



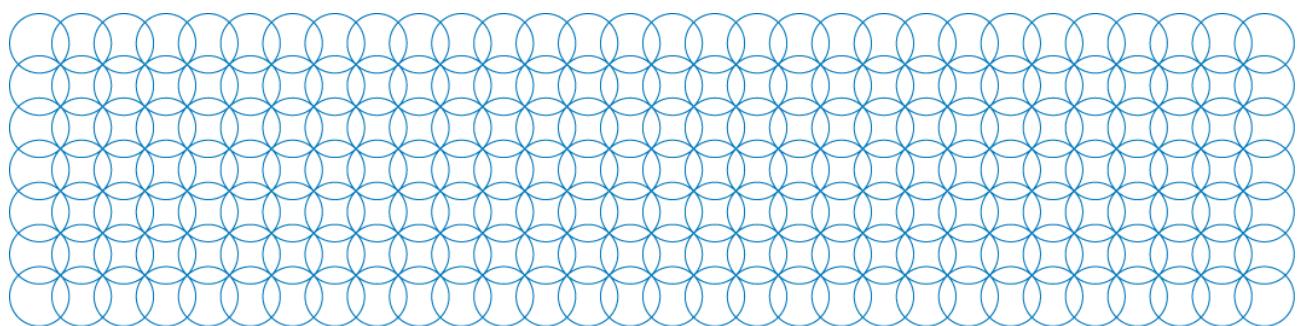
Ministry  
of Justice

# **Guardianship of the Property and Affairs of Missing Persons**

## A consultation

This consultation begins on 27 August 2014

This consultation ends on 18 November 2014





Ministry  
of Justice

## **Guardianship of the Property and Affairs of Missing Persons**

A consultation

A consultation produced by the Ministry of Justice. It is also available at  
<https://consult.justice.gov.uk/>

## About this consultation

**To:**

This consultation is aimed at anyone in England and Wales interested in what happens to the property and affairs of a missing person before he or she returns or is found or presumed to have died.

This includes people who have been missing, but have returned; their families and the families of currently missing people; professional advisors; charities and other organisations that are involved with missing people; and businesses and other bodies who have had to deal, or may have to deal, with problems related to the property and affairs of a missing person.

**Duration:**

From 27/08/14 to 18/11/14

**Enquiries (including requests for the paper in an alternative format) to:**

Criminal and Civil Law Policy Unit  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ

Tel: 020 3334 6964

Email: [missing\\_persons\\_guardianship@justice.gsi.gov.uk](mailto:missing_persons_guardianship@justice.gsi.gov.uk)

**How to respond:**

Please respond online by 18/11/14 at:

<https://consult.justice.gov.uk/digital-communications/guardianship-property-and-affairs-missing-persons>

Or send your response by 18/11/14 to:

Criminal and Civil Law Policy Unit  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ

Email: [missing\\_persons\\_guardianship@justice.gsi.gov.uk](mailto:missing_persons_guardianship@justice.gsi.gov.uk)

**Response paper:**

A response to this consultation exercise is due to be published by 10/02/15 at: <https://consult.justice.gov.uk/>

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**Guardianship of the Property and Affairs of Missing Persons Consultation Paper**

## **Foreword**

The sudden disappearance of a loved one, perhaps without any obvious explanation as to the cause of the disappearance or any certain knowledge as to whether the missing person is alive, is a traumatic event for even the most resilient individual, particularly when the disappearance lasts for several months or even years. The emotional and personal problems caused by absences of this length are all too obvious, but they can be compounded by the practical consequences of the disappearance.

Faced with a disappearance the law assumes that the missing person is alive until the contrary is proved. The main consequence of this is that no one has legal authority to deal with the missing person's property. This can lead to:

- family members left without the financial support they need and were expecting to receive;
- creditors being unpaid and having to turn to insolvency or, in the case of mortgages, repossession, procedures;
- banks and other financial institutions not being able to release the missing person's assets or even information about them to those left behind; and
- the missing person's money being wasted by automated payments that cannot be stopped and his or her assets decaying for want of repair.

We need to find ways to enable these problems to be solved.

The purpose of this consultation paper is to invite views on whether a system should be created under which a person can be appointed to deal with the property and affairs of a missing person; and, if so, how and on what terms.

The provisional proposals in this paper have been developed by the Ministry of Justice with the help of the leading charity in this field, Missing People, and their pro bono lawyers, Clifford Chance LLP, in the light of systems already in use elsewhere in the world. We are very grateful to Missing People and Clifford Chance for their contributions to this project.

I urge everyone interested in this topic to reply to this consultation so that the Government's decision on whether to create a new system is as well informed as it can be.

Lord Faulks QC

Minister of State for Justice

## **Executive summary**

Many people are aware through media reports or personal experience of instances where individuals go missing without warning or explanation and disappear for a significant period of time. Their disappearance exposes their property and affairs to the risk of deterioration as there is no one to manage or direct them; and leaves their families and dependants without the support that they would have expected to receive.

In some countries there are legal provisions that operate in these situations that enable a person to obtain authority from a court or tribunal to step in and protect the interests of the missing person and thereby assist those left behind. There is no similar arrangement in the law of England and Wales.

In this paper we seek views on whether there ought to be a new legal mechanism by which a person could be appointed to act on behalf and in the best interests of a person who has gone missing. For convenience we refer to the person appointed as “the guardian” of the property and affairs of the missing person, but a different term may well be used in any legislation that results from this consultation.

Granting one person authority to use the property of another, who is not present to represent his or her own interests, is not a step to be taken lightly as the opportunity for abuse is only too evident. A person granted such authority would be expected to act according to the highest standards and only in the best interests of the missing person.

There has, however, been considerable support for the creation of a status of guardian for use in these situations. In 2011 and 2012 the All Party Parliamentary Group for Runaway and Missing Children and Adults and the Justice Committee of the House of Commons called for legislation and several Members of Parliament expressed their support during the passage of the Bill that became the Presumption of Death Act 2013 through Parliament during the 2012-13 session.

The Government acknowledges the support for reform and intends to decide whether to introduce a legal status of guardian when it has considered the response to this consultation. Notwithstanding this, the consultation paper sets out for consideration by consultees provisional proposals as to the form that a scheme of guardianship could take if it were to be decided that a scheme should be implemented. These provisional proposals draw on the precedents of the systems used in other countries and the broadly analogous provisions governing the appointment of Deputies under the Mental Capacity Act 2005.

The key features of the provisional proposals are:

Guardianship will be a fiduciary role akin to trusteeship.

The guardian must only act in the best interests of the missing person.

Actions taken by the guardian should have the same effect as if they had been taken by the missing person.

The guardian should generally be able to access information relating to the missing person and do anything in relation to the property and affairs of the missing person (except make a will) that the missing person would have been able to do in person.

Anyone should be able to apply for appointment as guardian provided he or she has a sufficient interest but his or her interests must not conflict with those of the missing person.

The appointment should be made by a court.

The appointment should only be capable of being made if a person has been missing for 90 days or more and it seems likely that a decision will need to be made regarding the property and affairs of the missing person.

The appointment should be for a period of up to four years with the possibility of applying for an extension for up to another four years.

The appointment may be general or limited and may be made on condition that an adequate security bond is provided.

The guardian will be supervised by the Office of the Public Guardian and will be required to file accounts.

The details of the proposed scheme of guardianship remain to be settled but we anticipate that if the new legal status is created there could be considerable benefits for missing persons and those left behind, whether they are family members, dependants or third parties, such as banks, financial institutions or creditors. The benefits may take the form of protecting property of the missing person that would otherwise deteriorate or be dissipated; or protecting the position of family members left behind by enabling mortgage and other financial commitments of the missing person to be met; or by creating greater certainty for third parties who have to decide whether to disclose information or to conduct a transaction. There would however also be some costs for business and others in adapting to the new provisions.

Data on the number of people who go missing in England and Wales together with indications from other jurisdictions on the use of their legislation, suggest that if similar provisions were created in England and Wales there would be between 50 and 300 appointments annually.

We would welcome views on the provisional proposals and on the assessment of the impact that they may have.

In preparing this consultation paper the Ministry of Justice has been helped and supported by the charity Missing People and its pro bono lawyers Clifford Chance. We are very grateful for the assistance they have provided. The Ministry of Justice is, however, responsible for the content of the consultation paper.

## **Introduction**

### **Aim of this paper**

The purpose of this consultation paper is to seek views on whether a new jurisdiction should be created in England and Wales to enable the court to appoint a person to deal with the property and affairs of a missing person; and if so, what the process of making the appointment and the terms of appointment should be.

### **Terminology**

In this paper we refer to the person appointed as a guardian of the property and affairs of the missing person or, simply, the guardian. This is the term that has been applied generally in the discussions that have taken place in Parliament and elsewhere,<sup>1</sup> but if legislation is introduced to create this new legal status, it is quite possible that some other term, such as manager, administrator or administrative guardian may be used. In deciding the appropriate name we will bear in mind the possibility of confusion of the new role with existing roles that have the same name.<sup>2</sup> We refer to property and affairs to indicate that the power is restricted to property and money matters and does not extend to any welfare or medical matters.

### **Present Position**

Although there is considerable support across the political spectrum for the introduction of a new status of guardian, the Government has not yet taken any final decision on whether to create the new jurisdiction. However, if the Government does decide to introduce the status, it is provisionally minded to do so along the lines of the provisional proposals set out in this paper. The responses received to this consultation will help the Government to decide how to proceed.

### **Presumption of Death Act 2013 and guardianship**

The vast majority of disappearances end when the missing person is found or returns home. Sadly, a small number of people who have gone missing are later found to have died. For other disappearances, information and circumstances may sooner or later enable those left behind to establish that the missing person is likely to have died. The Presumption of Death Act 2013 is intended to enable families to resolve a missing loved one's affairs in those situations.<sup>3</sup> In this consultation we are concerned specifically with the legal and financial problems that may arise in the period of time between the

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<sup>1</sup> For example, see the report of the All Party Parliamentary Group on Missing and Runaway Children and Adults on its inquiry into Support for Families of Missing People in 2011; the Justice Committee's 12th Report of the 2011-12 session on presumption of death, and parliamentary debates during passage of the Presumption of Death Act 2013.

<sup>2</sup> For example, "guardians" appointed under the Mental Health Act 1983 or "deputies" appointed under the Mental Capacity Act 2005.

<sup>3</sup> The Presumption of Death Act 2013 will come into force on 01 October 2014 under the Presumption of Death Act 2013 (Commencement and Transitional and Saving Provision) Order 2014 (<http://www.legislation.gov.uk/uksi/2014/1810/made>).

disappearance and the return or actual or presumed death of the missing person. This is when guardianship may be a useful solution to the problems that those left behind face.

## Consultees

The consultation is aimed at anyone in England and Wales interested in what happens to the property and affairs of a missing person before he or she returns or is found or presumed to have died. This includes people who have been missing, but have returned; their families and the families of currently missing people; professional advisers, charities and other organisations that are involved with missing people and their families; and businesses, such as banks, and other bodies, for example, local authorities, who have had to deal with problems related to the property and affairs of a missing person.

Copies of the consultation paper are being sent to the organisations named in Annex 1. Responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

## Acknowledgment

This consultation paper has been written with the help and support of charity *Missing People* and its pro bono lawyers *Clifford Chance*. The Ministry of Justice is extremely grateful for the expert advice and help that they and their contacts around the world have provided. The views expressed in it are, however, those of the Ministry of Justice, which is responsible for the content of the paper.

The quotations contained in this paper from family members of missing persons have been anonymised but they are all from people who have been supported by the charity *Missing People*.

## Cost-Benefit Analysis

A cost-benefit analysis has been prepared and is included within this consultation paper. It indicates that the proposals are likely to lead to some additional costs for businesses that have to deal with guardians and for the justice system in introducing a new court procedure and supervision regime. The analysis also anticipates that there may be some benefits for businesses, which will be able to rely on standard procedures to deal with guardians rather than having to make special arrangements as at present. The analysis also identifies advantages and some costs for missing persons, guardians and those left behind.

## Structure and content of this paper

This paper is divided into three principal parts. **In part 1 we set out the underlying reasons for our proposals.** In particular, we examine the current legal position; the problems that it creates; what support there is for change; the solutions to these problems that have been found in other jurisdictions; our objectives in introducing a new status; and the reason for choosing our proposed route. **In part 2 we set out our provisional proposals for a new procedure** to confer a status of guardian of the property and affairs of a missing person. This begins with a consideration of the **status and role of a guardian**, including how a guardian would make decisions and the actions that a guardian would be permitted to take. We then set out the **proposed procedure for appointing a guardian**, including where, when and by whom an application could be made, the circumstances in which an appointment could be made and the criteria for appointing a

person as guardian. This is followed by consideration of the **terms of appointment**, such as duration, means of early termination, possible limitations to scope and recovery of expenses. The subsequent section is concerned with **safeguards for the missing person and guardian**, in particular how the guardian can be held accountable and how the guardian may be supervised. **In part 3 we assess the costs and benefits** of introducing our proposed reform. This considers the scale of the issue; the potential costs for business, missing person and their families, and the justice system; and the benefits to businesses and missing persons and their families. **Part 4 contains our equalities analysis**, which assesses the likely equalities impact of the proposals on those with protected characteristics. **Part 5 is a questionnaire**, drawing together the questions we pose in parts 2 to 4. We would be grateful for your views and details of how to respond are set out at the end of part 5.

## 1. Background

### Introduction

1. This paper sets out proposals for the creation in England and Wales of a new legal status of guardian of the property and affairs of a missing person. When a person goes missing, no legal effects are triggered by the disappearance. There is currently no mechanism to protect or deal with that person's property and affairs and no provision for another person to act with authority on behalf of the missing person. This may make it difficult for those left behind to find out about the missing person's property and can lead both to the loss or deterioration of the missing person's assets and to practical, financial and legal problems for the families and dependants left behind. It can also create complications for businesses and institutions which hold the missing person's assets or liabilities, and the organisations and agencies that a missing person's family might approach for advice.
2. The Government has developed the proposals in this paper in the overall context of its commitment to ensuring that there are appropriate systems in place for families to deal with these legal and financial problems, together with accessible practical guidance on how they should be used.<sup>4</sup> These proposals are aimed at addressing these issues in a way which upholds the best interests of the missing person.

### Current law

3. Under the law of England and Wales a person is presumed to be alive until the contrary is shown. The disappearance of a person does not therefore of itself affect the ownership or control of his or her property and affairs. He or she remains the owner of his or her property to the same degree as before his or her disappearance. Any legal or financial arrangements in place will therefore continue, including bank accounts, mortgages, leases, and contracts for on-going services (such as insurance, utilities and subscriptions), together with Direct Debit agreements and standing orders. Any property, businesses and other assets or liabilities owned jointly or solely also remain in the missing person's name as before the disappearance.
4. Similarly, there is no assumption that, because a person has disappeared, he or she has lost capacity to deal with financial affairs, and as such a missing person's affairs may remain unmanaged for weeks, months or even years. Whilst there may be concerns that such an absence is affecting the missing person's financial situation (or that of any family or dependants), there is no specific provision or procedure for another person to access or take control of the assets of a person who has disappeared. It would be possible for a missing person to have created a power of attorney in advance of his or her disappearance but this seems an unlikely eventuality.

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<sup>4</sup> Missing Adults and Children Cross-government Strategy published in December 2011 paragraph 4.31: see [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117793/missing-persons-strategy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117793/missing-persons-strategy.pdf)

5. In instances where it is believed that the missing person is likely to have died, he or she may be presumed dead under a variety of procedures<sup>5</sup> and those left behind can then administer his or her property and affairs on that basis.<sup>6</sup> These do nothing to help in the period when it is not clear whether a person should be presumed to be alive or dead, or in the months or years that sometimes need to elapse before a person can legally be treated as having died.

*'Every solicitor I have spoken to has just said [in my case] it's seven years and there is absolutely nothing I can do about it. I have got to wait until seven years, or obviously if [my husband] came back, but if it was after a seven year period... only then would the mortgage be sorted out and shares and things sorted out. It's just the seven years, it seems an awful long time. The finances are an added stress that you don't need at the time really.'* (wife of a missing person)

6. There are of course situations in which one person can make a legally binding decision in relation to the property and affairs of another. However, none of these matches the situation of a disappearance. Thus, unlike a standard power of attorney, where the donor is capable of granting the authority to act to the guardian, a missing person is unable to do so. A better comparison may therefore be with a Deputy appointed by the Court of Protection, or an attorney appointed under a Lasting Power of Attorney, to manage the property of a person lacking mental capacity.<sup>7</sup> In the case of a deputy the authority to act is conferred by the court rather than by donor. However, unlike the missing person, the person lacking capacity is present and is to be consulted by the Deputy and involved in decisions to the fullest extent possible.

## Problems

7. The fact that a person's disappearance has no legal effect on his or her property is problematic for the missing person, the family he or she leaves behind, and for third parties who either hold a missing person's assets or liabilities, or who are approached to provide advice or representation.

### ***The missing person***

8. The legal assumption that a missing person remains capable to manage his or her property and affairs can adversely affect his or her financial interests. Left unmanaged, these can fall into disarray, and can be particularly at risk if the missing person's income is affected by the disappearance; for example, if his or her salary payments stop, and no longer offset outgoings such as rent or mortgage payments. Automated payments may continue to be made under Direct Debits and standing orders thus depleting bank accounts, while necessary expenditure on assets (such as

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<sup>5</sup> For example, the leave to swear death procedure for obtaining a grant of probate. The Presumption of Death Act 2013 will introduce, from 01 October 2014, a general procedure for obtaining a certificate of presumed death.

<sup>6</sup> For information on when a person can be presumed dead, see Missing People's guidance sheet, *When can a missing person be declared presumed dead: The seven year rule?* at [www.missingpeople.org.uk/legalandfinancial](http://www.missingpeople.org.uk/legalandfinancial)

<sup>7</sup> Sections 9 and 16 of the Mental Capacity Act 2005.

for insurance or repairs) or moving money from one account to another to meet payments may not be able to be authorised.

*[My daughter's] bank would not consider even moving any money from one account, a savings account, to her own current account to enable her direct debits to be continued to be paid..." (Father of a missing woman).*

9. Where such automated payments cannot be met, the missing person may face penalties, and in the most serious cases, his or her property may be repossessed and insurance policies stopped.
10. As a result, should a missing person be found or return, he or she may find that assets have been dissipated or damaged, possibly beyond the point of repair, and liabilities incurred.

#### ***The family and dependants left behind***

11. The present legal situation causes issues for the members of the family if they seek to prevent the problems outlined above by managing the missing person's affairs in his or her absence. Further problems can arise if the missing person leaves behind dependants, or if family members share assets or liabilities with the missing person.
12. Families can attempt to manage a missing relative's property and affairs, so that they will be in order should the missing person return or be found. However, in the absence of a specific process or procedure to enable them to take legal control of a missing person's assets, families can encounter problems in trying to do so. For example, as explained below, some families report that they find it difficult to engage with institutions that hold the missing person's assets or liabilities due to the legal restraints and obligations placed upon those institutions by way of their relationship to their customer, the missing person.

*'If I told an organisation about my husband's missing status, they were unable to offer advice. Problems have included payment of mortgage, car insurance, legal ownership of the car, applying for tax, what to put on the electoral register, how to inform the tax office, stopping payment of direct debits.' (Wife of a missing man)*

13. Aware their relative's affairs and property are unmanaged, and yet unable to assist themselves, families can feel helpless and upset.

*"I've found it very stressful to deal with financial institutions and other organisations regarding my partner's affairs... None of the authorities appears to have a policy regarding missing people, and my partner's affairs are left in a mess." (Partner of a missing person)*

14. With regard to dependants, situations can quickly arise after a disappearance in which funds are needed to meet everyday expenses, such as food or utility bills, but where dependants of the missing person are unable to access money from his or her bank accounts to meet their needs. This can leave dependants in a financially

precarious and worrisome position. In the longer term, potential inheritances may be wasted.

15. Changing circumstances may create a situation in which those left behind may need to move from a family home owned by the missing person to a smaller property so as to reduce mortgage payments; or need to re-negotiate the terms of a mortgage (particularly if, say, a mortgage reaches the end of an advantageous fixed rate and automatically transfers onto a higher rate). Similarly, with jointly-owned assets or liabilities where outstanding or on-going payment is required, such as for a joint consumer credit agreement, the family may find itself struggling to meet payments alone. Yet if the property is solely or jointly owned by the missing person, the defendants and, indeed, other family members or joint owners may be unable to act, and, in the most serious cases, assets may be seized and homes may be at risk of repossession if they can neither maintain payments nor sell the property. Similar situations may arise in relation to a tenancy that the family needs to surrender.

*"We still have a mortgage that has not been resolved, which is still in joint names. I can't change that mortgage. I can't move house. I haven't been able to do anything for the past eight years. It has been extremely difficult." (Wife of a missing man)*

16. Problems faced by families are therefore multifaceted, and can be very complex, depending on the relationship with the missing person, the nature of the missing person's affairs and property, and whether any property or assets are held jointly with the missing person. The scale of the problems will often depend on the response of third parties, such as banks and other financial institutions holding the assets of the missing person.

### ***Third parties***

17. No matter how sympathetic they may be to the situation of those left behind, third parties may legitimately feel constrained as to the amount they can do to help because of the legal duties they owe to the missing person. In the absence of a legal basis, financial institutions such as banks, mortgage lenders and insurers may not, for example, consider themselves able even to discuss the financial affairs of the missing person with someone else because of concerns about data protection, confidentiality and the possibility of fraud. In giving evidence to the Justice Committee inquiry on Presumption of Death, the Association of British Insurers stated, for example, that the Data Protection Act "can prevent insurers from disclosing information", which "may create barriers and delays if the insurer is contacted by someone who isn't the policyholder".<sup>8</sup>
18. In addition problems may arise, where contracts to which the missing person is a party need to be altered, because of the legal limitations on the ability of someone who is not a party to a contract to alter its terms. The same issues apply in relation to leases of property.

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<sup>8</sup> Justice Select Committee, Twelfth Report of Session 2010-12, *Presumption of Death*, HC 1663, Ev. 44, February 2012.

19. Situations can also arise where a third party owed duties to the missing person as a trustee or in some other fiduciary capacity and cannot assist those left behind without being in breach of duty. Third parties are understandably wary of the liability that they may incur if they are found to be in breach of such duties so it is legitimate for them to balance their desire to help against their potential liability.
20. Some third parties will be creditors of the missing person. They can find it difficult to obtain payment. Others will be his or her business partners or fellow shareholders in a family company. They may be unable to make decisions which require collective agreement or perhaps wind up the partnership.
21. The result of the absence of a legal framework to deal with these problems is that if an institution chooses to engage with the family, the relationship will usually have to be dealt with outside standard procedures by escalating decisions to more senior management, increasing costs. A new mechanism would help to address these issues. It would also provide greater certainty and legal protection for third parties, thereby enabling them to help those left behind as well as benefitting directly from the confidence that they are dealing with a person able legally to bind the missing person.

#### ***Availability of advice***

22. All of these problems are compounded by the apparent difficulty of finding clear legal advice for dealing with the affairs of missing people.

*"In order to deal with day to day personal and financial issues I had to trawl the internet to find information. This was very time consuming and confusing... In the early days of [my son's] disappearance I was at a loss on how to start handling his financial affairs. It was imperative that his house be protected from repossession."*

(Mother of a missing man).

23. The All-Party Parliamentary Group for Runaway and Missing Children and Adults concluded that "it can be difficult for families to find knowledgeable, professional advice. Missing People told the Inquiry of how it is approached by families for information on presumption of death as there is no other source of help or clear information".<sup>9</sup>
24. In this regard, the publication of guidance might go some way to helping people to deal with some issues, for example, in relation to social security benefits. Indeed, the charity Missing People has produced a series of guidance for families in this situation, including some produced in conjunction with the British Bankers' Association and the Association of British Insurers.<sup>10</sup> However, this does not provide a solution, since in many cases the guidance is not able to do more than point to the deficiencies in the current system, and to highlight some of the problems the families of missing persons face. This gives little practical assistance to the missing person or those left behind.

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<sup>9</sup> All-Party Parliamentary Group for Runaway and Missing Children and Adults, *Inquiry: Support for Families of Missing People*, Report, July 2011.

<sup>10</sup> [www.missingpeople.org.uk/familyguidance](http://www.missingpeople.org.uk/familyguidance)

## Scale of the Issue

25. People go missing for all manner of reasons and although a proportion may make a reasoned and deliberate choice to begin a new life elsewhere, consciously leaving all property behind, the majority of adults go missing as a result of factors somewhat or entirely beyond their control, such as the effects of mental illness or degeneration or due to falling victim to some kind of accident or violence.
26. In 2011-12, a total of 280,000 missing person incidents were recorded in England and Wales, relating to an estimated 172,000 individuals. However, the vast majority of these incidents are resolved relatively quickly. As at 5 March 2014,<sup>11</sup> just 301 of the adults who had gone missing in England and Wales during the previous year were still missing. Of these, 158 had been missing for over three months.
27. Not all these missing adults will have left behind them property that needs to be managed or families that need to be supported. On the assumption that guardianship would not be available for short absences these figures suggest that the upper limit for the number of new missing person incidents which might result in an application for guardianship might be between 150 and 300 cases annually.
28. This estimate is supported by the experience in jurisdictions where a mechanism for dealing with the property and affairs of missing persons already exists. In the Australian Capital Territory, for example, there have been three applications since the legislation was enacted in 2007. In Victoria, there have been five appointments since 2012. In New South Wales there have been four appointments since 2009. The proportion of applications compared to the total number of missing persons cases and to the general population in each jurisdiction, when applied to the total number of missing persons cases and to the general population in England and Wales, suggests in the much larger population of England and Wales there could be around 50 applications for the appointment of a guardian annually.
29. Our working estimate is therefore that it is reasonable to assume that there might be between 50 and 300 appointments annually, but between 50 and 100 is more likely. Fuller details of the statistics we have obtained from other jurisdictions are set out in the cost-benefit analysis in Part 3 of this consultation paper (paragraphs 130 and following).
30. In all these cases the law of England and Wales does not at present provide a suitable remedy for the proper management of the property and affairs of a missing person.

## Support for change

31. The introduction of a status of guardian of the property and affairs of a missing person appears to be a well supported concept. In 2012 the Justice Committee recommended immediate legislation to create a status of guardianship for a missing person along the lines of the Australian model. The All-Party Parliamentary Group for Runaway and Missing Children and Adults had made a similar recommendation in 2011 following an inquiry into support for families of missing people. There were also several calls for prompt legislation on guardianship from members of the three main

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<sup>11</sup> Data provided by the National Crime Agency, UK Missing Persons Bureau.

political parties during the parliamentary passage of the Presumption of Death Bill in 2012. Baroness Kramer, who sponsored the Presumption of Death Bill in the House of Lords, had previously introduced a Private Members' Bill containing provisions for a system of guardianship.<sup>12</sup> These provisions were based on the legislation currently in place in Victoria, Australia (see paragraph 39 and subsequent paragraphs) and are broadly similar to those outlined in this consultation paper.

32. The charity, Missing People, which has assisted the Ministry of Justice in the preparation of this paper, has been campaigning for guardianship provisions for a number of years, supported by many families of those who have been or still are missing. The charity 'believes there is compelling evidence to demonstrate that provisions need to be put in place to protect the affairs both of missing people and those they leave behind.'<sup>13</sup> This has been supported by the charity Missing Abroad, which called such provisions "absolutely vital" in its evidence to the All-Party Parliamentary Group for Runaway and Missing Children and Adults inquiry.<sup>14</sup>
33. Guardianship was additionally raised by the UK Missing Persons Bureau in its written submission to the Justice Committee,<sup>15</sup> commenting that 'The ability to assign a missing person with a form of "protected status" such as that given to those who may for mental health reasons be incapable of administering their own affairs would enable families to ensure that neither they or their missing relative is unfairly disadvantaged whilst the individual is absent.'
34. The Ministry of Justice has also sought initial views from representative business associations, such as the British Bankers' Association, the Council of Mortgage Lenders and the Association of British Insurers. They broadly support a system that will provide them with greater certainty and protection when assisting with the affairs of their customers and those who are dependent on them. As the Association of British Insurers stated to the Justice Committee, '... while striving to assist relatives where possible the person missing or presumed dead has a right of confidentiality which needs to be protected and fraud avoided... A solution may be to establish a streamlined method of appointing a Power of Attorney or "guardian" where someone is presumed dead or has been missing for a certain amount of time.'<sup>16</sup>

## Solutions in other jurisdictions

35. As noted by the Justice Committee,<sup>17</sup> there are several jurisdictions which already have a procedure for enabling a person to deal with a missing person's affairs. New South Wales, Victoria and the Australian Capital Territory in Australia, and British

<sup>12</sup> The Presumption of Death and Provisions Relating to Missing Persons Bill (HL Bill 12, 2012-13).

<sup>13</sup> Missing People, *Missing People Policy Briefing: Guardianship*, 2013.

<sup>14</sup> All-Party Parliamentary Group for Runaway and Missing Children and Adults, *Inquiry: Support for Families of Missing People* session two transcript, p. 26 ([http://www.missingpeople.org.uk/downloads.raw?task=callelement&item\\_id=5391&element=dfb\\_b2d4b-e3af-40bc-a511-b0d819792af1&method=download&Itemid=474](http://www.missingpeople.org.uk/downloads.raw?task=callelement&item_id=5391&element=dfb_b2d4b-e3af-40bc-a511-b0d819792af1&method=download&Itemid=474)).

<sup>15</sup> Justice Select Committee, Twelfth Report of Session 2010-12, *Presumption of Death*, HC 1663, Ev. 36.

<sup>16</sup> Ibid. Ev. 44.

<sup>17</sup> Ibid. Paragraphs 50-53.

Columbia and Ontario in Canada all make specific provision for the management of the affairs of missing persons.

36. The clear intention of the legislative provisions in Australia and Canada is to permit a person (in Ontario, a committee) to manage the affairs of the missing person where it is in the best interests of the missing person and, in some of the provisions, where a decision will, or may, need to be made.
37. This legislation seems to envisage that the appointment of such a person is most likely to arise in situations where the person is missing without proof of presumed death, but it could also be used even where death is virtually certain or highly probable, particularly if those left behind do not wish to obtain a declaration of death or presumed death.
38. The legislation in Australia and Canada deals with these situations by adding specific provisions for the limited management of the property of the missing person into its existing legislation on adult guardianship (for cases of mental incapacity). The following summary sets out some of the ways in which the issue has been dealt with.

#### ***Australian law***

39. Legislation in three Australian states, New South Wales (NSW), Victoria and the Australian Capital Territory (ACT), sets out a process under which an individual can seek to be appointed to manage the affairs of a person who is missing. A person may be deemed missing if it is not known whether the person is alive; and reasonable efforts have been made to find the person; and for at least 90 days, the person has not contacted anyone with whom he or she would be likely to communicate.<sup>18</sup>
40. In Victoria, the person seeking the appointment applies to the Victorian Civil and Administrative Tribunal ("VCAT"), a forum which, while technically not a court, hears small claims and a range of disputes, often involving litigants in person. Similarly in ACT, applications are made to the ACT Civil and Administrative Tribunal ("ACAT"). In NSW, however, applications are made to the Supreme Court.
41. To make an order appointing a manager (Victoria and NSW) or administrator (ACT) the court or tribunal must be satisfied that: (i) the person is a missing person; (ii) the person usually resides in the state in which the application is being made; and (iii) it is in the best interests of the missing person to make such an appointment (Victoria and NSW) or that the missing person's interests will be significantly adversely affected if a manager is not appointed (ACT). The tribunals in Victoria and ACT must also be satisfied that while the person is missing there is, or is likely to be, a need for a decision in relation to the person's financial matters or property.<sup>19</sup>
42. In Victoria and ACT, the administrator or manager is appointed initially for up to two years; this appointment may be extended for up to a further two years. Alternatively

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<sup>18</sup> Section 60(AB)(2) of the Guardianship and Administration Act 1986 (Victoria), section 54(2) of the Trustee and Guardianship Act 2009 (New South Wales) and section 8AA (3) of the Guardianship and Management of Property Act 1991 (Australian Capital Territory).

<sup>19</sup> Section 60AB(1) of the Guardianship and Administration Act 1986 (Victoria), section 54(2) of the Trustee and Guardianship Act 2009 (New South Wales) and section 8AA (1) of the Guardianship and Management of Property Act 1991 (Australian Capital Territory).

an application can be made for a temporary order, which lasts for a period not exceeding 21 days (Victoria) or 10 days (ACT).

43. All three jurisdictions impose some kind of requirement on the guardian to act in the best interests of the missing person. The NSW legislation requires the manager, in exercising his or her functions, to observe the principle that the interests of the managed person should be given paramount consideration.<sup>20</sup> The ACT legislation sets out decision-making principles which state that the manager must give effect to the protected (missing) person's wishes as far as possible without significantly adversely affecting the protected person's interests, but that if the manager cannot give effect to the protected person's wishes at all, the interests of the protected person must be promoted. A person's interests are stated to include promotion of the person's financial security and prevention of the wasting of the person's financial resources.<sup>21</sup>
44. In Victoria, an administrator must act in the best interests of the represented (missing) person and the administrator is deemed to be doing so if he or she only makes decisions that he or she considers necessary and desirable for: the payment of the missing person's debts; the maintenance and benefit of the missing person's dependants; and the care and maintenance of the missing person's estate.<sup>22</sup>

#### ***Canadian law***

45. Legislation in a number of Canadian provinces, including Ontario and British Columbia,<sup>23</sup> includes similar provisions. In Ontario, the Superior Court of Justice may declare a person to be an absentee - defined as "a person who, having had his or her usual place of residence or domicile in Ontario, has disappeared, whose whereabouts is unknown and as to whom there is no knowledge as to whether he or she is alive or dead"<sup>24</sup> - if it is shown that due and satisfactory inquiry has been made, or may direct further inquiry to be made.<sup>25</sup> The court may then appoint a committee (which may be a trust corporation) to provide for the custody, due care and management of the property of an absentee.<sup>26</sup> The powers and duties of the committee must be exercised and performed diligently, with honesty and integrity and in good faith, for the missing person's benefit.
46. In British Columbia, the Supreme Court may appoint a curator if: a person has been missing for more than three months (or less than three months if there is an urgent need for the preservation of the estate or the support of the dependants); the person owns or is interested in property in British Columbia; and it is expedient that a curator be appointed to manage, preserve, deal with or dispose of any or all of the property.

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<sup>20</sup> Section 39 of the Trustee and Guardianship Act 2009.

<sup>21</sup> Section 4 of the Guardianship and Management of Property Act 1991.

<sup>22</sup> See section 60AI of the Guardianship and Administration Act 1986.

<sup>23</sup> Other Canadian provinces with similar legislation include Labrador and Newfoundland, New Brunswick, Northwest Territories, Nova Scotia, Nunavut and Yukon.

<sup>24</sup> Section 1 of the Absentees Act 1990 (Ontario).

<sup>25</sup> Section 2 of the Absentees Act 1990 (Ontario).

<sup>26</sup> Sections 4 and 5 of the Absentees Act 1990 (Ontario).

The curator is deemed to be a trustee in respect of the property and must act accordingly".<sup>27</sup>

### ***Irish Law***

47. The law of the Republic of Ireland does not currently make provision for the appointment of a guardian or similar to protect the interests of a missing person. However, the Civil Law (Missing Persons) Bill 2013, which was introduced in the Irish Parliament on 20 February 2013, would, if enacted, make such provision for missing persons. The Bill as introduced would implement recommendations made in a report<sup>28</sup> by the Law Reform Commission of the Republic of Ireland following its consultation<sup>29</sup> on the civil law aspects of missing persons. The Bill addresses both presumption of death and guardianship.
48. If enacted, the Bill would allow an applicant (who may be a family member or another person with a sufficient interest) to apply to the Circuit Court<sup>30</sup> for an order to be appointed as the interim manager of the property of a missing person. Additionally, a County Registrar<sup>31</sup> would be able to make an order appointing a person as interim manager of the property of a missing person, where the order does not empower the interim manager to initiate or defend proceedings, or to enter into a conveyance of an estate or estate in land.<sup>32</sup>
49. In either case, an order could only be made where it has been established that the missing person is not known to be alive, reasonable efforts have been made to find the missing person, and for at least 90 days, the missing person has not contacted any person who lives at the missing person's last-known home address, or any relative or friend of the missing person with whom he or she is likely to communicate.

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<sup>27</sup> Estates of Missing Persons Act [RSBC 1996].

<sup>28</sup> Civil Law Aspects of Missing Persons, Law Reform Commission (LRC 106-2013), January 2013.

<sup>29</sup> Civil Law Aspects of Missing Persons, Law Reform Commission (LRC CP 64-2011), December 2011.

<sup>30</sup> Ireland is divided into eight circuits with one judge assigned to each circuit except in Dublin, where ten judges may be assigned, and Cork, where there is provision for three judges. The Circuit Court is a court of limited and local jurisdiction which deals with civil actions (where the claim does not exceed EUR75.000), family law cases and criminal matters (except for very serious crimes). Circuit courts also hear appeals from District Courts. Source: Irish Courts Service website.

<sup>31</sup> County Registrars are appointed directly by the Irish government, and perform a number of quasi-judicial functions which are conferred on them by statute - for example holding motions courts and case progression hearings, conducting arbitrations under the Landlord and Tenant (Ground Rents) Acts and the taxation of costs. They are independent in the exercise of these functions and appeals against their decisions are made directly to the circuit court judge. In addition, the county registrar has responsibility for the administration and management of the circuit court offices in each county. There are 14 District Probate Registries covering all counties other than Dublin. In these counties the county registrar is the district probate registrar. The district probate registry provides a local and accessible service to legal practitioners and the public whereby they can apply for and obtain grants of probate and administration in relation to the estates of deceased persons. Except in Dublin and Cork, the county registrar is also the sheriff and responsible for the enforcement of court orders and acts as returning officer for all referenda and elections. Source: Irish Courts Service website.

<sup>32</sup> Clause 3, Civil Law (Missing Persons) Bill 2013.

50. The interim manager would be under a duty to act in the best interests of the missing person at all times. The powers and actions of the interim manager will be specified in the order of appointment. The period of appointment would be for up to two years, and this may be extended by a further two years. The interim manager would have to file annual accounts with the court.

### ***Common international elements***

51. All of these measures in Australia, Canada and Ireland have the following elements in common:
  - (i) an application by a relative or a person with a sufficient interest;
  - (ii) to a court, tribunal or registrar;
  - (iii) seeking powers (which may be restricted) to act in respect of the property and assets of a missing person;
  - (iv) subject to a duty to act in the best interests of the missing person.

In drawing up our own proposals we have drawn inspiration both from the Irish Law Reform Commission's report and the legislative models that currently exist in Australia and Canada.

### ***Power to deal with property***

52. In some jurisdictions there are more general provisions that enable a specified person to deal with the property belonging to another. These powers are not designed as a means to deal with the problems caused by the disappearance of a person but they could have some application in such situations. For example, in Scotland, the Court of Session may appoint a judicial factor *in loco absentia* to administer a missing person's estate fulfilling all responsibilities that the missing person would have had. There is no specific time period that must elapse before the court may make such an appointment; the court bases its decision on the merit of the application before it. There is no restriction on who may be appointed but we understand that it tends to be a professional person rather than a family member. In the Australian state of Victoria there is a mechanism for the Supreme Court to appoint a trustee company (that is, State Trustees or a licensed trustee company) in relation to uncared-for property,<sup>33</sup> which covers (amongst other circumstances) missing-person cases. We understand, however, that only a handful of appointments in relation to missing persons are made under these provisions and our initial expectation is that we should create a solution that is tailored specifically to the needs of missing persons and those left behind.

### **Main objectives**

53. The overriding objective of creating a new status of guardian of the property and affairs of a missing person is to create a legal framework that will allow the interests of a missing person to be protected. This will provide a solution to the problems we have identified. It will enable the property of the missing person to be protected and the needs of his or her family to be met. It will also give third parties the certainty they need to deal with those left behind with confidence.

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<sup>33</sup> Section 24A of the Administration and Probate Act 1958.

### **Is a new law necessary to achieve these objectives?**

54. There is no equivalent to the proposed role of guardian under the present law. Providing for the appointment of guardians will therefore require the creation of a new legal status. This new status must have attributes established by law so that the persons holding the status can act with certainty as to their powers and so that others dealing with that person can do so in confidence that their interaction will be legally effective to achieve the desired results. The status can therefore only be created and operate if new powers are created in law.
55. We are therefore certain that if there is a desire to create a status of guardian primary legislation will be necessary. This consultation does not therefore propose any alternative way of achieving the objectives.
56. This is the same conclusion that has clearly been reached in several other jurisdictions. It was also the view taken by the Justice Committee in its report.<sup>34</sup> It recommended that “the Government take steps to introduce provision for ‘guardianship’ orders modelled on the approach adopted by states in Australia, either via the introduction of the presumption of death legislation we have recommended, or some alternative legislative mechanism. This will protect the financial position of the missing person and his or her dependents.”<sup>35</sup>

**Q.1 Do you agree in principle that a new status of guardian for the property and affairs of a missing person should be created? Please give reasons for your answer.**

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<sup>34</sup> Justice Committee, *Presumption of Death*, Twelfth Report of Session 2010-12, HC 1663.

<sup>35</sup> Paragraph 55, *ibid*.

## 2. The proposals

### Introduction

57. The Government has not yet decided whether to create a legal status of guardian of the property and affairs of a missing person. However, if the Government should decide to do so, it has provisionally concluded that the details of the scheme would be along the lines of the provisional proposals set out in this part of the paper.
58. Although there are a number of situations where one person may obtain authority to act in relation to the financial affairs of another person on their behalf, there is no exact precedent within England and Wales for the creation of the status of guardian in the circumstance of a disappearance. Given that the status of guardian of a missing person will, therefore, be novel within this jurisdiction, we are seeking views on a range of significant issues relating to the proposed status before deciding whether to create it.

### ***The status, role and duties of a guardian***

#### **Status and role of guardian**

59. As the purpose of appointing a guardian is to enable the problems caused by a disappearance to be addressed in a controlled, safe and practical way, the status of guardian is to be one that is recognised in law, so that any decisions and actions taken have a legally binding effect. The acts of the guardian in his or her capacity as such are to have the same effect as against any third party as if they had been done by the missing person.
60. The fact that the appointment of a guardian will enable someone to deal with the property and affairs of a missing person in this way, without his or her express consent, distinguishes the appointment from the appointment of an attorney, whether under a Lasting Power of Attorney or otherwise, and means that the appointment affects fundamental principles of ownership and the ability to make decisions for one's self. The appointment of a guardian is more similar in this respect to the situation where a Deputy is appointed by the court<sup>36</sup> to make these types of decisions on behalf of a person who does not have sufficient mental capacity to make (some or all) decisions for him or her self. As with court appointed Deputies, the position of guardian is necessarily one of great confidence and trust, akin to a trustee or other fiduciary. The highest standards are therefore to be expected from the guardian in the performance of his or her duties.

#### **How should a guardian act?**

61. The guiding principle should be that the guardian must act in the best interests of the missing person at all times. For any action that needs to be taken, the guardian must consider what is in the missing person's best interests in that situation and act in

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<sup>36</sup> Section 19 of the Mental Capacity Act 2005.

accordance with what he or she believes them to be. A guardian should not be authorised to act in a way that is not in the best interests of the missing person.

62. In considering what is in the best interests of the represented person, we propose that the guardian should take account of all of the relevant circumstances, including the missing person's known wishes regarding his or her property, family and other affairs as far as possible and insofar as that is compatible with acting in his or her best interests. We consider that when making important financial decisions, the guardian should obtain and consider proper advice in much the same way as a trustee is required to do.<sup>37</sup>
63. Precisely what is in any individual's best interests will depend on the particular situation in question, but, by way of example, we consider that it would usually be in the missing person's best interests for the guardian to aim to maintain, protect and, if possible, enhance the financial resources and other property, of the missing person. There might however be circumstances in which the overall best interests of the missing person would only be served by selling assets and spending the proceeds on those left behind.
64. In addition to the general requirement to act in the best interests of the missing person, we propose that the guardian ought to be subject to specific trustee-like duties. In particular, the guardian should be under a duty: to act in good faith and with reasonable diligence; to exercise reasonable care and skill in financial dealings; not to profit from his or her position; to avoid conflict between his or her personal interest and duties; and to keep accurate accounts. However, we are conscious of the danger of over-loading guardians with duties. Guardianship is not exactly the same as trusteeship so it may not be appropriate to impose all the duties of a trustee on a guardian: for example, the duty to balance the interests of beneficiaries interested in capital with those of the beneficiaries interested in income might not be generally appropriate. As a result of this, we also propose that the Court should be able, as part of the appointment process, to consider whether there were specific duties that would be appropriate in any given case.
65. As the role of guardian, like that of a trustee, is one of the highest good faith, we do not consider that the question of whether a proposed act or omission is or is not in the best interests of the missing person can ultimately be decided by the subjective view of the guardian alone. Ultimately, it will be for the court to decide whether a guardian has acted in the best interests of the missing person or is in breach of duty.
66. This approach is consistent with requirements in the Australian and Ontario legislation as well as in the Irish proposals.<sup>38</sup>

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<sup>37</sup> A similar requirement exists in relation to trustees. Before exercising any power of investment, a trustee must (unless the exception applies) obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised. The exception is that a trustee is not required to obtain advice if he or she reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so. There is a similar provision regarding reviewing investments (see section 5 of the Trustee Act 2000).

<sup>38</sup> For example see:  
[http://www.lawreform.ie/\\_fileupload/consultation%20papers/cp64MissingPersons.pdf](http://www.lawreform.ie/_fileupload/consultation%20papers/cp64MissingPersons.pdf)

## What can a guardian do?

67. The guardian is the representative of the missing person. We propose that a guardian should be able to act in relation to the property and affairs of the missing person as if he or she were the missing person subject to any specific limits imposed on the appointment. Third parties will therefore be bound to deal with the guardian in the way they would have dealt with the missing person. We discuss below how an appointment will be made and when limits may be imposed.<sup>39</sup> For present purposes we will assume that there are no limits on the scope of the power of the guardian to act.
68. A guardian with general powers will therefore have power to act in relation to the care and management of the property and affairs of the missing person and will be empowered, in this regard, to exercise the rights of the missing person. The guardian may therefore, for example, invest money; sell, let or mortgage property; execute deeds; and enforce and perform obligations such as collecting in assets, including debts, paying debts and ongoing tax liabilities, and taking legal proceedings. In doing so, since the role of guardian is a fiduciary role, the guardian will have broadly the same powers of investment as a trustee in relation to the property of the missing person. We do not consider, however, that the power to execute documents should extend to the making of a will on behalf of the missing person.
69. In addition to being able to act to protect the missing person's property, the guardian will also be able to act for the maintenance and benefit of anyone wholly or partly dependent on the missing person if that is in the best interests of the missing person. Such dependants are likely to include the missing person's spouse or cohabitee and minor children, but may also include others. Clearly, spending money on dependants is likely to deplete the assets of the missing person, nonetheless this may in appropriate circumstances be what the missing person would have done had he or she been present. We do not consider that it is necessarily incompatible with the overriding requirement to act in the best interests of the missing person. What is required for their maintenance will depend on the circumstances but, subject to the overriding principle of acting in the best interests of the missing person, is likely to include consideration of the manner in which they were being maintained by the missing person prior to the disappearance.
70. The guardian would also have power to act for the benefit of dependants more generally, separate from their maintenance, provided it is in the best interests of the missing person. This could extend, for example, to facilitating the sale of the home and the purchase of a smaller one so that the missing person's estate was no longer subject to large mortgage outgoings, with the ancillary benefit that remaining family members can benefit from reduced mortgage payments. In considering what is in the missing person's best interests, the guardian would need to weigh up the consequences and ramifications of taking or not taking a particular decision as well as the known views of the missing person on such issues.
71. With regard to defining the actions that a guardian can properly take, we propose that he or she has authority to take actions that he or she considers are necessary or desirable in relation to the property and affairs of the missing person provided that, in doing so, he or she exercises this authority in a way which is consistent with the

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<sup>39</sup> At paragraphs 85 to 113.

requirement to act in the best interests of the missing person. Third parties will be able to rely on the authority of the guardian set out in the order. They will not have to look behind the terms of the court order making the appointment to decide whether the guardian has authority to enter into the transaction in question. This will remove any need to make further enquiries as to whether the authority to act, as specified in the court order making the appointment, has been exceeded.

72. Once appointed a guardian will, like a trustee, have to engage with his or her responsibilities on an ongoing basis. He or she will therefore have to decide whether to act or decline to act in relation to any particular set of circumstances. A guardian would therefore in effect be under a *duty* to consider whether or not to act. This is necessary to ensure that guardians are active in protecting the interests of the missing person.

### **Access to information**

73. We have considered whether there should be any limits on the information about the missing person that the guardian is able to access as guardian, such as historical documents including the missing person's past bank statements or itemised telephone bills. Full access to all information may give the guardian access to information that the missing person would properly regard as confidential even as against the person appointed to be guardian. For example the guardian may learn things about the missing person that he or she might not have wished the guardian to know, or may obtain sensitive financial or commercial information that the guardian could use for his or her own benefit. On the other hand, a guardian may find it more difficult or impossible to exercise his powers in the best interests of the missing person without information enabling him or her to determine the past behaviour of the missing person, for example, the guardian might need to see an itemised phone bill in order to determine whether the bill should be paid.
74. We propose therefore that the guardian would be entitled to request any information relating to the property and affairs of the missing person that he or she reasonably considers necessary in his or her capacity as such, and would be under an obligation to use it only for that purpose. The guardian would therefore be in breach of his or her duty if he or she accessed information unnecessarily or misused it, and could be held liable accordingly. In addition, we consider that risks of misuse will be mitigated by our proposal that the court must be satisfied that there is not a conflict of interests when appointing a guardian (see criteria for appointing a guardian below).
75. However, although the guardian would be under this duty to access only what is required for carrying out his or her role, third parties would not be required to make any such judgement. They should be able to rely on the authority of the appointment to release the information.

### **Guidance**

76. We anticipate that there would be guidance available for guardians in the form of online guidance, in the same way, for example, as there is currently guidance for Deputies.<sup>40</sup>

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<sup>40</sup> <http://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/mca-code-practice-0509.pdf>

**Q.2 Do you broadly agree with our proposals for the status, role and duties of a guardian? If not, please state why. If you consider that some additional or alternative provision should be made, please explain what that should be, giving your reasons.**

### ***The procedure for appointing a guardian***

#### **A court-based procedure**

77. The appointment of a guardian able to deal with the property and affairs of the missing person (without his or her prior consent) is a very serious step. It is important that a proper procedure for the making of the appointment with appropriate safeguards is in place. We propose, therefore, that a person wishing to be appointed as a guardian should apply to a court. As guardianship is a novel concept, the power to make the appointment will have to be conferred on the court by legislation. In effect, a new jurisdiction will be created for the appropriate court.
78. We have not yet determined which court should make the appointment. The most obvious candidates are the High Court and the Court of Protection.<sup>41</sup> The High Court has exclusive jurisdiction under the Presumption of Death Act 2013<sup>42</sup> and also makes Benjamin Orders.<sup>43</sup> In both types of cases the High Court is dealing with situations created by the disappearance of a person. On the other hand the Court of Protection already appoints Deputies under the Mental Capacity Act 2005, whose role is broadly analogous (though by no means identical) to the role of guardians. The Court of Protection also has close administrative links with the Office of the Public Guardian, which supervises Deputies and might be given the role of supervising guardians.
79. Although the approach taken in other jurisdictions has been a helpful guide in formulating some aspects of our proposals, the differences between the respective court systems make it less helpful here. We note, however, that there are precedents both for integrating guardianship into a system of appointing representatives for persons lacking mental capacity and for reserving applications for guardianship to the Supreme or Superior Court. On balance we consider that the High Court may be

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<sup>41</sup> The Court of Protection is a superior court of record. It is, in general terms, a specialist court for all issues relating to people who lack capacity to make specific decisions. The Court makes decisions and appoints deputies to make decisions in the best interests of those who lack capacity to do so in relation to their personal welfare and, which is more relevant in the context of guardianship, their property, liabilities and obligations. Its procedures are governed by Court of Protection Rules and Practice Directions made under the Mental Capacity Act 2005. The court may sit at any place in England and Wales, on any day and at any time. The Lord Chancellor, after consulting the Lord Chief Justice, may designate as additional registries of the court any district registry of the High Court and any county court office. The judges of the Court of Protection are appointed for that purpose and are drawn from a wide range of judicial office holders. All High Court judges are judges of the Court of Protection.

<sup>42</sup> See also section 19 of the Matrimonial Causes Act 1973 (Presumption of death and dissolution of marriage) which is to be repealed by the Presumption of Death Act 2013.

<sup>43</sup> "Benjamin Orders" take their name from the case of *Re Benjamin* [1902] 1 Ch 723. The effect of such an order is that the trustees are authorised to distribute the assets of an estate or trust on the basis that a person has died before the testator or is presumed to be dead. Tolley's Administration of Trusts states the orders can also be used to establish either that a contingent liability should be ignored (as in *Re Yorke (dec'd)* [1997] 4 All ER 907) or that, where an original settlement has been lost, the trusts are those established by secondary evidence.

more appropriate given its existing jurisdictions and may be more suited to considering evidence as to a person's disappearance and the need for a guardian to be appointed in those circumstances.

## Who may apply for guardianship?

80. Given the variety of individual circumstances and the range of persons who may be interested in the property and affairs of a missing person, we do not consider that there should be any general restriction as to who may apply for the appointment of a guardian.
81. Taking into account international standards,<sup>44</sup> and without implying any hierarchy of entitlement to be appointed, we provisionally propose that the following persons, over the age of 18 years, should be entitled to apply for the appointment of a guardian of the property of a missing person:
  - (a) the spouse or civil partner of the missing person,
  - (b) any other family member of the missing person, including a child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece of the missing person,
  - (c) a person who is acting *in loco parentis* to the missing person,
  - (d) a person who immediately before the disappearance was being maintained, either wholly or partly, by the missing person, or
  - (e) any other person with a sufficient interest (this might include a local authority).
82. Although those financially dependant on the missing person are likely in many cases to fall into one of the first two categories, category (d) would enable an application to be made by anyone else being maintained financially by the missing person at the date of his or her disappearance. This might include, for example, a cohabitant or step-child.
83. With regard to the level of interest necessary for a person in the final category to apply, we do not think that further definition is likely to be helpful. Examples of a person with a sufficient interest (in relation to at least part of the missing person's property and affairs) might include a business partner, a creditor, a very close family friend, a cohabitant with a joint property interest or shared children, or the missing person's Deputy or attorney.
84. We envisage that guidance would be available to assist applicants in preparing an application.

## When can an application be made?

85. To prevent unnecessary applications, it is sensible to allow a reasonable period of time to elapse between the disappearance and the right to make an application for the appointment of a guardian. However, there is a balance to be struck between the length of time a person has been missing, on the one hand, and enabling solutions to be reached before problems escalate, on the other.

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<sup>44</sup> See generally paragraphs 35 to 52 above.

86. To achieve this we provisionally propose that an application may only be made to the court for the appointment of a guardian to manage the property of a missing person where the person has been missing for at least 90 days. This follows the approach in other jurisdictions.<sup>45</sup>
87. We anticipate that for an application to extend or renew an appointment, the existing guardian or any new applicant would have to check whether the missing person has been found, for example by consulting the police. We believe that this would not be burdensome either on professional guardians or on non-professional guardians, and we would expect that family members would be very likely to be consulting the police and making ongoing inquiries in any case.
88. We do not consider that there should be a bar on applying for guardianship in circumstances where an order for presumed death could also be applied for. In particular, we want to ensure that the family of a missing person is not prevented from administering the missing person's affairs in circumstances where there is a reason why the family is not able, or does not wish, to make an application under the Presumption of Death Act 2013. However, we do consider that the potential availability of a declaration of presumed death is one of the circumstances that the court should be able to take into account in deciding whether the making or extension of an appointment of a guardian is in the best interests of the missing person.<sup>46</sup>

### **Notice and Advertisement**

89. We also consider it necessary to include a safeguard to protect other persons who may be interested in the property and affairs of the missing person by ensuring that they have the opportunity to challenge the application. We therefore propose that the applicant must advertise their application in appropriate media (for example, national or local newspapers) as well as notifying people that are likely to have an interest, including the spouse, civil partner, primary carer and close relatives (parent, child, sibling) of the missing person known to the applicant.

### **In what circumstances can the court make an appointment?**

90. We propose that to make the appointment of a guardian of the property and affairs of a missing person the court must be satisfied that:
  - (a) it has jurisdiction to make the order in respect of the missing person;
  - (b) while the person is missing there is, or is likely to be, a need for a decision in relation to the person's financial affairs or property; and
  - (c) it is in the best interests of the missing person for a person to be appointed to administer that person's estate while he or she is missing.
91. On the question of jurisdiction we consider that the court should be able to appoint a guardian in the same circumstances in this respect as it could make a declaration of presumed death under the Presumption of Death Act 2013. This means that there must be a sufficient connection with England and Wales - either that the missing

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<sup>45</sup> For example, New South Wales; Australian Capital Territory; Victoria; and British Columbia.

<sup>46</sup> See paragraphs 95 to 99.

person was domiciled<sup>47</sup> in England and Wales at the date on which he or she was last known to be alive or had been habitually resident there for the whole of the year ending with that date; or, if the application was made by the spouse or civil partner of the missing person, the spouse or civil partner was domiciled in England and Wales when the application was made or had been habitually resident there for the whole of the year ending with that date. It is immaterial where the missing person actually disappeared, and therefore an appointment could be made where a person has gone missing outside England and Wales.

92. We are aware that an issue has arisen in at least one jurisdiction in Australia whereby the owners of real estate located within the jurisdiction have gone missing but do not meet the residence requirement. We therefore seek views on the possibility of granting the court jurisdiction where the missing person owns real estate in England and Wales but is not habitually resident or domiciled there, on the basis that the court's jurisdiction would be limited to making an appointment to deal with that property. This would be in line with the legislation in Ontario where the Court may, in these circumstances, appoint a committee to manage, sell or otherwise deal with the interest in land as in the opinion of the court is in his or her best interests and those of his or her family.<sup>48</sup>
93. The question of whether there is, or is likely to be, a need for a decision in relation to the person's financial affairs or property, will clearly turn on the circumstances of the case. For example, if the missing person has no property or significant financial obligations it may be unlikely that a decision will have to be made. Alternatively there may be a need for a decision to draw money from a bank account in order to support dependants financially, or to pay for the renewal of insurance for the missing person's property. There may be a need for a decision to cancel ongoing subscriptions for sports or social clubs or to end a lease agreement or change the terms of a mortgage.
94. The best interests test would support the achievement of the overriding objective of the proposals: namely, protecting the missing person in his or her absence. We consider this to be of the utmost importance and do not consider that the required level of protection could be afforded by adopting a lower standard (for example, that it is more in the interest of the missing person to appoint a guardian than not to do so).

**Q.3 Do you agree with our proposals for the procedure for appointing a guardian of the property and affairs of a missing person? If not, please state why. If you consider that some additional or alternative provision should be made, please explain what that should be, giving your reasons.**

**Criteria for appointing a person as guardian**

95. The guardian need not be the same person as the applicant (for example, the brother of a missing person could apply on behalf of his missing sibling's spouse, or a creditor could apply for the appointment of a professional, independent guardian) and there does not seem to be any advantage in arbitrarily limiting the range of persons from whom the appointment can be made or in limiting the number of people who

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<sup>47</sup> Domicile is a legal concept used to connect a person to a legal jurisdiction, such as England and Wales. It defines where a person is deemed to have his or her permanent home.

<sup>48</sup> Section 8 of the Absentees Act R.S.O. 1990.

may be appointed to act as guardians, whether jointly or individually, in any one case. Guardians may therefore be professionally qualified persons, such as lawyers or accountants, offering services for a fee, or simply family members.

96. Based on the approach in other jurisdictions we propose that the court may appoint as a guardian of the property and affairs of a missing person any person if the court is satisfied that:
  - (a) the person consents to the appointment
  - (b) the person will act in the best interests of the missing person;
  - (c) the person is not in a position where his or her interests conflict or may conflict with the interests of the missing person: provided that this shall not disqualify a spouse, civil partner or close relative of the missing person by virtue only of their relationship;
  - (d) the person is, taking into account the wishes of the missing person so far as practicable, a suitable person to act as guardian; and
  - (e) the person has sufficient expertise to administer the estate or there is a special relationship or other special reason why that person should be appointed as guardian.
97. These criteria are necessarily general but should enable the court to decide whether the proposed guardian should be appointed. For example, a test of the person's suitability could include consideration of his or her past conduct in financial dealings (such as having been declared bankrupt) or consideration of the extent to which the person had been trusted by the missing person with regard to other matters. We anticipate that these criteria will restrict the number of people who can act but believe this is a price worth paying to be as sure as it is possible to be that the guardian appointed will act in a proper way.
98. Where there is a choice of willing candidates, the court would be required to decide who should be appointed. In this situation, we propose that the court should make the appointment or appointments that it considers to be in the missing person's best interests, taking into account the degree to which the requirements above are demonstrated. Where there is no-one appointable, we anticipate that there will be a panel of independent guardians from which an appointment could be made, in much the same way as the Office of the Public Guardian maintains a panel of Deputies.
99. The court should be able to appoint more than one guardian, either jointly and severally or individually. For example, in the case of an estate with complex business affairs in addition to more ordinary domestic affairs, it may be that one person (say a family friend and business colleague of the missing person) would satisfy the suitability and expertise criteria in relation to the business aspects of the estate whereas another (such as the spouse) would do so in respect of dealing with day to day domestic issues including providing for dependants.<sup>49</sup> In other cases, two people may wish to share the role for convenience's sake and to reduce the burden falling on any one individual (for example, two adult siblings may jointly manage the affairs of a missing parent).

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<sup>49</sup> In such cases the court may decide to impose limits on the types of decision that can be taken or limits on the property within the guardian's control, as discussed below at paragraph 112.

**Q.4 Do you agree with our proposals for the criteria for appointing a guardian of the property and affairs of a missing person? If not, please state why. If you consider that different criteria should be used, please explain what they should be, giving your reasons.**

## ***Terms of Appointment***

### **Duration of appointment**

100. Given the variety of circumstances in which a person may disappear and the different circumstances of missing persons at the time of their disappearance, there is no obvious generally applicable period for which the appointment should be made. Different jurisdictions have taken different approaches. Ontario, British Columbia and New South Wales for example, do not have any general time limit, whilst the legislation in Victoria and Australian Capital Territory and that proposed in the Republic of Ireland, allows the court to make the appointment for a period of up to two years, extendable on application for a further two years. Further applications where an appointment has expired are then permitted.
101. We think that there may be much to be said for permitting the court to determine the length of the appointment. Nonetheless, we do not think that the court should have power to make an open-ended appointment. Guardianship is intended to be a temporary state of affairs so that a maximum period ought to be specified. This does not mean that the court should always make the appointment for the maximum period. Making an appointment for a shorter period may be appropriate where, for example, there are very few issues or very little property to sort out; or where the prospective guardian is only willing or able to act for a limited period.
102. We propose that the maximum period for which an initial appointment could be made should be four years, with discretion for the court to set a shorter period if appropriate. The appointment would be extendable on application for up to a further four years. We will consider whether the process for an application for a renewal of an appointment can be streamlined in any way so that it is simpler than a free-standing application, although it will still raise important questions about the ownership and control of property, so all or most of the same conditions should apply as apply to an original application. If there remained a need for a guardian after the initial and extended appointments had expired, a new application could be made.
103. We have three reasons for choosing the pattern of a four-year period plus a possible four-year extension. First, this would allow for the full seven year period at the end of which a person may be presumed to be dead to have expired before an application for a new appointment had to be made. At that stage it may well be more appropriate for the missing person to be declared dead. In this regard, we note that seven years is not required for a finding of presumed death where there is evidence that a person is likely to have died and so seven years will not always be the relevant period by reference to which a person may be presumed dead.
104. Secondly, a four-year period as opposed to a shorter period (such as two years) would be likely to reduce the potential costs for the estate and court time that may otherwise be required in processing additional applications. We note that in the Australian states where a two-year maximum applies, applications are made to a tribunal rather than the court.

105. Finally, we wish to avoid lengthy appointments that might lead to assumptions that a person is alive for longer than is reasonable given the circumstances of the disappearance and the results of any investigation into it. We consider that a four-year appointment (together with the court's discretion to make a shorter appointment where appropriate) would be sufficiently limited in this regard.
106. We are aware that in other jurisdictions an application can be made for an interim or temporary appointment. However, the requirements that must be met for an application for an interim or temporary appointment in these jurisdictions seem to be no different to those for a full appointment. We therefore do not propose any similar provision for interim or temporary appointments since we consider that this need would be met through the ability to apply for an appointment of a period of less than four years.

### **Termination of appointment (other than by expiry)**

107. We propose that if the guardian of a missing person's property and affairs becomes aware, whether directly or on being informed by someone else, that the missing person is in fact alive or dead, the guardian must notify the court and apply to have the guardianship terminated. This would be in line with the legislation in other jurisdictions, and is also a common sense approach. Where a person applies for an order of presumed death of the missing person and is successful, the appointment of a guardian would be terminated automatically.
108. The guardian may also apply to have the guardianship terminated if he or she no longer wishes, or is no longer able, to perform his or her duties.
109. On applying to the Court for termination, the guardian would have to give notice to those persons to whom notice must be given on applying for a guardianship (see paragraph 89). This notice would alert any one else with a sufficient interest in the property and affairs of a missing person to the possibility that a new guardian might be needed.
110. We propose that it will also be possible for the appointment to be terminated if there are concerns around the guardian's conduct; for more information on these proposals, see paragraphs 116 and 126.
111. Once an appointment had been terminated, we consider that it would be for the new guardian or personal representative or returned missing person to inform appropriate third parties. If the person is still missing, is not presumed dead and no new guardian is appointed we consider that the court should determine how relevant interested parties should be informed, as appropriate in the circumstances of the case.

### **Limitations on the appointment**

112. As we have mentioned, the court should have power to limit the power of the guardian to act. This would be an option the court could use where, for example, the affairs of the missing person were complex or where granting full rights over the missing person's assets might compromise or otherwise affect the rights of a third party. Another example might be where the missing person was in a commercial partnership and his or her partner (or partners) wanted to obtain an order to enable them to take necessary business decisions. The court in such a case might consider it appropriate to limit the powers granted under the guardianship order to certain

business-related assets. The ability of the Court to limit appointments in this way would complement the proposals in relation to the appointment of more than one guardian, as discussed in paragraph 99.

113. The disadvantage of a limited power is that it complicates the position for third parties. However, if the experience of the Court of Protection under the Mental Capacity Act 2005 in appointing Deputies is a guide, limited powers should be the exception rather the norm.

### **Recovery of expenses and fees by the guardian**

114. In general, a guardian should not be entitled to be paid a salary from the property of the missing person but should be able, subject to the approval of the court, to recover his or her expenses.
115. In other fields, professional persons providing services as trustees, executors and Deputies are generally able to charge for their services. It would therefore seem appropriate for professionals appointed as guardians to be able to charge in the same manner. The level of charges will however have to be regulated to some degree to minimise the risk of excessive charging. The details of this framework will need to be settled but ideally the charges will be proportionate to the size of the estate. By way of example, the Court of Protection sets out a fixed costs structure for professional and local authority Deputies, while other Deputy costs must be submitted for detailed assessment by the Senior Courts Costs Office. It might also be appropriate to provide the supervising authority (such as the Office of the Public Guardian) with powers to investigate professional charges.

### **Q.5 Do you agree with our proposals relating to the terms of appointment of a guardian of the property and affairs of a missing person? If not, please state why and explain what terms you would suggest instead.**

## ***Safeguards for the missing person and guardian***

### **Accountability**

116. Guardianship would be a fiduciary position and the guardian could therefore personally be held liable if he or she did not act properly. Anyone interested in the property and affairs of the missing person should be entitled to apply to the court if he or she is concerned that the guardian is not acting, or has not acted, properly. We would not expect such applications to be common as, in practice, we would expect the complainant to report concerns to the Public Guardian who will have powers to investigate (see paragraph 124 below). Acting for these purposes would include considering whether or not to act. The criticism could be on the grounds that the guardian had acted in a way which was outside the scope of his or her powers or had not acted in the best interests of the missing person. If the court finds that the guardian has not acted properly, it should have power to terminate the appointment and/or to order the guardian to pay compensation and/or to order some other remedy as appropriate. If a security bond is in place (see paragraph 121 below) this could be called in to provide compensation.

117. In deciding whether a guardian has not acted properly, the court should also have regard to the level of skill expected of the guardian. Specifically, a professional guardian will be expected to exercise a higher degree of skill, in carrying out his or

her duties, than a lay person acting as guardian. This follows an established approach in relation to those acting in a fiduciary capacity.

118. Separately from any civil liability, in very serious cases a guardian could potentially be found guilty of fraud or other criminal offences, which might result in a fine or imprisonment. We consider the provisions of the existing criminal law are sufficient and do not propose creating any new criminal offence.
119. Whether or not the guardian is suspected of acting improperly, the missing person and his or her personal representatives should be entitled to an account of the guardianship. If one is not provided voluntarily by the guardian, it should be possible for them to make an application to the court for an order to provide such an account. Others with a sufficient interest in the missing person's estate should be able to apply to the court for an account of the guardianship, but in determining such an application the court would have to have regard to the need for the confidentiality of the affairs of the missing person. In relation to a periodic or final report required from the guardian by the regulating authority, that authority should be able to take action to compel its delivery.
120. In addition to these proposals to enable third parties to monitor the guardianship and seek redress, we consider that the guardian should be able to seek guidance from the court (for example in relation to significant decisions such as whether to sell property) and should be protected from liability to the missing person if he or she follows the guidance of the court. This protection may, however, be withdrawn if the guardian misleads the court as to any of the facts relevant to determining the issue.

## **Security bond**

121. As a further means of protecting the missing person, the guardian and third parties, we propose that the court order appointing the guardian could require the guardian to take out a security bond for the tenure of their guardianship. The security could be provided by a 'one-off' bond. This would follow the model of Court of Protection Deputies who can be required to take out such a guarantee. The amount of security required would be likely to depend on the value of the missing person's estate and whether the guardian were acting in a professional capacity or not. In the event of any wrongdoing by the guardian, the bond could be used to compensate the estate of the missing person.

## **Supervision**

122. The position of guardian is one of the highest trust and therefore, in addition to providing private law remedies for breach of duty, there is also a need to provide public assurance that the system of guardianship is operating properly.
123. We propose that guardians' actions should be supervised by the Office of the Public Guardian (OPG). The level of supervision that is necessary may vary from case to case and could depend on a number of variables, such as the complexity of the missing person's estate, the type of decisions required to be taken by the guardian, and the duration of the appointment. The OPG currently has, for example, four levels of supervision for court appointed Deputies under the Mental Capacity Act 2005 depending on the nature of the case. We are aware that OPG is currently conducting a fundamental review of its supervisory regimes but we will consider with OPG how the supervision of guardians could fit with any new regime depending on the outcome

of the review. We do not propose that a particular regime should be prescribed in legislation. As is currently the case in relation to Deputies, we propose there should be flexibility to adapt the supervision regime over time as systems develop. Fees would be payable to the OPG out of the property of the missing person and would be set on a full-cost recovery basis.

124. The supervision responsibilities of the OPG could include the guardian having to report to the OPG on his or her activities, and the guardian filing accounts with the OPG annually and upon termination of the appointment (setting out all income and outgoings into and from the missing person's estate, including charges for expenses or professional fees). The OPG would monitor the actions of guardians by way of these reports, accounts and any representations made by third parties, and by making visits where appropriate. If the OPG considered that a guardian were not acting in the best interests of the missing person, or had exceeded his or her powers, it should be able to investigate. This would follow existing practice in relation to Deputies.
125. The report by the guardian could be required annually to coincide with the laying of accounts but there may be some advantage in requiring an initial report within three to six months of the commencement of the appointment as in many cases this may be the most active period and waiting for a year to elapse could lead to undesirable patterns of behaviour being undetected for too long. There could also be some flexibility for the Public Guardian to be able to request a report to be filed at other times where appropriate. Against this, every reporting requirement has a cost implication. Another possibility might be to require a guardian as a condition of his or her appointment to make an initial report of his or her activities in the first three or six months to the court, which could review the performance and make such order as was necessary.
126. To support its supervisory role, the OPG should be able to refer the guardian to the court for the terms of the appointment to be changed or for the guardian to be removed.

### **Funding of the process**

127. As noted above, fees will be prescribed for applications to the court. Fees will also be prescribed in relation to the filing of accounts and supervision. Both types of fees will be set on a cost recovery basis in line with other court and OPG fees. We propose that fees, like expenses, should be able to be paid out of the property of the missing person.

### **Proof of guardian status**

128. Persons appointed as guardians will need to be able to prove to third parties that they are empowered to act on behalf of the missing person. We consider that a court order setting out the details of both the missing person and the appointed guardian, and the terms of the appointment, should be sufficient proof (backed up, where appropriate, with identification to show that the person presenting the order is the named guardian). This should also be sufficiently similar to the current system for demonstrating authority to act as a Deputy or as personal representative, for example, for it to be practical for third parties to use within existing procedures.

129. In addition, on the assumption that the OPG are to supervise guardians, we propose that guardianship appointments be included on the OPG registers. The OPG currently holds registers of Enduring Powers of Attorney (EPA), Lasting Powers of Attorney (LPA) and Court of Protection appointed Deputies. Any member of the public can request a 'first tier' search of the register and receive basic limited information about whether a Deputy or attorney exists for a given person and what type of power is in place. If a 'match' is found at this first tier search, a 'second tier' search can then be requested, asking for further information. The OPG may provide this on a discretionary basis, taking into account the reasons given for the need to access the information and the role of the individual or organisation seeking it.

**Q.6 Do you agree with our proposals for safeguards for the missing person and the guardian of his or her property and affairs? If not, please state why. If you consider that some additional or alternative provision should be made, please explain what that should be, giving your reasons.**

### 3. Cost-Benefit Analysis

#### Introduction

130. In the following paragraphs we set out the analysis we have made of the costs and benefits of the proposed creation of the status of guardian. We hope that the responses to the consultation will enable us to improve and refine the analysis and assessment.

#### Scale of the issue

131. In 2011-12, 280,000 missing person incidents were recorded in England and Wales, relating to an estimated 172,000 separate people. However, the vast majority of these incidents were resolved relatively quickly such that, where police forces routinely recorded the duration of absences, only 2% of cases were outstanding after 7 days.<sup>50</sup> Only 36% of missing person incidents related to adults, suggesting a possible upper limit of around 1,000 guardianship cases if an appointment were allowed after a very short absence.<sup>51</sup> As at 5 March 2014,<sup>52</sup> just 301 of the adults who had gone missing in England and Wales during the previous year were still missing. Of these, 158 had been missing for over 3 months.

132. Not all these missing adults will have left behind them property that needs to be managed or families that need to be supported. On the assumption that guardianship would not be available for short absences these figures suggest that the upper limit for the number of new missing person incidents which might result in an application for guardianship might be between 150 and 300 cases annually.

133. This estimate of the upper limit is supported by the experience in jurisdictions where a mechanism for dealing with the property and affairs of missing persons already exists. The following table sets out the average number of applications per year in each jurisdiction. The proportion of applications compared to both the general population and the total number of missing persons cases in each jurisdiction are applied to the population and total number of missing persons cases respectively in England and Wales.<sup>53</sup> This suggests there could be around 50 applications for the appointment of a guardian annually.

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<sup>50</sup> No breakdown is provided for durations of longer than 7 days.

<sup>51</sup> 2% of 172,000 is 3,440; 36% of which is 1,238.

<sup>52</sup> Data provided by the National Crime Agency, UK Missing Persons Bureau.

<sup>53</sup> Where other jurisdictions only provide the number of missing adults as opposed to all missing persons, an estimate of the number of missing adults in England and Wales is used for comparison.

Jurisdiction	Population	Number of reported missing (in given year)	Number of cases using guardianship legislation	Equivalent number of applications in E&W as proportion of population	Equivalent number of applications in E&W as proportion of missing cases
England & Wales	56.6 million <sup>54</sup>	172,000 <sup>55</sup> in 2011–12 (estimated 61,920 adults <sup>56</sup> )			
NSW	7.4 million	About 10,000 <sup>57</sup> in 2005–6	2009–2013: 4 cases [= 4 cases in 5 years = 0.8/year]	6.1	13.8
Australian Capital Territory (ACT)	0.38 million	1,100 in 2012	3 cases since 2007 <sup>58</sup> [= 3 cases in 7 years = 0.4/year]	59.5	62.5
Victoria	5.7 million	About 5,500 in 2005–6 <sup>59</sup>	2012: 3 applications 2013: 2 applications [= 5 cases in 2 years = 2.5/year]	24.8	78.2

<sup>54</sup> <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2011-and-mid-2012/index.html>

<sup>55</sup> UK Missing Persons Bureau report 2011–12 <http://missingpersons.police.uk/download/29>

<sup>56</sup> Children and young people 18 years and under made up 64% of the missing incidents (UK Missing Persons Bureau report 2011–12, p.15); number of adults is taken to be 36% of total number of missing persons.

<sup>57</sup> <http://www.missingpersons.gov.au/about-us/faqs.aspx>

<sup>58</sup> Confirmed by ACT Civil and Administrative Tribunal.

<sup>59</sup> <http://www.missingpersons.gov.au/about-us/faqs.aspx>

Jurisdiction	Population	Number of reported missing (in given year)	Number of cases using guardianship legislation	Equivalent number of applications in E&W as proportion of population	Equivalent number of applications in E&W as proportion of missing cases
Ontario	13.5 million	5,877 adults reported missing in 2012	Anecdotally, only one or two would be received in any given year. <sup>60</sup> [=2 per year]	8.3	21.1
British Columbia	4.6 million	6,540 adults reported missing in 2012	Public Guardian and Trustee acts as curator: <sup>61</sup> no. of cases: 2012/13 – 2 2011/12 – 3 2010/11 – 0 2009/10 – 2 2008/09 – 2  Private applications (not tracked): only a few every year and possibly to a maximum of 5 per year. <sup>62</sup> [= 5 per year]	61.5	47.3

<sup>60</sup> Confirmed by the Office of the Public Guardian and Trustee; the Public Guardian and Trustee is required to be served on behalf of the missing person in applications under the Absentees Act. Superior Court of Justice is unable to provide statistics.

<sup>61</sup> Public Guardian and Trustee annual reports ([http://www.trustee.bc.ca/reports\\_publications/index.html](http://www.trustee.bc.ca/reports_publications/index.html)).

<sup>62</sup> Confirmed by the Public Guardian and Trustee, which is usually served with private applications.

134. Based on the missing persons statistics<sup>63</sup> and this international comparison, our working estimate is that there could potentially be between 50 and 300 appointments annually, but that it is probably more likely to be between 50 and 100.
135. In addition to this annual figure, we anticipate that there may be an initial spike in the first year. This is due to a number of legacy missing persons cases, where the person has been missing for longer than a year. For example, as at 5 March 2014, the Missing Persons Bureau's records contained 1,289 live cases of adults who had been reported missing prior to 5 March 2013. However, we expect that in some of these cases alternative solutions may have already been found (such as by negotiating with asset holders) or that assets will have depleted to a point where guardianship would no longer be required, so the size of any potential spike will be limited to this degree.

## Costs

### Costs to business

#### ***One-off costs – system changes***

136. In relation to financial assets, financial institutions with large customer bases, such as the six largest high street banks, may decide they need to amend their administrative systems to allow the new status of guardian to be registered on an account before the legislation comes into force. These costs are likely to be very small, with similar procedures already likely to be in place to deal with existing types of representative and with amendments possibly being incorporated in annual IT upgrades without generating additional costs.<sup>64</sup>
137. In relation to other assets, such as property and vehicles, we do not anticipate that similar costs will be incurred by businesses in relation to amending administrative systems. We expect other businesses which are not asset holders but which may deal with guardians in relation to non-financial affairs (such as letting agencies) to react on an ad-hoc basis rather than systematically preparing for the new status.

#### ***One-off costs - familiarisation***

138. In relation to financial assets, there will be initial familiarisation costs to banks and other financial institutions from disseminating information to key staff about the new guardianship status and how it is to be registered on internal systems. This is expected to be limited to staff who currently oversee existing provisions whereby one person may act on behalf of another. In practice the information is likely to be disseminated by way of routine staff bulletins or practice notes. As such, these familiarisation costs are expected to be negligible.<sup>65</sup>
139. In relation to other assets, such as property and vehicles, or other non-financial affairs we do not anticipate that similar familiarisation costs will be incurred by businesses. We anticipate that all businesses and organisations will take an

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<sup>63</sup> See paragraph 131.

<sup>64</sup> This assumption is based on preliminary consultation with the British Bankers Association (BBA) and the Council of Mortgage Lenders (CML).

<sup>65</sup> As above.

approach that is proportionate to the numbers of guardians with whom they expect to have to deal.

***Ongoing costs – registering guardians on financial accounts***

140. In relation to financial assets, financial institutions will incur ongoing costs in registering guardians as the controllers of the accounts in question. There will be an administrative cost to banks and other businesses and organisations from amending the status of an account to allow the guardian to manage the financial affairs of the missing person. Other ‘know your customer’ costs may be incurred to verify the identity of the guardian for anti-money laundering purposes, if this has not already been verified (e.g. if they do not already hold an account with the financial institution in question).
141. It is not known whether banks and other financial institutions would levy fees and charges in order to register a guardian as the controller of a missing person’s account. If fees were charged it is possible that these might be set to cover the costs incurred, leaving banks and other financial institutions with no net costs.
142. If fees are not charged, we estimate that ongoing costs of undertaking anti-money laundering ‘know your customer’ checks might be of the order of approximately £175,000. This is based on the assumption that each person has about 1 to 2.2 bank accounts on average.<sup>66</sup> If we apply this to the 50-300 guardianships which may arise per year, these costs may be incurred in relation to around 50 to 660 bank accounts per year, i.e. to about 350 bank accounts on average. Assuming for illustrative purposes that missing persons also hold the same number of other financial accounts (relating to investments rather than to money held in banks), then around 700 financial accounts may be affected each year. We also assume that the total costs of verifying pieces of information and costs of managing the entire process are likely to be less than £250 per account.<sup>67</sup> Applying this figure of £250 to 700 accounts per year generates a gross cost of £175,000. This is a purely illustrative estimate which aims to indicate the order of magnitude of the possible gross business costs.

***Ongoing costs – consequences of decisions made by guardians***

143. Once a guardian’s authority has been accepted, there may be some cost to business depending on any subsequent action that a guardian decides is in the best interest of the missing person. For example, this may include businesses who no longer receive automatic payments for goods or services which are not being used, or may include banks which in future might pay more interest on deposits if dormant savings are moved to higher earning accounts, or banks which see deposits withdrawn and invested or spent elsewhere. Whether this impact generates an overall aggregate cost to business is unclear.
144. This consultation seeks views on what the costs of these proposals might be for business.

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<sup>66</sup> <http://siteresources.worldbank.org/INTTOPACCFINSER/Resources/Banking.pdf>

<sup>67</sup> Based on ASHE 2012 data on the average wage of “business, finance and related associate professionals” (£19.68 per hour), with an additional 30% added to account for overheads, which yields a staff cost per hour figure of £25.58.

## **Costs to missing persons or guardians**

145. Guardians may be required to pay for a security bond, the level of which will depend on the level of risk determined by the court making the appointment. Fees for court applications and supervision by OPG will be payable out of the estate of the missing person. The cost of professional advice may also be recoverable in this way. We expect that these costs will be outweighed by the benefits (set out below) in any given case, or no application for guardianship would be made.

## **Costs to the Justice System**

146. The proposals, if implemented, will create a new court procedure and a new supervisory role for the OPG, generating an estimated 50 to 300 cases per year. There will therefore be an impact on the justice system from this increase in the use of both the court and the OPG.
147. Ongoing use of the court process and supervision by the OPG would be funded by fees charged on a full cost recovery basis. However, there would also be initial set-up costs such as judicial and staff training, IT changes, rule and form amendments, and the production of guidance and a Code of Practice.
148. MoJ is liaising with HMCTS, OPG and the judiciary over the proposals to ensure that proposals are workable and that impacts are minimised (for example by aligning the new process with existing procedures where appropriate).
149. We expect that legal aid will not be available in relation to guardianship cases except in exceptional circumstances (under the general power to make such awards).

## **Benefits**

### **Benefits to businesses**

#### ***One-off benefits – establishing guardian status***

150. Those seeking to obtain guardianship status may make use of legal professional services, both to assist with an initial application and subsequently for advice in carrying out guardianship duties. This could lead to an increase in business for legal service providers.
151. Some businesses may decide to provide professional guardianship services, for example where there is no family member or other individual willing and able to act as guardian. This opportunity is likely to be taken up by businesses (typically legal and accountancy service providers) that already act as professional attorneys and court appointed Deputies.

#### ***Ongoing benefits – from being able to deal with a person***

152. Third parties, such as those who hold assets belonging to, or are owed liabilities by, the missing person may benefit from increased legal certainty. This may apply if they currently act upon decisions made by a representative of the missing person who does not currently have the legal authority to make such decisions. This risk will be removed under the proposed change. It is unclear how significant this benefit might be.

153. Third parties may benefit from having a guardian to deal with in negotiating the payment of debts owed by the missing person. For example, a mortgage lender having a point of contact on a mortgage account could result in a property not being repossessed if a guardian intends to meet the monthly mortgage payment and as such the associated administrative and legal fees that go along with repossession can be avoided.

***Ongoing benefits – consequences of decisions made by guardians***

154. Some third parties may also benefit from economic activity generated by decisions of the guardian (for example, to repair or insure a property, or to dispose of unused property and allow other persons to make use of it). Whether this impact generates an overall aggregate benefit to business is unclear and this consultation seeks views on what the benefits of these proposals might be for business.

**Benefits to missing persons and their families**

155. Families of missing persons may benefit from cost savings in terms of avoiding time and money currently spent trying to find solutions to problems relating to the assets owned by the missing person. The aggregate annual cost incurred by families seeking legal and other solutions to problems following a disappearance is unknown. However, although it may not be representative of costs incurred in all cases, a case study provided by charity Missing People shows that one woman's family spent over £36,500 protecting her missing brother's affairs, in the 17 year period before they were able to sell his flat. We hope to obtain additional case studies during the consultation period which shed further light on this.

156. Missing persons may benefit from their assets no longer dissipating or falling into disrepair from not being managed. This may include cancelling unnecessary automatic payments for goods and services no longer used, preventing interest from accruing on debts, disposing of unused assets and investing the sums obtained, ensuring financial assets are invested in the most appropriate way, and ensuring physical assets such as property are maintained and do not fall into disrepair.

157. In addition to the management of assets, the families and dependents of missing persons may benefit themselves from drawing from the missing person's assets.

**Q.7 Do you agree with the costs and benefits of the proposals described in this analysis? If not please explain why.**

**Q.8 Can you provide any evidence or sources of information that will help us better understand and inform our cost-benefit analysis?**

## 4. Equalities Analysis

158. Under the Equality Act 2010, Government must consider the equalities impact of any proposed changes and have due regard to the need to:

- eliminate discrimination, harassment and victimisation and other conduct prohibited by the Act;
- advance equality of opportunity between people who share a protected characteristic and those who do not; and
- foster good relations between people who share a protected characteristic and those who do not.

159. For the purposes of the public sector equality duty the relevant protected characteristics are: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

160. We have undertaken an initial equalities assessment of the likely equalities impact of our proposals, which is provided at **Annex 2**. The assessment concludes that the proposals are not directly discriminatory and are also unlikely to amount to indirect discrimination.

161. We welcome any further views on the potential equalities impacts of the proposals as well as any related information to help with our understanding and assessment of the impacts.

**Q.9 What do you consider to be the equality impacts of the proposals for those who have protected characteristics?**

**Q.10 Can you provide any evidence or sources of information that will help us better understand and inform our equalities assessment of the impact of these proposals?**

**Q.11. Are you able to provide any evidence or sources of information to help us assess whether any particular group with a protected characteristic might experience any particular or different effect of the proposals compared to people without that protected characteristic?**

162. We will consider our initial assessment further in light of the consultation responses.

## 5. Questionnaire

We would welcome responses to the following questions set out in this consultation paper. If you do not agree with our proposals please explain why, and explain what additional or alternative provision you think should be made.

- Q.1 Do you agree in principle that a new status of guardian of the property and affairs of a missing person should be created? Please give reasons for your answer.**
- Q.2 Do you broadly agree with our proposals for the status, role and duties of a guardian of the property and affairs of a missing person? If not, please state why. If you consider that some additional or alternative provision should be made, please explain what that provision should be, giving your reasons.**
- Q.3 Do you agree with our proposals for the procedure for appointing a guardian of the property and affairs of a missing person? If not, please state why. If you consider that some additional or alternative provision should be made, please explain what that should be, giving your reasons.**
- Q.4 Do you agree with our proposals for the criteria for appointing a guardian of the property and affairs of a missing person? If not, please state why. If you consider that different criteria should be used, please explain what they should be, giving your reasons.**
- Q.5 Do you agree with our proposals relating to the terms of appointment? If not, please state why and explain what terms you would suggest instead.**
- Q.6 Do you agree with our proposals for safeguards for the missing person and the guardian of his or her property and affairs? If not, please state why. If you consider that some additional or alternative provision should be made, please explain what that should be, giving your reasons.**
- Q.7 Do you agree with the costs and benefits of the proposals described in this cost-benefit analysis? If not, please explain why.**
- Q.8 Can you provide any evidence or sources of information that will help us better understand and inform our cost-benefit analysis of the proposals?**
- Q.9 What do you consider to be the equality impacts of the proposals for those who have protected characteristics?**
- Q.10 Can you provide any evidence or sources of information that will help us better understand and inform our equalities assessment of the impact of these proposals?**
- Q.11 Are you able to provide any evidence or sources of information to help us assess whether any particular group with a protected characteristic might experience any particular or different effect of the proposals compared to people without that protected characteristic?**

Thank you for participating in this consultation exercise.

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
<b>Address to which the acknowledgement should be sent, if different from above</b>	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## **Contact details/How to respond**

Please submit your response online by 18/11/14 at:

<https://consult.justice.gov.uk/digital-communications/guardianship-property-and-affairs-missing-persons>

Or send your response by 18/11/14 to:

**Criminal and Civil Law Policy Unit**

**Ministry of Justice**

**6.21**

**102 Petty France**

**London SW1H 9AJ**

**Tel: 020 3334 6964**

**Email: missing\_persons\_guardianship@justice.gsi.gov.uk**

### **Complaints or comments**

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

### **Extra copies**

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>

Alternative format versions of this publication can be requested from [missing\\_persons\\_guardianship@justice.gsi.gov.uk](mailto:missing_persons_guardianship@justice.gsi.gov.uk) or 020 3334 6964.

### **Publication of response**

A paper summarising the responses to this consultation will be published in three months time. The response paper will be available on-line at <https://consult.justice.gov.uk/>

### **Representative groups**

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### **Confidentiality**

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In

view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## **Consultation principles**

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255180/Consultation-Principles-Oct-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf)

## **Annex 1 – Consultees**

ABI (the Association of British Insurers)  
ACCA (the Association of Chartered Certified Accountants)  
Action for Children  
Advice Services Alliance  
Advice UK  
Age UK  
Alzheimer's Society  
APFA (Association of Professional Financial Advisers)  
Association of Chief Police Officers  
Association of Contentious Trust and Probate Solicitors  
Association of Directors of Children's Services  
Association of Her Majesty's District Judges  
Association of High Court Masters  
Bar Council  
BBA (British Bankers' Association)  
British Accounting Association  
British Asian Trust  
British Chamber of Commerce  
British Institute of Human Rights  
British Retail Consortium  
BSA (Building Societies Association)  
Callcredit  
Centre for Mental Health  
Centre for Policy on Ageing  
Centre for Social Justice  
Chancery Bar Association  
Chief Social Worker for Children and Families  
Child Maintenance Enforcement Commission  
Churches Together in England  
Citizen's Advice  
Civil Court Users Association  
Civil Justice Council  
CML (Council of Mortgage Lenders)

Confederation of British Industry  
Confederation of British Service and Ex-Service Organisations  
Council for Licensed Conveyancers  
Credit Services Association  
Dementia UK  
Disability Rights UK  
Equality and Human Rights Commission  
Equifax  
Experian  
Faith Action  
Family Law Bar Association  
Family Action  
Family Justice Council  
Fawcett Society  
Federation of Muslim Organisations  
Federation of Small Business  
Forum of Private Business  
Gingerbread  
HM Council of Circuit Judges  
ICAEW (The Institute of Chartered Accountants in England and Wales)  
Institute of Credit Management  
Institute of Directors  
Institute of Money Advisers  
Law Society  
LawWorks Mediation  
Lawyers in Local Government  
Legal Action Group  
Liberty  
Local Government Association  
Mental Health Foundation  
Mental Health Lawyers Association  
Mind  
Missing Abroad  
Missing People  
Money Advice Group  
Muslim Women's Network

NAGALRO

National Council for Voluntary Organisations

National Council of Hindu Temples UK

National Debt Line

National Housing Federation

National Institute of Economic and Social Research

National Landlords Association

National Private Tenants Organisation

Office of the Children's Commissioner for England

R3

Rene Cassin

Residential Landlords Association

RNIB (Royal National Institute for the Blind)

Sikh Council UK

Scope

Shelter

Social Care Institute for Excellence

Society of Legal Scholars

Society of Trust and Estate Practitioners (STEP)

Stonewall

TUC (Trades Union Congress)

UK Missing Persons Bureau

## **Annex 2 – Equalities Statement**

### **Introduction**

This equalities statement covers proposals to create the new legal status of guardian of the property and affairs of missing people. When a person goes missing, there is currently no legal mechanism for another person to manage his or her affairs during his or her absence. This can lead to the dissipation of the missing person's assets (for example, through uncancelable Direct Debits) and the deterioration or loss of assets (for example, through lack of maintenance or failure to meet financial obligations, such as mortgage payments). For the same reason the disappearance can deprive dependants of the support they need (and have been accustomed to receive) from the missing person.

We are consulting on whether there ought to be a new legal mechanism by which a guardian could be appointed to act on behalf and in the best interests of a person who has gone missing. The key features of the proposal are as follows:

#### ***The role***

- Guardianship will be a fiduciary role akin to trusteeship.
- A guardian must act in the best interests of the missing person.
- A guardian can only be appointed by the court.
- The appointment may relate to all the property and affairs of the missing person or be limited.
- Within the scope of his or her authority the guardian will be able to do anything (including obtaining information) in relation to the property and affairs of the missing person that the missing person would have been able to do in person, other than making a will.
- Third parties will deal with the guardian as if he or she were the missing person.

#### ***The appointment***

- No appointment can be made unless the person has been missing for 90 days.
- Anyone with a sufficient interest in the affairs of the missing person can apply for a guardian to be appointed.
- The appointment may be made for a period of up to four years with the possibility of an extension of up to a further four years.
- Before making the appointment the court must be satisfied that the proposed guardian is suitable (for example, he or she must have the necessary expertise and his or her interests must not conflict with those of the missing person).

#### ***Supervision***

- The guardian will be supervised by the Office of the Public Guardian and would be required to file accounts.
- There will be a register of appointments.

## Equality Duties

Under the Equality Act 2010, Government must consider the equalities impact of any proposed changes and have due regard to the need to:

- eliminate discrimination, harassment and victimisation and other conduct prohibited by the Act;
- advance equality of opportunity between people who share a protected characteristic and those who do not; and
- foster good relations between people who share a protected characteristic and those who do not.

For the purposes of the public sector equality duty the relevant protected characteristics are: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

## Summary

Consideration has been given to the impact of the proposals against the statutory obligations under the Equality Act (EA). These are outlined below.

**Individuals affected by the proposals:** Those who could potentially experience discrimination under these proposals are missing persons whose property and affairs could be subject to a guardianship order and people who are financially dependant on them.

**Direct discrimination:** Our assessment is that the proposed changes are not directly discriminatory within the meaning of the EA as they apply equally to all missing people irrespective of whether or not they have a protected characteristic. The power for a guardian to provide for people dependant on the missing person out of the missing person's estate (provided it is in the best interests of the missing person) also applies equally to all dependants. We do not consider that the proposals would result in people being treated less favourably because of their protected characteristic.

**Indirect Discrimination:** Our initial assessment, based on the limited information available, is that the proposals are unlikely to amount to indirect discrimination within the meaning of the EA since any resulting changes are unlikely to result in anyone sharing a protected characteristic being put at a particular disadvantage, compared to those who do not share that protected characteristic. If there were to be any difference in treatment between those sharing a protected characteristic and those who do not, the government's initial assessment is that the proposed options are a proportionate means of achieving the legitimate aims of the policy objectives set out above in this consultation paper.

**Discrimination arising from disability and duty to make reasonable adjustments:** Our initial assessment, based on the limited information available, is that it is unlikely that the proposals will put a disabled person at a disadvantage in relation to a relevant matter. As the details of the proposals are developed, we will consider whether reasonable adjustments are required to ensure that fair and equal access is maintained for service users with disabilities.

**Harassment and victimisation:** Our initial assessment, based on the limited information available, is that it is unlikely that the proposals will give rise to any harassment and victimisation within the meaning of the EA.

**Advancing equality of opportunity:** We have considered the extent to which the proposed changes are compatible with the need to promote equality of opportunity and consider that the proposals do not undermine attainment of that objective.

**Fostering good relations:** We consider that it is very unlikely that the proposals will impact on this obligation.

We will consider our initial assessment further in light of the consultation responses.

We have asked for views on potential equalities impacts through questions in the consultation paper.

## **Methodology and analysis**

The Government acknowledges that it does not collect comprehensive information about the protected characteristics of missing people. This limits Government understanding of the potential equality impacts of the proposals.

With the limited available information we have so far not identified any ways in which the creation of a status of guardian of the property and affairs of a missing person will impact negatively on those with protected characteristics. As set out below there is some evidence that dependants of missing persons may be more likely to share the protected characteristics of age (being minors) and marital status. Family members who are appointed as guardians may share the protected characteristic of sex, perhaps being more likely to be female. There is also some evidence that those who disappear may have a mental health disability at the point of disappearance. As there is some evidence that missing people and their families may be more likely than not to share these protected characteristics, they may be more likely than others to benefit from the proposals. The benefits will however, be the same as those provided to others that don't share these protected characteristics.

The information used to inform this analysis is set out below.

### **Missing persons**

Statistical information from the National Policing Improvement Agency as to the age, gender and ethnicity of missing people as a whole indicates that in relation to gender and ethnicity the subjects of missing incidents reflect the general distribution in society. There is a slightly higher ratio of females to males amongst teenaged missing persons, and conversely in respect of other ages. In relation to age they indicate that Under 18s are the subject of two-thirds of disappearances. However, we do not know if this profile extends to those who remain missing after three months. Therefore, we do not know if the profile revealed is characteristic of the missing people who are likely to be the subject of a guardianship appointment.

As to disability, evidence from Missing People, and information provided to the All Party Parliamentary Group on Runaway and Missing Adults and Children and to the Justice Committee in the House of Commons, indicate that some of those missing are, at the point of disappearance, afflicted with amnesia or Alzheimer's disease or living with other mental illnesses. "Lost from View" - a study of a sample of missing person cases from the charity Missing People (Biehal, N., Mithcell F., and Wade J. (2003)) - found that 39 percent of people reported missing in its sample had a health condition or disability. These proposals will enable their property and affairs to be protected, in their best interests, and

so will provide benefits for this group, although the benefits will be the same as those provided to other groups.

***Families and other individuals affected by a disappearance***

We do not have statistical information or other evidence as to the numbers or protected characteristics of the people left behind by missing persons. These proposals may affect those left behind in three possible ways: first, in their capacity as appointed guardians of the property and affairs of the missing person; second, as dependants who can be provided for out of the missing person's estate; and third, those who had some kind of financial or other dealings with the missing person and who cannot act in the person's absence.

The charity Missing People has told us that generally a specific relative will take the lead in dealing with a disappearance and its effects, and that there appears to be a bias towards women in taking this lead role; 73 to 77 percent of respondents to the charity's annual feedback survey over the last three years have been women. However, it is not certain whether those taking a lead role in dealing with the charity and dealing with matters generally would also seek to be appointed as guardian of the missing person's property and affairs. In any case, it is open to the left-behind family members to decide whether they want to act as guardian; an independent, professional guardian can be appointed if that is preferred. As such, there are not expected to be any equality impacts arising for those being appointed as guardians.

Dependants are more likely to have protected characteristics, either in terms of age (being minors) or disability or possibly marital/civil partnership status. The impact of these proposals on dependants of a missing person will be beneficial, providing a mechanism for them to be provided for out of the missing person's assets where none exists at present. The proposals may therefore provide benefits for these groups.

Amongst those who had some kind of financial dealings with the missing person, we do not expect groups with protected characteristics to be represented any more than in the general population.

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