

EXPLANATORY MEMORANDUM TO
THE LASTING POWERS OF ATTORNEY, ENDURING POWERS OF ATTORNEY
AND PUBLIC GUARDIAN (AMENDMENT) REGULATIONS 2013

2013 No. 506

1. 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**
 - 2.1 The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2013 make provision to change the prescribed period to elapse before the Public Guardian may register a Lasting Power of Attorney and the period in which objections to registration may be lodged, and for a new basis on which a security provided by a court-appointed deputy may be discharged.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1. None

4. **Legislative Context**
 - 4.1 Part Two of Schedule 1 to The Mental Capacity Act 2005 (“The Act”) requires a prescribed period to have passed after submission of a Lasting Power of Attorney before the Public Guardian registers it, and a time frame to be allowed for the donor, attorney and persons named by the donor of the Lasting Power of Attorney to lodge any objections to the registration either to the Public Guardian or to the Court of Protection. Schedule 1 provides that regulations may make provision about the prescribed period and the time frame for applications to object.

 - 4.2 Schedule 2, and Parts 1 and 2 of Schedule 4, to the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 prescribe the forms to be used when notifying of impending registration.

 - 4.3 Under section 19(9) (a) of the Act, a deputy appointed by the Court of Protection may be required to give such security to the Public Guardian as the court thinks fit for the due discharge of his duties. Regulations provide for the manner in which security may be given, maintained or replaced.

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 Act, as well as empowering and protecting people who may lack capacity, provides a number of options for those people who wish to plan ahead for the future. It enables individuals to make a Lasting Power of Attorney to give someone authority to make decisions relating to either their property and affairs or their personal welfare, were they to lack capacity at sometime in the future.

7.2 The person making the Lasting Power of Attorney - the donor - can name up to five people to be notified that the Lasting Power of Attorney is about to be registered. These people are known as named persons. Once notified of the impending registration, if a named person objects to registration proceedings, he or she must notify the Public Guardian or the Court of Protection (as appropriate) within five weeks of receiving the notification.

7.3 The Public Guardian must notify either the donor or the attorney that an application to register the Lasting Power of Attorney has been received.

7.4 The Public Guardian must not register the Lasting Power of Attorney until the prescribed period has elapsed. This allows named persons to make any objections. The prescribed period is currently six weeks, and the period within which applications for objections to registration should be made by named persons is currently five weeks.

7.5 The policy view is that the current six week period to elapse before the Public Guardian may register a Lasting Power of Attorney is too long, creates unnecessary delay and should be reduced. Although the Government consultation suggested that the reduction should be to five weeks, the widespread support for the reduction has led Government to conclude that the reduction should be to four weeks.

7.6 This further reduction in the period does raise a particular issue, to cover which the regulations make transitional provision, which is explained in the paragraphs below. In considering the reduction of the waiting period, consideration was also given to the period in which the donor, the attorney and named persons are allowed to lodge objections. Although this point was not specifically consulted upon, evidence from the

Court of Protection and the OPG has shown there are few objections to the registration of Lasting Powers of Attorney. In 2011 the Office of the Public Guardian (“OPG”) received 174,214 applications to register Lasting Powers of Attorney of which only 107 resulted in applications to the court to object to registration. In 2010 this figure was 98. On this basis Government has concluded that it is right to reduce the period in which the donor, the attorney or named persons have to lodge objections from five weeks to three in order to maintain the one week gap between the end of the period during which objections can be made and the statutory waiting period after which the Public Guardian must register the instrument.

- 7.7 Notification to named persons of impending registration is effected by use of the form LPA001 and is carried out by the applicant for registration of the power. The form is available to download from either the Justice or Gov.uk websites or obtained from legal stationers. A new LPA001 advising that objections should be notified to the court or the Public Guardian within three weeks from receipt of the notification will be available from 1 April 2013. However, the Government is aware that there may be applicants who notify named persons on old versions of the form which specify the original five week period to make an objection to the court or the OPG. The result is that the named person is misled as to the objection period and may not make an application to the court in time.
- 7.8 As the OPG do not see the LPA001, they will have no way of knowing which, either pre or post 1 April 2013, version of the form has been used and may have proceeded with registering the Lasting Power of Attorney after four weeks. Amending Regulations to provide that the form LPA001 is sent to the OPG when the objection is made would have significant resource implications by placing burdens on the objectors who would have to collate both the LPA001 and the application to object and on OPG staff who would have to check the forms upon receipt. Given the numbers of annual applications (see 7.6 above), this would be a substantial burden.
- 7.9 The named person process is an additional safeguard for the donor and we have sought to balance the need to protect individual donors against the need to introduce the new four week objection period which is an important reform for all those making Lasting Powers of Attorney. The transitional arrangements seek to protect those named persons who were notified on the old version of the LPA001 which advises that they have five weeks to object but find that after 1 April 2013, this has been reduced to three weeks. The transitional arrangements therefore provide (at regulation 13(4)) that where notice has been given to a named person on or before 30 September 2013, on the old version of form LPA001, any application to object to registration made either to the court or the OPG will be treated as if it has been made within the new three week period.
- 7.10 A security bond is a form of financial security set by the Court of Protection on the appointment of a deputy. A yearly sum is payable, which is variable dependent on the level of security set by the Court. The security bond provides protection for the person lacking capacity from any financial loss that may occur due to the deputy’s handling of their finances.

7.11 As more insurers enter the market to provide security bonds, the Government is aware that deputies are investigating the schemes being offered in order to get the best value for the person lacking capacity. This means they may wish to change bond providers, potentially on more than one occasion, over the life of their deputyship. At present, if a deputy wishes to change insurer this must be approved by the OPG. In such circumstances, the previous bond will still remain in place unless an application is made to the court to have it discharged. The decision whether to discharge the bond in any given case will be a judicial one. The risk, therefore, is that changing bond providers may result in two premiums being payable for a period of time unless an application for discharge is made.

7.12 We are amending the current regulations to allow deputies to change security provider without the need to apply to the court. The Public Guardian must be satisfied that the new security is adequate and will provide confirmation to the deputy within two weeks of being advised of the change of provider. The original security will be automatically discharged two years after date on which the Public Guardian confirms that the new security is adequate.

8. Consultation outcome

8.1 The Government held a full consultation on the *Transforming the Services of the Office of the Public Guardian* from 27 July 2012 to 19 October 2012. The consultation invited comments on a range of issues related to the OPG aspiration to deliver services digitally by default and the reform of its systems and processes in order to deal effectively and consistently with the increasing demand to register Lasting Powers of Attorney. In particular it invited comments on changes to the prescribed period to elapse before the Public Guardian may register an Lasting Power of Attorney and changes to the regulations to enable financial deputies appointed by the Court of Protection to change security provider and enter into a new replacement security without having to obtain an order of the court to discharge the original security.

8.2 . The Consultation received one hundred and twenty-five responses from representative bodies and other organisations, individual members of the judiciary, individual solicitors and members of the public. There was broad support for the proposals in the consultation responses. A detailed Government response to the consultation is available on the Ministry of Justice website at <https://consult.justice.gov.uk/digital-communications/transforming-services-opg/>

9. Guidance

9.1 Guidance is not being prepared specifically on this instrument. The OPG is preparing detailed communications for stakeholders.

10. Impact

10.1. The impact of Transforming the Services of the Office of the Public Guardian are set on an impact assessment which was updated following the response to the consultation. This is available at: <https://consult.justice.gov.uk/digital-communications/transforming-services-opg/>

10.2. There is no impact on business, charities or voluntary bodies

10.3. There is no impact on the public sector.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The OPG's transformation programme and its aspiration to deliver services digitally by default, is set to continue until 2015. To facilitate this, the Government will continue to review the OPG's operational process and how this is affected by legislation whether primary or secondary on an annually basis.

13. Contact

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