

**EXPLANATORY MEMORANDUM TO**  
**THE PUBLIC GUARDIAN (FEES, ETC) (AMENDMENTS) REGULATION 2019**  
**2019 No. 1033**

**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 This instrument introduces and sets the level of guardianship fees that will be charged by the Office of the Public Guardian (“OPG”) in relation to the supervision of guardians appointed by the court to manage the property and financial affairs of missing persons. It also provides an income-based remissions scheme which will apply to certain OPG fees, and provisions regarding applications for exemptions and remissions.

**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.  
4.2 The territorial application of this instrument is England and Wales.

**5. European Convention on Human Rights**

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

**6. Legislative Context**

- 6.1 The Guardianship (Missing Persons) Act 2017 (“the Act”) creates a new legal role of a 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. Under s.58(2A) of the Mental Capacity Act 2005 (as inserted by the Act), the Public Guardian is given

certain functions in relation to the registration and supervision of guardians, and under s.58(4) the Lord Chancellor has the power to make provisions for the fees which may be charged by the Public Guardian in exercise of those functions, and the means by which the fee is to be paid. Under the same power, the Lord Chancellor may also provide exemptions, remissions and reductions of such fees in whole or in part.

- 6.2 Under this power, two guardianship fees are being introduced (the one-off guardianship set-up fee of £200, and the annual guardianship supervision fee of £320). This instrument also explicitly provides for an income-based remissions scheme, which will apply to fees for registering a Power of Attorney, the deputyship assessment and general supervision for deputies, and the fees for set-up and supervision of guardians. It makes some further provisions regarding applications for remissions and exemptions.
- 6.3 The two guardianship fees are set below the current cost-recovery level, which means that the cost of the service is higher than the fees charged for the service. The cost of providing these services will therefore be cross-subsidised by fees collected for other OPG services under powers provided in the Anti-Social Behaviour, Crime and Policing Act 2014.
- 6.4 In addition to the statutory instrument which is the subject of this Explanatory Memorandum, there are additional instruments being made in order to implement the Act. They are as follows:
  - a) The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2019<sup>1</sup>, which makes provision relating to the additional functions of the Public Guardian in registering and supervising guardians;
  - b) The Guardianship (Missing Persons) Act 2017<sup>2</sup> (Designation of Court) Regulations 2019, which designates the High Court to have jurisdiction to exercise the functions of the court in proceedings under the Act; and
  - c) The Civil Procedure (Amendment No. 2) Rules 2019<sup>3</sup>, which make provision for the rules of court for claims and applications relating to guardianship orders sought under the Act.

## 7. Policy background

*What is being done and why?*

### Guardianship fees

- 7.1 The Act establishes a new role of a ‘guardian of a missing person’, who will be appointed by the High court to manage a missing person’s property and financial affairs and subject to the supervision by the OPG. This supervision will incur costs, and it is therefore appropriate to create new guardianship fees to recover some of that cost.
- 7.2 The OPG operates on a full cost recovery basis, meaning that the total cost of all of its services is recovered by the fees it charges. Under the ‘enhanced’ fee power contained in s180 Anti-Social Behaviour, Crime and Policing Act 2014, fees can be set to

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<sup>1</sup> S.I. 2019/1030

<sup>2</sup> S.I. 2019/1029

<sup>3</sup> S.I. 2019/1034

recover more than the cost of a particular service in order to cross-subsidise other services provided by the OPG.

- 7.3 Once the High Court (either Family or Chancery Division) has made an order appointing a guardian, the OPG will charge a one-off set-up fee covering initial registration of details of the guardian, terms of the guardianship order and provision of any initial support and guidance needed. This fee is payable within 30 days of the date of the invoice which the OPG will send to the guardian. In addition, there will be an annual supervision fee to contribute to the cost of providing ongoing supervision and oversight of guardians including answering questions, providing information and guidance, receiving reports from guardians and investigating any concerns or complaints. This fee is payable in arrears every 12 months, starting from the date of the Guardianship order coming into force, and within 30 days of the date of the invoice which the OPG will send to the guardian.
- 7.4 The role of the guardian is similar to the existing role of deputies, who are appointed by the court of protection to manage the property and financial affairs of those who lack mental capacity to do so themselves. Due to their similarities, the fees for guardianship will be broadly in line with the fees for deputyship. The set-up fee and the supervision fee are therefore being set at £200 and £320 respectively. This is in line with the existing assessment fee (£100) and the general supervision fee (£320) for deputyship. However, the set-up fee for guardianship is higher than the assessment fee for deputyship due to the increased administrative and support process involved. The expectation is that guardians will be able to use proceeds from the missing person's estate to pay the fees.
- 7.5 We expect the volume of guardianship cases to be low (between 50-100 per year). As the costs of running the service are to be recovered from very few cases, the cost per case becomes exceptionally high (above £1,000 for both set-up and supervision) compared to deputyship. We are therefore setting the fees below cost to maintain affordability and setting the fees in line with deputyship. The remaining cost will be cross-subsidised by other fees charged by the OPG. The additional cost can be absorbed by wider OPG fees without the need for any fee increases.

#### Fee remissions and exemptions

- 7.6 In addition to introducing the fees structure for guardianship, the instrument also explicitly provides for OPG's existing remissions scheme. The remissions and exemptions scheme in place for OPG cases provides protection for those who are unable to pay their fees. Although the remissions scheme is already in operation and well established by OPG, the provisions place the scheme on a clearer statutory footing.
- 7.7 The scheme applies a benefits test and an income test, and it is the means of the relevant person that that is assessed. For guardianship or deputyship, the relevant person is the missing person or the person that lacks capacity, respectively. The relevant person for the Power of Attorney fees would be the person making the power of attorney themselves. As already provided under regulation 9 of The Public Guardian (Fees, etc) Regulations 2007 ("the Regulations"), where the relevant person is in receipt of certain state benefits they will be eligible for a fee exemption
- 7.8 If not in receipt of a qualifying benefit, where the fee payer's income falls below £12,000, they will be eligible to be granted a 50% fee remission. However, while the

benefits exemption is explicitly set out in the Regulations, there is no provision for the income-based remissions set out within the Regulations. Instead, the income test – which has been in place for many years – currently relies on the Public Guardian’s discretionary power under s10 of the Regulations to remit a fee where payment of that fee would, due to exceptional circumstances, involve undue hardship.

- 7.9 The explicit provision of the income-based element of the exemptions and remissions scheme will provide additional certainty and clarity to the application of the scheme. The income-based remissions provision applies to the fees for registering a Power of Attorney, the deputyship assessment and general supervision for deputies, and the fees for set-up and supervision of guardians.
- 7.10 The instrument amends regulation 9 of the Regulations to clarify that an application must be made in order to be granted an exemption or remission, and makes new provision for the timing and content of applications for both exemptions and remissions. Finally, it provides for the Public Guardian, at their discretion, to grant an exemption or remission for a period of up to 3 years, following which a new application would need to be made.

## **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.

## **9. Consolidation**

- 9.1 No consolidation is required.

## **10. Consultation outcome**

- 10.1 On 19 December 2018 the Ministry of Justice published a public consultation that sought views on the department’s proposals for implementing the Act. The consultation proposed that the guardianship fees would be introduced broadly in line with the existing deputyship fees.
- 10.2 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 provides 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. The Code also provides guidance for businesses and organisations who come into contact with a guardian. The fees structure and the remissions and exemptions scheme are detailed within the Code.
- 11.2 Guidance on all Court and OPG fees already exists and is publicly available on gov.uk. This has been updated accordingly.

## **12. Impact**

- 12.1 There is no significant, impact on business, charities or voluntary bodies.
- 12.2 There will be an impact on the public sector, in relation to the OPG in administering the fees.
- 12.3 An Impact Assessment has not been prepared for this instrument because case numbers are estimated to be too low in frequency to require one.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

## **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 the regulations to ensure they are fit for purpose. The OPG and Ministry of Justice regularly monitor and review both fee levels and cost to ensure that the costs for OPG services remain fully recoverable through its fees.

## **15. Contact**

- 15.1 Dhruvee Masters at the Ministry of Justice, email: dhruvee.masters1@justice.gov.uk can answer any queries regarding the instrument.
- 15.2 Andrew Waldren, Deputy Director for Courts and Tribunal fees, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Paul Maynard MP, Parliamentary Under-Secretary of State for Justice, can confirm that this Explanatory Memorandum meets the required standard.