cases.

(ii) Evidence in England and Wales, from the Court of Protection's 2010 annual report (July 2011) shows there were 298 objections concerning EPAs. This compares to 98 objections in respect of LPAs. Given the volume of LPA registration applications made to the OPG during the same period, (170,000) - objection applications represent a tiny proportion of overall cases, and raise the question of whether the notification process is a proportionate safeguard.

(iii) It could be argued that the limited number of objections reflect the success of the certificate provider role and so negates the need to challenge. However perhaps a more compelling argument is that the grounds for objecting under a LPA are harder to establish: The attorney of an EPA will usually (unless there is a restriction) have been acting under the power and so there will be evidence of the attorney's past decision-making. In contrast, the grounds for objecting to the registration of a LPA can be summarised as a challenge:

> (a) against the opinion of the Certificate provider (fraud, undue pressure or creation requirements not met, such as the donor did not have mental capacity); or
> (b) that the attorney proposes to behave in a way which is not in the donor's best interests.

No pre- registration objections have been successful, with most being withdrawn. Challenging a Certificate Provider is difficult, as it is usually the best opinion the court has of the time the donor executed the power and challenging the attorney's future decision making creates an obstacle. It is hard to establish as the attorney is not yet in a position to act, so evidence will be speculative. Furthermore, if the donor had capacity, it is hard to see a Court overturning the donor's choice, as to do so would impact on the donor's rights under the Human Rights Act 1998 and the ECHR, Arts. 8 as well as the UNCRPD, right to have his will and preferences followed.

(iv) An objection to registration will need to be made to the OPG at the same time as an application being made to the Court to resolve the issue. This will create duplication of effort on the part of the objector and possible confusion as to the role of the OPG and the Court. There is also the risk that the objector will fail to do both. For example, if the objector were to fail to notify the OPG, and make the application to the Court, the LPA will be registered. The objector would then need to seek an order from the Court, to cancel the power.

If the objector only notified the OPG, at the end of the notification period, the OPG will be obliged to check whether an application has been made to the Court, and if not, then the power must be registered (Sch 4, para 5(5)). This will be burdensome to the OPG, unless they have automatic access to Court data. Furthermore, the OPG will have to enter into additional communication with the objector and the applicant to inform them of the objection. It will be less confusing for concerned people, who can raise concerns to the OPG, who can then investigate and if necessary make an application to the Court after registration.

(v) The Public Guardian has no function to investigate the circumstances surrounding the creation of the power and so his role prior to registration is limited.

(vi) It delays registration, often at a time when the power needs to be used. This can cause financial and administrative hardship. Removal of notification would eliminate the waiting period in its entirety resulting in a quicker registration process.

(vii) It may be better use of the OPG resources to focus on the administration of registration and target investigations more appropriately, to those who are already making decisions, and leave it to the Court to test evidence of the circumstances of the power's creation.

Include a maintenance provision for those acting under Property & Affairs LPA

16. The Bill contains no express provision for the attorney acting under an LPA to maintain others for whom the donor would be reasonably be expected to provide, including spouses, partners and children. The EPA regime contains such power. This replicates the gap in the MCA 2005, which resulted in numerous donors attempting to make provision, only for the provision to be severed on the application of the Public Guardian by the Court. Even if the Bill was not amended to mirror the EPA regime, consideration should be given as to whether there is express provision to maintain a spouse, civil and other partners, minor children and those who are adults but are still in full time education or who live with disabilities.

Extend powers of the Public Guardian in Clauses 124-125 in respect of registered EPAs

17. The Bill does not enable the Public Guardian to:

(i) direct a Court of Protection Visitor to visit an EPA attorney or donor;
(ii) receive reports from attorneys under EPAs and
(iii) deal with representations (including complaints) about the way in which an attorney under an EPA is exercising their powers.

18. This should be extended to registered EPAs.

19. The Public Guardian can only require certain information to be provided to him – mainly in a health or social care context. It would seem sensible for the Public Guardian to be given power to require third parties, in particular financial institutions, to provide any information required by the Public Guardian to fulfil his duties. Although banks and financial institutions may be helpful in providing information in the course of an investigation, if they are not obliged to do so, one can see difficulties for the Public Guardian in exercising his investigatory function under the Bill. It may also be appropriate for the Court visitors to also be given the power to see financial records, as clause 129 does not provide for this.

Extend court's power to call for reports

20. The Court also has power in clause 119 to call for reports from various state and care organisations/ providers. Consideration should be given as to whether to extend this to enable financial information to be obtained from third parties who hold such information, such as banks and other financial institutions.

Ill treatment and neglect offence- extend to EPA attorneys

21. This provision should be extended to attorneys acting under an EPA.

Nominated persons- exclude certain people

22. It would make sense to automatically prevent a default nominated person be able to act, where they have been found guilty of ill treatment and neglect under the Bill or removed as attorney or deputy by the Court. This would avoid the need for the Tribunal to determine the issue.

Best interest's decision making

23. It is notably strange that no one is required to inform P of the outcome of a best interest's decision in a way he will understand. This should be remedied.

24. The attorney acting under an EPA should be a ‘relevant person’ under Clause 7(11). Otherwise a decision maker, such as social services could decide P needs to move into a care home and the EPA attorney discovers it is not financially affordable on a sustained basis.

25. It is unclear whether the attorney under an EPA has to follow the Principles or whether they are excluded. If they are the latter then this should be expressly provided.

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