EXPLANATORY MEMORANDUM TO

THE PUBLIC GUARDIAN (FEES, etc) REGULATIONS 2007

2007 No. 2051

And

THE COURT OF PROTECTION FEES ORDER 2007

2007 No. 1745 (L. 13)

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. The Mental Capacity Act 2005 ("the Act") establishes a new specialist court, to be known as the Court of Protection ("the Court"). The Court of Protection Fees Order 2007 ("the Order") sets out the fees payable with respect to matters dealt with by the Court.

2.2. The Act establishes a new statutory office, known as the Public Guardian. The Public Guardian (Fees, etc) Regulations 2007 ("the Regulations") set out the fees to be charged in connection with the functions of the Public Guardian. The Regulations also make an amendment to one of the forms included in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007/1253).

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

3.1. The existing fee regime is replaced as one element of the changes to introduce a new court, and a new statutory Public Guardian under the Act. These instruments will replace, therefore, Part XVII (Fees) of the Court of Protection Rules 2001 which will be revoked by the Court of Protection Rules 2007 (2007/1744).

3.2. A new fees policy is needed as a result of the new powers and functions introduced under the Act, and as a result of organisation and procedural changes. The new fees reflect the new cost structures of the Court and the Public Guardian.

4. Legislative Background

4.1. The Order is made under sections 54(1) and (2) and 65(1) of the Act. The Regulations are made under section 58(3) and (4), and 65(1)(b) of the Act.

5. Extent

5.1. These instruments apply to England and Wales only.

6. European Convention on Human Rights

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

7. Policy Background

7.1. The Court has jurisdiction to make decisions on behalf of people who lack capacity to make those decisions themselves. It may also appoint persons (known as deputies) to make decisions for people who lack capacity on an ongoing basis. In addition to the jurisdiction that the current Court of Protection ("the current court") has over the property and financial affairs of people lacking capacity, the new court will also have the jurisdiction to make decisions in relation to their personal welfare. Personal welfare decisions are currently made under the inherent jurisdiction of the High Court.

7.2. In designing the fees policy, the Ministry has operated within the framework of HM Treasury guidelines for fees and charges, which require departments to meet full cost recovery of services through fees unless, after consulting Treasury, Ministers agree otherwise. It is expected that the Office of the Public Guardian (OPG) will approach full cost recovery in its first year. The Court is expected to recover approximately 63% of its costs. This level has been agreed with HM Treasury.

7.3. The new fee policy aims to reflect the new roles and responsibilities of the Court and the Public Guardian, to align fees with costs and to be transparent for users. Both instruments provide for exemption and remission from fees. Exemptions will apply to people in receipt of qualifying benefits who have not received a damages award in excess of £16,000 which has been disregarded for the purposes of eligibility for these benefits (as such awards commonly include an element for future court fees). The instruments also provide for discretionary remissions of all or part of a fee. The OPG will publish widely an exemptions and remissions policy, which will provide greater clarity as to when a fee is incurred, and help to ensure that applicants are not deterred from using the services of the Court and the Public Guardian.

7.4. One particular change to existing fees arising from the new policy is the introduction of a new approach to court application fees. The Order introduces a standard fee for all applications to court, which replaces all existing court application fees. This is to provide greater clarity and certainty to those that need to use the Court. In terms of new procedures, all applications received by

the Court will be handled using similar administrative procedures, and in all new cases after 1 October 2007, a judge, rather than a nominated officer of the Court, will consider the cases and make a decision.

7.5. The new fee policy also introduces a new oral hearing fee. The fee ensures that the majority of people whose applications can be disposed of by the Court without an oral hearing are not required to pay a share of the additional administrative and judicial costs generated by the small number of applicants who do require an oral hearing. The oral hearing fee is subject to a significant subsidy, and does not reflect the true cost of a Court hearing.

7.6. The policy also provides a new, proportionate approach to supervision of deputies by the OPG. The range of current fees related to the administration of receivers will be replaced by a single set up fee and a single annual administration fee. Cases will fall into one of three new categories of supervision. It is anticipated that the majority of supervision cases will fall into the Type II supervision category and pay less than at present. In addition, since consultation, a third category of supervision has been introduced for most cases where there are limited assets and there will be no supervision fee for this category.

7.7. The then Department for Constitutional Affairs conducted a public consultation between 7 September and 29 November 2007. The consultation document is available at the following link:

http://www.dca.gov.uk/consult/court-protection-rules/cp2306.htm

Respondents were asked to comment on the proposed fees for the Court and the Public Guardian, and in particular, whether any of the proposed fees were inappropriate.

7.8. 65 responses were received from a range of parties including receivers appointed by the current court to make decisions on behalf of people who lack capacity, representative groups (on behalf of people who lack capacity, and their families and carers), legal professionals, local authorities and public bodies, members of the public, and charities and voluntary groups.

7.9. In its response to consultation, the department set out the changes it had made to the proposals consulted on. These were:

- not making the proposed £5 increase in the fee for registering an Enduring Powers of Attorney (EPA);

- removing the proposed fees for objecting to the registration of an EPA or a Lasting Powers Attorney (LPA) by someone entitled to do so by statute, so that such persons are not deterred from raising objections to the registration of an

LPA or about an EPA;

- removing the proposed administration fee for court reports produced by the Public Guardian reporting service; and

- introducing an additional (lowest) level of supervision for deputies that will attract no annual fee.

7.10. In addition, other useful suggestions were made during the consultation process, such as annual fees for searches of the Public Guardian's register of LPAs and EPAs, or fees for bulk searches. It is expected that the fee policy will continue to develop over time, and the OPG will consider the viability of these suggestions in more detail once it has had the opportunity to assess the operation of the registers in practice.

7.11. The Department's full response to the fee consultation is available on the archived Department of Constitutional Affairs web site at the following link:

http://www.dca.gov.uk/consult/court-protection-rules/response2306.pdf

7.12. In addition to the public consultation, during the preparation of these instruments the Ministry has also consulted the President, Vice President and Senior Judge of the Court on the Court of Protection Fees Order, as required under section 53(4) of the Act. There was discussion of the range of court fees and the thinking behind them and further refinements were made as a result.

The OPG customer service unit will be the first point of contact and advice for anyone who needs information, help or guidance regarding fees charged by the Court or the OPG.

7.13. The OPG will provide comprehensive guidance as to when a fee is incurred, the service being provided for the fee, the options for applying for exemptions or remissions, and when a service is provided free of charge. A range of guidance to staff and public covering these aspects is currently being developed and will be made available through a range of channels and in different formats by 1 October 2007.

7.14. The Order and Regulations create no penalties or sanctions.

8. Impact

8.1. A full Regulatory Impact Assessment (RIA) was produced for the passage of the Act, considering the benefits, cost and risks of setting up a statutory framework for decision making. The RIA can be accessed at http://www.dca.gov.uk/risk/mcbria.pdf

8.2. The Ministry has also produced an Equality Impact Assessment (EIA) to cover the Act and its implementation, which was published on 30 May 2007. The EIA examines the potential impacts of the Act on the diverse groups of people affected by it. The EIA can be accessed at http://www.justice.gov.uk/docs/mc-equality-impact.pdf

9. Contact

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

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