



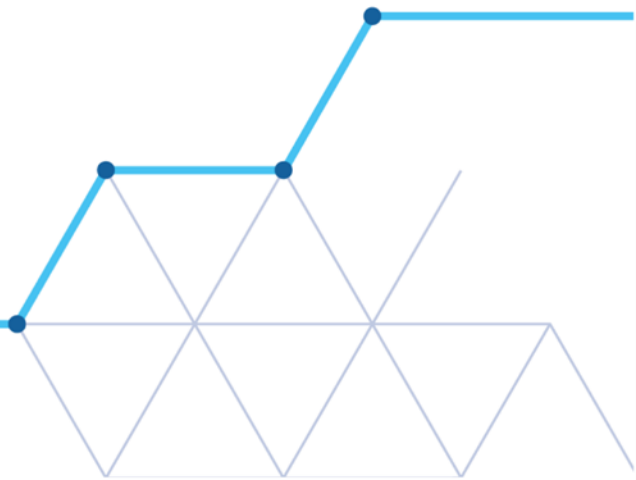
Ministry  
of Justice

# Guardianship (Missing Persons) Act 2017

## Implementing the Act

This response is published on 29 April 2019

Protecting and advancing the principles of justice







Ministry  
of Justice

## **Guardianship (Missing Persons) Act 2017**

### Implementing the Act

**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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## Introduction and contact details

This document is the post-consultation report for the consultation paper; Guardianship (Missing Persons) Act 2017: Implementing the Act.

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 us at the address below:

**Civil Law Policy, Post point 10.18**  
**Ministry of Justice**  
**102 Petty France**  
**London SW1H 9AJ**

**Email: [guardianshipconsultation2018@justice.gov.uk](mailto:guardianshipconsultation2018@justice.gov.uk)**

This report is also available at [consult.justice.gov.uk/](http://consult.justice.gov.uk/)

Alternative format versions of this publication can be requested from [guardianshipconsultation2018@justice.gov.uk](mailto:guardianshipconsultation2018@justice.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

The Ministry of Justice published the consultation paper *Guardianship (Missing Persons) Act 2017: Implementing the Act* on 19 December 2018. The paper invited comments on a range of proposals to implement the Guardianship (Missing Persons) Act 2017 (“the Act”).

The Act creates a new legal position of ‘guardian of the property and affairs of a missing person’ (“guardian”). A guardian will be a trusted person appointed by the High Court to look after the property and financial affairs of the person who is missing in their best interests.

The purpose of the consultation paper was to obtain views from the people, businesses and organisations, who will be most affected by the system, on how they think it should work, and what guidance they think would be the most helpful to the people who come into contact with it.

Specifically, it sought views on the content and presentation of a Code of Practice; the procedure to be followed by the court and the parties in applications for guardianship orders; the supervisory regime to be set up by the Public Guardian; and the fees to be levied.

In addition to asking for replies to the questions asked in the consultation paper, the department indicated that it intended to hold a series of meetings with stakeholders about the proposals in the consultation paper, and these are continuing.

The consultation period closed on 12 February 2019. There were seven written replies to the consultation paper, but this response document has also been informed by numerous comments from stakeholder meetings held with charities active in the field, finance and public utility organisations and regulators and other Government Departments.

The summary includes consideration of how the consultation process has influenced the various aspects of implementing this legislation, and sets out the next steps in creating the new legal status of guardian.

The department is very grateful to everyone who responded and provided views from several important perspectives. The principal points raised were:

- there was general support for the approach proposed, including that the rules of court and practice direction should where appropriate follow those applicable to presumption of death applications and that the regulations relating to the registration and supervision of guardians should follow those applicable to deputies under the Mental Capacity Act 2005.
- the application process should be as sympathetic as possible to the predicament of the people left behind by the disappearance of the missing person, but should also seek to make the court proceedings and regulation as efficient as practicable.
- the general language and presentation of the Code of Practice should be simplified and clarified in places and consideration be given to including more visual material to explain procedures and concepts.



- more guidance should be provided on the definition of missing, conflicts of interest, the making of gifts, jointly owned property, issues around debts, the position of dependants, the liability of the guardian and joint guardianships.

We have continued to develop our proposals and have submitted draft rules of court to the Civil Procedure Rule Committee (“CPRC”) for consideration. We have also worked to improve the language and presentation of the draft Code of Practice and have revisited those parts of the draft Code that attracted particular comments. We will continue to work on the draft Code and discuss it with key stakeholders. Draft rules will be sent to key stakeholders once the CPRC is content.

The impact assessment published alongside the consultation paper was not commented on by those responding to the consultation. Therefore, the consultation stage impact assessment has not been revised.

A Welsh language summary can be found at [consult.justice.gov.uk/digital-communications/guardianship-missing-persons-act/](https://consult.justice.gov.uk/digital-communications/guardianship-missing-persons-act/)

A list of formal consultation respondents is at Annex A.

## Introduction

1. Seven formal written responses were received to the consultation paper, but a much wider number of organisations and individuals contributed comments and suggestions in a series of meetings the Ministry convened with stakeholders and interested parties.
2. Responses and comments came from families of missing people, leading charities supporting them, lawyers, and financial and public utility organisations. We are grateful to everyone who shared their expertise, experience and insights, particularly those who have had personal experience of dealing with a disappearance.
3. We are also grateful to the members of the judiciary, and the colleagues in both HM Courts and Tribunals Service and the Office of the Public Guardian, who have worked with us to prepare for the implementation of the Act.
4. In this response paper we summarise the responses to the questions in the consultation paper and the other comments made on implementation issues, both in the responses and the meetings relating to the content of the proposed rules of court and practice directions; regulations for the registration and supervision of guardians; and, the draft Code of Practice.

## Responses to specific questions

### Code of Practice

As the consultation paper explained, the Act provides that the Lord Chancellor must prepare and issue one or more codes of practice for the guidance of guardians, for the guidance of persons making applications under this Act, and with respect to such other matters concerned with this Act as the Lord Chancellor thinks fit. This guidance should help to give guardians confidence to make decisions and make clear to them the processes, including the management of money and the keeping of records, they should follow in doing so. The parts of the proposed Code that related directly to rules of court and practice directions and to the regulations relating to the registration and supervision of guardians could not be fully drafted as the content of the rules, directions and regulations was subject to the consultation. The consultation paper invited comments on the draft of the other parts of the proposed Code of Practice, which were set out in Appendix 1 to the paper.

The department invited comments on the content of the proposed draft, including on generic issues of approach, language and presentation. The consultation paper asked the following question.

#### 1. Question 1 – Do you agree that:

- **The guidance meets the objectives it sets out in each chapter?**
- **The content of the provisions in the draft Code of Practice is accurate?**
- **The extent, appropriateness and usefulness of the content of the provisions in the draft code of practice are satisfactory?**
- **The structure and language of the draft Code of Practice are satisfactory?**
- **The style of presentation of information in the draft Code of Practice is helpful?**
- **The examples given are helpful and realistic?**
- **The guidance provided will meet the needs of users?**
- **If not, please say how you think the draft Code of Practice can be improved, including whether other topics should be included. We are particularly interested to learn from families and individuals whether they think the guidance would work for them.**

## **General points on the draft Code of Practice**

The responses generally agreed that the Code of Practice would be helpful and that it should be as comprehensive as practicable. The inclusion of a glossary was also welcomed. There was, however, concern that the present draft was in parts too complex and legalistic in its language and that this would be a barrier to its effective use by the families and friends of missing people, who would often be unfamiliar with court procedures and legal process and language generally. It was also suggested that the Code might benefit from an index and a greater use of visual materials, such as flowcharts and illustrative timelines showing how the procedures would work in practice.

The short case studies used as examples in the draft Code were also generally welcomed, but some responses commented that they should be made more relevant to the everyday circumstances of people and less reliant on scenarios that implied the missing person was extremely wealthy: for example, an example might refer to someone who owns one home with a mortgage, or rents a property with a partner, has a small savings account and current account.

One response also suggested that there should be more examples involving people with disabilities.

Missing People, suggested that one way to make the information in the draft Code more accessible would be to produce a simpler short guide to supplement the Code for people who would be encountering this issue for the first time; and offered to assist in drafting such a guide.

The Law Society noted that there was limited guidance in the Code to help people select relevant information to include in their application and recommended putting this information on gov.uk rather than in the Code to avoid weighing the Code down with too much detail.

The point was made that for unrepresented families the court process may be a complex and daunting one. Accordingly, the respondent urged there was a need for the Code of Practice to offer guidance on the process and what is required at various stages.

HM Land Registry questioned whether the Code of Practice should touch on the issue of missing people who had a health condition or disability that might amount to a lack of mental capacity, and, whether a Deputy under the Mental Capacity Act 2005 may be more appropriate than the guardianship procedure.

## **Response to general points about the draft Code**

We acknowledge the concerns of all respondents about the accessibility of the Code. We share their objective of creating a Code that will provide practical guidance in a useful way. Achieving this objective fully may require the revision of the Code in the light of experience, but we have reviewed the language and format of the draft Code in the light of the comments received. As part of this exercise we have included some visual content and illustrative timelines. We are not persuaded that an index is necessary, but have included an extended table of contents with links to the corresponding text. We will continue to work to improve the content of the draft Code both before and after implementation and intend to review the Code in the light of experience gained in the first three years operation of the Act.

We welcome the suggestion from Missing People for a simpler “introductory” guide, and will be happy to assist them in producing one. In the meantime, following a suggestion from The Law Society, we have included an extended overview of the legislation in the introduction to the draft Code. We hope this will go some way to providing a simple accessible introduction to the subject.

We note the Law Society’s proposal about gov.uk. We hope that the checklists and further information we have included in the Code do not overweigh it. We will be working to prepare material for gov.uk in time for implementation.

We have expanded the draft Code to contain more information about the relationship of guardianship on the one hand and deputyship on the other. Guardianship relates to someone appointed by the High Court to manage the financial and property affairs of a missing person, whilst a Deputy is someone appointed to manage the affairs of a person who lacks mental capacity to do so themselves as defined in the terms of the Mental Capacity Act 2005.

## **Comments on specific parts of the draft Code of Practice**

Most respondents made specific comments about specific parts of the draft Code. We describe them by reference to the relevant part of the text. We respond to each in turn.

### **Section 3 Key Concepts**

#### ***What does “missing” mean under the Guardianship (Missing Persons) Act 2017? (paragraphs 3.1 to 3.3)***

The National Crime Agency (UK Missing Persons Unit) (“NCA”) said that police forces in the United Kingdom are required, under the College of Policing, Missing Persons Authorised Professional Practice, to create records of all people reported missing in the UK as well as all British citizens reported as missing abroad; and, that the UK Missing Persons Unit (“UKMPU”) also keeps records of missing person in the UK and British citizens missing abroad. NCA therefore suggested adding the following paragraph towards the end of the section in the draft Code on the definition of when a person is a missing person for the purposes of the Act:

“To be a ‘missing person’ under the Act it is necessary for the police to have made a formal record of a person’s disappearance. The police force responsible for making such a record will be the police force from where the person has gone missing or, if the person has gone missing abroad, the police force in which the family of the missing person are resident.”

Prisoners Abroad and Missing People suggested that the second limb of the definition of missing, which is aimed at some hostage and foreign detention situations, should be more fully explained with examples of both types of situations. Missing People also expressed concern that it was unlikely the police would be able to share the missing person’s report and suggested that a standard letter should be developed to confirm that all reasonable investigations had been carried out.

The Foreign and Commonwealth Office pointed out that the definition of '*unable to communicate*' may be hard to determine in some cases and changeable. People in held in detention may have communication 'rights' revoked for periods due to behaviour in detention or may be able to write letters but not make calls. On occasion, an individual may have no way of communicating directly with family in the UK, but the FCO would still be able to make consular visits and messages between family and the detained person. Or a detained individual may have no contact with family in the UK due to their detention overseas but is able to communicate with family in the country they are detained in. The Act makes clear that guardianship offers an option when there are no means of the missing person being able to make decisions on conducting their affairs.

### **Response**

We agree that obtaining a police report about the disappearance is likely to be persuasive evidence to support the application for the appointment of a guardian and will amend the Code to make this and the working of the second limb of the definition of "missing" clearer, but the statutory definition of "missing" does not require police evidence. We will work with NCA following the Act being brought into force to see if standard procedures can be developed for the obtaining and issue of reports.

### ***What is meant by 'sufficient interest' in the property and financial affairs of the missing person? (paragraphs 3.11 to 3.16); Who should be consulted when working out someone's best interests? (paragraphs 3.37 to 3.40); and Why are guardians to be appointed? (paragraph 4.2)***

Missing People, suggested adding to the existing categories of people who would automatically be regarded as having 'sufficient interest' to be a guardian 'friend' to make it clear it was not just family members who would fit this category. Similarly, the Law Society recommended that references to persons who should be consulted by the guardian in ascertaining the best interests of the missing person should expressly include close family members (see paragraph 3.37).

### **Response**

We agree the Code should be clear that those able to intervene in proceedings for a guardianship order, those who may be appointed as a guardian and those who ought to be consulted about the missing person's best interests are not be limited to relatives. The Act sets out the categories of people automatically deemed to have sufficient interest in the making or taking part in an application for guardianship e.g. spouse/child/parent/sibling of the missing person. However, anyone else connected to the missing person may ask the court for permission to be involved in proceedings as the Code of Practice states, a friend of the missing person could be a suitable candidate to apply to be their guardian. We have amended the Code to make this clear. We have also included express reference to close family members in the Code.

### ***Can a guardian make a personal gain from actions taken on behalf of the missing person? (paragraphs 3.48 to 3.54) and 'fiduciary duty' (glossary)***

Missing People noted that there will be circumstances in which guardians may profit from exercising their functions, but in a way that does not conflict with their responsibilities. The example provided was the sale of a missing person's property (which might be jointly owned) as mortgage payments cannot be continued; or to pay off debts. Missing People suggested that this could be included as an example in the Code.

Missing People also questioned the statement provided in the Code's glossary section (on 'fiduciary duty'), stating that guardians should not be able to buy property that they are selling. The point was made that this may be too inflexible a position – for example, securing a family caravan as a family asset could be regarded generally as a reasonable action. Missing People were concerned that, where possible, the guidance should be made as flexible as possible to ensure that it can address the variety of situations that might arise for guardians.

The Law Society said that the examples provided on this point were too simplistic. It suggested that the example should be more nuanced, for example, considering how much to spend on birthday presents, or whether to fund a family holiday for a missing person's spouse/civil partner/partner and children.

### **Response**

We have amended the wording of the Code to make clear that there is no absolute prohibition on a guardian benefiting as a result of actions they take as a guardian. The actions of the guardian must be judged against the 'best interests' test.

In relation to both profiting from an action and acquiring property from the missing person, which may be an example of such profiting, we did not intend the draft Code to give the impression that absolute rules had been created. We have amended the definition in the glossary and the equivalent text at paragraph 4.38 to make the intended flexibility more apparent. Ultimately it will be for guardians, the Public Guardian (as supervisors) and the courts to determine whether a guardian's decisions have been in the best interests of the missing person and reasonable and proportionate.

### ***Who can be appointed guardian by the court? (paragraph 4.8)***

Missing People, was concerned that the draft Code indicated creditors of the missing person could apply and be appointed as guardians. The charity felt creditors would not know a missing person well enough to represent their interests and may put their own commercial interests first, in seeking to recover debts.

### **Response**

We appreciate the concerns raised and doubt that in practice a purely commercial creditor would wish to be a guardian. However, a person is not disqualified from being a guardian merely by virtue of being a creditor of the missing person. The protection against the concern raised is the process of becoming a guardian and the controls which apply to the person appointed. An applicant has to satisfy the court that they are an appropriate person to undertake the role and they commit to serving the best interests of the missing person. In making an appointment the court may impose requirements and restrictions on the guardian. The Public Guardian will supervise the work of a guardian, who will need to be able to account for how they have used the missing person's estate. It is possible that a close friend or family member might be a creditor of the missing person.

***What is the legal relationship of the guardian and the missing person?  
(paragraph 4.31)***

Missing People, commented that paragraph 4.31 of the draft Code lacks detail on the personal liability of a guardian, and said that this should be both expanded and covered at an earlier point. Missing People suggested, for example, that the guidance should make clear whether, if a missing person were to be sued, the guardian be responsible for legal fees that might not be recoupable from the missing person's estate if there is little money available.

The Law Society questioned the guardian's legal protection should the missing person return and question their actions. The Society suggested that the same protection is given to guardians as those which are given to trustees under the Mental Capacity Act 2005.

A related point raised was the degree to which guardians would be liable for the missing person's debts, and if there should be guidance on guardianship not necessarily being the best course for a missing person who had accrued debts.

**Response**

We have amended the Code to make the extent of the guardian's personal liability clearer by linking paragraph 4.31 to paragraphs 4.64 to 4.66. We have also included further material on a guardian's personal liability in the performance of their duties in the revised Code. We note that section 11 of the Act provides protection for guardians in much the same way as applies to trustees generally (see Trustee Act 1925, s 61).

Guardians who act within the terms of their order of appointment and in accordance with their duties (including to do so in the best interests of the missing person) will not be personally liable to third parties for their actions.

For those occasions where the guardian does not act within the terms of the court order the court may make a declaration where it considers a guardian has acted outside the scope of their powers, or failed to perform a duty owed to the missing person under the terms of the order or the rule of law.

In those circumstances the court may make an order which disallows expenses or remuneration for the guardian, and/or require them to make a payment to the missing person's estate or another order to compensate the missing person. However, the court may relieve the guardian of all or some of the liability, if it considers that the guardian behaved honestly and reasonably in doing so and the court considers that having regard to all the circumstance the guardian ought to be relieved of personal liability (section 11).

In addition, if the court has ordered a guardian to take out a security bond, the court has the option of ordering the bond to be paid to cover the loss to the missing person's estate. In this case the bond provider may pursue the guardian for recompense.

In the situation described by Missing People, we do not consider that the guardian would be liable for the missing person's costs only by reason of being guardian. The guardian's own assets are irrelevant in relation to a third party action against the missing person, unless such action has only arisen as a result of unauthorised/negligent acts of the guardian on behalf of the missing person. In practice, we would expect that advisers may well wish to be sure of the ability of the missing person to pay their charges before accruing liabilities.



We have expanded the material in the draft Code on debt management options (including consideration of whether guardianship might not be appropriate in relation to indebted estates).

***Can two or more guardians be appointed in relation to one missing person? (paragraphs 4.16 and 4.17)***

There was some concern among respondents that joint and sole appointments might create confusion. TISA suggested that having joint/several guardians may cause confusion to financial organisations and others in terms of knowing who was authorised for different aspects of a missing person's affairs. They pressed for one type of authorisation for consistency and in line with the approach for deputies and powers of attorney. The Act makes clear that a court order will set out the terms and limitations for each guardian where more than one is appointed.

The Law Society suggested an example of joint rather than separate guardian should be used to illustrate the roles of joint and separate guardians, as a joint appointment was more likely. HM Land Registry made comments on these sections – for example on guardians appointed jointly, but with differing expiry dates for their appointment, and the impact this may have on property transactions.

**Response**

We note the concerns. The legislation (section 16 of the Act and its Schedule) expressly provides for two or more guardians to be appointed. The Act sets out the court's role in specifying for which aspects of a missing person's property or financial affairs a separate specific guardian will be responsible. We have reviewed the guidance to address the specific concerns raised, but appointments of joint guardians or appointments of different guardians in respect of different property and financial affairs will inevitably raise issues that do not arise in single appointments and future reviews will need to assess whether further specific advice is.

***How long can a guardianship order last? (paragraphs 4.24 to 4.29); Can a guardian exercise a missing person's powers as trustee? (paragraph 4.60); What are the powers of guardian in relation to a jointly owned home? (paragraphs 4.61 to 4.63)***

One respondent suggested that the Code needed to include more guidance for guardians and families contemplating or seeking a renewed application for a Guardianship Order.

HM Land Registry asked how the guardianship procedure would work in relation to existing remedies under the Trustee Act 1925 when a missing person is a joint owner of land (for example, the replacement of a guardian as a joint owner/trustee of land under s.36 or s.41 Trustee Act 1925, or the making of a vesting order by the court under s.44(i)(c) or 44(iv) of the same Act). Land Registry were also concerned that restrictions on the ability of a trustee to retire in section 39 of the Trustee Act 1925 and section 19(3)(c) Trusts of Land and Appointment of Trustees Act 1996. Land Registry considered that these provisions meant that a joint owner/trustee of land cannot resign without leaving at least two continuing trustees (or a trust corporation), which will not usually be the case in jointly owned homes; and that if there is only one continuing joint owner/trustee of a jointly owned home who is not a trust corporation, a new trustee must be appointed before the outgoing joint/owner trustee can resign. Land Registry commented that, although a

new trustee can be appointed under section 36 or 41 of the Trustee Act 1925, there was some doubt about the examples given after paragraph 4.62.

Land Registry were also concerned that a guardian might not, in a joint ownership case, be able to exercise a power to resign a trusteeship held by a missing person, because the Act provides that a guardian cannot exercise a power vested in the missing person as a trustee in relation to another person's land (in this case his or her co-owners interest in the land).

Missing People drew attention to the need to explain the application of the trust concept to joint ownership as most joint owners were unlikely to know that they were trustees by virtue of their joint ownership.

### **Response**

We accept that describing the operation of trust law concepts in relation to jointly owned homes risks becoming too technical. We think however that some mention of the concepts cannot be avoided if users of the Code are to understand their position in law. We have reviewed the content of the draft Code and made amendments in response to these comments.

In relation to the interaction of guardianship remedies and remedies available under the general law, we remain of the view that the availability of other legal remedies for specific problems would not prevent a guardianship application, and vice versa.

We agree that where a missing person owns but is not the sole legal and beneficial owner of a property, the guardian cannot act as a trustee in place of the missing person in relation to that property. In the case of property belonging to the missing person but held on a bare trust we consider that the guardian can act as there will not be any person other than the missing person beneficially entitled to the trust property.

We have extended the content of the draft Code in relation to joint owners of land to make the actions that may have to be taken by the guardian and the surviving trustee clearer. We hope that by doing so we will make it more likely that potential applicants will consider what legal steps need to be taken in relation to any jointly owned home so that the court can make any appropriate orders in or at the same time as the guardianship order. We hope that this will make the references to trusts and trust law clearer without overburdening the user with technical legal details.

### ***What is the legal effect of the guardian being the agent of the missing person? Duty not to delegate (paragraph 4.42)***

The Law Society raised concerns about the effect of the appointment of a guardian on the role of financial advisers/agents who may have been managing a missing person's affairs under discretionary management regimes. The Society was concerned that the guardian would not be able to delegate investment management decisions to the investment manager. The fear was that this may lead to additional costs/delays, whilst new arrangements are made concerning the discretionary management scheme in question when stability was needed. The Society considered that express authority to delegate should be conferred (and pointed to the practice in the Court of Protection template orders for the appointment of a financial deputy under the Mental Capacity Act 2005).

Land Registry said that a court should be able to order that a guardian was able to delegate a function if it wished to and recommended that the Code should be clear as to whether a guardian could appoint an attorney. Land Registry also suggested that more examples of permissible delegations should be given; and that the principle that the guardian is deemed to be the agent of the missing person and “stands in their shoes” does not remove any of the powers of the missing person as an owner.

### **Response**

We have amended the draft Code to address these points.

The Act does not authorise guardians to delegate their duties unless, as is stated in paragraph 3.33 of the draft Code, provision is made in the court order appointing them to do so. A guardian can also apply to the court for a variation of their order if they wish to delegate a function. The delegation of administrative functions is not subject to these controls. A guardian can appoint an estate agent to sell a house or a bookkeeper to prepare accounts, but cannot leave the decision of whether to sell or what money to spend or save to someone else. This follows the general law relating to fiduciaries.

In relation to discretionary management arrangements, we have amended the draft Code to suggest that applicants for a guardianship order consider whether there are any such arrangements when they are considering what order to seek so that any necessary special provision can be made in the order. Without such arrangements, the guardian will not be able to resume control of those assets.

## **Section 4 Guardianship Orders**

### ***When can a guardian make a gift? (paragraphs 4.57 and 4.58)***

Several respondents commented on these paragraphs. The principal concern was that the guidance was not sufficiently clear.

Missing People recommended that the definition of gift from the glossary should be included in the body of the text so the meaning is clearer. The charity also made a number of specific observations:

- the draft Code did not make it sufficiently clear when a guardian could make a gift, particularly in relation to gifts for dependants;
- the guardianship order should contain provision about the scope of the guardian’s powers in relation to dependants;
- the Code should make clear that continuing existing payments would be likely to comply with the best interest test.
- the guidance should not focus too heavily on costs for dependants that are already proven in the missing person’s spending before they went.

The point was made that if a missing person was making an existing payment or would normally give a wedding/birthday/religious festival gift (or other ‘customary occasions’), the expectation would be that the guardian would continue to make payments would be in line with the missing person’s intention and wishes.

The Law Society pointed out that gifts could be distinct from maintenance, and helpfully suggested that the comments of District Judge Eldergill in the 2017 Court of Protection case, *The Public Guardian's Severance Applications*<sup>1</sup> about the distinction between gifts and maintenance could be incorporated in the Code with minimal adjustment. Missing People suggested that analogies could be drawn from Court of Protection case law.

TISA said that it would help financial organisations to have more clarity both in the Code's guidance and in court orders on what would and would not be permissible for gifts made by a guardian, including in relation to discretionary trusts. TISA also made the point that some bodies had additional internal controls and processes for withdrawals that might prevent third party withdrawals from the missing person's accounts.

Land Registry noted that it would be helpful for the guardianship order to make clear whether and to what extent the guardian can make gifts.

### **Response**

We note the concerns expressed about gifting. The Act specifies that gifts are not allowed unless specified in the Order of appointment, except for gifts made for the maintenance or benefit of a missing person's dependants.

We have reviewed the content of the relevant paragraphs in the draft Code and have sought to include additional and clearer guidance. We have drawn on the guidance issued by the Office of the Public Guardian<sup>2</sup> on gifting by Deputies in preparing the amendments. We would, however, stress that decisions about the power to make gifts will, however, ultimately depend on the facts of the gift in question. It is not sufficient to authorise the making of a gift that the missing person had made similar gifts in the past since the missing person's income may significantly decrease following their disappearance.

### ***When does a person cease to be a guardian? (sections 4.88 to 4.91)***

Land Registry noted that the Act did not provide for a guardian becoming bankrupt to lead to an automatic termination of their guardianship.

### **Response**

Bankruptcy of a guardian or the missing person does not automatically revoke the appointment of a guardian. This is analogous to the position in relation to deputyship under the Mental Capacity Act 2005. Revocation of a guardianship order would therefore ultimately be a matter for the court.

An existing or previous bankruptcy may be relevant to the decision of the court as to whether a person is a suitable person to be appointed guardian. We have amended the draft Code to encourage applicants for guardianship to consider making a number of financial declarations, including whether they have ever been a bankrupt, as part of the information provided to the court.

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<sup>1</sup> *The Public Guardian's Severance Applications* (Rev 1) [2017] EWHC COP 10, at para 152 (f) & (g):

<sup>2</sup> [www.gov.uk/government/publications/public-guardian-practice-note-gifts](http://www.gov.uk/government/publications/public-guardian-practice-note-gifts)

Once a guardianship order has been made, any bankruptcy of the guardian may potentially form the basis of applications for revocation on the basis that bankruptcy would demonstrate a lack of suitability to hold the role.

The Code of Practice as revised sets out details of issues relating to the guardian's own financial position which the court must have information about in determining guardianship applications. This will include any other proceedings or applications involving the missing person or their property – for example, bankruptcy proceedings and details of Power of Attorneys or deputyships in relation to the missing person. In relation to the guardian themselves, the Code suggests their witness statement (accompanying their application) covers issues such as whether they have ever been refused credit, have outstanding judgment debts, have been declared bankrupt or disqualified as a company director. The Code also advises applicants to declare in their witness statement if they have ever been convicted of a criminal offence.

Applicants could use publicly accessible free searches– for example, the Insolvency Service Register or for disqualified company directors<sup>3</sup> as well as the Public Guardian's register of deputies for powers of attorney.

## **Guardian's access to confidential documents**

The Law Society suggested guardians should be able to access confidential information, including a missing person's will, to enable them to fulfil their role in acting in the best interests of the missing person. It pointed to existing guidance issued by the Law Society and the Solicitor's Regulation Authority in relation to people who lack mental capacity, making clear that deputies are entitled to a copy of a will.

### **Response**

The Act does not provide a specific power to enable guardians to automatically access confidential information, and applicants for guardianship may wish to include requests in their application so the court can consider making provision in the order it makes. The Law Society and SRA may wish to consider the position of guardians in their guidance.

### **Question 2 - Do you wish to suggest:**

- **Any additional persons or organisations whom the Lord Chancellor should consult in the preparation of the Code of Practice?**
- **Any additional ways in which the Code of Practice should be made available other than as a hardcopy and online print document?**

Organisations responded with helpful suggestions of further contacts in the charity and financial sectors, and with public utilities.

On making the Code of Practice available in other forms, it was suggested that a summary be provided, and versions developed in response to needs.

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<sup>3</sup> [www.insolvencydirect.bis.gov.uk/eiir/IIRRegisterNameInput.asp?option=NAME&court=ALL](http://www.insolvencydirect.bis.gov.uk/eiir/IIRRegisterNameInput.asp?option=NAME&court=ALL)

The Law Society suggested the emphasis should be online in terms of increasing ease of access for lay people.

### **Response**

Some of the contacts suggested had been contacted as part of the consultation process, and the others have been followed up after the consultation period.

As mentioned in relation to question 1, we have included an overview in the introduction to the draft Code and hope this will provide a short guide. We also intend to work with Missing People to produce a summary. We will look at the production of other versions – for example, we will be producing a Welsh language version.

## **Applications to the Court - Rules of Court and Practice Directions**

The consultation paper explained that the High Court will have a central role in the proposed scheme of guardianship. It will have the exclusive power of appointing guardians and defining their authority. The court will also have power to:

- vary or revoke guardianship orders;
- provide rulings on whether proposed acts or past acts are or were within the authority of the guardian;
- issue directions as to how a guardian should act; and
- require the guardian to provide information and accounts about his or her stewardship to another person.

The practice and procedure of the court in relation to all these functions will be regulated by rules of court and practice directions so that people can readily exercise their rights and the business of the court can be conducted efficiently. To achieve this, it must be clear to the parties involved from the rules of court and practice directions what they have to do and when they have to do it.

In the consultation paper we indicated that we expected that existing rules of court and practice directions would provide generic procedures that can be applied and followed. We anticipated that applications would probably be made under Part 8 or Part 23 of the Civil Procedure Rules, but that the precise details of the rules and practice directions would need to be addressed in the rules in any event. The consultation paper asked:

**Question 3. Do you agree with the proposals made for content of rules of court and practice directions in relation to guardianship? In particular, do you agree with the proposals in relation to:**

- a) the content of applications for guardianship orders, variation orders and revocation orders?**
- b) the content of applications for accounts or other information, directions to a guardian or a declaration to be made?**
- c) the time limits and periods proposed?**
- d) the identity of the persons on whom notice of an application must be served?**

- e) the timing, form and content of the advertisement of an application?
  - f) the evidence required in support of an application and when it should be served?
  - g) the ground on which a claim or application may be served without notice?
- If not, please give details.

**Question 4. Do you agree with the other requirements set out in the proposals for rules of court and practice directions matters? If not please give details.**

**Question 5. Are there any matters omitted from the proposals for rules of court and practice directions that you consider should be included?**

**Question 6. Are there any other points relating to rules of court and practice directions that you wish to make?**

The response in the written replies was relatively limited, but there has been substantial engagement with HM Courts and Tribunals Service, the Office of the Public Guardian and lead members of the judiciary in the preparation of rules and a Practice Direction We describe first some general points made and then the specific observations, before responding to both.

The Law Society expressed the view that the Court of Protection, rather than the High Court, should have been the designated court for guardianship matters. The Society argued that these cases may often be dealt with on paper without hearings, the Court of Protection is non-adversarial and has cheaper fees plus a working relationship with the Public Guardian.

Land Registry suggested that when serving documents on interested persons, the guardian should specify the relationship of the missing person to the person served.

Concerns were expressed about the cost of advertisements, and the fact that some areas no longer have a local newspaper serving them. There were queries on whether online adverts would be sufficient. Requests were made for guidance on the content for adverts. Finally, concerns were raised about privacy issues in terms of details in the advert including addresses being given (especially in cases where an abusive relationship had been alleged).

The Law Society thought newspaper advertising was outdated, and rules adopted by the Court of Protection would provide a better approach to serving notice of applications.

Missing People, and Peter Lawrence (a leading campaigner on missing people) made the point that families who have previously made applications under the presumption of death court process encountered difficulties in getting copies of some documents requested by the court. This included getting statements from financial organisations on account details or police reports on the missing person investigation. Mr Lawrence also suggested further guidance for applicants on the papers they should be sending in to the court and that the early stages of the application process should be as simple as was possible.

## Response

We have prepared draft rules of court and a new practice direction in the light of the comments received and have submitted them to the Civil Procedure Rule Committee for its consideration. The principal features are:

The initial application for a guardianship order will be by way of a Part 8 claim form supported by a witness statement. The draft Code of Practice (and Practice Direction) sets out what information should be in the claim form and what should be provided in an accompanying witness statement. The intention here is to keep sensitive personal information about the circumstances in which the person has gone missing and why the guardianship order is needed, which will be required by the court, separate from the claim form which is a public record document. This broadly follows the information indicated in the consultation paper, albeit in more detail. All other applications, including applications for a further guardianship order and applications for variation orders and revocation orders, will be made by way of application notices. The information to be included is again described in the Code of Practice. The intention reflected in the way the rules/practice direction have been drafted is that all the applications are linked to the original claim thereby avoiding multiple applications in different courts for guardianship orders in respect of the same missing person.

We have also changed some of the expected time periods in the procedure, in the light of concerns about ensuring there will be sufficient time for parties and the court to process or prepare the papers. In doing so we have provided a separate time period for potential interveners (people who want to become involved in the court application/process) who learn of the claim through an advertisement.

The provisions in the rules regarding service of the claim broadly follow those anticipated in the consultation paper. We have, however, added the Public Guardian to those who must be notified of the claim and have added those who have applied to intervene in applications previously into the list of those to be notified of subsequent applications.

We noted the suggestion that some cases (or some stages of cases) could be suitable to be heard on paper. We think this is a matter best left to the court under its powers of case management and have provided for this in the Practice Direction.

Peter Lawrence suggested that the notice requirements and the procedure of applying to the court for permission to dispense with these should be made clearer: and whether a separate prior application would be necessary. We have taken this into account in the draft Code and have suggested in the Practice Direction that you need to apply to the court before issuing the claim form. In situations where the applicant does not know details of the missing person's close family members this can be explained in the witness statement accompanying the application.

In the consultation paper we also raised questions as to when information and evidence should be provided. This struck a chord with some respondents who were concerned that the court procedure should be as simple as possible, especially in the early stages. After discussions with the court we have, however, decided that the court proceedings should follow the usual process, but that the Code of Practice should provide as much assistance as practicable as to the approaches that might be adopted by applicants as to the amount of information that will have to be included.



In view of the revisions we have made to the time limits for responses, the draft rules now provide for the first hearing to be no less than 70 days after the issue of the application (claim form) rather than more than 28 and less than 56 days. We apologise for the error on page 28 of the consultation paper that indicated a period of no more than 28 days.

The Court's broad case management powers allow it to decide whether to issue directions or determine applications for guardianship order on the papers alone, or to have an oral hearing. This position is reflected in the draft Practice Direction. We note the Law Society's concern that applications should be as simple and inexpensive as possible, but the best safeguard against guardians defaulting in the performance of their duties is a rigorous appointment process.

On Land Registry's suggestion about specifying the relationship to the missing person of the person served by a guardian, we agree and have included this in the Code of Practice and the court rules.

We have noted the concerns about the difficulties of obtaining information before the order is made. We have expanded the draft Code of Practice to include a list of papers that may be required by the court, and suggestions as to how to explain their absence to the court where there have been difficulties in accessing material to submit in support of the application. In some cases, this may result in the court requesting access to papers or making a disclosure order under its case management powers to obtain documents from third parties. Nonetheless, there may be cases in which it is more difficult than the families would hope to obtain information and the proceedings take longer as a result. We are therefore discussing the Act with key stakeholders, such as financial organisations, to investigate whether there are steps that could be taken to help them to respond to enquiries from applicants for guardianship.

We note The Law Society's comments about the choice of court. Careful consideration was given to the possibility of allocating the guardianship jurisdiction to the Court of Protection. The designation of the High Court was determined after consultation with the senior judiciary in accordance with section 23 of the Act. The Court of Protection's jurisdiction is concerned with persons who lack capacity. Introducing guardianship cases would undermine the integrity of the jurisdiction. The High Court has a wider range of powers at its disposal and is already the designated court for applications under the Presumption of Death Act 2013, which is also concerned with disappearances (and applications for guardianship and presumption of death may arise at the same time in relation to the same missing person).

Finally, we have noted the comments regarding advertisement and mention that draft practice direction makes clear that the advertisement need not follow the format proposed provided equivalent information is provided. We have now also provided that the advert can be placed in either the internet or print edition of a newspaper. The advertisements are an important part of the process in providing an opportunity for people who are not automatically served notice to intervene in a guardianship application or pass information to the applicant or the court. Removing a requirement for advertisement would potentially significantly reduce the number of persons who might learn of the proposed application and it is intended that it will be retained. The need for advertising is a statutory requirement in relation to applications for guardianship orders, variation orders and revocation orders (section 20(1) of the Act).

**Question 7. Do you agree with the information to be included in the court order appointing a guardian? If not, please provide reasons.**

Missing People, was unsure of how much information had to be provided in a court guardianship order, but were in favour of a significant level of detail. There was also concern that whatever information was included, it should be clear (for example, in relation to joint and separate appointments). TISA suggested the last known address of the missing person should appear in the order to assist financial (and other organisations) with identification and verification.

**Response**

We consider that the information suggested is broadly correct, but the drafting of the court order will ultimately be a matter for the judiciary on a case by case basis.

**Question 8. Do you agree that standard wording should be developed to assist in the drafting of guardianship orders?**

This proposal was generally supported in our discussions.

Missing People, asked for plain and accessible English to be used in any standard wording in court orders. The charity also made the point that court orders should not be so standardised that the individual circumstances and needs of a guardian were not addressed.

TISA supported standardisation of court orders to assist financial organisations handling them, and also to reassure service providers that a guardian's authorisation was bona fide.

**Response**

The drafting of the court order will ultimately be a matter for the judiciary, but we have passed comments on to the lead judges in the Chancery and Family Divisions of the High Court. We will work with them to try to develop suitable standard wording.

**Question 9. Do you agree that the Public Guardian should have the right to request copies of court documents relating to the appointment of a guardian or should a more selective approach be adopted?**

This suggestion of a right to request court papers was supported by Missing People, who argued it would help the Public Guardian have an understanding of the basis and context for a guardian's application. A number of other respondents supported this as well.

**Response**

We support this proposal and have incorporated it into the draft rules of court for guardianship proceedings that will be considered by the Civil Procedure Rule Committee. We have also provided for copies of all orders made by the court to be provided to the Public Guardian.

## **Registration and Supervision of Guardians - OPG Regulations**

The Public Guardian will be responsible for the supervision of guardians in much the same ways as he or she is for the supervision of deputies under the Mental Capacity Act 2005. The Public Guardian will be able to take action against guardians who are failing to fulfil their duties properly, including making applications to the court. The Public Guardian will also be able to provide general guidance to guardians and others.

The proposed functions of the Public Guardian in relation to guardians in the 2017 Act were modelled on the Public Guardian's functions in relation to deputies appointed under the Mental Capacity Act 2005 as set out in Part 4 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007. The guardianship regulations will be implemented as an amendment to the existing deputyship regulations.

**Question 10. Do you agree that the registration and supervisory provisions of the secondary legislation for guardians should be based upon, and where appropriate, the same as for deputies appointed under the 2005 Act? If not, please give reasons.**

**Question 11. In particular, do you agree that the regulations relating to the functions of the Public Guardian in respect of guardians should follow the terms of the equivalent regulations for deputies under the Mental Capacity Act 2005 in each of the following areas:**

- a) **Registration**
- b) **Searching the register**
- c) **Providing, maintaining and replacing a security bond**
- d) **Reporting to the Public Guardian**
- e) **Complaints against guardians**
- f) **Review of decisions made by the Public Guardian**

**If not, please give details.**

In various meetings stakeholders thought that the analogy of deputies was a good one, and should apply. Most of those who commented considered that the relationship of both deputies and guardians to a person not able for the present to manage their affairs, and the responsibilities they bore for managing them were directly comparable. There were comments made that the Public Guardian's staff who will be supervising guardians would need specialist training and guidance to undertake the new role, including sensitivity to the emotional impact on families of missing people, and an understanding of some of the challenges that were presented to guardians and families – for example, not necessarily having details of the missing person's financial accounts and records.

Other comments noted that the benefits of this approach would also extend to financial institutions who would be able to adapt their existing systems for handling deputies to guardians,

HM Land Registry stressed the importance of unique identifying reference numbers for guardians to assist with authentication. Land Registry also asked for confirmation on the face of the order as to when it would take effect – for example whether it took immediate effect on the day of the court hearing, or was activated only when a guardian had been registered by the Public Guardian.

### **Response**

We are encouraged by the supportive comments in responses and discussions for the approach proposed. We will proceed with the preparation of regulations based on the registration and supervision for deputies appointed under the Mental Capacity Act 2005.

We are in discussions with the judiciary, HM Courts and Tribunals Service and Office of the Public Guardian on the terms of orders and the administration of cases at the court, registration and supervision stages. Suggestions made in consultation responses and stakeholder meetings are being fed into those discussions and will be considered as part of the process of finalising the operational aspects of implementation.

We have noted the suggestion of a unique identifying reference for every guardian. We will keep this under-consideration, but the procedures we are developing have to be accommodated within the administrative systems of the court and the Office of the Public Guardian. Within the court system, the guardianship claim case number will link all subsequent applications, but it will not identify the guardian in the way suggested. We do not propose to make any requirements in this respect.

The date for the order taking effect will be a decision for the court.

**Question 12. Do you think that regulations should be made relating to any other aspects of the functions of the Public Guardian in respect of guardians? If so please give details.**

**Question 13. Do you consider that the Public Guardian should be given additional powers to secure compliance with requests made to guardians in the course of supervision? If so, please give details.**

The Law Society has said that further detail is required on the Public Guardian's powers in relation to supervision of guardians of missing people. The point was made that the Public Guardian should have powers to access financial data where the guardian is not providing it. The Society also queried how Public Guardian visitors would be able to call on the guardian as the Public Guardian's powers did not extend to this.

Land Registry requested notification of orders and variations/revocations where a missing person is the registered proprietor of (solely or jointly) of a registered estate or registered land charge, and on being advised of guardianship applications.

### **Response**

The Public Guardian's supervisory role is based on the same statutory provisions that apply to the supervision of deputies under the Mental Capacity Act 2005. The intention is that substantially the same regulations will apply to guardians as apply to deputies under the Lasting Power of Attorney, Enduring Powers of Attorney, Public Guardian Regulations 2007 which includes the right to request information from the guardian. The court will also be setting out conditions in making Guardianship Orders, such as the need for guardians to make annual reports and financial returns to the Public Guardian. The Public Guardian

will have the same powers in relation to guardians as in relation to deputies. We do not propose to extend those powers as part of the implementation of the Act.

The missing person may be the registered proprietor of land. The guardian will wish to know whether this is the case (assuming the order relates to the property). The onus will be on the guardian, when appointed, to notify HM Land Registry where their appointment has implications for information held by the Registry. However, they may not know that the missing person is a registered proprietor. We do not intend to propose any obligation on the guardian in this respect, but have amended the draft Code of Practice to raise awareness of the issue. Notification of the making of an order will be restricted to the notification of the Public Guardian by the court.

## Fees

The purpose of appointing a guardian is to secure the proper management of the property and financial affairs of a missing person. The consultation paper described the fees that would be payable to the court and the Office of the Public Guardian. The expectation was that court fees would follow the standard fees payable for Part 8 and Part 23 applications (subject to the present exemptions and remissions); and, that new fees would be set by the Public Guardian for registration and supervision with the expectation that they would be broadly similar to those charged for deputyship cases. Different fees are charged by the Family Division and the Chancery Division.

### **Question 14. Do you agree with the approach proposed to court fees, exemptions and remissions in respect of guardianship applications? If not, please give reasons.**

Missing People welcomed the proposal that guardians would be able to recover court fee costs from the missing person's estate.

The differing court fees between the Chancery and Family Divisions of the High Court were noted. One respondent stressed the need for the Code of Practice to provide information on which division guardians should apply through, based on the circumstances of their case. It was suggested by Missing People that the Code of Practice should be transparent on the differences in fees for bringing cases in the Chancery and Family Divisions of the High Court.

Three responses (including Missing People and The Law Society) requested that court fees should be deferrable until after a guardian had obtained access to a missing person's estate.

Missing People, suggested that there should be the possibility of a minimum supervision fee for guardians.

Missing People also recommended the court be able to use its discretion in deciding whether someone intervening in a case could have their costs reimbursed from the missing person's estate, rather than it being automatically being assumed. The fear expressed was in relation to the need for a safeguard against malicious interventions.

## Response

Applications relating to guardianship proceedings are required to fit into the wider framework of court fees. The current system does not permit deferred payments to be made. Similarly, general provisions will govern the court's discretion as to whether intervenors could be reimbursed for their court costs from the estate of the missing person.

The Code of Practice will make it clear that different fees are levied in the Chancery and Family Divisions, and provide links to information on fees, including exemptions and remissions from fees. As fees will change periodically, including the amount of specific fees in the Code of Practice could be misleading as the Code would have to be amended, which can only be achieved after a draft is laid before Parliament for 40 days without objection.

### **Question 15. Do you agree that the fee structure to be implemented by OPG for guardianship related services should broadly follow that for deputies? If not, please give reasons.**

Missing People agreed with the principle, but emphasised that costs should not be prohibitive for guardians.

## Response

It will be for the Lord Chancellor, with the agreement of the Treasury to determine the level of fees for guardianship services and will be laid down in regulations.

## Assessment of Impact

The consultation paper also considered the expected impact of the proposals. The impact was analysed generally in an impact assessment, in relation to the Public Sector Equality Duty in an equalities assessment and in relation to families through a family impact assessment. All three assessments are built upon the equivalent assessments carried out for the 2017 Bill (and before that the 2014 consultation paper).

### **Q.15 Do you agree with the assessment of the impact of the proposals to implement the Act set out in the impact assessment?**

**Question 16. What do you consider to be the equalities impacts on individuals with protected characteristics of each of implementation proposals? Please give reasons.**

**Question 17. Do you agree that we have correctly identified the range of equalities' impacts under each of the implementation proposals? Please give reasons.**

**Question 18. Do you agree with this assessment of the impact of the proposals to implement the Act on families?**

No new information was supplied and we do not propose to alter our assessments.

## **Additional points raised in consultation responses**

Respondents raised a number of points outside their replies to the questions asked in the consultation paper. Some relate to questions already asked but all are to some degree independent. We summarise them here and respond to them individually.

### **1. Debts of the missing person**

An issue which a number of respondents raised was a lack of information on how a guardian should handle debts in the missing person's name. It was suggested the Code of Practice should include guidance on the repayment of debts or talking to creditors about cancelling them or agreeing a debt management plan.

#### **Response**

We have amended the Code of Practice to include material on debt issues.

We understand from discussions that financial organisations will adopt individual commercial approaches to debt management for a missing person, and in many cases will use their discretion to work with the guardian or others to resolve debt issues. Just as guardians will assume responsibility for managing a missing person's assets, so they will be responsible for managing their debts. They will be able to seek assistance from debt advice agencies and services.

### **2. Guidance for financial organisations/public utilities**

It was recommended that guidance was produced for financial organisations and public utilities on the arrangements that could be made with guardians for managing a missing person's account and commitments. This would include guidance on reaching an agreement on payments (including for shared properties), and freezing interest on debts.

Additional guidance was suggested for consumers with joint accounts that would be affected by the appointment of a guardian, for example those who are joint holders with the missing person.

#### **Response**

We have been speaking to financial organisations and public utilities on the introduction of the legislation and the role of the guardian and will explore whether cross-industry practice guidelines (which will be industry led) could be developed. In the meantime, we have included more material on joint accounts and the restrictions that financial institutions apply.

### **3. Financial/Economic abuse**

Missing People, and other respondents raised concerns about the court's role in protecting a missing person from an applicant for guardianship who had been part of an abusive relationship with the missing person. The point was made that guardianship would provide such a person with more control over the missing person's finances and an ability to exert harmful influence in their absence.

This reinforced the need for wider family members and friends to be aware of guardianship applications and be able to make comments directly to the court (rather than via the applicant).

This also raised the question of whether the police should be a consultee on applications.

## Response

The system has been designed to protect the best interests of a missing person, and safeguards have been put in place for every stage of the process. This includes features such as the serving of notice and advertising for applications (which will enable others to become involved in court applications to raise any concerns about an application), and the role of the court in satisfying itself that a proposed guardian is suitable.

A court may restrict the powers granted to a guardian and impose responsibilities – for example, they may be granted power over only part of a missing person's estate. The court may require reports to be submitted by the guardian to the Public Guardian on their actions and use of funds. The court may require guardians provide security which can be drawn on if a guardian has misused funds.

The legislation provides for the Office of the Public Guardian to supervise the work of guardians, and it can act in a variety of ways if there are grounds for concern about how a guardian is exercising their powers. Ultimately the Public Guardian can apply to the court to vary or revoke a guardianship order. Such applications can, with the permission of the court, be made to the court 'without notice', that is without the guardian being aware of a move to remove them, to protect the missing person's estate.

On the police being a formal consultee for each guardianship application, this is not a legislative requirement and is not a duty we would prescribe. The police will usually be involved in the process in terms of a guardian seeking a police report/confirmation of a person being missing. In some cases, the missing person will have disappeared abroad, and the British police may not be involved.

## 4. Sale of Property

The Law Society expressed concern that a missing person does not have the same protection as a person who lacks mental capacity if a property in which they have an interest needs to be sold. The Society points that under the Mental Capacity Act 2005, the Court of Protection or High Court is required to expressly authorise the retirement of an incapable person as trustee and someone is appointed in their place to ensure a property sale is dealt with and the incapacitated person's interests are served in full. A particular concern would be situations in which the guardian was the same person as the co-owner of a property (such as a spouse) and the risk this would provide for the missing person.

## Response

The legislation does not provide for the same remedy as provided in the Mental Capacity Act 2005, but the prime duty of a guardian is to act in the best interests of the missing person, and that is the standard against which their conduct will be measured. In the case of a joint tenancy a guardian can resign their trusteeship. The best protection against abuse is the quality of the assessment of the character of the proposed guardian. The numbers of applications for deputyship are much greater than applications for guardianship are expected to be. The standard of scrutiny involved in the appointment is expected to be higher than in deputyship cases. The approach in the 2005 Act was therefore not replicated in the 2017 Act, which specifies that gifts are not allowed unless set out in the Order (except in relation to a gift made for the maintenance or benefit of a dependant of the missing person).

Guardianship orders are time limited, for a maximum four year period, and will be fairly specific in the powers granted to a guardian. The court would need to be satisfied that a property needed to be sold for instance, before granting that power.



## **5. Number of Guardians**

TISA suggested that no more than 4 persons may be appointed to act for a missing person at any one time, in line with company law. TISA argued that more than four guardians would cause administration issues for financial organisations.

### **Response**

We believe that in the majority of cases a single guardian will be appointed, and unless the missing person's estate is vast it will be very unusual for more than two to be appointed. The Act does not provide legal authority to set a ceiling on the number of guardians who may be appointed.

## **6. Residency**

TISA sought clarification on whether only UK residents would be permitted to act as guardians, as non-UK residents may pose issues for some financial organisations.

### **Response**

The legislation does not prescribe that the guardian must be a UK resident. Any applicant for guardianship would have to satisfy a court of their ability to discharge their functions satisfactorily.

## **7. Return of the Missing Person**

A number of financial and utility bodies sought further clarification of the steps to be taken when a missing person returned and resumed making personal transactions and decisions while a guardian for them was still in place.

Another query was if a missing person returned but lacked mental capacity, would the guardianship order/role remain in place or be replaced by either an attorney (previously appointed under a Power of Attorney) or a Deputy appointed by the Court of Protection.

### **Response**

The return of a missing person does not lead to an automatic revocation of the court order – a legal process needs to take place. Where a missing person returns, the guardian, on becoming aware, is obliged to apply to the court for a revocation order. This applies irrespective of whether the returned missing person has mental capacity. Any question about the capacity of the returned missing person would be addressed in accordance with the provisions of the Mental Capacity Act.

## **8. Mental Capacity of the Guardian**

Some respondents raised the issue of what would need to happen were the guardian to lose their mental capacity.

### **Response**

A guardian lacking the mental capacity to carry out the functions of guardianship properly should be removed. The process would be for the order of guardianship to be varied or revoked. This would be done by an application from either a third party or the Public Guardian (if aware) with sufficient interest in the guardianship order, but could be initiated by the guardian. Another guardian could then be appointed to take care of the property and financial affairs of the missing person if appropriate.

## **9. Express Trusts**

In some cases, an express trust may be set up on the basis of the Act, for example to manage a missing person's property or land. An express trust is one set up with a clear, expressed intention to create a trust. If such a trust is set up it will need to be registered with HM Revenue and Customs in line with the requirements of the EU Fifth Money-Laundering Directive.

### **Response**

We will address this in the guidance in the Code of Practice.

## **10. Access to personal data of missing person**

During a meeting with public utilities to discuss the Act's implementation, a point was made on personal data of the missing person. Internet providers suggested there were types of personal information (for example personal files and pictures, computer browsing history) which the supplier would not allow to be made available to a guardian.

Another point made at the meeting was whether a guardian could make a subject access request (under data protection law) on behalf of the missing person. Subject access requests are normally made by an individual themselves, for information an organisation holds on them.

### **Response**

We agree that a guardian may wish to access personal information about the missing person (for example, to establish what his or her wishes had been). The Act has not made any amendments to data protection legislation which applies.

A guardian would be able to make a subject access request on behalf of a missing person, but the organisation would be able to refuse the request unless they felt it was reasonable to provide a guardian with the information, without the missing person's consent. The organisation would decide this by balancing a guardian's right to access data against the individual's information rights. A guardian could challenge such a decision via the Information Commissioner or the courts.

## **11. Closing utility accounts**

During the meeting with public utilities to discuss the Act's implementation, public utility representatives agreed with the need for sensitivity on closing customer accounts ((e.g. for gas, electricity, water services etc).

In the normal course of commercial practice, no payment for three months would result in an account being closed, but representatives accepted the circumstances of a missing person were different. Once appointed, a guardian would be able to take on responsibility for paying bills from the missing person's assets, or they may choose to transfer bills to another person's name.

### **Response**

A sensitive approach to the closing of utility accounts would be welcomed, and the guardian would be able to assume responsibility for the account once appointed if there were sufficient assets in the missing person's estate.

## **12. Fraud and impersonation**

A number of organisations raised concerns about the risk of someone posing as a guardian in order to access a missing person's finances or personal information.

TISA raised concerns about the address/last known address of a missing person. In subsequent discussions, the Financial Conduct Authority advised on standard checks financial bodies would undertake as part of anti-money laundering measures.

### **Response**

As with all verification processes, the organisation handling a request will want to be satisfied that a person is who they say they are and in relation to a missing person is a guardian authorised to act.

Guardians will need to be able to provide a copy of the order providing their authority, and some satisfactory personal identification. The organisation checking a guardian's credentials will be able to contact the Public Guardian (as holder of the register of guardians) or the court which made the order. This will include checking on whether the guardian is subject to a variation order, and that there has not been a revocation order.

A missing person's last known address will normally be known, unless they were of no fixed abode.

## **13. Guardian and Registered Land**

HM Land Registry raised the issue of a person's powers of disposing of land that is registered, governed by the Land Registration Act 2002, in the context of guardians. If a guardian has been appointed, the missing person's powers as owner of registered land are unchanged. Unlikely though the eventuality may be, the missing person could still deal with his or her property.

Land Registry have suggested this is addressed by asking the guardian to apply to Land Registry for an entry on the Register for a restriction to reflect their appointment. If a missing person then reappeared, they could apply to cancel the registration (or the guardian would have revoked their appointment).

### **Response**

We will discuss this further with Land Registry.

## **14. Guardian's ability to enter longer term financial commitments**

Financial and other organisations queried whether a guardian, with a 4-year term of authority (at least initially) would be authorised to act for longer term transactions for a missing person. The example given was whether a guardian could intervene to adjust the terms of a missing person's mortgage agreement.

Another query related to a guardian's ability to purchase/sell shares.

## Response

The legislation provides for a guardian's ability to manage the missing person's financial and property affairs, and so in law a guardian is able to act in these capacities. However, it will be for guardians/families to decide what is in the best interests of a missing person, and for financial organisations to form a commercial or policy view, depending on the specific circumstances of an individual case.

We will provide examples in the Code of Practice on these issues.

## 15. Situations where joint signatures are required

Some financial bodies highlighted transactions involving joint accounts where actions require two signatures to make changes. Where a guardian had been appointed, the probable solution is that the guardian – once authorised – would be able to take on the role of the missing person in jointly accessing and using the account.

Where the guardian was the other joint account holder (e.g. spouse of the missing person) the situation is more complex.

## Response

We will be discussing this issue with the financial sector further, and hope to work with representative organisations (who have been taking a very constructive approach) on guidance for both financial bodies and guardians/families. This may involve adapting existing guidance in relation to Deputies for people lacking mental capacity.

## 16. Multiple representatives of a Missing Person

HM Land Registry queried whether a guardianship application should proceed where a missing person was subject to a bankruptcy order or a Deputy has been appointed under the Mental Capacity Act 2005.

## Response

Applications for guardianship are not prohibited in these circumstances, but in practice we feel it is unlikely that a court will agree to the need for one if the missing person's interests are already being handled – guardianship is designed to cover situations where there is no other legal remedy for a family/friends of a missing person. We have included material in the draft Code of Practice to explain the relationship of these different statuses more fully.

## 17. Legal Aid Eligibility

Missing People asked whether legal aid would be available for guardianship applications, and if it was whether it would be the means of the missing person or the guardian that would be assessed in terms of eligibility.

## Response

Legal services in relation to guardianship applications are not in scope of legal aid. However, legal aid may be available through the Exceptional Case Funding scheme where a failure to provide legal aid would breach, or risk breaching, ECHR or enforceable EU law rights.

## Conclusion and next steps

1. The Ministry is very grateful to everyone who took part in the consultation. Their contributions have resulted in numerous changes to the detail of the initial proposals. We believe that these changes will make the system better and more efficient for those involved in guardianship.
2. The Act is an important piece of legislation filling a gap in the current system of legal remedies. At present the family and friends of a missing person have no means of dealing with the financial and property affairs of their loved one, and this is adding to the distress and difficulty of their situation. The Government is determined to do all it can to bring the Act into force in July 2019. As this consultation response illustrates, there is a wide range of work to be done in policy, legal, operational and procedural terms – including a number of Statutory Instruments
3. In moving forward with implementation, the Government will continue to work closely with a range of organisations and stakeholders to put all the necessary building blocks in place. As such, the plan is to have the following elements in place for the Act to come into force in July 2019:
  - Rules of court and, practice direction for guardianship applications
  - Regulations for the registration and supervision of guardians and specified fees payable to the Public Guardian for such supervision
  - A Code of Practice for guardians and anyone who becomes involved when a guardian for a missing person has been appointed.
4. Guardianship is a new legal status, and it is clear that once it becomes operational there will be a need for regular review to ensure that the processes which have been designed work in practice, and meet the needs of all those who are using them. That applies most of all to the families and friends who need a guardianship order, but it applies equally to the organisations who will be involved in making it work – whether Missing People providing support, the Public Guardian’s staff, the judiciary and court staff, financial and other organisations processing business for guardians.
5. Below the level of the formal rules, regulations and operating systems, we see the need for other materials – for material on the gov.uk website that helps people step-by-step with considering or making applications; for a user-friendly mini-guide as envisaged by Missing People; for guidance from the Public Guardian on steps to comply with supervision; and for guidance to financial organisations drawn up by their representative bodies. We will be working to prepare these.

## 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 respondents**

1. The Law Society
2. Peter Lawrence OBE
3. National Crime Agency
4. Missing People
5. HM Land Registry
6. Lloyds Banking Group
7. TISA













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