

There is something distinctly peculiar about section 7 of the LPA Form

I downloaded some of the LPA material a few days ago – I had not previously bothered with the forms much. Section 7 of the ‘health and care’ LPA form, strikes me as being rather peculiar, in several ways.

There is a document ‘Make and register your lasting power of attorney a guide’, LP12, from the Office of the Public Guardian, which you can download from:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631084/LP12-Make-and-register-your-lasting-power-of-attorney-a-guide.pdf

Page 28 of the PDF, covers section 7 (also called Part A7) of the LPA form. The section allows the donor to write down Preferences and Instructions: I’m not persuaded that these should be on an LPA form, and it seems most people leave those sections blank.

I have a concern about section 7, which amounts to ‘if I write things in section 7, get my LPA registered, and change my mind about section 7, how do I revoke or change what I’ve written in section 7?’ and it isn’t obvious to me how a capacitous donor would do that: I’ve just sent an e-mail to the OPG asking how it would be done.

More fundamentally, I’m bothered by the ‘Instructions’ section. The PDF makes it clear, that the instructions **are instructions** – we can read:

Instructions tell your attorneys what they **must** do when acting on your behalf. If you write any instructions, use words such as ‘must’, ‘shall’ and ‘have to’.

To make the point crystal-clear, that follows on from this explanation of ‘preferences’:

Preferences are what you’d like all your attorneys to think about when they make decisions for you. Your attorneys don’t have to follow them but should bear them in mind. If you write any preferences, avoid words such as ‘must’ and ‘shall’. Instead use words such as ‘prefer’ and ‘would like’, so it’s clear that you’re giving your attorneys advice. If your attorneys **must** do something, include it in your instructions.

Now, there is something about the idea of giving a Welfare Attorney a legally-binding instruction about a medical intervention, which is a **very uneasy fit** with the Mental Capacity Act: although, we can immediately see that if you can write down an instruction which is legally-binding on the best-interests decision-making of your welfare attorney, the same instruction must also be binding on the best-interests process in general [you can’t ‘give a best-interests instruction to only the attorneys’].

On page 30 of the PDF, we are given some examples of the sort of instruction which you might include in the 'Instructions' section of a Health and Care LPA, and one example is:

"My attorneys must not consent to any medical treatment involving blood products, as this is against my religion."

That is the sort of refusal – it is related to, but wider than, the classic 'I refuse blood transfusions' - which you could record on an Advance Decision (ADRT).

And, **here is the 'conceptual problem'**. If you refuse blood transfusions by means of an Advance Decision, then your refusal is legally-binding on your attorney and on everyone else – **but it isn't legally-binding 'during best-interests decision-making', because the ADRT removes the need for any best-interests decision-making to take place.**

In the MCA itself – if you read the Act, not the Code of Practice, etc – it is clear that Advance Decisions are conceptually part of patient autonomy during mental capacity: ADRTs are a projection forwards, into future incapacity, of a decision the patient makes while mentally capable. And – you can only project a refusal of treatment forwards into incapacity: **the Act deliberately does not allow you to project 'consent to' a future medical intervention, forwards into future incapacity.**

By contrast, **best-interests is not limited in that way**: a best-interests decision-maker is required to work out which of the many available options – so both treatment and the withholding of treatment – is in the patient's best-interests.

If section 7 of the LPA form 'is an instruction about best-interests' then presumably it could also be 'my attorney must accept any offer of a blood transfusion' as well as 'my attorney must refuse any offer of a blood transfusion': and that is very strange, because there is an obvious 'legal hierarchy' between ADRTs and best-interests decisions, with the ADRT ranking above best-interests decisions. So it seems peculiar, that the Act decided to only allow patient self-determination to replace best-interests decision-making for refusals of treatment, if the LPA form then effectively allows, via 'instructions to best-interests decision-makers', patients to project self-determination for 'consent' as well as 'refusal'.

It is worth pondering that sentence again:

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It is a sentence, which introduces two different 'decision-makers' within best-interests: the patient via LPA section 7, and the 'best-interests decision-maker'. Nothing at all obvious, in the MCA itself, fits well with that: the MCA seems to be saying 'if the patient has made the decision, do not embark on best-interests decision-making at all' and 'during best-interests decision-making, a person other than the patient is the decision-maker'.

Section 4(6) of the MCA, seems pretty clear:

4(6) He [the person making the determination] must consider, so far as is reasonably ascertainable—

- (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
- (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
- (c) the other factors that he would be likely to consider if he were able to do so.

Even by the standards of MCA analysis, this is much easier to 'see in your head 'as a conceptual cloud' than it is to write down, as I have tried to write it down it here – if you haven't been able to make much sense of what I've written so far, then I don't think I can do better: **but there is definitely something 'conceptually contradictory' between the MCA's descriptions of Advance Decisions and best-interests, and that section 7 of the LPA if the instruction in section 7 is about a medical treatment.**