EXPLANATORY DOCUMENT TO

THE PUBLIC BODIES (ABOLITION OF THE PUBLIC GUARDIAN BOARD AND HER MAJESTY'S INSPECTORATE OF COURT ADMINISTRATION) ORDER 2012
2012 No. xxxx

1. This explanatory document has been prepared by the Ministry of Justice (MoJ) and is laid before Parliament under section 11(1) of the Public Bodies Act 2011.

2. Purpose of the instrument

2.1 The purpose of this instrument is to abolish the Public Guardian Board (PGB) and Her Majesty's Inspectorate of Court Administration (HMICA).

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

3.1 The Committee will note article 5 of the instrument, which repeals the entries in Schedule 1 to the Public Bodies Act 2011 ('the Act') for HMICA and the PGB. This is permitted by section 6(5) of the Act, and this section is cited as one of the enabling powers in the instrument.

4. Legislative Context

4.1 HMICA was set up under section 58 of the Courts Act 2003 and has a statutory duty to inspect and report to the Lord Chancellor on the system that supports the carrying on of the business of the Crown, County and Magistrates' courts and the services provided for those courts. It also has a statutory duty introduced by the Police and Justice Act 2006 to carry out joint inspection (with the other criminal justice inspectorates) of the criminal justice system. It has a further statutory duty which has never been brought into force, under section 39 of the Coroners and Justice Act 2009, to inspect and report to the Lord Chancellor on the operation of the coroner system.

4.2 The PGB was set up under section 59 of the Mental Capacity Act 2005 to scrutinise and review the way in which the Public Guardian discharges its functions and to make such recommendations about that matter to the Lord Chancellor as it thinks appropriate.

4.3 On 7 December 2009, the then Government announced its intention to abolish HMICA, as part of Putting the Frontline First: Smarter Government reforms. In 2010, the Cabinet Office led a review of all arm's length bodies across government in order to increase the transparency and accountability of public bodies and to reduce their number and cost. Each body was tested under three criteria: whether it

needs to perform a technical function, act independently to establish facts or be politically impartial. HMICA was tested under these criteria and was not deemed to meet any of these tests, which reaffirmed the decision made by the previous administration. The Lord Chancellor agreed to early administrative closure on 31st December 2010; this had the full agreement of the inspectorate's senior management team.

4.4 The PGB was similarly tested and was found not to meet any of these criteria to justify its retention. Both bodies were therefore included in Schedule 1 to the Act, which allows abolition of the listed bodies. This instrument, made under the Act, provides for the abolition of HMICA and the PGB. More detail on these tests is included at section 7 below.

4.5 There is no transfer of functions in respect of the PGB.

4.6 For HMICA, two functions are transferred to Her Majesty's Chief Inspector of Prisons: firstly, the function of inspecting custody areas of the Crown Court, county courts and magistrates' courts, and secondly the function of inspecting custody transport (any vehicle used to transport prisoners in custody to and from the Crown Court, county courts or magistrates' courts). This is in order that the UK may ensure that court custody areas are inspected in accordance with obligations under the United Nations Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

4.7 The order also enables any of the other criminal justice inspectorates (Her Majesty's Chief Inspector of Prisons, Her Majesty's Chief Inspector of the Crown Prosecution Service, Her Majesty's Inspectorate of Probation for England and Wales and Her Majesty's Inspectors of Constabulary) to inspect any aspect of the Crown Court or magistrates' courts in relation to their criminal jurisdiction which could have been inspected by HMICA, as long as the inspection includes matters other than aspects of those courts. This is to ensure that the Government's commitment to joint inspection of the criminal justice system can be maintained.

4.8 The MoJ has decided to group together reforms to HMICA and the PGB. The MoJ took the decision to group bodies, for the sake of efficiency of preparation and scrutiny, into omnibus orders where possible**.** This was applied in the case of HMICA and PGB. The bodies were both listed in Schedule 1 to the Bill and therefore subject to the same closure proposal; they were of similar priority for the MoJ; and in terms of timing for the proposed abolitions, it was felt that they could be subjected to Parliamentary scrutiny on similar timescales.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom. Both HMICA and the PGB are operational only in England and Wales so the practical effect

of this instrument is limited to those territories, but section 59(3) of the Courts Act 2003[1] is repealed by this instrument and that subsection applies to the whole of the UK.

6. European Convention on Human Rights

6.1 The Secretary of State for Justice has made the following statement regarding Human Rights:

In my view the provisions of the Public Bodies (Abolition of the Public Guardian Board and Her Majesty's Inspectorate of Court Administration) Order 2012 are compatible with the European Convention on Human Rights.

7. Policy background

7.1 The Public Guardian Board was set up to scrutinise and review the way in which the Public Guardian discharges his functions and to make such recommendations to the Lord Chancellor about that matter as it thinks appropriate. The Board consists of seven members who have been appointed because they have appropriate knowledge or experience in the areas of work covered by the Public Guardian.

7.2 The Lord Chancellor is responsible for making appointments directly to the Public Guardian Board, and for its membership. It is to the Lord Chancellor that the Board reports; the Lord Chancellor must give due consideration to recommendations made by the Board.

7.3 While the Executive Board of the Office of the Public Guardian (OPG) has a role in the overall management of the organisation, the Public Guardian Board is focused on monitoring and reporting on the work of the Public Guardian.

7.4 The PGB was included in the 2010 Government review of public bodies, and its role examined against the three tests set out at 4.3. It was deemed that it did not meet the criteria in any of the three tests: particularly, it was considered more effective for the scrutiny and review of the Public Guardian's functions to be achieved not through a separate board, but through the development of governance arrangements which are appropriate to the Office of the Public Guardian's (OPG) status as an executive agency. These arrangements are spelled out below.

7.5 The PGB currently has seven members. Of these:

[1] Section 59(3) confers a power on the Lord Chancellor to add any court to the list of courts which may be inspected by HMICA if that court has jurisdiction in the UK, other than one having jurisdiction solely in Scotland or Northern Ireland. In practice this would mean a court which has jurisdiction in either England and Wales or whose jurisdictions is UK-wide. This power has never been used, so HMICA's remit remains the Crown Court, county courts and magistrates' courts (all of whose jurisdiction is solely England and Wales).

- three were reappointed for a second term in February 2012 and will remain in post until the PGB is abolished. MoJ officials have written to the members to lay out these arrangements, and they have agreed.

- three were previously reappointed for a second term, which lasts until February 2013. MoJ officials wrote to the members in February 2012 to propose that they remain in post only until the PGB is abolished. All members have agreed.

- one is a judicial member and not subject to remuneration; the member's appointment will end when the PGB is abolished.

7.6 There are no redundancy costs associated with closing this body. Six of the seven members of the Board are paid on a daily rate; the seventh member is judicial and is not remunerated for Board membership. The Board has agreed that its last meeting will take place in June 2012; members will not be remunerated beyond this date except for outstanding travel and subsistence claims.

7.7 Section 9(6) of the Public Bodies Act provides that an order to abolish, merge or transfer the functions of a public body requires the consent of the National Assembly for Wales to make provision which would be within the legislative competence of the Assembly if it were contained in an Act of the Assembly. Section 9(7) of the Act states that an order requires the consent of the Welsh Ministers to make provision not falling within subsection (6) which either modifies the functions of the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Government, or which could be made by any of those persons.

7.8 Abolition of the PGB meets the criteria set out under section 9(6) of the Act, as the National Assembly for Wales has competence in relation to medical treatment and health services, social welfare and care of vulnerable persons. Jonathan Djanogly, Parliamentary Under-Secretary of State for Justice, wrote to the Welsh Government in March 2012 to seek agreement to lay a consent motion in the National Assembly for the provisions within this order which come within section 9(6) of the Act. This agreement was given.

7.9 Abolition of the PGB does not meet the criteria under section 9(7) of the Act. Abolition of HMICA meets neither the criteria under section 9(6) nor section 9(7) of the Act.

7.10 HMICA was set up with a remit to inspect and report to the Lord Chancellor on the system that supports the carrying on of the business of the crown, county and magistrates' courts, and the services provided for those courts.

7.11 The landscape in which HMICA operated has changed considerably since its inception in 2005. HM Courts and Tribunals Service (HMCTS) now has robust audit methods and management information processes in place, which negates the need for independent inspection. HMCTS is also subject to external audit by the NAO, which could duplicate the work of HMICA.

7.12 It was concluded that whilst it is important to provide assurance that the systems within HMCTS are robust and effective it is not necessary for purely administrative systems to be subject to inspection by an independent body. We need to focus resources on delivering frontline services.

7.13 The Government remains committed to joint inspection of the criminal justice system. It is intended that secondary legislation will enable the other Criminal Justice Inspectorates to inspect HMCTS for the purposes of joint inspection. HMCTS continues to support the cross criminal justice system inspection work and the CJS inspectors have committed to consulting HMCTS on its future inspection programme to ensure that the right links can be made.

7.14 HMICA closed in December 2010, and all staff have found alternative posts or chose to leave the civil service through voluntary early departure or voluntary redundancy schemes. There is therefore no impact on staff arising from the legal abolition.

7.15 The Minister considers that this order serves the purpose in section 8(1) of the Act for the following reasons:

i **Efficiency:** for HMICA, the decision to abolish is consistent with reducing unnecessary bureaucracy and duplication. HMICA's role as set out in legislation was to inspect the administrative processes within the Courts. Oversight will instead be achieved through two means: by transferring certain functions to HM Chief Inspector of Prisons (see paragraph 4.6), and through the robust management and audit processes in place within HMCTS. These include:

- A comprehensive internal audit programme;
- The HMCTS Risk Management Committee, which reviews and considers the corporate risk register and identification of new threats to HMCTS's objectives.
- The HMCTS Audit Committee, whose key responsibility is to support the Accounting Officers in the discharge of their responsibilities for governance, risk management, control and assurance;

- the use of regional risk registers that can be escalated to relevant fora, such as the HMCTS Audit Committee, for action;

- The HMCTS Assurance Programme (HAP) which is a set of processes and tools for operational managers to measure and assess assurance on key processes and controls within their remit;

For the PGB, abolition is consistent with removing duplication of functions. Its role to scrutinise and review the Public Guardian's functions can be more efficiently achieved through oversight within the OPG, the proposed governance arrangements for which are spelled out below.

ii **Effectiveness:** it is more effective to achieve oversight of the administration of the courts using existing audit and risk management processes within HMCTS than through an independent inspectorate. HMICA's abolition also frees resources which can be used to deliver frontline services. When it was functional the inspectorate's full complement of staff was 36 and its yearly budget was in the region of £2 million; these resources can be better deployed elsewhere while the functions of HMICA can be carried out elsewhere

In the case of the PGB, the Government believes that the appropriate scrutiny and review of the Public Guardian's functions is best delivered through developing governance arrangements that are suited to the OPG's status as an executive agency. The PGB has accepted the proposal to abolish, recognising that such an advisory board cannot continue into the future given current financial constraints and the Government's obligation to concentrate expenditure on essential areas. The new OPG governance arrangements will ensure that effective arrangements are in place for the oversight of the Public Guardian's activities. These arrangements are as follows:

- There will be a Management Board, chaired by the OPG Chief Executive, with executive membership from OPG and MoJ as well as three non-executive directors. The Management Board will be charged with overseeing the management and performance of the OPG, including the OPG's transformation programme. It will meet on a monthly basis.

- The presence of the Non-Executive Directors will provide independent scrutiny and challenge of the discharge of the Public Guardian's functions and those of his office. Collectively, the Non-Executive Directors will have relevant experience such as business/performance management, financial management and dealing with those who lack capacity.

- There will also be non-executive director representation on the Public Guardian's two existing stakeholder groups (which meet four times per year each) and there will be continued liaison

between the OPG and the MoJ sponsor team and relevant policy officials, including those leading on the Mental Capacity Act 2005.

iii **Economy:** The abolition of HMICA, which closed administratively at the end of December 2010, is expected to provide cumulative nominal savings of around £6.4m (against MoJ's SR10 baseline) over the current spending review period. The £6.4m savings are net of all costs.

The abolition of the PGB is expected to provide cumulative nominal savings in the region of £0.4m over the current spending review period.

These savings can be broken down by year as follows:

Body	**2011/12**	**2012/13**	**2013/14**	**2014/15**	**Total**
HMICA	£1.5m[2]	£1.6m	£1.7m	£1.7m	£6.4m
PGB	£0	£0.1m	£0.1m	£0.1m	£0.4m

The savings of £0.4m for the PGB above are administrative, and are net of any redundancy costs, as there are none associated with closure.

However, implementation of the new governance arrangements for the OPG will incur some costs which will offset these savings. Our best estimate of these costs is no more than **£187,000** over the current spending review period, broken down as follows:

- **£9,000-£10,000** (ex. VAT) maximum one-off cost for an external recruitment exercise of non-executive directors to the OPG board.

- **£72,000:** £24,000 per annum remuneration (multiplied by the 3 remaining years of the current SR period) for 3 non-executive directors at £8,000 each, representing up to 20 days' time commitment per year each.

- **£105,000 maximum:** no more than £35,000 per annum travel and subsistence (multiplied by the 3 remaining years of the current SR period) for members of the OPG board to travel to meetings. This is a best estimate of maximum costs, taking into account the number of meetings that board members will be expected to attend as per the governance arrangements above.

iv **Securing appropriate accountability to Ministers:** the abolition of HMICA and PGB will not result in any lack of accountability to Ministers since both HMCTS and the OPG are executive agencies within the MoJ and are ultimately accountable to Ministers.

[2] HMICA's budget allocation had already been reduced from around £2m at the time of the June 2010 Emergency Budget and savings are therefore calculated against this reduced baseline.

7.16. The Minister considers that the conditions in section 8(2) of the Act are satisfied in respect of both the HMICA and the PGB. Abolition of either body does not affect the exercise of any legal rights or freedoms either directly or indirectly. In the case of HMICA, two functions regarding the inspection of custody are being transferred to HM Inspectorate of Prisons. This will be for the purposes of joint inspection only (for example, tracking categories of cases from initial arrest to charge, court appearance, court result and rehabilitation or custody). HMCTS continues to support the cross-criminal justice system inspection work and the CJS inspectors have committed to consulting HMCTS on its future inspection programme to ensure that the right links can be made.

7.17 In the case of the PGB, Ministers are aware of the PGB's view that new governance arrangements for the OPG should include a strong non-executive presence as well as expertise across a number of disciplines. This is reflected in the new governance arrangements laid out above.

7.18 It was concluded that whilst it is important to provide assurance that the systems within HMCTS are robust and effective, it is not necessary for purely administrative systems to be subject to inspection by an independent body. The Government wishes to focus resources on delivering frontline services. HMICA has no staff and no public appointees; there are no outstanding HR issues regarding this body.

7.19 HMICA and PGB were both listed in Schedule 1 to the Bill at its inception. Both bodies were subject to amendments laid in the House of Lords at Committee stage by Lord Bach, Lord Hunt of Kings Heath, Lord Ramsbotham and Baroness Hayter of Kentish Town and debated on 11 January 2011. These amendments aimed to remove the bodies from Schedule 1. The amendment concerning HMICA was withdrawn. The committee did not reach the amendment concerning the PGB but the amendment was not moved further.

8. Consultation outcome

8.1 A public consultation covering the bodies the Government proposed to reform through the Public Bodies Bill, including HMICA and the PGB, was launched on 12th July and closed on 11th October 2011.

8.2 18 responses were received regarding the proposal to abolish HMICA. Of these, seven respondents stated specifically that they are opposed to the abolition of HMICA, three expressed concerns surrounding aspects of the proposal to abolish, six specifically stated that they are in support of abolition and two did not express a specific view either way.

8.3 The general opinion amongst those who supported the abolition was that there was no need for independent inspection of the courts in the

current climate and that HMICA's functions could be adequately carried out elsewhere.

8.4 A main theme to the responses from those who did not support abolition was that the abolition of HMICA leaves a key government body without independent scrutiny and results in a loss of expertise. There was also doubt expressed as to whether HMCTS has the appropriate processes in place to challenge its own performance. Concern was also expressed with regard to specific functions of the Inspectorate including its role in joint inspections of the criminal justice process, the inspection of court custody areas and proposed inspection of the coroner's service.

8.5 Following consultation, the Lord Chancellor announced on 15th December 2011 his decision to proceed with the abolition of HMICA.

8.6 There were a total of 12 responses to the consultation regarding the proposal to abolish the PGB. Ten respondents out of twelve had no objection to the abolition of the PGB providing that robust alternative governance structures for the OPG are put in place. Two respondents were opposed to the abolition due to concern that the PGB's functions will not be adequately carried out by other means.

8.7 Following consultation, the Lord Chancellor announced on 15th December 2011 his decision to proceed with the abolition of the Public Guardian Board.

8.8 The Government's response to the consultation on proposals for reform of its bodies included in the Public Bodies Bill can be found on the Ministry Of Justice website at:

https://consult.justice.gov.uk/digital-communications/public_bodies_bill/results/consultation-response-public-bodies.pdf

9. Guidance

9.1. The nature of this instrument makes it unnecessary to publish guidance in relation to it.

9.2 The Minister has written to the Chair of the PGB to inform them of the intention to abolish. No letter was sent in relation to HMICA, which closed administratively at the end of 2010.

10. Impact

10.1 An impact assessment (IA) on the abolition of HMICA was prepared in May 2011 as part of the wider consultation on the Public Bodies Bill. It covered the impacts of the formal abolition of HMICA and also included some information on the costs and benefits of the administrative closure of HMICA. The IA concluded that, as HMICA

has already closed administratively, the formal closure has minimal costs associated with it. This IA was updated after consultation to reflect the most recent available information.

10.2 An equality impact assessment (EIA) initial screening was carried out for HMICA. As the formal closure of this body follows its administrative closure, there is no equality impact.

The IA and EIA are available online at:

https://consult.justice.gov.uk/digital-communications/public_bodies_bill/results/public-bodies-bill-abolition-hmica-ia.pdf.

https://consult.justice.gov.uk/digital-communications/public_bodies_bill/results/public-bodies-bill-hmica-eia.pdf

10.3 An Impact Assessment was not considered necessary for the abolition of the PGB because of the very limited impact its abolition will have in any wider context, and because the financial impact of abolition is so low. The year-on-year breakdown of this financial impact over the current spending review period is spelled out above.

10.4 An EIA initial screening was carried out for the Public Guardian Board. This screening showed that, as the small number of PGB members are public appointees and not employees, there is no equality impact. There is one member of staff carrying out secretariat duties for the board, which takes up a small proportion of their time; the member of staff has been redeployed to other duties within the Ministry of Justice. The EIA is currently being updated to reflect the new OPG governance arrangements; the current EIA can be found online at:

https://consult.justice.gov.uk/digital-communications/public_bodies_bill/results/public-bodies-bill-pgb-eia.pdf

11. Regulating small businesses

11.1 The legislation does not apply to small business.

12. Monitoring and review

12.1 Cabinet Office will carry out a post legislative scrutiny review after the passage of the Public Bodies Bill and MoJ will monitor the outcome of that.

13. Contact

13.1 Maggie Garrett, Ministry of Justice, tel. 020 3334 6168 or email Maggie.Garrett@justice.gsi.gov.uk can answer any queries regarding the instrument.