EXPLANATORY MEMORANDUM TO

THE LASTING POWERS OF ATTORNEY, ENDURING POWERS OF ATTORNEY AND PUBLIC GUARDIAN (AMENDMENT) REGULATIONS 2009

2009 No. 1884

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. 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). The prescribed forms must be used to make a Lasting Power of Attorney.

2.2 A transitional provision permits the continued use of the prescribed forms in the 2007 Regulations provided that execution of the form occurs before 1 April 2011.

2.3 These Regulations also correct minor errors in regulations 18(2)(a) and 32(6) of the 2007 regulations relating to the delivery of the LPA instrument and the release of information regarding a person.

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

3.1 None

4. Legislative Context

4.1 This instrument amends the 2007 Regulations by replacing the Schedule to those regulations with a new Schedule that sets out the new prescribed forms which must be used in order to create an LPA.

4.2. The 2007 Regulations supplement the requirements set out in Schedule 1 of the Mental Capacity Act 2005, which apply to the making of lasting powers of attorney. Regulation 5 and Schedule 1 of the 2007 Regulations make provision for the forms of instruments to be used when making a lasting power of attorney. A different form must be used according to

whether the instrument is intended to confer authority to make decisions about the donor's personal welfare or about his property and affairs.

4.3 The tiles of the new forms detour slightly from the terms used in the Mental Capacity Act 2005 this is purely for presentational purposes. Property and affairs becomes property and financial affairs whilst personal welfare becomes health and welfare. Respondents to the consultation held between 23 October 2008 and 15 January 2009 were in favour of the changes as they felt that they are a better description of the two types of LPA's

4.4 Since the 2007 Regulations came into force the errors in regulations 18(2)(a) and 32(6) have been noticed. We have used this legislative opportunity to correct those errors.

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 was fully implemented on 1 October 2007. The current Lasting Power of Attorney (LPA) forms (prescribed in the 2007 Regulations) have been in use since that date and have been criticised in terms of layout and length.

7.2. The new forms are 12 pages long reduced from 28 pages, have plainer language and problem areas such as tick boxes have been removed. Continuation sheets have also been introduced either for the purposes of creating restrictions on the attorney or to list named persons, to be notified of the application to register the instrument –or if the donor cannot sign or mark.

7.3. 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. As result, we have decided that once the new forms are introduced on 1 October 2009, use of the forms prescribed in the 2007 Regulations should be covered by a transitional period up to 1 April 2011 where the prescribed forms in the 2007 Regulations are executed by that date. If we do not extend the time period then the Public Guardian would be unable to register LPAs intended to be made using the forms prescribed by the 2007 Regulations and executed after 1 October 2009 because they will not be in the form prescribed by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulation 2009.

7.4. Regarding the minor change to regulation 18(2)(a) of the 2007 Regulations, the current regulation reads that *'the Public Guardian must give notice to the donor and donee… requiring him to deliver to the Public Guardian the original **of** instrument which was sent to the Public Guardian for registration'*

7.5. This should instead read *'the Public Guardian must give notice to the donor and donee… requiring him to deliver to the Public Guardian the original instrument which was sent to the Public Guardian for registration'.* The removal of the word 'of ' corrects this error.

7.6. Regulation 32(6) of the 2007 Regulations currently reads *'in determining whether to disclose any additional information to P the Public Guardian must….* This should instead read ' *'in determining whether to disclose any additional information **regarding** P the Public Guardian must….'.* The purpose of regulation 32 is to disclose information about P rather than to disclose information to P, as regulation 32(3) of the 2007 Regulations makes clear. The insertion of the word 'regarding' corrects this error.

8. Consultation Outcome.

8.1 A consultation was launched on 23 October 2008 into the forms and the proposal to redesign them and invited responses to the proposal. The new forms have been developed using the responses to the consultation; suggestions received through correspondence and via the OPG stakeholder groups

8.2 An advisory group with experience of using the current forms has provided advice on the new versions particularly with respect to their practicality and workability. We have also had the assistance of the Senior Judge of the Court of Protection.

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 website www.publicguardian.gov.uk.

10. Impact

10.1. A Regulatory Impact assessment is being finalised and will be available shortly

11. Regulating Small Business

11.1 This legislation does not apply to small businesses.

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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