

**EXPLANATORY MEMORANDUM TO**

**THE LASTING POWERS OF ATTORNEY, ENDURING POWERS OF**  
**ATTORNEY AND PUBLIC GUARDIAN (AMENDMENT) REGULATIONS**  
**2015**

**2015 No. 899**

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 These Regulations amend the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (S.I. 2007/1253) (the 2007 Regulations), to introduce new prescribed forms for the use of persons intending to make a property and financial affairs Lasting Power of Attorney or a health and personal welfare Lasting Powers of Attorney (replacing the prescribed forms in the 2007 Regulations as amended). The prescribed forms must be used to make a Lasting Power of Attorney (LPA), but transitional provision is made to permit the continued use of the existing version of the prescribed forms provided that execution of the form occurs before 1 January 2016.

2.2. These Regulations also make related amendments intended to simplify the process of making and registering an LPA.

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

3.1 None

**4. Legislative Context**

4.1 The 2007 Regulations supplement the requirements of Schedule 1 to the Mental Capacity Act 2005 which apply to the making of LPAs. The 2007 Regulations have been amended on a number of occasions, particularly in 2009 by the Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2009 (S.I. 2009/1884) which replaced Schedule 1 to the 2007 Regulations with a new Schedule containing new versions of the prescribed forms which must be used in order to create an LPA. A different form must be used according to whether the LPA is intended to confer authority to make decisions about the donor's personal welfare or about his property and affairs.

4.2 Since the Regulations came into force users have advised the Office of the Public Guardian of the difficulties they encounter in trying to find two certificate providers. Following a consultation, we are using this legislative opportunity to amend regulation 7 and remove the requirement for two certificate providers. Regulation 11 is also being amended to take into account the revision to the application to register form.

## **5. Territorial Extent and Application**

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**

7.1 The Mental Capacity Act 2005 came into force on 1 October 2007. The current prescribed forms for the creation of an LPA forms were introduced in October 2009 in response to criticisms of the original versions, but criticism is still received regarding their clarity and layout. The new forms to be introduced by these Regulations use simplified language and the main instrument for creating the LPA has been amalgamated with the form for application to register the LPA with the intention of avoiding duplication of details regarding the donor of the power and the people to be notified, and reducing errors, since the current requirement for the entry of data over two forms is an area where errors have often arisen in completion of the forms.

7.2 As the current forms have been made available via the internet, legal stationers and from the Office of the Public Guardian, it is difficult to estimate how many are in circulation. It has therefore been decided that once the new forms are introduced on 1 July 2015, there should be a transitional period of 6 months, up to 1 January 2016, during which the present version of the prescribed forms may still be used. In particular, the transitional arrangements will enable the present version of the form to create an LPA still to be used to create a valid LPA and may be registered after 1 January 2016, provided that the LPA is actually executed by 1 January 2016.

7.3 In addition to the move to new forms, the 2007 Regulations are amended to introduce a change in language. A donor of an LPA is able, in the instrument creating the LPA, to name persons whom he or she wishes to be notified of any application for the registration of the LPA. The 2007 Regulations refer to such persons as “named persons”, but that term has been criticised as being unclear for users of the forms; and these Regulations amend the 2007 Regulations to change “named person” to “person to notify”, and “named persons” to “people to notify”, which are considered to be clearer. A second change of language has been to amend the definition of “prescribed information” – information that a donor must read before creating a LPA – to make it clear where that information appears in the LPA.

7.4 Finally, it has been decided to remove the requirement in some cases to have a second “certificate provider”. One of the requirements of the Mental Capacity Act 2005 for the making of an LPA is that the instrument making it should contain a certificate by a person in one of a number of categories that the donor understands the nature of the LPA and what it does, that there has been no fraud

or undue or influence, and that there is nothing else which would prevent a valid LPA being created by the instrument. Normally only one such certificate is required; but in a case where the donor chooses not to name any “named persons” (or, as they are now to be described, “people to be notified”) and makes a statement in the instrument creating the LPA that there are no persons whom he or she wishes to be notified of any application for registration, regulation 7 of the 2007 Regulations requires an additional certificate to be provided, by a different person from the first certificate.

- 7.5 This requirement has been identified as adding to the complexity of the process of creating an LPA and creating a barrier to those people who wish to make an LPA but who do not have anyone to notify or to undertake the second certificate provider role; and as being routinely circumvented by donors naming an individual not well known to them. In considering change, consideration was given to the balance between ease of making an LPA and reducing the barriers for individuals wanting to make LPAs, against ensuring that the system as a whole retains adequate safeguards, and following the responses to the consultation mentioned at 8 below, the decision was taken to remove the requirement for the second certificate provider.

## **8. Consultation Outcome**

- 8.1 A consultation was launched on 27 July 2013 into the forms, the proposal to redesign them and the change to the requirement for two certificate providers and invited responses to the proposal. The consultation closed in November 2013. The Consultation and the Consultation Response can be found at <https://consult.justice.gov.uk/digital-communications/opg-enabling-digital-default>. The new forms have been developed using the responses to the consultation; suggestions received through correspondence, the OPG stakeholder groups and user testing.
- 8.2 The Government Digital Service has assisted the Office of the Public Guardian in the development of the new forms and user testing.

## **9. Guidance**

- 9.1 Guidance on the operation of a lasting power or attorney is available through the Code of Practice that supports the Mental Capacity Act 2005 (c.9) and through the Gov.UK website.

## **10. Impact**

- 10.1 A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

## **11. Regulating Small Business**

- 11.1 The legislation applies to small businesses such as legal practices but impact would not be significant, being limited to familiarisation with the changes.

## **12. Monitoring and Review**

12.1 Monitoring and reviewing the effects of the new form and the minor changes to the regulations will be carried out by the Office of the Public Guardian.

## **13. Contact**

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

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