

EXPLANATORY MEMORANDUM TO
THE LASTING POWERS OF ATTORNEY, ENDURING POWERS OF
ATTORNEY AND PUBLIC GUARDIAN (AMENDMENT) REGULATIONS 2010

2010 No. 1063

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The instrument makes amendments to the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007/1253) (“the 2007 Regulations”). The purpose of the instrument is to:-

- clarify that, in an application to register an enduring power of attorney (“EPA”), a certified copy of the EPA will only be accepted if the applicant verifies that the original cannot be produced due to its being lost or destroyed;
 - reduce the security bond discovery period (the period during which the bond may not be discharged, apart from under an order of the court) from 7 to 2 years in cases where the person for whose benefit the bond was given dies. The 2-year period will run from the date of death;
 - enable the Public Guardian jointly to investigate, in co-operation with other interested parties, EPA attorneys;
 - amend form EP1PG ‘Notice of intention to apply for registration of an Enduring Power of Attorney’ so as:
 - (i) to require the applicant to name all other attorneys who will be empowered to act on a joint and several basis once the instrument is registered, giving notifiable people the chance to object to their appointment if they so wish;
 - (ii) to clarify that any objection to the registration of the instrument must specify the ground(s) relied on, from among the permissible grounds mentioned in the form;
 - amend form EP2PG ‘Application to register an Enduring Power of Attorney’ so that the applicant certifies, where a copy of the instrument is provided, that this is because the original instrument has been lost or destroyed.
- 2.2 The amendments come into force on 1st May 2010. Under the transitional provisions in the instrument, the amendments apply to

applications for the registration of an EPA sent to the OPG, and investigatory functions undertaken by the OPG under regulation 48 of the 2007 Regulations, on or after 1st May 2010. The amendment to regulation 37 of the 2007 Regulations (discharge of any endorsed security) applies to the discharge of any security given to the Public Guardian under that regulation, where the person for whose benefit the security was given dies on or after 1st May 2010.

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

3.1 None.

4. Legislative Context

4.1 The Mental Capacity Act 2005 (“MCA 2005”) provides a statutory framework to empower and protect people who may lack capacity to make some decisions for themselves. The Act created the office of Public Guardian whose role is to ensure that those appointed to take decisions on behalf of people who lack capacity to take those decisions, discharge their duties properly, without abuse, and act in the best interests of the person lacking capacity. The Public Guardian does this through the Office of the Public Guardian (“the OPG”), by supervising deputies appointed by the Court of Protection (“the Court”) and investigating the ways Attorneys and Deputies exercise their powers.

4.2 The Court and the OPG started their new roles on 1st October 2007, the date when the MCA 2005 came into force, and thereby brought into practice the additional safeguards and protection afforded to vulnerable people by the MCA 2005. At that time the OPG announced its intention to review the implementation of the MCA 2005 after one year to ensure that the potential benefits of the new statutory regime are being fully realised.

4.2 An initial consultation paper resulted in major changes being made to forms, supervision and fees with effect from April 2009. The recent consultation paper relating to the 2007 Regulations is part of the second stage of review, and the outcome is the present Amending Regulations (there is a separate amending instrument relating to OPG fees which also comes into force on 1st May 2010). The nature of the amendments are described above.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

- 7.1 The legislation intended that a certified copy of an EPA could only be registered in cases where the original had either been lost or destroyed. However, a practice has grown up of applicants retaining the original EPA and sending in a certified copy to be registered.
- 7.2 To maintain the intention of the legislation, the amendment sought to regulation 24 (application for registration) of the 2007 Regulations and form EP2PG 'Application to register an Enduring Power of Attorney', will clarify that certified copies of EPA forms will be accepted for registration only if the applicant verifies that the original form has either been lost or destroyed.
- 7.3 MCA 2005 deputyship orders allow deputies far greater access to a person's assets than was previously the case resulting in average bonding levels now over 100% higher than those of pre-MCA 2005 levels, which in turn increases the insurance risk to the provider.
- 7.4 The current 7 year discovery period has so far proved to be longer than necessary and brings considerable cost to insurers and professional deputies who are required to keep the liability on their books for the extended period whilst offering little additional value to most clients. Many professionals have a financial risk ceiling and may be unable to take on additional deputyship work in the future if their overall bond exposure exceeds this ceiling.
- 7.5 In the future, it is likely that insurers will raise premiums across the board. If the bond disclosure period is reduced to 2 years after death of P it is likely that the reduced levels of overall risk would help offset any such increases in premiums, to the benefit of the persons lacking capacity.
- 7.6 It would benefit deputies to have access to a variety of bond providers as the current requirement risks limiting the range of providers who may be tempted to provide alternative products or to tender for preferred supplier status in the future, thus limiting the options of deputies, narrowing the choice available to them.
- 7.7 Currently the Public Guardian has the power to investigate attorneys appointed under a registered EPA if a complaint is made. He has no powers in relation to unregistered EPAs nor are we seeking any. The Public Guardian must currently undertake the investigation alone. This is inconsistent with Lasting Power of Attorney ("LPA") investigations which he can undertake with other interested parties such as Local Authorities: see MCA 2005 section 58(1)(h) and (2) (functions of the Public Guardian).
- 7.8 The change to allow the Public Guardian to investigate EPA attorneys together with other interested parties by amending regulation 48 (other

functions in relation to enduring powers of attorney) of the 2007 Regulations will lead to more complete investigations, which can only be good for the persons lacking capacity. It will also ensure a consistent approach to both EPA and LPA investigations.

- 7.9 Currently when an attorney wishes to register an EPA, he must send form EP1PG 'Notice of intention to apply for registration of an Enduring Power of Attorney', stating his intention register the instrument, to any of the people listed in paragraph 6 of Part 3 (notification prior to registration) of MCA 2005 Schedule 4. This gives the recipients the chance to object to the proposed appointment of the person as an attorney, if they wish to do so.
- 7.10 In the case of joint and several attorneys, currently only one of the attorneys has to send the above form to the listed people and needs only identify himself/herself as the party wishing to register it.
- 7.11 The change to require the applicant to name all other attorneys who will be empowered to act on a joint and several basis once the instrument is registered will ensure that all listed people will have a chance to object to all the attorneys who can exercise power under the EPA and not just those who are seeking to register it. This will provide a more open registration process.
- 7.12 The legislation intended that upon receipt of form EP1PG, 'Notice of intention to apply for registration of an Enduring Power of Attorney', an objection to the applicant's registration of the instrument could be made by way of notice to the Public Guardian, specifying the particular ground(s) the objection was made on. A practice has grown up however of some objections being made without reference to any grounds, rendering them invalid.
- 7.13 To maintain the intention of the legislation, an amendment is sought to form EP1PG, 'Notice of intention to apply for registration of an Enduring Power of Attorney', clarifying that the objector must specify the particular ground(s) relied on when notifying the Public Guardian of an objection to register.

8. Consultation outcome

8.1 A consultation paper, *Office of the Public Guardian: amendments to secondary legislation*, was published on 16th December 2009 on the proposed amendments to the 2007 Regulations and invited responses on the proposals. The responses to the proposals were broadly positive in nature and supportive of their implementation.

9. Guidance

9.1 Guidance documents will not need to be amended.

10. Impact

10.1 As these are minor amendments to secondary legislation, there will be no impact on business, charities or voluntary bodies.

10.2 As these are minor amendments to secondary legislation, there will be no impact on the public sector.

10.3 An Impact Assessment was included in the consultation circulation.

11. Regulating small business

11.1 This legislation does not apply to small businesses.

12. Monitoring & review

12.1 Monitoring and reviewing the effect of the amendments will be carried out by the OPG.

13. Contact

Any enquiries about the content of the memorandum should be addressed to:

David O'Shea, Office of the Public Guardian, tel: 0207 664 7247
email: David.Oshea@publicguardian.gsi.gov.uk