

EXPLANATORY MEMORANDUM TO
THE LASTING POWERS OF ATTORNEY, ENDURING POWERS OF
ATTORNEY AND PUBLIC GUARDIAN (AMENDMENT) REGULATIONS 2007

2007 No. 2161

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. This instrument amends The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 SI 2007/1253 (“The Regulations”). The Regulations set out the requirements necessary for the making and registration of Lasting Powers of Attorney (LPAs) as specified in Section 9 of the Mental Capacity Act 2005 (the Act). Regulation 14 deals with objections to the registration of an LPA and giving notice of an objection to the Public Guardian.
- 2.2. This instrument disapplies regulation 14 to objections by the donor of an LPA and inserts a new regulation 14A which deals solely with objections to registration made by the donor. The effect of this instrument is that if a donor wants to object to the registration of their LPA they must do so within 5 weeks of receiving notice of an application to register the LPA.

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

- 3.1. The instrument has been made in consequence of an omission in SI 2007/1253 and is being issued free of charge to all recipients of that Statutory Instrument.

4. Legislative Background

- 4.1. The order is made by the Lord Chancellor under sections 58(3), 64(1) and 65(1)(b) of the Act.
- 4.2. No undertakings relating to this instrument were given to Parliament at the time of the passage of the Act.

5. Extent

- 5.1. The Act and these regulations apply to England and Wales only.

6. European Convention on Human Rights

- 6.1. As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

- 7.1. The Act provides a statutory framework for people who lack the mental capacity to make their own decisions. Section 9 of the Act provides for the creation of a new kind of power of attorney called an LPA. LPAs will replace EPAs (which were restricted to property and affairs matters only) as the primary way by which a person may authorise someone to make decisions on their behalf.
- 7.2. The Regulations were laid before Parliament on 17 April 2007 and will come into force on 1 October 2007.
- 7.3. The instrument is necessary to satisfy the policy intention that the 5-week period for objections by those who have a statutory right to object to the registration of an LPA applies to any objections by the donor of an LPA. This is not a change in policy or legislative intent but a correction of an oversight in The Regulations.
- 7.4. The consultation paper on LPAs, published in January 2006, laid out an objection period of 5 weeks for all those entitled to object and the government response paper showed that the majority of respondents agreed with this approach.
- 7.5. The donor of an LPA has a right to object to the registration of their LPA. Unlike other people objecting to registration, the donor does not have to specify particular grounds for their objection. If the donor objects, the Office of the Public Guardian must then not register the LPA unless, upon the application of the donee, the Court of Protection decides that the donor does not have capacity to object to registration and directs registration, under paragraph 14(2) of Schedule 1 to the Act.
- 7.6. Regulation 14 of The Regulations, as currently drafted, assumes that all objections are made on the grounds set out in paragraph 13(1) of Schedule 1 to the Act and prescribes an objection period of 5 weeks. The amendment regulations clarify the situation by disapplying regulation 14 to objections made by the donor of an LPA and inserting regulation 14A which deals solely with donor objections to registration. This ensures that the original intention is fulfilled, namely that donors have 5 weeks to make an objection on any ground to the registration of their LPA.
- 7.7. This instrument has not been subject to any consultation process as it is correctional in nature and does not introduce new policy.
- 7.8. The regulations create no penalties or sanctions.

8. Impact

- 8.1. A Full Regulatory Impact Assessment (RIA) was produced for the passage of the Mental Capacity Act 2005. The RIA considered the benefits, cost and risks of setting up a statutory framework for decision making.

9. Contact

- 9.1. Any enquiries about the contents of this memorandum should be addressed to: Lucy McKee, Mental Capacity Implementation Programme, Ministry of Justice
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