

EXPLANATORY MEMORANDUM TO
THE GUARDIANSHIP (MISSING PERSONS) ACT 2017 (DESIGNATION OF COURT) REGULATIONS 2019

2019 No. 1029

AND

THE LASTING POWERS OF ATTORNEY, ENDURING POWERS OF ATTORNEY AND PUBLIC GUARDIAN (AMENDMENT) REGULATIONS 2019

2019 No. 1030

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.

2. Purpose of the instrument

- 2.1 The purpose of the Guardianship (Missing Persons) Act 2017 (Designation of Court) Regulations 2019 (“the first instrument”) and the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2019 (“the second instrument”) (collectively “the instruments”) is to provide the legislative framework required to fully implement the Guardianship (Missing Persons) Act 2017 (c. 27) (“the Act”).
- 2.2 The first instrument designates the High Court to have jurisdiction to exercise the functions of the court in proceedings under the Act.
- 2.3 The second instrument amends the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (S.I. 2007/1253) to make provision relating to the additional functions of the Public Guardian in registering and supervising guardians.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales only.
- 4.2 The territorial application of this instrument is England and Wales only.

5. European Convention on Human Rights

As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The Act creates a new legal role of guardian of a missing person who is appointed by the court to manage the property and financial affairs of a person who is “missing” as defined in the Act. The guardianship order will set out the terms of the guardian’s authority and the extent of the property and financial affairs to which the order relates.
- 6.2 The Act amends the Mental Capacity Act 2005 (C.9) (“the 2005 Act”) to give the Public Guardian functions in relation to the registration and supervision of guardians appointed by the court. The exercise of those functions by the Public Guardian is set out in more detail in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (S.I. 2007/1253).
- 6.3 In addition to the two statutory instruments which are the subject of this Explanatory Memorandum, there are additional instruments being made to implement the Act. They are as follows:
- The Civil Procedure (Amendment No. 2) Rules 2019¹, which make provision for the rules of court for claims and applications relating to guardianship orders sought under the Act; and
 - The Public Guardian (Fees, etc) (Amendment) Order 2019², which sets the fees payable to the Office of the Public Guardian in relation to the registration and supervision of guardians.

7. Policy background

What is being done and why?

- 7.1 The Act comes into force in July 2019. It addresses a ‘gap’ in the law as previously there was no procedure for anyone to obtain authority to manage the property and financial affairs of a missing person. The Act creates a new legal status of ‘guardians’, who are appointed by court order and are agents of the missing person whose property and financial affairs they are authorised by the court to manage.
- 7.2 The first instrument designates the High Court as having jurisdiction to exercise the functions of the court in proceedings under the Act. Claimants can choose to issue a claim for a guardianship order in either the Chancery or Family Division of the High Court. The Chancery Division is most suited to handle issues arising from the missing person’s business, property and trusts, whereas the Family Division may be more appropriate for proceedings where family-related issues are likely to arise, for example disputes between family members. The ability to choose the division in which to issue a claim will allow judges experienced in the relevant matters to make effective decisions in relation to proceedings under the Act. Once a claim has been issued in either the Chancery or Family Division, any subsequent proceedings under the Act must also be brought in that division, however, the court may transfer proceedings between the two divisions where it decides they would be better disposed of in the other.

¹ S.I. 2019/1034

² S.I. 2019/1033

The second instrument makes provision relating to the additional functions conferred on the Public Guardian by section 58(2A) of the 2005 Act, in effect extending the existing role of supervising deputies under the 2005 Act to guardians of missing persons. The instrument will protect the interests of the missing person by extending practical provisions relating to the provision and discharge of a financial bond as security for the proper performance of their duties where the court requires it; requiring guardians to report to the Public Guardian when requested and providing information as specified; and enabling the Public Guardian to investigate alleged misconduct by guardians by requiring them to provide information. The Public Guardian will keep a register of guardians, and receive copies of all court orders. They will require financial returns and other reports from guardians. This balances the missing persons' interest whilst ensuring the guardian has sufficient management powers.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 None.

10. Consultation outcome

- 10.1 The Lord Chancellor has performed his statutory obligation to consult the Lord Chief Justice before making the first instrument.
- 10.2 On 19 December 2018 the Ministry published a public consultation that sought views on the department's proposals for implementing the Act, including a draft Code of Practice; the procedure to be followed by the court and the parties in guardianship cases; the supervisory regime to be set up by the Public Guardian and fees to be charged.
- 10.3 The public Consultation received formal responses from The Law Society, HM Land Registry, Peter Lawrence OBE, National Crime Agency, Missing People, Lloyds Banking Group and TISA. Alongside this, consultation meetings were held with financial organisations, public utilities and industry regulators.
- 10.4 The Government's Response was published on 29 April 2019 which can be found at <https://consult.justice.gov.uk/digital-communications/guardianship-missing-persons-act/>. Responses to the Consultation showed the proposals for implementing the Act were largely supported.

11. Guidance

- 11.1 A Code of Practice has been laid in draft and is publicly available on gov.uk, which aims to provide guidance to families and friends of the missing person who are applying to be guardians, as well as to guardians during their term of appointment. It addresses the provisions of these instruments, namely the courts in which proceedings must be issued and the duties of the guardian in relation to supervision by the Public Guardian. The Code also provides guidance for business and organisations who come into contact with a guardian.

12. Impact

- 12.1 There is no significant, impact on business, charities or voluntary bodies. Businesses, such as banks and public utilities, will likely have some minor familiarisation costs but this will be from disseminating information to key staff about the new guardianship provisions. In practice, information is likely to be disseminated by way of routine staff bulletins or practice notes. As such, familiarisation costs are expected to be negligible. Operational and staffing costs are also expected to be low. There is expected to be a limited number of staff in each organisation, who are experienced in overseeing similar provisions whereby one person may act on behalf of another, dealing with guardians.
- 12.2 There is no significant, impact on the public sector. The Office of the Public Guardian will supervise guardians in broadly the same way it supervises deputies appointed under the Mental Capacity Act 2005. Its supervision will help to avoid financial and other misconduct by guardians.
- 12.3 An impact assessment has not been prepared for this instrument. One was published alongside the public consultation (https://consult.justice.gov.uk/digital-communications/guardianship-missing-persons-act/supporting_documents/guardianshipimpactassessment.pdf). The Impact Assessment has not been revised, given the anticipated low number of cases annually, there will only be a small impact for courts, businesses, and other organisations from the Act. Organisations, such as financial institutions and utility companies will have to adapt their existing process for deputies or in some instances implement new processes to manage guardians who are handling the financial affairs of the missing person. However, the creation of guardianship orders by the Act, provides a legal remedy which will benefit businesses who were previously struggling to assist families in resolving problems.
- 12.4 There is no significant impact on charities, save for those who deal with missing people, both in England and Wales and abroad, will be impacted by the legislation. They will be the first point of contact for many guardians. Some organisations involved (e.g. Citizens Advice) will already be experienced in dealing with deputies. Others, such as leading charity Missing People, will likely be the first point of call for specific issues relating to supervision of guardians, and are already working with many of the families who will consider applying. The Code of Practice, that complements both instruments, will provide accessible guidance on both supervision and the court process.
- 12.5 The designation of the High Court enables the courts and judges with experience of handling Presumption of Death (and a full spectrum of financial, property and family legal issues) to consider guardianship applications and serve the interests of missing people. Both HM Courts and Tribunals Service (HMCTS) and the OPG are fully prepared to handle guardianship applications. There will be some impact, but this will be small due to the low numbers of applications annually.

13. Regulating small business

- 13.1 The legislation does not apply to the activities that are undertaken by small businesses, except in so far as they are connected to the missing person's financial affairs.

14. Monitoring & review

- 14.1 These instruments do not include a statutory review clause because they do not regulate or directly relate to business activity, but the Ministry of Justice will periodically review all the regulations which implement the Act to ensure they are operating as intended and are fit for purpose. The Code of Practice will also be reviewed periodically.

15. Contact

- 15.1 Peter Farr, Head of Civil Law, at the Ministry of Justice. Telephone: 07540 262982 or email: peter.farr@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 David Parkin, Deputy Director for Civil Justice and Law, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Paul Maynard MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.