

# Guardianship consultation

*Missing People has produced this paper as a guide. It should be used in conjunction with the Ministry of Justice's consultation paper by way of getting a full picture of the proposals.*

The Government is considering introducing a new law in England and Wales that would allow those close to a missing person to manage the financial affairs of that person while he or she is missing, by becoming the 'guardian' of the missing person. It has launched a consultation in order to find out what members of the public think about its proposals. Similar schemes already exist in other countries (e.g. Australia and Canada) and these have influenced the consultation proposals.

Outlined below are some frequently asked questions concerning the consultation, a summary of the Government's proposals and details of how you can respond to the consultation. If you want more details of the proposals you should refer to the appropriate section of the [consultation paper](#).

## FAQs for families of missing people

### What is a consultation?

A consultation is a way for the Government to obtain views from members of the public and organisations on a particular issue. The Government produces proposals for a change in the law and then asks for comment before making a final decision about whether to take those proposals forward. Consultations are therefore an important way in which the public can influence new laws.

### Will it influence the Government's decision?

The Government will take into account the responses to the consultation when making a decision as to whether to introduce new legislation, and will also be influenced by the numbers of people responding either for or against the proposals. The Government has not yet decided if it will bring forward new legislation, but, if it does, it will most likely be along the lines of the proposals set out in the consultation. It is also possible that the Government will change its proposals in light of better alternatives suggested by people and organisations who respond to the consultation.

### Why should I respond?

The Government has aimed this consultation at anyone in England and Wales interested in what happens to the property (including finances) and affairs of a missing person before they return or are found, or are presumed to have died (there is a separate law for dealing with the affairs of a missing person who is presumed to have died). The Government has specifically included families of people who have been missing or who are currently missing in a list of people they are hoping will respond.

The families of missing people are likely to have particular insight into the practical difficulties of trying to look after a missing person's property and affairs, and will be in a good position to judge whether or not the proposals will work. Your response could help identify a particular issue the Government has not thought of, or simply encourage the Government to go ahead with the proposals (if you think they are a good idea).

### **How can I respond?**

There are two ways in which you can make your views known. You can respond online via the consultation paper itself, or you can send a letter. The addresses can be found towards the end of the consultation paper.

The consultation paper has a list of specific questions that the Government is seeking answers to. You can answer as many or as few questions as you would like. Alternatively you can write a letter setting out your views on the proposals without specifically answering the questions. Even a short response saying that you support the proposals, or a response explaining why you think a new guardian position should or should not exist, will be taken into account. You do not have to give an opinion on how the position would work in practice, if you do not want to.

Although you do not need to respond in the format set out in the consultation paper, if you do not, you should make sure that you state your name and address, and, if you are representing a group or organisation, that you state the name of the group or organisation and a summary of the people or organisations you represent.

### **Who else will be responding?**

A number of other interested organisations and individuals will be responding to the consultation. This may include people who have previously been missing themselves, charities and other organisations who support missing people and their families (e.g. Missing People), organisations representing bodies affected by the proposals (e.g. insurance companies and banks) and other professionals whose work may be affected by a change in the law in this area (e.g. lawyers).

### **When do responses need to be submitted by?**

You need to send in your response by 18 November 2014.

It is possible that your response may be taken into consideration if you respond later than this date, but you should check with the Ministry of Justice first, using the contact details provided in the consultation paper.

### **Will my response be treated confidentially?**

Please bear in mind that this is a public consultation and the Government will publish a paper which summarises the responses received, and may reproduce responses in whole or in part. In addition, the names of all respondents will most likely be published alongside the Government response. If there is

sensitive information in your response, you may prefer your response to be published anonymously, or for certain information not to be published. If this is the case, you should explain in your response why you think the information should be kept confidential. While the Government cannot promise not to disclose information you have asked them to keep confidential, it is unlikely to make public any personal information that you have asked them not to disclose.

### **What happens next?**

Once the consultation period has ended, the Government will look at the responses received in order to evaluate public opinion on the proposals. The Ministry of Justice will produce a consultation response in which it will summarise the responses received, say whether the Government intends to go ahead with the proposals, and explain any changes to the proposals, in light of the consultation responses.

### **Consultation summary**

Below is a summary of the parts of the consultation relevant to family members of missing people. After each section of the summary we have included some questions which will hopefully flag up relevant issues you may wish to think about or include in your response.

#### **Current legal situation**

When a person goes missing, any legal or financial arrangements in relation to the missing person's affairs will remain in place just as they did before the person's disappearance. In some cases this can cause problems for family or friends of a missing person who may struggle to deal with the missing person's debts, mortgages or Direct Debits. It may be difficult to access money needed for dependants who were previously reliant on the missing person for financial or practical support. Banks, insurance companies, or other organisations may not be prepared to discuss the missing person's affairs with anyone other than the missing person, or to accept instructions – which may be designed to protect the interests of the missing person – to move money or to stop or vary payments because of their contract with the missing person. As a result, missing people can return to find their financial and legal arrangements in disarray, possibly beyond repair.

#### **Things to think about:**

- *Do you have any experience of the types of issues mentioned above? What practical difficulties did you face, and was it possible to overcome them?*

#### **The Government's proposal for a guardian role**

The Government is suggesting addressing the issues above by introducing a new legal status of 'guardian'. Applicants for the role of guardian could include the spouse or relative of the missing person, or a business partner. Once appointed (by the court), the guardian would have the authority to deal with the property and financial interests of the missing person. The guardian's decisions would be

legally binding and he or she would have to act in the best interests of the missing person. This would involve taking into account any relevant circumstances and known wishes of the missing person in making decisions.

The role of guardian would be an active role and he or she would be expected to take steps to protect the interests of the missing person rather than just responding when problems arise. Third parties (e.g. banks and insurers) would deal with the guardian as the representative of the missing person. Guardians would have the power to act in relation to the property and affairs of the missing person in the way that the missing person would have been able to do in person, however this is subject to restriction by the court and would not include making a will for the missing person. When making important financial decisions, the guardian would be expected to obtain and consider proper advice. Guardians are expected to have access to online guidance to help them fulfil their role.

### **Consultation question 1 – Do you agree in principle that a new status of guardian for the property and affairs of a missing person should be created?**

#### Things to think about:

- *Do you broadly agree with these proposals?*
- *Do you have any concerns with introducing this type of legal position?*
- *What do you think of the proposals as to what a guardian should be able / should not be able to do?*

#### **Appointment of a guardian**

A person would be able to apply to be appointed as guardian when the missing person has been missing for at least 90 days without contact. The Government does not intend to impose a strict restriction on who could apply to be a guardian, but it is expected that the following people (over 18) would be entitled to apply:

- Spouse or civil partner of the missing person
- Other family members of the missing person
- A person acting in loco parentis to the missing person
- A person who immediately before the disappearance was partly or wholly financially dependent on the missing person
- Any other person with sufficient interest.

It would be possible for more than one person to be a guardian at one time. These people could either act together, for example two siblings may choose to both act as their missing parent's guardian in order to share the task. Alternatively, the guardians may deal with different aspects of the missing person's property, for example a spouse may deal with day to day provision for dependants whilst a family friend deals with business issues.

It would also be possible for a guardian to be a professional person (e.g. a lawyer) who is paid to maintain and manage the missing person's property in their best interests. Non-professional guardians would only be able to claim expenses.

The guardian would be appointed for a period of up to four years, but it would be possible to extend this for another period of up to four years. It would also be possible to make another application. However, when a person has been missing for seven years, it might be considered more appropriate to apply for a presumption of death certificate in some instances.

## **Consultation question 2 – Do you broadly agree with the proposals for the status, role and duties of a guardian?**

### Things to think about:

- *Do you think the proposals offer appropriate flexibility for different families?*
- *Do you agree with the proposals as to who can apply to be a guardian?*
- *How do you feel about the 90 days period proposed before a guardianship application can be made?*
- *Do you think a maximum appointment period of four years is appropriate (bearing in mind that this can be extended)?*

### Safeguards

The Government realises that the guardian position could be open to abuse and so has included a number of safeguards to protect the interests of the missing person. These safeguards are also designed to protect the guardian when fulfilling their role.

Before making the appointment, the court would have to be satisfied that there was likely to be a need for a decision in relation to the missing person's financial affairs or property, and that it was in the best interests of the missing person for a person to be appointed to administer the missing person's affairs. The court would also have to be satisfied that the missing person had been missing for at least 90 days without contact. This is intended to ensure that guardians are only appointed in appropriate cases.

A guardian would be under a duty to act in the best interests of the missing person. (In deciding whether something was in the best interests of the missing person, the guardian would be able to take account of all the relevant circumstances, including the missing person's known wishes regarding his or her property, family and other affairs as far as possible.) The guardian would also be under a duty to act in good faith and with reasonable diligence, to exercise reasonable care and skill in financial dealings, not to profit from his / her position and to avoid conflict between his or her personal interest and duties.

The guardian's actions would be supervised by the Office of the Public Guardian (OPG) and they would be required to provide accounts on a regular basis detailing how the missing person's money is being managed. The OPG would have the power to investigate if it considered that a guardian was acting outside the scope of his or her powers or not in the best interests of the missing person. In addition, any person interested in the property or affairs of the missing person would be able to apply to the court if they were concerned that the guardian had acted improperly.

A financial institution, or other organisation, dealing with a guardian would be able to ask the guardian

to provide proof of his or her authority to act. The Government proposes that the court order setting out the details of the missing person, the appointed guardian and the terms of the appointment should be sufficient proof, along with identification as appropriate to show that the person presenting the order was the named guardian. Additionally, a central register held by the OPG would hold details of guardians and the missing people that they represent. Third parties (such as banks and insurers) would be able to access this register.

If a guardian were to be found by a court to have acted improperly their position as guardian could be terminated. If it was sufficiently serious they could also be made to pay compensation to the missing person's estate and face criminal charges such as fraud. A guardian could be required by the court to take out a security bond when appointed which could be used to compensate the estate of the missing person in the event of any wrongdoing by the guardian.

### **Consultation question 6 – Do you agree with these proposals for safeguards for the missing person and guardian?**

#### Things to think about:

- *Do you feel these safeguards would appropriately protect the missing person and the guardian?*

### **Analysis of potential to save families money**

As part of the consultation, the Government is particularly interested in obtaining estimates of the amount of money these proposals would cost and also how much money could be saved by individuals. Having a guardian in place may prevent families having to spend their own money when there are financial difficulties for someone who is missing.

### **Consultation question 8 – Can you provide any evidence or sources of information that will better help the Government to understand and inform the cost-benefit analysis of the proposals?**

#### Things to think about:

- *Have you had to spend any money protecting the assets or paying the liabilities of someone who has gone missing? (e.g. mortgage payments, Direct Debits, utility bills, storage of furniture)*
- *If so, can you estimate how much?*

### **More information**

If you would like to see the full consultation document and contact details for the Ministry of Justice, these can be accessed here <https://consult.justice.gov.uk/digital-communications/guardianship-property-and-affairs-missing-persons>.

If you would like to talk to someone at Missing People about the consultation, please contact Holly Towell, Policy and Campaigns Manager, at [holly.towell@missingpeople.org.uk](mailto:holly.towell@missingpeople.org.uk) or on 020 8392 4566.

If you would like support following reading about this consultation, Missing People's helpline team are here around the clock, 24/7, and can be reached by phoning or texting **116 000**, or by emailing [116000@missingpeople.org.uk](mailto:116000@missingpeople.org.uk).

Missing People's Family Guidance sheets cover a range of practical and legal issues that you might be dealing with, including banking, mortgages and benefits. These can be found at [www.missingpeople.org.uk/legalandfinancial](http://www.missingpeople.org.uk/legalandfinancial), or you can get them by post by speaking to our helpline team by phoning **116 000**.

This has been written with the kind support of Clifford Chance.