

EXPLANATORY MEMORANDUM TO
THE PUBLIC GUARDIAN BOARD REGULATIONS 2007

2007 No. 1770

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Description

2.1. Section 59 of the Mental Capacity Act 2005 (the Act) establishes a Public Guardian Board to oversee the functions of the Public Guardian. These regulations make provision in relation to the selection of the chairman, the term of office of the chairman and members of the Public Guardian Board and other procedural matters.

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

3.1. None.

4. Legislative Background

4.1. Section 57 of the Act establishes a new statutory office holder, the Public Guardian, with specific functions intended to ensure that those appointed to make decisions on behalf of people who lack capacity do so in accordance with their powers.

4.2. The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 [S.I. 2007/1253] supplement the requirements in the Act that apply to lasting powers of attorney and enduring powers of attorney. They also confer functions on the Public Guardian and make other provision in connection with functions conferred on him by the Act.

4.3. A Government amendment based on an opposition proposal was made during the Mental Capacity Bill's passage through Parliament to provide for the creation of a Board to oversee the functions of the Public Guardian. Section 59 of the Act establishes the Public Guardian Board.

5. Extent

5.1. These regulations apply to England and Wales only.

6. European Convention on Human Rights

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

7. Policy Background

Policy

- 7.1. The Act provides the framework for making decisions and acting on behalf of people who lack the capacity to make decisions or act for themselves because of an impairment of, or a disturbance in the functioning of, the mind or brain. The Act aims both to protect people who lack capacity and also maximise their autonomy and ability to participate in decision-making.
- 7.2. 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 by making a lasting power of attorney. Where the Court of Protection (established by section 45 of the Act) believes that there is a need for someone to exercise on-going decision-making powers for a person lacking capacity to make particular decisions and there is no relevant power of attorney, it may appoint a deputy.
- 7.3. The Public Guardian is responsible for ensuring that people appointed as attorneys and deputies discharge their duties properly and do not abuse their responsibilities. The functions of the Public Guardian specified in Section 58(1) of the Act include managing a register of lasting powers of attorney and orders appointing deputies, supervising deputies, arranging visits by Court of Protection Visitors and dealing with representations (including complaints) about the way deputies and attorneys carry out their roles. The new Office of the Public Guardian will support the Public Guardian.
- 7.4. The Act provides that the Public Guardian Board's duty is to scrutinise and review the way in which the Public Guardian discharges his functions and to make recommendations to the Lord Chancellor as it thinks appropriate. The Board must have at least one member who is a judge of the Court of Protection and at least four other members who have appropriate knowledge or experience of the work of the Public Guardian.
- 7.5. The regulations prescribe requirements for the selection of the chairman, the term of office of the chairman and members of the Board and the resignation, suspension or removal of members. The regulations also make provision about the procedure of the Board including quorum, voting and the validity of proceedings notwithstanding a vacancy in the membership or a defect in a member's appointment.

- 7.6. Members are to be appointed for a fixed term not exceeding 4 years and may be re-appointed for one further fixed term not exceeding 4 years.
- 7.7. Regulations covering the resignation, suspension and removal of members of the Board do not make provision for the judge member, who holds the position by virtue of being a judge of the Court of Protection. The Lord Chief Justice appoints the judge member in consultation with the Lord Chancellor under section 59(5) of the Act and is also responsible for their suspension and removal.

Consultation

- 7.8. Consultation has been undertaken with those who will be affected by the regulations. They were circulated in draft to the members of the Board, which is operating in shadow form (the appointments having been made in reliance on section 13 of the Interpretation Act to allow the Board to begin operating in shadow form in advance of the Act coming into force). The regulations were also circulated to members of the judiciary for comment. No significant concerns were raised with feedback generally limited to drafting comments.
- 7.9. The role and functions of the Public Guardian and the Public Guardian Board were set out in the public consultation document on the draft Court of Protection Rules, which focussed on the Rules but also set out the overall framework provided by the Act. This consultation took place from July to September 2006. The consultation document was available on the Department website and was publicised in the stakeholder newsletter and at stakeholder events. There were no specific questions in the document regarding the Public Guardian Board and no comments were received.
- 7.10. The posts to be filled by ministerial appointment were advertised in the national media and the appointments made following an open competition.

8. Impact

- 8.1. A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

- 9.1. Any enquiries about the contents of this memorandum should be addressed to Nicola Webster, Mental Capacity Implementation Programme, Ministry of Justice, email: nicola.webster@justice.gsi.gov.uk, telephone: 020 7210 0032.