

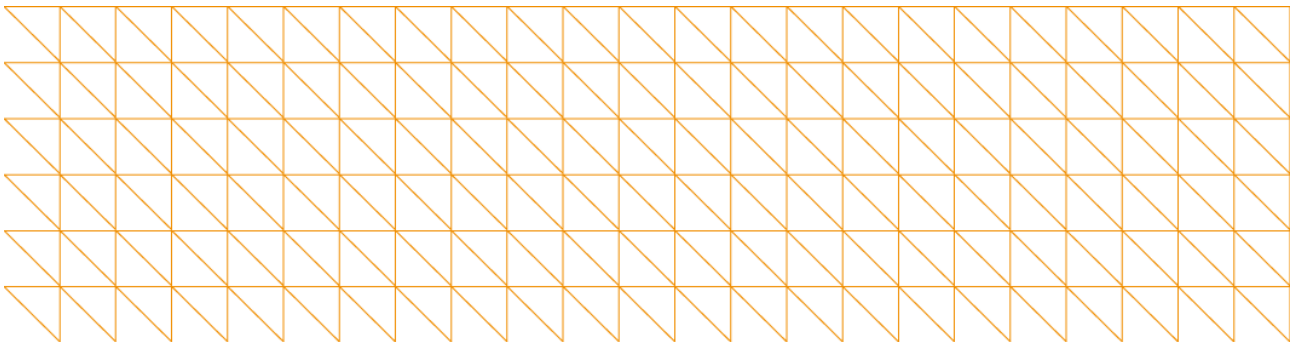


Ministry  
of Justice

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

## A response to consultation

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

A response to consultation

**Response to consultation carried out by the Ministry of Justice.**

**This information is also available at <https://consult.justice.gov.uk/>**



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## Executive Summary

Under current law families of missing people have no way to make alternative arrangements until their loved one can be judicially declared to be dead. This can be years after they go missing. When a person disappears, their property is effectively left ownerless. No one can protect it on their behalf. This can often add to the distress to family members and loved ones, and if the missing person has dependants, they will be left without the financial support they would have expected to receive from the missing person to pay their everyday expenses and more.

In August 2014 the Government consulted on the creation of a new legal status of guardian of the property and affairs of a missing person. The response strongly supported the provisional proposals.

The consultation sought views on whether to create a new legal status of guardian for a missing person and, if so, on what terms. The provisional proposals were broadly based on legislation in other countries and had been developed with the leading charity, Missing People, and other stakeholders. The response was overwhelmingly positive both to the principle of guardianship and the provisional proposals for implementing it.

The Government very strongly supports the creation of a new legal status of guardian of the property and affairs of a missing person and is committed to bringing forward legislation to give it effect as soon as possible.

The key features of the proposed scheme will be:

- A guardian will be required to act in the best interests of the missing person and in this respect will be subject to duties akin to those of a trustee.
- The guardian will be supervised by the Office of the Public Guardian and will be required to file accounts in much the same way as a Deputy appointed under the Mental Capacity Act 2005.
- A guardian will be appointed by a court on application by a person with a sufficient interest. The appointment may be general (in which case the guardian will be able to do what the missing person could have done) or limited.
- 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 for a period of up to four years with the possibility of applying for an extension for up to another four years.

The Government is grateful to everyone who responded to the consultation and will continue to work with stakeholders to develop the detail of the legislation with a view to enacting it as soon as possible.

## Introduction and contact details

This document is the post-consultation report for the consultation paper *Guardianship of the Property and Affairs of Missing Persons* published by the Ministry of Justice on 27 August 2014.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **the Civil and Criminal Law Policy Unit** at the address below:

**Ministry of Justice  
102 Petty France  
London SW1H 9AJ**

**Telephone: 020 3334 3555**

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

This report is also available 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)**

### 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.



## Background

### *Overview*

The Ministry of Justice published the consultation paper *Guardianship of the Property and Affairs of Missing Persons* on 27 August 2014. The paper invited comments on whether there ought to be a new legal mechanism by which a person could be appointed to act on behalf of and in the best interests of a person who has gone missing. The paper referred 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 subsequent legislation. The paper also sought views on detailed provisional proposals as to the detail of a system of guardianship. The consultation period closed on 18 November 2014 and this report summarises the responses, including how the consultation process influenced the further development of the proposals consulted upon.

We received 41 responses to the consultation paper. All the respondents agreed that there is a need to provide protection for a missing person’s property and affairs; and all but two agreed that the creation of a new status of guardian would be a suitable way to do this. The responses, whilst strongly supportive of the provisional proposals in the consultation paper, drew attention to a number of issues that the respondents considered should be resolved during the development of the detail of the scheme.

**In the light of the very positive response to the consultation and the strong pre-existing support for the creation of a system of guardianship inside and outside Parliament, the Government has decided to create a new legal status of guardian of the property and affairs of a missing person. Implementation of this commitment will require primary legislation. We will now finalise the development of the necessary detailed legislative proposals in order to enact them without delay.**

### *Present Position*

The sudden disappearance of a loved one 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 created can be compounded by the practical consequences of the disappearance.

Under the current law a person who goes missing is assumed to be alive but there is no mechanism to protect or deal with a missing person’s property and affairs and no provision for another person to act with authority on behalf of the missing person. This 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.

The consultation paper set out 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 and invited views on the proposals and their impact. The provisional proposals were 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, and drew on the precedents of the systems used in other countries and the broadly analogous provisions governing the appointment and responsibilities of Deputies under the Mental Capacity Act

2005. We are grateful to Missing People and Clifford Chance LLP for their continuing support in the development of the proposals.

The key features of the provisional proposals were:

- 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 the appointment of a guardian provided he or she has a sufficient interest.
- Anyone could be appointed as a guardian provided that he or she: will act in the best interests of the missing person; is not likely to have a conflict of interests; is suitable; and has sufficient expertise.
- 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 consultation paper contained a cost-benefit analysis of the proposed creation of the status of guardian. It estimated that there would probably be between 50 and 100 appointments annually. Respondents were invited to comment on the analysis and to provide further evidence that would help to improve our understanding of the effect of the proposals. 29 respondents commented. All but one respondent, who did not provide reasons, agreed with the analysis. Respondents were also asked to comment on the equality impacts of the proposals. Over half did not think there were equality impacts. We have considered the cost-benefit analysis and the equalities impact in the consultation paper in the light of the comments received but do not consider that any change is necessary. We will however continue to assess these issues as the detailed proposals are developed.

There will be points of detail to settle as the legislation is drafted but it is clear that the key features of the proposed scheme will follow the provisional proposals.

### ***Structure and content of this paper***

The remainder of this paper contains a brief general summary of the responses and then a detailed summary of the responses to each question asked in the consultation paper, which will include our response to the points raised. Finally, we set out how we propose to develop the proposals.

A Welsh language summary can be found at <https://consult.justice.gov.uk/>

A list of the organisations who replied to the consultation paper is at Annex A.

## Summary of responses

1. A total of 41 responses to the consultation paper were received. Of these, approximately one third of responses were from members of the public, including families of missing persons and those who work with them. Another third were from lawyers and their representative bodies. The other third were from public bodies, the voluntary sector, business representatives and Members of Parliament, including the All Party Parliamentary Groups for Runaway and Missing Children and Adults and on Insurance and Financial Services respectively.
2. The responses were analysed for general support for the introduction of a system for dealing with the property and affairs of missing persons. They were also analysed for perspectives on how the proposals would work in practice and for whether they would meet the intended objectives. Consideration was also given to suggestions of alternative solutions to the problems being addressed, and to sources for further evidence (or sources of evidence) of the problems caused by a disappearance.
3. The consultation responses demonstrated overwhelming support for the creation of a new guardianship status: all forty-one respondents agreed that there is a need to provide protection for a missing person's property and affairs; and all but two agreed that the creation of a new status would be a suitable way to do this. Comments and suggestions received about the proposed framework related predominantly to points of detail. No significant new evidence of the problems or their impacts was obtained. We will, however, consider the comments made as proposals are developed.

## Responses to specific questions

### 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.

All 41 respondents answered this question. Every respondent (100%) agreed that there was a need to provide protection for a missing person's property and affairs and all but two (95%) agreed that in principle the creation of a new status would be a suitable way to do this.

33 (80%) respondents provided comments in support of the creation of a new status. Most of these respondents cited reasons that had been referred to within the consultation paper, specifically: preventing a missing person's property and affairs from falling into disarray; being able to manage assets and liabilities owned jointly with a missing person; creating certainty and security for third parties such as financial institutions; and providing protection for dependents. A few respondents also proposed additional reasons, including families no longer being forced into using presumption of death procedures; the police being able to provide an answer to families' questions; third parties (such as creditors) suffering from fewer payment defaults; and third parties (such as tenants of a missing landlord) being able to enforce obligations. **We consider that the responses demonstrate overwhelming support for the creation of a system of guardianship. We will now develop detailed legislative proposals.**

#### *Other comments*

One respondent<sup>1</sup> proposed an alternative way of dealing with a disappearance, suggesting instead that the court should have a more general authority to order specific actions in relation to property in any circumstances where the owner of the property is unable to do so. Another respondent considered that the court should be able to appoint a receiver and manager for limited purposes only. **We accept that an alternative approach to dealing with the property and affairs of missing persons could be for specific orders to be made by the court on application or for a person to be appointed for specific purposes only. However, the evidence supplied by families of missing persons suggests that in many cases, a large number of minor decisions regularly need to be taken. Requiring judicial input at every occasion, or when further directions for were required, would be likely to increase both the time and costs involved. Although this alternative proposal would address other situations besides missing person cases, such situations are outside the scope of our consideration.**

The Law Society, while accepting that the creation of a new status could be the best way to protect the property and interests of a missing person, suggested that it may be disproportionate if there were very few cases. **We acknowledge that if there were only very few cases the costs of creating a system might be disproportionate. However, we do not consider that this is the case in relation to guardianship. Our impact assessment will consider whether the benefits outweigh the costs.**

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<sup>1</sup> City of Westminster and Holborn Law Society, Law Reform Committee

The Land Registry queried what the relationship of guardianship would be with remedies currently available under the Trustee Act 1925 where the missing person is a joint owner of land. **We anticipate that the availability of remedies under other legislation for specific problems would not prevent an application for guardianship or vice versa. We will, however, keep this issue under review as we develop the proposals.**

The Chancery Bar Association disagreed in principle with granting unlimited powers of management over the property and affairs of a person presumed to be alive and capable of managing them. It thought the proposals went too far and that the appointment should be in the nature of a receiver and manager for limited purposes pending clarification of the circumstances of the missing person. **We acknowledge the seriousness and sensitivity of putting one person in control of the assets of another. This is one of the reasons why we consider the appointment should be made by the court on the terms it thinks appropriate (even though we expect that general appointments will be the norm) and the appointee subject to supervision by the Office of the Public Guardian.**

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**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.**

In the consultation paper we provisionally proposed that the main features of the status, role and duties of the guardian were:

- A guardian must always act in the best interests of the missing person, taking into account all circumstances (including the missing person’s known wishes).
- A guardian should be under specific duties (e.g. to act in good faith, to exercise reasonable care and skill in financial dealings, and to avoid conflicts of interest).
- Actions taken by a guardian should have the same effect as if they had been taken by the missing person.
- A 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 that the missing person would have been able to do.
- A guardian would have power to act for:
  - the care and management of the missing person’s property and affairs;
  - the maintenance and benefit of the missing person’s dependants.

37 respondents answered this question. The vast majority, 32 (86%), of respondents stated that they agreed or broadly agreed with proposals for the status, role and duties of a guardian. Of these, 10 respondents provided further comments, although some of these related to the procedure for appointing a guardian (question 3). Four (11%) respondents disagreed with the proposals and provided comments. A further respondent neither agreed nor disagreed but raised some points of practical detail. **We consider that this response demonstrates considerable support for the general approach we have proposed and intend to develop detailed proposals on this**

**basis, subject to our comments on the following more specific points raised by respondents.**

In relation to how a guardian should act the main issue raised was the requirement to act in the missing person's best interests. Two respondents commented that the interests of a third party (such as a creditor or family member) might, at times, be the primary driver for making a decision, even though the decision taken is not inconsistent with the missing person's best interests, and that this should be acknowledged. One of these respondents said that it is not possible to say what is in the best interests of the missing person at any given moment since his or her actual situation is necessarily unknown and emphasised the need to distinguish between "best interests" under the guardianship legislation and the Mental Capacity Act 2005.

Two further respondents stated that guidance would need to set out clearly how 'best interests' was to be interpreted, one of whom also stated that further clarification was needed for the situation where the missing person's known wishes did not match what was taken to be in his or her best interests.

**We agree that the concept of what is and what is not in the 'best interests' of the missing person is central to the proposals and must be capable of being readily understandable. We acknowledge that the absence of the missing person means that a decision might be taken that the missing person would not have taken had he or she been there to take it, but do not think that it will necessarily be contrary to the interests of the missing person either at that time or in the future to use his or her property for the benefit of family members or other third parties.**

**We will address all issues raised in relation to the 'best interest' requirement in the development of our detailed policy and in the drafting of legislation and guidance. In doing this we will, in particular, give further consider the way that other jurisdictions have defined the requirement.**

A number of other points were raised by one or two respondents:

- The presumption should be for the least amount of power necessary to be granted to the guardian:  
*"where possible, a guardian's powers should be limited to help protect the interests of the missing person."* (The Law Society)
- The court already has power under s.37 Senior Courts Act 1981 to appoint a receiver and manager whenever it appears to the court to be just and convenient to do so, and/or under its inherent jurisdiction; the receiver must act in accordance with the directions of the court in administering the property to which the receivership extends. (The Chancery Bar Association)

**The evidence supplied by families of missing persons suggests that in many cases, a large number of minor decisions regularly need to be taken, requiring judicial input at every occasion would be likely to increase both the time and costs involved. We therefore consider that restricting the amount of power given to a guardian to the minimum necessary at any one time would make the scheme more difficult and expensive to operate; and we envisage that although the legislation to be developed would allow the court to impose restrictions in individual cases, a general power will be granted in most cases. We acknowledge that the power to appoint receivers is potentially very wide but**

**consider a structured subject specific jurisdiction will provide a better and more efficient solution, which will leave the jurisdiction to appoint receivers intact for use in suitable situations.**

**We consider that the duties of the guardian and the proposed supervision regime will counter any increased risk from conferring a general as opposed to a specific power. In this respect, we note that in relation to Deputies appointed under the Mental Capacity Act 2005 the Office of the Public Guardian operates a system of supervision under which different cases attract different levels of supervision so that the burden can be proportionate to the level of risk. It may be that a similar system could be appropriate in relation to guardianship.**

- Further clarification is required of how guardians will satisfy financial lending criteria and of requirements for the enforceability and the execution of loan documentation. **We agree that any new scheme must be compatible with existing legal requirements. We will work out such details, in consultation with stakeholders, in drafting legislation and guidance.**
- In relation to access to information, the framework should specify that data access is limited to what the missing person could obtain. Guidance must state the consequences for guardians of unauthorised data access.

*“...a guardian could be held liable for breach of duty if he or she accessed information unnecessarily or misused it. ... the guardian may also be guilty of an offence of unlawfully obtaining personal data under section 55 of the DPA. Given the serious consequences of abusing the right of subject access by a guardian,...it is imperative that the circumstances in which guardians exercise the right of subject access are clearly explained to them”* (Information Commissioner)

**We agree that data protection rights, obligations and penalties must be made clear. We will address these issues in drafting any legislation and guidance.**

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**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.**

In the consultation paper we provisionally proposed that the main features of the system for the appointment of a guardian would be:

- Appointments to be made by a court (Court of Protection or High Court)
- Anyone with an interest should be able to apply for the appointment of a guardian
- Person to be missing for 90 days before an application can be made
- Applicant to advertise the application and notify those likely to have an interest
- The court could only make an appointment if:
  - the missing person was (or spouse/civil partner is) domiciled or habitually resident in England and Wales
  - it is likely that a decision will need to be made regarding the missing person’s property and affairs



- it is in missing person’s best interests for a guardian to be appointed
- *For consideration:* Where the domicile/habitual residence test is not met, the court could make an appointment limited to dealing with the missing person’s real estate located in England and Wales.

36 respondents answered this question, of whom 23 (64%) agreed or broadly agreed (three with comments) and 25% partly agreed. Four respondents (11%) answered that they disagreed but the comments of one of them did not relate to the proposals and the comments of two other respondents related to specific points of detail, which we consider below, rather than the proposals in general.

The consultation paper did not make a proposal as to the identity of the court to which applications should be made, but stated that the most obvious candidates were the High Court and the Court of Protection and concluded that on balance the High Court may be more appropriate. Six respondents made suggestions in this regard: three respondents (a barrister, the City of Westminster and Holborn Law Society and the Chancery Bar Association) suggested the High Court on the basis that guardianship is like a trustee role; the other three respondents (the Bar Council & two solicitors) suggested the Court of Protection given its existing link to OPG and case law on ‘best interests’.

**In view of the level of support we remain of the view that the appointment of a guardian should be made by a court. We note that there was no consensus of opinion amongst respondents as to which court would be most suitable. We will consider this issue with the judiciary and Her Majesty’s Courts and Tribunals Service (“HMCTS”) to develop the best practical solution.**

Nine respondents commented on the proposal that applications should only be able to be made after the missing person had been missing for 90 days. The main suggestion made was that people should be able to apply before 90 days have expired if there was an urgent need or the missing person was clearly missing, for example:

*“issues can escalate quickly and ...a missing person’s finances (and potentially their family’s) could already be in difficulty within 90 days.”* (Missing People).

Some practical points relating to timing were also identified, for example:

*“While we do not disagree with this approach, in the interim there may be situations where lenders are under a legal duty to send information and take action if repayments are not made. For example, lenders are required under the Consumer Credit Act to send prescribed notices to the customer where repayments have not been made for two months. And if there is an outstanding motor finance loan which is not being repaid, the depreciation in the value of the vehicle could result in a higher debt for the missing person if any action is severely delayed”* (Finance and Leasing Association)

**We accept that the 90 day period may create problems in some cases, but are also conscious that over-hasty applications may result in unnecessary expenses being incurred. We will consider whether and, if so, how the need for urgent and immediate action in the immediate aftermath of a disappearance could be accommodated within the system. We will, in particular, consider the applicability of the jurisdiction to appoint a receiver under section 37 of the**

### **Senior Courts Act 1981 and how other jurisdictions have dealt with this problem.**

Four respondents (The Law Society and three others) supported the suggestion that the court could have jurisdiction in the absence of domicile or habitual residence where the missing person had property in England and Wales, and one respondent noted that this was provided for under the Mental Capacity Act 2005. Another noted that if the appointment went beyond preservation of real estate in England and Wales, complex private international law issues would arise. **As there were divergent views on this provisional proposal, we will consider it further.**

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#### **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.**

In the consultation paper we provisionally proposed that the main criteria for the appointment of a guardian would be:

- There is no limit to who may be appointed as guardian or the number of people who may be appointed (whether jointly or individually)
- The court may appoint a person as guardian if satisfied that the person:
  - Consents to the appointment
  - Will act in the best interests of the missing person
  - Is not likely to have a conflict of interests
  - Is a suitable person to act as guardian, taking into account the wishes of the missing person
  - Has sufficient expertise, or there is a special relationship or other special reason for being appointed
- We anticipate there will be a panel of independent guardians to draw from if there is no-one appointable.

34 responses were received to this question. The vast majority, 28 (82%), agreed or broadly agreed with the appointment criteria. Of these, three respondents added comments, emphasising or agreeing with particular elements of the proposals. Five respondents (15%) answered that they disagreed but the comments of one of them did not relate to the proposals and the comments of three related to specific points of detail rather than the appointment criteria in general. Another considered that no criteria need be specified as well-established principles could be applied (this respondent favoured a limited receivership-type appointment and warned that it would be difficult for the court to assess whether a person would act in the best interests of the missing person and whether, taking into account the wishes of the missing person, he or she would be suitable). A further respondent (3%) made comments only, noting that it did not agree with the approach of guardianship in general but stating that it could see no theoretical difficulty in appointing multiple guardians. **We therefore propose that the criteria for appointment as a guardian should follow the provisional proposals in the consultation paper, subject to further work on some points of detail.**

The following points were drawn to our attention by the responses to the consultation.

The British Bankers Association noted that the guardian must be legally able to deal with the missing person's bank accounts. **We agree that the guardian must be able to deal with third parties.**

**We agree that any new scheme must be compatible with existing legal requirements and we anticipate that the suitability criterion will be one way to ensure this; we will be working up detailed criterion as proposals are taken forward. We will in particular consider whether any specific provisions are necessary, for example, as regards bankruptcy, immigration status and criminal convictions.**

The Law Society and Missing People mentioned the difficulties that might arise where multiple guardians are appointed in respect of a single missing person, particularly where disputes arise. **We agree that if joint guardians are appointed or if guardians are appointed with separate limited powers this could be an important practical issue. We consider that joint guardians should act unanimously (as with joint trustees or executors), with provision for the court to settle disputes. For guardians with separate responsibilities, the court will set out their respective spheres. We will consider how disputes might be avoided or resolved and will consider what suggestions as to how guardians can work effectively together can be included in guidance.**

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**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.**

In the consultation paper we provisionally proposed that the main terms of the appointment of a guardian would be:

- 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
- The appointment could be terminated upon application by the guardian at any stage or by others with an interest if there were concerns around conduct
- A guardian should be able to recover expenses from the missing person's estate
- A person appointed as guardian in a professional capacity should be able to charge for services, out of the missing person's estate, but the level of charges should be regulated

31 responses were received to this question, of which 28 (90%) agreed or broadly agreed with the appointment terms. Of these, five respondents made comments, mostly relating to the duration of the appointment. One of the five agreed with the criteria for making an appointment but mentioned that there may be cases where an *ex parte* application is appropriate. Three respondents (10%) answered that they disagreed but the comments of one of them did not relate to the proposals and the comments of the other two respondents related to specific points of detail rather than relating to appointment terms in general. A further three respondents (10%) made comments only that were either neutral or negative and which are addressed below.

**We therefore propose that the terms of appointment as a guardian should follow the provisional proposals in the consultation paper, subject to further work on some points of detail.**

Six respondents made comments relating to the process of terminating an appointment. Specifically, the Law Society, Land Registry, Missing People and BBA suggested that there would need to be a process for terminating an appointment in the situation where a guardian dies or loses mental capacity. Two responses also stated that third parties (such as banks) with an interest in the affairs of the missing person must be notified of the early termination of an appointment, so that they would not continue to act on the basis of the original order.

**We agree that provision needs to be made for the situation where a guardian can no longer act and is unable to inform the court. We also agree that those with an ongoing reliance on the terms of the original order should be notified if the appointment is terminated other than by expiry. We will address these issues, around the detail of the process for ending appointments, in the drafting of any legislation, rules and guidance.**

The BBA also commented that where an authority was limited banks should not be required to verify the guardian is acting within the limitations beyond ensuring that the guardian only has access to accounts specified in the order. **We agree that banks and other third parties must be able to rely on the appointment of the guardian and will continue to work with stakeholders to try to develop a practical and robust system.**

We received a range of views on the appropriate duration of guardianship appointments. Two respondents stated that they agreed with the proposed term of a maximum of four years, while suggestions from four other respondents included: a shorter period of one or two years; a longer period of up to eight years; an upper limit of four years not to be applied routinely; and an absolute discretion for the court to decide the duration in any case.

**We acknowledge that different periods of appointment could be chosen. In the absence of any consensus of opinion for an alternative, we maintain the view 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.**

Missing People stated that a family should not be compelled to seek a presumption of death declaration at the expiry of a period of guardianship. **We agree that no one should be compelled in this way but equally a guardian should only be appointed where it is appropriate. We consider that these matters will have to be decided on a case by case basis.**

Two respondents commented on the procedure for applying for an extension of an appointment. One of them stated that the procedure for extensions should be streamlined as compared to the initial application. The other respondent, the UK Missing Persons Bureau, also suggested that a police case review be completed to ensure that the missing person had not returned or been found.

**We will consider further the possibilities for creating a separate procedure for applying to extend an appointment as the details of the main procedure are developed. Even if a separate procedure is not feasible, we consider that an**

application to extend an appointment could potentially be made more straightforward by the track record of the guardian, which would on the basis of the provisional proposals be available at OPG, demonstrating that the appointment criteria were met.

We agree that evidence of the missing person's continuing absence would be required and that a police case review would be one way to provide this. We will consider further what evidence could be used, including the costs involved and how it would be funded.

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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.

In the consultation paper we provisionally proposed the following safeguards:

- The guardian would be supervised by the Office of the Public Guardian (OPG) and would be required to file accounts
- The court could require a guardian to take out a security bond as a condition of the appointment
- Others with a sufficient interest could apply to the court for an account of the guardianship or could hold the guardian personally liable for not acting properly
- Third parties would obtain proof of the guardianship from the court order of appointment presented by the guardian and from the OPG register

24 responses were received to this question, of which 15 (62%) agreed or broadly agreed with safeguarding proposals. Of these, five respondents made comments. Five (21%) respondents stated that they disagreed with the proposals, though the comments of one of these did not relate to the proposals and a further two of these respondents disagreed with particular details. A further four (17%) respondents made comments only that were either neutral or negative. **Although the level of support is less emphatic than in relation to some of the preceding questions it is still significant. We do not propose changing our overall approach to the specific safeguards we have described.**

We now set out our responses to specific points made by individual consultees.

A solicitor recorded his agreement with the suggestion mooted in the consultation paper that the first set of accounts might be filed within six months rather than a year. **We will consider this possibility further.**

The City of Westminster and Holborn Law Society disagreed with the provisional proposal that guardians should be supervised by OPG. It stated: – “If in specific circumstances the guardian should be required to hold or handle the missing person's money he should be treated just as any other receiver, or receiver and manager, and be ordered to file accounts and /or give security in the same way. That is not the kind of supervisory work appropriate for the Public Guardian. We disagree that such appointments are appropriate for inclusion in OPG registers.” The Society also noted that if the OPG was not engaged some expense might be saved.

A solicitor thought that the new responsibilities would overburden the OPG.

A member of the public expressed concern that ordinary people may not be able to prepare accounts.

The Chancery Bar Association considered that the terms of the appointment should be left to the court and that section 61 of the Trustee Act 1925, which enables trustees who have acted honestly and reasonably to be exonerated for breach of trust, should apply.

**We agree that the court should be able to order an account of the guardianship where required. However, we are concerned that all guardians should be monitored, regardless of whether there are interested third parties to hold them to account. In the missing person's absence, we consider that independent oversight of guardianship is essential. We consider that the OPG is well placed to do this. We also consider in view of its experience with Deputies under the Mental Capacity Act 2005 that it is well placed to prepare guidance to assist guardians. We think it will be helpful to the court and the parties to have a framework clearly set out in legislation but will consider whether there should be provision similar to section 61 of the Trustee Act 1925.**

Missing People commented on the need for guidance about security bonds and the need to ensure that they were affordable, whilst a solicitor commented on the importance of guidance in enabling guardians to understand their powers and duties. **We agree that preparing clear guidance for guardians is a key part of the preparation for the introduction of the status. We will take into account lessons learned in connection with bonds obtained by Deputies under the Mental Capacity Act 2005. We will pick up the suggestions made by consultees when drafting guidance.**

The UK Missing Persons Bureau suggested that it should be notified of applications for guardianship so that relevant checks can be made against its database. **We agree that it is important that the court has accurate, up-to-date information about the missing person when considering an application for guardianship. We will consider how contact with UKMPB can be incorporated into the application process as we develop the detail of proposals.**

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

The cost-benefit analysis in the consultation paper identified the following costs and benefits, based on an estimate of 50 to 300 guardianship applications annually.

*Costs:*

- One-off setup and implementation costs for the Justice System
- Negligible cost for businesses adapting systems to accept guardians
- Annual cost of under £1m for business (e.g. banks) identity checks
- Costs to business from guardians' actions (e.g. cancelling direct debits)
- Missing persons to pay Court and supervision fees, and any professional fees

- Guardians may be required to pay for security bonds

*Benefits:*

- Ongoing benefits for business from increased legal certainty
- New business for professionals acting as, or providing advice to, guardians
- Savings for business from simpler debt recovery and fewer default payments
- Benefits to business from guardians' actions (e.g. repairing or insuring property)
- Families save the time and cost currently spent trying to find solutions to problems
- Missing persons benefit from estates no longer dissipating or falling into disrepair

From the consultation stage analysis it was not clear whether costs from guardians' actions would outweigh benefits for business.

Benefits were expected to outweigh costs for missing persons, their families and guardians on the assumption that no application would be made if it were not cost-effective.

29 respondents answered this question. The overwhelming majority of these, 28 (97%) respondents, agreed or broadly agreed with the cost-benefit analysis. 23 (79%) respondents stated that they agreed with the analysis and a further five respondents provided comments only, either agreeing with specific aspects of the cost-benefit analysis or stating general agreement but noting a particular reservation. Five of the respondents' comments agreed that there would be savings for families and benefits for business. Only one respondent disagreed but the supporting comments provided by this respondent did not relate to the content of the cost benefit analysis. **As the cost-benefit analysis was not commented on substantively by those responding to the consultation, we have not revised the consultation stage cost-benefit analysis.**

We now set out our responses to specific points made by individual consultees.

The charity Missing People agreed with the estimate of the number of applications but provided alternative figures, suggesting that there would be a significant spike in the first one or two years:

*“As of 18 November 2014, there were 2,414 missing adults on our database who had been missing for over three months, and for whom no outcome was known”*

**This number of long-term cases is higher than the 1,447 cited in the consultation paper (recorded by the Missing Persons Bureau as at March 2013), but it is of roughly the same order, and is in keeping with our assessment that there may be an initial spike.**

BBA, Missing People and a solicitor commented that one-off setup and implementation costs for business and the justice system will be low *provided* that any new regime is similar to existing systems. **We are liaising with HMCTS and OPG to ensure that procedures are as aligned as possible to existing processes.**

BBA made the point that it is important for banks to be able to rely on the terms of the court order in deciding whether a guardian can access a bank account without having to consider whether the guardian is acting outside his or her powers, otherwise potentially costly compliance systems and training would be required. **This follows our proposal that third parties will be able to rely on the Court order as to the guardian's authority to act and confirms that this is a cost effective approach.**

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**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?**

12 responses were received to this question, of which five (42%) provided informative, qualitative comments, suggesting sources of evidence or referring to unquantified, anecdotal costs from individual cases. These are noted below. The remaining seven respondents simply stated that they could not provide anything, or commented on the impacts generally, or made comments that did not relate to the question. No respondents were able to provide quantified costs or benefits.

The National Policing Lead for Missing Persons proposed facilitating a straightforward and consistent approach regarding the costs of obtaining police information.

**We will consider how police reports should be included within the application process, including the cost of doing so, and will consult stakeholders as we develop detailed proposals.**

The Bar Council, BBA and Missing People stated that they are aware of examples where a person's disappearance has caused difficulty and cost for the remaining family. Missing People provided nine case studies which illustrated the causes of costs for families and the deterioration of missing persons' assets. **These responses support the assumptions made in the cost-benefit analysis and underline the problems that the policy is intended to address.**

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

The Government is required by the Equalities Act 2010 to consider the equalities impact of any proposed changes to the law. On the basis of the limited information available, which it was hoped the consultation would improve, the key conclusions of the analysis in the consultation paper in relation to the Equality Act 2010 were that the guardianship proposals are not directly discriminatory and are unlikely to amount to indirect discrimination. We also considered that the proposals would not result in people being treated less favourably because of their protected characteristic. More specifically, the equalities statement reached the following conclusions:

**Individuals affected by the proposals:** the proposals will affect missing persons subject to a guardianship order; people financially dependent on them; and people appointed as guardians. There is limited information available as to their protected characteristics but missing persons may be more likely to have a mental health disability and dependants are more likely to share characteristics of age (minors), disability or marital/civil partner status.



**Direct discrimination:** the proposals are not directly discriminatory as they apply equally to all individuals irrespective of whether or not they have a protected characteristic; we do not consider that the proposals would result in people being treated less favourably because of the protected characteristic.

**Indirect discrimination:** it is unlikely that proposals will result in those who share a protected characteristic being put at a particular disadvantage compared to those who do not. If there is any difference in treatment, the proposals are a proportionate means of achieving the policy objectives.

**Discrimination arising from disability and duty to make reasonable adjustments:** it is unlikely that the proposals will put a disabled person at a disadvantage; we will consider further whether reasonable adjustments are required to ensure fair and equal access to services.

**Harassment and victimisation:** it is unlikely that the proposals will give rise to harassment and victimisation.

**Advancing equality of opportunity:** The proposals are not expected to affect adversely equality of opportunity.

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

13 respondents answered this question. However, the responses of three (25%) made comments that did not relate to equality impacts. Of the remainder seven (58%) considered that there are no equality impacts. Two respondents (17%) suggested potential equality impacts, noted below. **We consider from the responses received that the analysis in the consultation paper remains valid. We will, however, continue to assess the proposals as they develop by reference to the equality duty.**

The Bar Council commented that persons who are “vulnerable, for example because of their mental health difficulties, or because they are controlled by others in their life; perhaps especially women with limited English (and therefore likely to be from an ethnic minority), might be at particular risk of a fraudulent application for guardianship of their assets when they are not in fact genuinely missing. This latter issue could be dealt with by being brought within the scope of the security bond.” It also commented that it might be more difficult for a person lacking mental capacity to regain control from a guardian or enforce remedies if a guardian has abused their position.

The Law Society said there may be some equality impact in situations where the missing person has a mental disability and this could in fact be the reason for their disappearance.

A lawyer said in response to question 11 that most missing people are from ethnic minorities.

**We will bear these observations in mind as we develop the detail of the proposals. We note, however, that if a missing person returns, the guardian must notify the court. The OPG (or other supervisory body) would also have power to take action against any guardian acting outside his or her powers. We consider that the robust application process will provide sufficient protection from fraud regardless of whether potential victims share a protected characteristic.**

**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?**

No respondents provided evidence or sources of information to help us better understand or inform the equalities assessment of the impact of proposals. Seven responses were received, of which six (86%) answered “no” and one (14%) gave an answer that did not relate to equality impacts. **We will consider any evidence that is presented to us.**

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**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?**

Eight responses were received, of which four (50%) simply stated “no” and one (13%) gave an answer that did not relate to equality impacts. Of the three respondents that did provide substantive comment, two (66%) of them suggested sources of information as follows.

A member of public and a lawyer referred us to the UK Missing Persons Bureau and Missing Persons data.

**The consultation paper, including the cost-benefit analysis and the equalities assessment, used information obtained from both the UK Missing Persons Bureau and the charity Missing People; we will continue to liaise with these organisations about the statistical information, research and anecdotal evidence they hold. We are very grateful for their assistance.**

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## Conclusion and next steps

1. The response to the consultation demonstrates considerable support for the approach proposed. Having considered the responses, the Government strongly supports the creation of the new legal role and status of guardian of the property and affairs of a missing person. The Government has therefore decided to proceed with the creation of the new legal role and status of guardian of the property and affairs of a missing person.
2. The next stage will be to prepare primary and secondary legislation with suitable guidance to help people using the new system to understand what to do.
3. The Government will work as quickly as possible to achieve this and in doing so will continue to work with stakeholders so that the new system can be implemented with the minimum cost and operate with minimum problems.
4. The creation of the status of guardianship is an important development in the law. It raises serious legal issues as one person is given control of the property of another. We have identified some of the issues that will have to be addressed but are confident that there will be other policy decisions to be taken as the examination of the detail of the proposals throws up issues not yet identified.
5. The Government has taken the first steps towards the creation of a new law of guardianship. While the imminence of the 2015 General Election means the question of when legislation will be introduced will have to be considered by Ministers in the next Parliament, it is hoped that given the importance of this measure and the strong support from all sides, legislation will be brought forward as soon as possible in the new Parliament.

## **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/publications/consultation-principles-guidance>

## **Annex A – List of organisations which responded to the consultation**

All Party Parliamentary Group for Runaway and Missing Children and Adults and  
All Party Parliamentary Group on Insurance and Financial Services (joint response)

British Banking Association

Chancery Bar Association

Chief Constable, national policing lead for missing persons

Finance and Leasing Association

Information Commissioner

Land Registry

Missing People

The Bar Council

The Law Society

UK Missing Persons Bureau













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