

**EXPLANATORY MEMORANDUM TO  
THE PUBLIC GUARDIAN (FEES, Etc.) (AMENDMENT) REGULATIONS 2009**

**2009 No. 514**

**AND**

**THE COURT OF PROTECTION FEES (AMENDMENT) ORDER 2009**

**2009 No. 513 (L. 3)**

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 instruments**
  - 2.1. The Public Guardian (Fees, Etc.) (Amendment) Regulations 2009 (“the Regulations”) and the Court of Protection Fees (Amendment) Order 2009 (“the Order”) set out revised fees to be charged in connection with the functions of the Public Guardian and the Court of Protection respectively. The Regulations include provision for a new level of fees and decreased fees for particular services, and an additional circumstance under which those fees may be exempted. The Order abolishes the fee for a certified copy of a document and provides for an additional circumstance under which fees may be exempted.
- 3. Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1. None.
- 4. Legislative Context**
  - 4.1. Following the implementation of the Mental Capacity Act 2005 in 2007 the Ministry of Justice (“MoJ”) conducted a review of the implementation of the Act. In line with the review, the Regulations reduce particular fees and also create new fees and the Order makes provision for the abolition of a fee.
  - 4.2. H M Treasury has consented to the Order.
- 5. Territorial Extent and Application**
  - 5.1. These instruments apply to England and Wales only.

## 6. European Convention on Human Rights

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

## 7. Policy Background

- *What is being done and why*

- 7.1. A new Court of Protection and the Office of the Public Guardian were created on 1 October 2007 upon implementation of The Mental Capacity Act 2005 (“the MCA”). The MCA provides a statutory framework to empower and protect people who may lack capacity to make some decisions for themselves. It makes it clear who can take decisions in which situations, and how they should go about this. It also allows people to plan ahead for a time when they may lack capacity. It covers major decisions about someone's property and affairs, healthcare treatment and where the person lives, as well as everyday decisions about personal care (such as what the person eats), where the person lacks capacity to make those decisions themselves. It provides empowerment, protection and choice to some of the most vulnerable people in society
- 7.2. The Office of Public Guardian's functions include the supervision of deputies appointed by the Court and the registration of Lasting and Enduring Powers of Attorney. Lasting Powers of Attorney (“LPA”) replaced Enduring Powers of Attorney and introduced improved safeguards and also allowed for the first time appointment of attorneys that may make decisions concerning personal welfare as well as the donor's property and affairs.
- 7.3. Upon implementation MoJ announced its intention to review the implementation of the MCA after one year to ensure the potential benefits of the MCA were being fully realised. The review is not intended to revisit the Act itself or its core principles. The MCA remains a useful and valuable piece of legislation that was designed to empower and protect some of the most vulnerable people within our society. The review will be aimed squarely at evaluating how well the Act's vision has been translated into reality and what needs to be done to ensure its ambition can be met as fully as possible.
- 7.4. The MoJ's consultation paper CP26/08 “Reviewing the Mental Capacity Act 2005: forms fees and supervision” which ran between 23 October 2008 and 15 January 2009 marked the first stage of the review. Respondents were asked to comment on proposals on revisions to LPA forms, changes to the way in which some Court of Protection appointed deputies are supervised by the Office of the Public Guardian and a new fee policy, with views sought on whether any of the proposed fees were inappropriate.
- 7.5. This is the first amendment of the Court of Protection Fees Order 2007 and the second amendment of the Public Guardian (Fees, etc) Regulations 2007 (the first being to correct an error), and there are no current plans to consolidate relevant legislation.

7.6. The following are amendments to the original statutory instruments.

- The certified copy of a document fee is to be abolished as the fee has not been raised since the new Court of Protection came into existence in October 2007, furthermore within the Court rules and practice directions for the Court there is no requirement to provide a certified copy.
- The existing LPA fee is to be reduced to £120.00. The overall reduction in the price is funded as a result of the increased volume of applications beyond projections.
- A new fee relating to EPA and LPA office copies is to be introduced. The Office of the Public Guardian does not normally provide office copies of EPAs or LPAs as certified copies can usually be obtained from Solicitors. On occasions where there is no alternative to an office copy being obtained, the Public Guardian will exceptionally provide an office copy. In those circumstances the fee will be payable to offset the cost of producing the office copy.
- The Deputy Assessment fee is to be reduced to £100.00.
- The Deputy Supervision fees are to remain with the inclusion of an additional level of supervision Type IIA attracting a fee of £350.00 per annum.
- The exemptions and remission policy is altered to introduce the new income related Employment and Support allowance as part of the exemptions for both the Court of Protection and the Office of the Public Guardian.

## **8. Consultation outcome**

- 8.1. Consultation was aimed at legal professionals; local authorities, medical professionals and the general public and there were 76 formal written responses to the consultation paper from a range of parties that reflected this.
- 8.2. The Office of the Public Guardian held 4 stakeholder events around England and Wales which were attended by a variety of stakeholders including professionals as well as lay deputies and attorneys
- 8.3. All consultation responses were analysed and influenced the Public Guardian's decision-making and next steps. There was a broad support for the changes particularly for the reduction to the LPA registration fee and all changes to the fees will go ahead as proposed in the consultation document.
- 8.4. The Department's full response to the consultation is available at <http://www.justice.gov.uk/publications/reviewing-mental-capacity-act.htm>
- 8.5. The Department will maintain a 100% cost recovery with respect to fees charged by the Public Guardian and 80% cost recovery for Court of Protection as agreed by H M Treasury.

8.6. Section 54(3) of the MCA requires the Lord Chancellor to consult the President of the Court of Protection, the Vice-President of the Court of Protection and the Senior Judge of the Court of Protection in relation to making changes to Court of Protection fees. The consultation paper was sent in line with this requirement on 24 October 2008. A copy of the Order was also sent post consultation and the President, Vice-President and Senior Judge have confirmed their approval of the proposed amendments as set out in the Order.

## **9. Guidance**

9.1. New fees and remissions guidance will be produced and will be available to the public prior to the Statutory Instruments becoming effective.

9.2. Guidance and information will be available on the website, [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk)

9.3. All existing deputies have been advised of proposals and will be kept advised of the changes through the quarterly newsletter.

## **10. Impact**

10.1 No impact on business, charities or voluntary bodies is foreseen.

10.2 No impact on the public sector is foreseen.

10.3 An impact assessment has not been prepared for these instruments.

## **11. Regulating small business**

11.1. The legislation does not apply to small business.

## **12. Monitoring and review**

12.1. With effect from 1<sup>st</sup> April 2009 the Court of Protection will become part of Her Majesty's Court Service and therefore monitoring and review will fall under that agency. The Office of the Public Guardian will continue to pursue 100% full cost recovery and is committed to continuing to review of the implementation of the MCA over the course of next 12 months, which will include commissioning independent research into the wider impact of the MCA. The Office of the Public Guardian will also review its fees on an annual basis.

### **13. Contact**

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