EXPLANATORY MEMORANDUM TO

THE PUBLIC GUARDIAN (FEES, ETC.) (AMENDMENT) REGULATIONS 2011

2011 No. 2189

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. Description

2.1 This instrument makes provision amending the Public Guardian (Fees, etc.) Regulations 2007 (SI 2007/2051) and the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007/1253) to implement a new fee structure together with a new form for a specific type of application in the new structure.

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

3.1 The cost of registering both Lasting and Enduring Powers of Attorney (LPA and EPA) will be subject to an above inflation rise as current fees no longer cover the cost of the work involved (Please refer to section 7 for further detail).

3.2 The current Supervision of Deputy fee system also no longer covers the cost of the work involved and will be restructured. This means that some customers in this area will also be subject to above inflation fee rises (Please refer to section 7 for further detail).

3.3 This SI covers the 4 year Spending Review period with no further increases projected in the meantime. After 4 years the OPG will review its fees again with a view to reducing wherever possible.

4. Legislative background

4.1 The Mental Capacity Act 2005 (MCA 2005) provides a statutory framework to empower and protect people who lack capacity to make some decisions for themselves. The MCA 2005 created the statutory role of Public Guardian, who is supported by the Office of the Public Guardian (OPG). Its purpose is the registration and maintenance of the register of LPAs, EPAs and Deputies, the supervision of Deputies appointed by the Court of Protection (The Court) and the investigation of any concerns around either an Attorney or Deputy's conduct.

4.2 On 1 October 2007 when the MCA 2005 came into force and the Court and OPG started their new roles, the OPG announced its intention to review the implementation

of the MCA 2005 after one year to ensure that the potential benefits of the new statutory regime were being fully realised.

4.3 An initial consultation paper published in October 2008 resulted in change to Supervision fees (Type 2A was introduced) and LPA fees (reduced from £150 to £130) by the Public Guardian (Fees, etc.) (Amendment) Regulations 2009 (SI 2009/514) with effect from April 2009.

4.4 As part of the same consultation, changes to simplify and provide better guidance to LPA forms by the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2009 (SI 2009/1884) came into effect in October 2009.

4.5 A further consultation paper published in December 2009 resulted in technical amendments to secondary legislation which helped the MCA 2005 to better operate in practice by The Lasting Power of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2010 (SI 2010/1063) came into effect in May 2010.

4.6 The recent consultation paper published in February 2011 relating to the 2007 Fees Regulations is the third part of this review and aims to put the OPG in a position where it is fully cost recoverable going forward and able to fund further development in systems, processes and capacity.

5. Extent

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 objective of the MCA 2005 is to empower and protect people who lack capacity. It 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. The Public Guardian does this through the OPG by the registration and maintenance of the register of LPAs, EPAs and Deputies, by the supervision of Deputies appointed by the Court of Protection (The Court) and the investigation of any concerns regarding an Attorney or Deputy's conduct.

7.2 The OPG needs to be in a position where it is truly 100% fee funded and able to cover all aspects of its business from revenue including upgrades and developments in IT, processes and capacity. The current fees no longer cover its operating costs and therefore change is required.

7.3 The majority of OPG work is LPA or EPA related (with the dedicated IT system accounting for 90% of all current OPG IT costs). Therefore the greater part of future

IT expenditure should be found from these fees, rather than from other OPG areas such as the supervision of Deputies.

7.4 Raising LPA/EPA fees from £120 to £130 will ensure that the OPG will meet future LPA demand whilst still maintaining a fee level lower than the original £150 put in place when LPAs were first implemented in October 2007. This also represents the first rise in the cost of registering an EPA in 4 years.

7.5 Current Type 1 (£800), 2A (£350), 2 (£175) and 3 (nil) Supervision of Deputy fees will be replaced by a flat fee of £320 with an administration fee of £35 charged to those in Type 3 requiring a minimal level of supervision. The current fees have not increased since 2007 (Type 2A was introduced in 2009) and like LPA/EPA fees, no longer cover the cost of the work involved.

7.6 The tiered structure also means that those cases that require extra work or an investigation into the Deputy attract the highest fee. This leads to the situation where if the OPG carries out an investigation into a Deputy it is the person who lacks capacity who ends up paying for the work as the fee is taken from their estate.

7.7 The move to a flat fee system will make the funding of investigations consistent with that of LPA/EPAs where an element of the fee goes towards this. This will be a fairer system and ensure any extra cost involved in investigatory work is covered proportionately.

7.8 We have also made other minor miscellaneous fee amendments such as abolishing the £25 fee to search the OPG Registers, implementing a repeat LPA applicaton fee of £65 where a previous LPA was invalid (which currently attracts a £120 charge) and raising the cost of providing Office Copies of LPAs from £25 to £35 as their bespoke production is not core to OPG business.

8. Consultation outcome

8.1 A Consultation Paper, *Office of the Public Guardian: Fees 2011/2012 (CP 16/10)* was published on 28 February 2011 and invited responses up until 21 May 2011. It was sent to over 100 key Stakeholders including Third Sector organisations, Solicitors and Local Authorities. It was published on the MOJ website and publicised extensively in the MCA update newsletter to which we have over 4000 subscriptions.

8.2 51 responses were received and whilst the general level of support for fee increases was not high, there was a common understanding that they were necessary for the OPG to be able to deal with an increasing work load and ensure it is able to offer a high quality service going forward.

8.3 In light of the responses received, the OPG made a concession to lower the proposed fee of £50, for the bespoke production of an LPA Office Copy, to £35. It also made a concession to allow exemptions on the £35 minimal Deputy Supervision Fee which was initially proposed as being ineligible.

9. Guidance

9.1 Robust guidance on the new LPA repeat application fee will be issued on the MOJ website to clarify that it is valid for 3 months from the date the original LPA was rejected as being invalid.

9.2 Details and further information on all other changes, including the new Supervision of Deputy Fee structure, will be published on the MOJ website and further communication will be made as part of the MCA update newsletter which has a circulation of over 4000 Stakeholders.

10. Impact

10.1 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 This legislation does not apply to small business.

12. Monitoring & review

12.1 The intention of the fee changes is to ensure OPG services are fully cost recoverable by the end of the Spending Review Period. The OPG will look to undertake a further fee review in 4 years time.

13. Contact

David O'Shea at the Office of the Public Guardian (telephone: 0207 664 7235 or email: David.Oshea@publicguardian.gsi.gov.uk) can answer any queries regarding the instrument.