EXPLANATORY MEMORANDUM TO

THE PUBLIC GUARDIAN (FEES, ETC.) (AMENDMENT) REGULATIONS 2017

2017 No. [xxxx]

1. Introduction

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

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

2. Purpose of the instrument

2.1 This instrument will make provision (by amending the Public Guardian (Fees, etc.) Regulations 2007 (S.I. 2007/2051) ("the 2007 Regulations")) to reduce the fees charged by the Public Guardian for the registration of lasting powers of attorney and enduring powers of attorney and the re-submission of lasting powers of attorney.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The fees charged by the Public Guardian are prescribed by the Lord Chancellor under powers in section 58(4) of the Mental Capacity Act 2005 ("the Act") which may, by virtue of provision in section 180 of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act")), be used to prescribe an enhanced fee. The fees affected by this instrument will be reduced but will remain above unit cost. The Government has decided, in view of the financial circumstances and given the reductions in public spending, that a fee above full cost is necessary in order to ensure that the Public Guardian is adequately funded and that safeguarding the vulnerable is protected in the long term

3.2 This instrument will come into force on 1st April 2017 (or if not on that date as soon as possible thereafter), which means that there are unlikely to be 21 days between the making and coming into force of this instrument. This is because it is important for the lower fee to be brought into force as quickly as possible. In addition, the Department does not consider that the instrument significantly diminishes rights, imposes new duties which are significantly more onerous than before or requires the adoption of different patterns of behaviours.

Other matters of interest to the House of Commons

3.3 This entire instrument applies only to England and Wales.

3.4 This instrument applies only to England and Wales because the relevant provision in the Act (section 58) which specifies the functions of the Public Guardian and gives the Lord Chancellor the power to make regulations about the fees which may be charged by the Public Guardian extends to England and Wales only. The instrument does not have minor or consequential effects outside England and Wales

3.5 In the view of the Department, for the purposes of the House of Commons Standing Order 83P the subject matter of this entire instrument would be within the devolved

legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and of the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament

3.6 The Department has reached this view because it considers that the primary purpose of the instrument relates to mental capacity, which is within the devolved legislative competence of the Northern Ireland Assembly and the Scottish Parliament; the primary purpose of the subject matter of the instrument is not within Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act); the primary purpose of the subject matter of the instrument is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act).

4. Legislative Context

4.1 Section 58(3) and (4) of the Act confers powers on the Lord Chancellor to make regulations in connection with the discharge by the Public Guardian of the latter's functions under that Act. This includes power to make provision regarding the fees (section 58(4)(b)).

4.2 Paragraph 4(3) of Schedule 1 to the Act requires an application to register a Lasting Power of Attorney ("LPA") to be accompanied by any fee provided for under section 58(4)(b). Regulation 5 of the 2007 Regulations confirms that a fee is payable upon an application to register, and that a further re-submission fee becomes payable in the event of a repeat application. Regulation 4 of the 2007 Regulations also provides that a fee is payable upon an application to register an Enduring Power of Attorney ("EPA").

4.3 This instrument is also made under section 180(1) of the 2014 Act, which provides that the Lord Chancellor's power to prescribe fees under section 58(4)(b) of the Act (described above) allows her to set fees which exceed the costs of anything in respect of which they are charged, and allows the excess to be used to finance the efficient and effective discharge of the Public Guardian's functions.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary for the State of Justice, Dr Phillip Lee as made the following statement regarding Human Rights:

"In my view the provisions of "The Public Guardian (Fees, etc.) (Amendment) Regulations 2017" are compatible with the Convention rights."

7. Policy background

What is being done and why

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 an LPA) to give someone authority to make decisions relating to either their property and affairs or their personal welfare, were they to lack capacity at some time in the future. LPAs replaced EPAs, but EPAs made under the previous legislation (the Enduring Powers of Attorney Act 1985) remain valid and may be registered. Because not all applications to register an LPA are successful, a re-submission fee was introduced in 2011. This fee, set at a lower level than the initial registration fee, is chargeable each time an LPA is re-submitted within 3 months of it being returned to the applicant as invalid.

7.2 The Act created the Public Guardian to ensure that those appointed to act in the best interests of those who lack capacity discharge their duties properly and without abuse. He is supported in this role by the Office of the Public Guardian ("OPG"). As part of his statutory obligations the Public Guardian maintains the register of powers of attorney (LPAs and EPAs), and supervises court appointed deputies.

7.3 The majority of OPG work is power of attorney related (with the dedicated IT system accounting for 90% of all current OPG IT costs). In October 2011, the OPG raised the power of attorney registration fees from £120 to £130 to ensure that the OPG would be able to meet future demand, transform its operating model and implement a new IT system to support their 'digital by default' ambitions. This increase still maintained a fee level lower than the original £150 put in place when LPAs were first implemented in October 2007. The increase also represented the first rise in the cost of registering an EPA in 4 years. The increase was temporary and it was intended to return the fee to the original level by October 2013As a result, the fees for powers of attorney were reduced to £110 per application for registration and £55 for a resubmission, with effect from 1st October 2013. This took OPG fees below the levels that they were prior to October 2011.

7.4 Due to the increasing ageing demographic of our society, the OPG has seen a continually increasing growth in volumes of powers of attorney. In 2015/16 the OPG received 547,021 applications, an increase of 34% on the previous year. At the end of 2015/16 the OPG had 1,870,393 power of attorneys on their register. Since then, that figure has risen to over 2 million.

7.5 These high volumes mean that the OPG is over-recovering on power of attorney registration fees and so is currently receiving more income through registration fees than the cost of the service, but without having exercised the power to do this under section 180 of the 2014 Act. This goes against the normal rule that where public authorities charge fees for services, fees should be set at a level designed to recover full costs of providing the service unless there is express parliamentary authority to do otherwise (see Managing Public Money, chapter 6, https://www.gov.uk/government/publications/managing-public-money. Going forwards in order to avoid any significant over-recovery the fees will be reviewed annually and if necessary varied every year.

7.6 The intention of this instrument, therefore, is to set a lower but still enhanced fee using the power under section 180 of the 2014 Act. The Government decided to take this power to charge fee income from the OPG above the full level of cost recovery to

help ensure that the Public Guardian's functions are discharged in an effective and efficient way. The proposed fee of £82 is a reduction from the current fee of £110, but it will cover the costs of the OPG including remissions/exemptions (available to those customers who are unable to pay the full fee) and the cross-subsidisation of a range of other OPG services. The re-submission fee will be reduced to £41 from £55. The new fees take effect from 1st April 2017.

7.7 Despite the significant economic progress that has been made over the last six years, the financial climate in which the Government is operating remains challenging. Since 2010, the Ministry of Justice has made substantial reductions to its spending but there is only so much that can be delivered through efficiency savings alone. Therefore it is right to look again at the balance between what users pay towards the overall cost of OPG services as compared with the financial burden that falls on the taxpayer.

7.8 In setting the new fee levels in this instrument the intention is to ensure that the OPG is properly funded to safeguard the vulnerable. In the current economic climate, the OPG needs to be in a position where it is 100% fee funded and able to cover all aspects of its business from revenue including upgrades and developments in information technology, processes and capacity.

Consolidation

7.9 It is not intended that this statutory instrument will consolidate any other legislation.

8. Consultation outcome

8.1 Although the proposed fees are enhanced, they are below the current costs for application to register power of attorneys and to re-submit registration applications where necessary. In light of this, and the fact that the fee levels need to be reduced urgently the Department has taken the decision that a consultation is not necessary. However, we will review the level of the fees annually to ensure that any volume increases or efficiency gains are taken into account and may consult in the future as necessary.

9. Guidance

9.1 OPG will update its guidance on fees for the registration of powers of attorney in line with this instrument. Guidance on the operation of a power of attorney is available through forms obtainable from OPG and the Gov.UK website.

10. Impact

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

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has been produced and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation does not apply to small businesses as the cost of the fee is payable by the individuals making the applications for LPAs. However, the changes will be of interest to small businesses such as legal practices involved with assisting individuals to make LPA applications.

12. Monitoring & review

12.1 Fees and the impact of any changes are constantly monitored by way of feedback from OPG and their customers and the monitoring of fee income and volumes

12.2 As noted above, the Department also intends to carry out a full review of the fees on an annual basis and to make adjustments to fee levels where necessary

13. Contact

13.1 Joan Goulbourn at the Ministry of Justice Telephone: 0203334 3019 or email: Joan. Goulbourn @justice.gsi.gov.uk can answer any queries regarding the instrument.