

EXPLANATORY MEMORANDUM TO
THE MENTAL CAPACITY ACT 2005 (THE LASTING POWERS OF
ATTORNEY, ENDURING POWERS OF ATTORNEY AND PUBLIC GUARDIAN
REGULATIONS 2007)

2007 No.1253

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

2. Description

- 2.1. This instrument sets out the prescribed forms and other requirements necessary for the making and registration of Lasting Powers of Attorney (LPAs) as specified in Section 9 of the Mental Capacity Act 2005 (the Act).
- 2.2. This instrument also sets out the forms and requirements for the registration of existing Enduring Powers of Attorney (EPAs) once the provisions of the Act concerning LPAs are brought into force on 1 October 2007.
- 2.3. This instrument also makes further provision with regard to the functions of the Public Guardian and the discharge of those functions as specified in section 58 of the Act.
- 2.4. This instrument consists of 48 regulations and 8 Schedules. Schedule 1 contains the LPA forms. Schedules 2 to 6 contain the LPA supporting forms. Schedules 7 and 8 contain the EPA registration supporting forms.
- 2.5. These regulations are subject to the negative Parliamentary procedure by way of section 65(2) of the Act.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None

4. Legislative Background

- 4.1. These regulations are made by the Lord Chancellor, in exercise of the powers conferred by sections 13(6)(a) and 58(3), 64(1) and Schedules 1 and 4 to, the Act.
- 4.2. Schedule 1 to the Act prescribes key elements relating to the content of LPAs and the procedures for their making and registration. These include information the prescribed form must contain, whether the LPA will relate to property and affairs or personal welfare (or both), the maximum number of individuals to be named in the LPA, and requirements for registering the LPA with the Public Guardian.

- 4.3. Section 13(6)(a) of the Act enables the Lord Chancellor to prescribe by regulation requirements for the disclaimer of appointment by a donee of an LPA.
- 4.4. Schedule 4 of the Act specifies provisions applying to existing EPAs once the provisions of the Act concerning LPAs come into force.
- 4.5. Section 57 of the Act creates a new statutory office known as the Public Guardian. Section 58 sets out the functions of the Public Guardian including maintaining registers of deputies and attorneys, supervising deputies in their duties, and dealing with representations about the way attorneys and deputies are exercising their powers.
- 4.6. Section 58(3) of the Act enables the Lord Chancellor to prescribe additional functions of the Public Guardian and to make regulations connected with the discharge of any of his functions.

5. Extent

- 5.1. The Act and these regulations apply to England and Wales only. This is subject to the exceptions in section 68(5) regarding evidence of instruments and of registration of EPAs, which apply to the United Kingdom.

6. European Convention on Human Rights

- 6.1. As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

- 7.1. The Act provides a statutory framework for people who lack the mental capacity to make their own decisions. It contains principles, procedures and safeguards to empower people to make as many decisions themselves as they can and to play as full a part as possible in the decision-making process when they lack the capacity to make a decision. The Act also enables people with capacity to make provision for a time in the future when they may lack the capacity to make some decisions.
- 7.2. Before deciding to legislate the Government considered a range of other policy options for providing protection to those who lack mental capacity. These included encouraging those who have or hold EPAs to register these; encouraging professional organisations to establish voluntary codes of practice for specific areas of mental incapacity; and producing Government guidelines about decision making on personal welfare and financial matters for adults who lack mental capacity. Legislating was considered to provide the strongest protection to those who lack capacity (and their carers) by enshrining in statute existing best practice for dealing with people who lack mental capacity.
- 7.3. Section 9 of the Act provides for the creation of a new kind of power of attorney called an LPA. LPAs will replace EPAs (which were restricted to property and

affairs matters only) as the primary way by which a person may authorise someone to make decisions on their behalf. LPAs will enable people to make provision for a time in the future when they may lack capacity to make decisions about their property and affairs, or personal welfare (or both) for themselves by appointing someone to make those decisions on their behalf at that time. LPAs concerning property and affairs may, subject to the LPA instrument, be used where the donor of the LPA has capacity.

- 7.4. This instrument fulfils the policy objectives of the Act by setting out the forms and requirements necessary for the making and registration of LPAs, the registration of EPAs, and elaborating on the functions of the Public Guardian. The Public Guardian will be supported in his functions by a new Office of the Public Guardian (OPG).
- 7.5. The Department conducted wide-ranging consultation before the passing of the Act, including the publishing of a draft Mental Incapacity Bill in 2003 for public comment and parliamentary review.
- 7.6. Following Royal Assent of the Act in April 2005 the Department has continued to consult on a number of areas related to the implementation of the Act. A consultation process was held from 20 January to 14 April 2006 that sought views on the draft LPA forms and prescribed information contained in these regulations and accompanying non-statutory guidance, as well as on the processes for certifying and registering LPAs. A total of 118 responses were received from a range of organisations and individuals including legal and medical professionals, local authorities, financial institutions, MPs and Peers, and members of the public. These regulations, and the forms contained in them, have been developed in light of the comments received during this process.
- 7.7. The Department has, as required by the Act, published general guidance on the operation of the Act in the form of a Code of Practice, which had its own consultation process from 9 March to 2 June 2006. The Code is for the guidance of a range of people with various functions and duties under the Act. Section 42(4) of the Act also places specific groups of people, mainly those acting in a paid or professional capacity, or occupying certain roles created by the Act, under a formal duty to 'have regard' to the Code.
- 7.8. In addition to the LPA and EPA forms prescribed in these regulations, separate non-statutory guidance will be available that may be used in conjunction with the Code and information from the Office of the Public Guardian.
- 7.9. These regulations create no penalties or sanctions. There will be fees associated with registering LPAs and EPAs with the OPG. The Department conducted a separate consultation on the fees for the Office of the Public Guardian between 7 September and 29 November 2006 and the results are to be made available in due course.

8. Impact

8.1. A Full Regulatory Impact Assessment (RIA) was produced for the passage of the Mental Capacity Act 2005. The RIA considered the benefits, cost and risks of setting up a statutory framework for decision making. A copy of that RIA is attached. The Department is also producing an Equality Impact Assessment (EIA) to cover the Act and its implementation, which will be published in May 2007.

9. Contact

9.1. Any enquiries about the contents of this memorandum should be addressed to:
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