



Ministry
of Justice

Guardianship (Missing Persons) Act 2017

Implementing the Act

This consultation begins on 19 December 2018

This consultation ends on 12 February 2019



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Guardianship (Missing Persons) Act 2017

Implementing the Act

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

About this consultation

To:	This consultation is open to the public
Duration:	From 19/12/18 to 12/02/19
Enquiries (including requests for the paper in an alternative format) to:	Guardianship consultation 2018 Ministry of Justice 9.25 102 Petty France London SW1H 9AJ Tel: 020 3334 3555 Email: GuardianshipConsultation2018@justice.gov.uk
How to respond:	Please send your response by 12 February 2019 to: Guardianship consultation 2018 Ministry of Justice 9.25 102 Petty France London SW1H 9AJ Tel: 020 3334 3555 Email: GuardianshipConsultation2018@justice.gov.uk
Additional ways to feed in your views:	For further information please use the “Enquiries” contact details above.
Response paper:	A response to this consultation exercise is due to be published by 13/05/19 at: https://consult.justice.gov.uk/digital-communications/guardianship-missing-persons-act

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Foreword

IMPLEMENTING THE GUARDIANSHIP (MISSING PERSONS) ACT 2017

The Guardianship (Missing Persons) Act 2017 was passed to help families and others trying to cope with the effects of a disappearance of a loved one.

The Act creates a legal framework for those left behind to secure the appointment of a trusted person to use and look after the property and financial affairs of the person who is missing. The purpose of this consultation paper is 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.

The consultation paper seeks views on: the content and presentation of the code of practice; the procedure to be followed by the court and the parties in guardianship cases; and the supervisory regime to be set up by the Public Guardian. We will use the replies we receive to settle the terms of the legislation in readiness for bringing the Act into force in July 2019.

I would encourage everyone with an interest in this subject to read the consultation paper, to consider the questions asked, to reply to all or some of them, and, if there are points that are not covered by the questions, to tell us your views.

I am very grateful to everyone who takes the time to consider our proposals and to respond.

A handwritten signature in black ink, appearing to read "David Gauke".

RT HON DAVID GAUKE MP,

LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE

Executive summary

In September 2018 the Government announced its intention to bring the Guardianship (Missing Persons) Act 2017 into force in July 2019. This consultation paper seeks views from interested parties on the Ministry of Justice's proposals for achieving this objective.

The Act created a new legal status of guardian¹ of the property and financial affairs of a missing person*. Guardians will be appointed by court order to be the agents* of the missing persons whose property and financial affairs they have been authorised to manage. The order making the appointment will set out the terms of their authority and the extent of the property and financial affairs to which the appointment relates. To bring the Act into force, rules of court*, regulations* and a code of practice will have to be created.

Court proceedings relating to guardianship will have some special features, but the department's intention is to try to use standard court procedures where possible so that new procedures are only made where necessary: as, for example, in relation to the content of applications for the appointment of a guardian, the notification and the advertisement of proceedings to interested parties, and the evidence to be presented.

The Act provides that the Lord Chancellor will designate either the High Court or the Court of Protection* as the court to be used for guardianship related applications. The Lord Chancellor has consulted the Lord Chief Justice and intends to designate the High Court. The consultation is drafted on this basis.

Once a guardian is appointed, the court will send a copy of the order making the appointment to the Public Guardian*, who will maintain a register* of orders and take on responsibility for the supervision of the guardian. The role of the Public Guardian in this respect will be similar to his role in relation to the supervision of deputies* appointed in respect of persons lacking mental capacity* under the Mental Capacity Act 2005.

Although there are significant differences between the roles of guardians and deputies, there are also strong similarities. The department's intention in relation to the supervision of guardians by the Public Guardian is to follow the model of the deputyship regulations and the related procedures and practice of the Public Guardian, as closely as practicable: including, for example, requiring guardians to provide a financial bond as security for the proper performance of his or her duties where the court requires it; requiring for guardians to report to the Public Guardian when requested; and enabling the Public Guardian to investigate alleged misconduct by guardians.

The system of guardianship will therefore require applications to the court and supervision of guardians by the Public Guardian. As fees are generally charged for applications to the court and for supervision by the Public Guardian in other contexts, the department's intention is that fees will be payable to the court and the Public Guardian respectively in relation to guardianship cases and that the fees will be subject to concessions similar to those that apply to the equivalent fees for people of limited means. The level of the fees

¹ Terms marked by an * are explained in the glossary (see page 11)

will be decided when details of the services* to be offered have been settled. It is expected that the fees would generally be payable from the estate of the missing person.

In addition to requiring the making of rules of court and regulations, the Act also requires the Lord Chancellor to publish a code of practice to provide guidance for guardians and applicants. The code is expected to be similar to the code published in relation to the Mental Capacity Act 2005, part of which gives guidance to deputies appointed by the court. The guardianship code will be modelled on this.

This consultation paper seeks views upon the proposals for the content of the rules of court, practice directions*, regulations and code of practice described in the paper.

Introduction

This paper sets out for consultation the Ministry of Justice's proposals for the implementation of the Guardianship (Missing Persons) Act 2017 in July 2019. In preparing these proposals the department has particularly taken into account the response to its consultation on the proposals for guardianship legislation carried out in 2014 and the comments made during the parliamentary passage of the Guardianship (Missing Persons) Bill in early 2017. The department has also worked closely with the Office of the Public Guardian and Her Majesty's Courts and Tribunals Service in the development of the proposals.

The consultation is aimed primarily at individuals who have or have had a missing relative or friend and for whom guardianship may be relevant, professionals who advise in this field, charities who provide help and advice to people affected by a disappearance and, businesses, organisations and institutions that have to deal with individuals trying to cope with the property and finance related consequences of a disappearance. The Ministry of Justice does, however, welcome views on its proposals from all individuals and organisations interested in this field.

Following the consultation period, the department will consider the comments received. The department will, both during and after the consultation period, engage with stakeholders to refine its proposals.

A Welsh language summary will be available at <https://consult.justice.gov.uk/digital-communications/guardianship-missing-persons-act>

Aim

The Government announced in September 2018 that it intended to bring the Guardianship (Missing Persons) Act 2017 ("the Act") into force in July 2019.

This consultation paper seeks views on the department's proposals for bringing the Act into force with the object of implementing the Act as smoothly and successfully as practicable.

Scope of the consultation

This paper seeks views on the content of the department's proposals for:

- rules of court and related practice directions for guardianship proceedings;
- regulations relating to the registration and supervision of guardians by the Public Guardian;
- fees payable to the court and to the Public Guardian; and
- a code of practice providing guidance to guardians and persons making applications under the Act.

The Act applies to England and Wales only. These rules of court, practice directions, regulations and code of practice will also apply to England and Wales only.

Background

Under the current law, when a person disappears he or she is presumed by the law to be alive until the contrary is proved. This means his or her property may effectively be left ownerless. Unless binding arrangements have already been made (for example, a power of attorney to cover absences has been granted before the disappearance or a mandate provided to a third party to access bank accounts), no one has legal authority to manage or deal with the missing person's property, even to the extent of being able to cancel subscriptions, direct debits and standing orders. This lack of management can lead to assets dissipating and property falling into disrepair. It can also leave dependants of the missing person facing legal and financial problems because they no longer have access to the financial support that the missing person was able to provide from his or her property or financial affairs. These financial problems can only exacerbate the emotional trauma caused to family members and others when a person disappears. The situation may be further complicated where the missing person ran a business and, as a result of the disappearance, creditors cannot be paid.

An unexplained lengthy absence of a missing person can also cause problems for businesses and institutions, such as banks and investment companies, holding the missing person's assets or liabilities, who are constrained by their responsibilities to the missing person.

To provide a means of resolving these problems, the Act creates a new legal status – the guardianship of the property and financial affairs of a missing person. The Act enables the court to appoint a guardian as an agent for the missing person. For an appointment to be made, someone with a sufficient interest must apply to the court. The court can hear the application if it is satisfied that there is sufficient connection between the missing person or the applicant with the court. This means that the missing person must have been domiciled* or habitually resident* in the United Kingdom for at least a year before he or she went missing; or, if their spouse or civil partner is the applicant, that he or she was so domiciled or habitually resident for at least a year before making the application. If this condition is satisfied, the court will only make an order if it considers the missing person has been missing for at least 90 days before the application (although the 90 day requirement may exceptionally be relaxed); that it is in the best interests* of the missing person to make the appointment; and, that there is a suitable person to be appointed. The court will decide on the evidence presented to it whether a guardian should be appointed. The court order making the appointment of the guardian will specify any particular terms and conditions that are to apply to the appointment.

Two or more people may be appointed as the guardian in respect of one missing person's property and financial affairs and more than one guardianship order may be in force simultaneously in relation to different parts of the property and financial affairs of the missing person, but a single guardianship order can only ever relate to the property and financial affairs of one missing person.

The maximum length of an appointment is four years, but a person can be re-appointed on a new application and there is no limit on the number of times applications can be made. The court order may provide for the suspension of the appointment.

No professional qualifications are required to be a guardian, but the position is one of great responsibility. It will require the guardian to act with the utmost integrity and may require high levels of skill in dealing with property and financial affairs.

Guardians can recover reasonable expenses incurred in relation to the performance of their duties, but can only charge for their services if authorised to do so by the terms of their appointment as set out in the court order.

Once appointed, the guardian will then “stand in the shoes” of the missing person in relation to so much of his or her property and financial affairs as are included in the appointment.

The guardian will, subject to the terms on which the court makes the appointment, be able among other things to access bank accounts, stop or set up direct debits and standing orders, pay debts, authorise mortgage and insurance payments, sell or rent a property, and manage investments. The guardian may also be able to make payments to dependants of the missing person to meet ongoing expenses and other needs. The guardian must, however, act within the scope of his or her authority under the terms of the guardianship order and the Act; and must exercise the powers conferred in the best interests of the missing person.

When the court makes a guardianship order, it will send a copy of the order to the Public Guardian, who will set up and maintain a register of guardianship orders. The Public Guardian will, on request, search the register and provide details of the results.

The Public Guardian is a public office created by the Mental Capacity Act 2005, whose role is to protect people in England and Wales who may not have the mental capacity to make certain decisions for themselves, such as about their health and finance. The Public Guardian largely acts through the Office of the Public Guardian (OPG), which is the public body that helps protect people who lack capacity in a number of ways. Examples include:

- establishing and maintaining a register of Lasting Powers of Attorney (LPA) and a register of Enduring Powers of Attorney (EPA) – these are appointments made by individuals with full mental capacity of other people (known as attorneys) to manage their affairs in the event that they are no longer able to do so in the future by reason of lack of mental capacity;
- establishing and maintaining a register of court orders that appoint deputies under the 2005 Act (deputies are appointed by the court of protection for someone who has lost capacity to make decisions about their finances and/or health and welfare but has not made an enduring or lasting power of attorney);
- supervising deputies;
- receiving security which the court requires a guardian to give for the exercise of a deputy's functions*;
- receiving reports from deputies;
- dealing with representations (including complaints) about the way in which a deputy or an attorney under a LPA or EPA is exercising their functions; and,
- instructing Court of Protection Visitors to visit people who may lack mental capacity (and their deputies or attorneys) to make particular decisions.

As a result of the Act, the Public Guardian will have the following guardianship related functions:

- establishing and maintaining a register of guardianship orders;
- supervising guardians;
- receiving security which the court requires a guardian to give for the exercise of the guardian's functions;
- receiving reports from guardians;
- reporting to the court on such matters relating to proceedings under the Act as the court requires;
- dealing with representations (including complaints) about the way in which a guardian is exercising the guardian's functions; and
- publishing, in any manner the Public Guardian thinks appropriate, information about the exercise of his or her functions in connection with guardians and guardianship.

These functions are modelled on the Public Guardian's functions in relation to deputies appointed by the court under the Mental Capacity Act 2005 to manage the property and affairs of persons lacking mental capacity.

The Public Guardian will be able to provide guidance to guardians and people interested in the missing person's property and financial affairs, but not legal advice. In some circumstances, deciding how to act or whether a proposed action is within the scope of the appointment may be difficult. To help in these circumstances, the Act provides for applications to be made to the court to provide directions as to how the guardian should act and to decide the extent of the relevant powers and duties.

Going to court should, however, be a last resort, so the Act also provides that the Lord Chancellor must issue a code of practice to provide guidance to guardians and persons making applications under the Act. This guidance should facilitate the resolution of issues relating to the exercise of the powers and duties given to guardians.

Overview of Proposals

Before the Act can be brought into force the several pieces of secondary legislation required to support it must be created.

First, the Lord Chancellor will have to make *regulations* designating whether the High Court or the Court of Protection is to have jurisdiction to exercise the functions of the court under the Act. The Act requires the Lord Chancellor to consult the Lord Chief Justice before making these regulations. Having consulted the Lord Chief Justice, the Lord Chancellor intends to designate the High Court. The intention is that applicants will be able to make applications to either the Chancery Division or the Family Division as occurs under the Presumption of Death Act 2013* and the Inheritance (Provision for Family and Dependents) Act 1975.

Secondly, *rules of court* and *practice directions* may have to be made. The proceedings in the High Court will be regulated by the Civil Procedure Rules and the related practice directions, which are made by the Civil Procedure Rule Committee.

The rules of court and practice directions relating to guardianship will be drafted by the department following its consideration of the response to the consultation and then made by the appropriate rule maker.

In this consultation paper, we describe the issues that will need to be resolved to settle the new rules and practice directions.

Thirdly, the Lord Chancellor will have to make *regulations* specifying how the Public Guardian will exercise his functions in relation to guardianship under the Act, including having to register guardianship orders and supervise guardians. These regulations will be made under section 58 of the Mental Capacity Act 2005. They are likely to be very similar to the regulations applicable to deputies set out in the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.

Fourthly, the Lord Chancellor must publish a *code of practice* providing guidance to guardians and persons making applications under the Act. In preparing the code the Act provides that the Lord Chancellor must consult such persons as he or she considers appropriate.

The code is important not only because guardianship is new, but also because guardianship will affect a wide variety of people, from all walks of life. Some of these people will be familiar with court procedures and how to deal with the Office of the Public Guardian; some will be familiar with legal matters, such as agency and the fiduciary* obligations that flow from it; but, others will not. The code will provide guidance about the working of the Act and the related legislation, so that people can find out what they can do to overcome the problems created by a disappearance and, after a guardian is appointed, to make sure that the guardianship is conducted properly.

Fifthly, the Lord Chancellor may have to make *orders* to designate the fees to be paid to the court in relation to guardianship claims and applications, unless existing fees can be applied, and, to designate fees to be paid to the Public Guardian for registration and supervision of guardians. Both types of fees will be subject to the usual exemptions* and remissions* scheme.

Finally, to bring the Act into force, the Lord Chancellor will have to make a *commencement order** to bring the Act into force. The Government has already announced its intention to commence the Act in July 2019, but the commencement order will only be made when it is certain that all necessary preparations will have been completed by the commencement date.

Next Steps

The department will continue to work closely with OPG and HMCTS in developing the proposals. The department and OPG will engage with stakeholders during and after the consultation period to refine the proposals.

Following the consultation period, the department, working with OPG and HMCTS, will carefully consider the responses to this consultation and prepare a response.

The regulations specifying the choice of court will be made in due course.

The rules of court will be made by the Civil Procedure Rule Committee in the usual way and will be subject to Parliamentary approval as specified in the Civil Procedure Act 1997. Practice Directions, which supplement rules of court by providing additional information and instructions, will also be made. They are made by the judiciary and are not subject to a Parliamentary procedure.

If any new High Court fees have to be specified for guardianship related court proceedings they will be prescribed by the Lord Chancellor with the agreement of HM Treasury under the Courts Act 2003.

The regulations relating to the functions of the Public Guardian will be made by the Lord Chancellor. These regulations will be subject to a Parliamentary approval in accordance with the Mental Capacity Act 2005. Fees payable to the Public Guardian will be specified in these regulations.

The draft code of practice will be finalised after the Lord Chancellor has carried out such further consultations as he considers appropriate. The code cannot be issued unless a draft has been laid before both Houses of Parliament for 40 days without a resolution being passed not to approve the draft.

The department intends that the rules, practice directions, regulations, code of practice and any new legislation prescribing fees in relation to guardianship will be laid before Parliament and published together.

Structure of Paper

This part of the paper explains the background to the proposals. Part 2 describes the proposals for the code of practice, rules of court, practice directions and regulations in relation to guardianship and the issues on which views are specifically sought. Part 3 summarises the impact assessment and the equalities statement prepared in relation to the proposals. Part 4 contains the questionnaire.

Appendix 1 sets out indicative text for those parts of the draft code of practice that do not relate to the content of the rules of court and regulations subject to this consultation.

Definitions and abbreviations

The table below is a list of key terms used in the consultation paper, code of practice and the Act. Words in the text that are included in the glossary are identified by the symbol '*' for ease of reference.

Absence Condition	The absence condition is the requirement that the missing person be missing for a continuous period of 90 days before the application for a guardianship order was made. See Section 3 (2) (b) of the Act.
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Agent	A person authorised to act on behalf of another person (“the principal”) under the law of agency. A person appointed agent is subject to legal duties under the law of agency in favour of the principal. See, for example, fiduciary duties below. A guardian will be deemed the agent of a missing person. A guardian’s authority to act for the missing person will be defined by the Act and the terms of the court order making the appointment.
Authorised insurance company	A person or EEA (investment, credit or financial) firm who, under Part 4 of the Financial Services and Markets Act 2006, has permission to carry out contracts of insurance and related activities
Authorised deposit taker	A person or EEA (investment, credit or financial) firm who, under Part 4 of the Financial Services and Markets Act 2000, has permission to accept deposits.
Best Interests	Guardians are required to act in the best interests of the missing person. Decisions by guardians must therefore be made in the best interests of the missing person. Section 18 of the Act explains how the best interests of the missing person should be assessed. See also paragraphs 3.17-3.22 of the draft code of practice.
Case Management Directions	Instructions issued by the court to the parties to litigation as to how to prepare the case and what to do, for example as to the production of evidence or the service of notice of proceedings. Directions may be decided at a case management conference, but can also be issued without a meeting between the parties and the court.
Code of practice	The Lord Chancellor is required to publish one or more codes of practice under section 22 of the Act. The codes are intended to provide statutory guidance to guardians and anyone making an application under the legislation. See the draft code of practice annexed to the consultation paper.
Codicil	A will.
Commencement Order	Commencement orders are a form of Statutory Instrument designed to bring into force the whole or part of an Act of Parliament.
Court of Protection	A specialist court that makes decisions on financial or welfare matters for people who can't make decisions at the time they need to be made because they lack mental capacity (see below).
Deputy	A person appointed by the Court of Protection under the Mental Capacity Act 2005 to make decisions on behalf of a person who lacks capacity to make decisions (see Mental Capacity Act 2005, s 16(2)).
Domiciled	Domicile is a common law concept. It encapsulates the notion of the connection required between a person and a country with which he or she has a permanent connection. It is different from the concept of habitual residence. A person is in broad terms domiciled in the jurisdiction to which he or she feels the most permanent connection.

Exemption	Where a fee is waived due to the low income of the person responsible for paying it, for example where they are in receipt of certain benefits. For guardianship applications it is the missing person's means rather than the applicant's means which will be assessed. The qualifying criteria for exemptions from court fees and OPG fees are specified in legislation.
Fiduciary duty	The duty imposed on a person in a fiduciary relationship (such as a trustee or agent) with another. A fiduciary duty is the highest standard of care. The fiduciary duty means guardians must not take advantage of their position unless authorised to do so. Nor should they put themselves in a position where their personal interests conflict with their duties. For example, guardians should not buy property that they are selling for the person they have been appointed to represent. They should also not accept a third-party commission in any transactions
Filing an application at the court	Giving the application and related papers to the court for placing on the court record.
Guardianship Order	The order made by the court appointing a guardian under the Act.
Habitual resident	Habitual residence is used in some cases instead of domicile as a test for establishing a sufficient link between a person and a country. To establish habitual residence a person will have to show that he or she is usually resident in the relevant country. Strong indicators of habitual residence include making a place their home by having stable employment, settled accommodation and strong personal ties.
Gift	A thing given willingly to someone without payment or other consideration. Section 6 of the Act sets out when a guardian may make a gift. Gifts for these purposes include payments for the living expenses of the missing person's dependants.
Guardian	Person appointed by the court under the Act on the terms specified in the court order making the appointment to act as an agent for the missing person in managing all their property and financial affairs or such part of them as is designated in the order. Guardians must act within the terms of the legislation and the court order which appoints them, and must act in the best interests of the missing person. Guardians are appointed for up to four years, but may be reappointed.
Intervene (in Law)	Where a third party (an intervenor) joins as a party in a case started by others due to an interest they have in the subject matter of the case.
Lien	A right to retain possession of another's property pending discharge of a debt.

Mental Capacity	The degree of decision making ability required by law to hold a person responsible for the decision in question. Different decisions may require different degrees of mental capacity. Decisions made by a person lacking the required degree of mental capacity to make the decisions in question are not binding on the person. See generally the Mental Capacity Act 2005.
Missing person	Section 1 of the Act defines when a person is a missing for the purposes of the Act. A missing person is someone who is absent from their usual residence and their usual daily activities; and who satisfies one of the following: (a) their whereabouts is either unknown or not known sufficiently precisely for them to be contacted for the purpose of making decisions about their property and financial affairs; or, (b) they are unable to make or communicate decisions about their property and financial affairs for a reason beyond their control (other than illness, injury or lack of mental capacity). See paragraphs 3.1-3.3 of the draft code of practice.
Practice Direction	A statement affiliated to the rules about court procedure, which sets out more detail and provides greater clarity about a specific procedure to be followed in a case. Practice Directions are issued by the head of the court or division to which they relate.
Presumption of death	A court may deem a person to have died for various purposes under different procedures. The Presumption of Death Act 2013 created a procedure by which the court may declare a person to be legally dead for all purposes.
Property and financial affairs	The matters in respect of which a guardian may be appointed under the Act. See paragraphs 3.4 to 3.10 of the draft code of practice.
Public Guardian	The Public Guardian is an office created by the Mental Capacity Act 2005. Supported by an Office (OPG), the Public Guardian protects people in England and Wales who may not have the mental capacity to make certain decisions for themselves, such as about their health and finance. The OPG supervises the work of guardians appointed under this legislation.
Register	The Office of the Public Guardian will be required to establish and maintain a register of all Guardianship Orders, including variation orders and revocation orders, made. The register will include information about the Orders. The Public Guardian is already required to establish and maintain registers of deputies and powers of attorney.
Regulations	A type of secondary legislation made by an executive authority or regulatory agency of a government, usually subject to approval by Parliament, and having the force of law. Regulations set out the terms under which legislation is implemented and how it should be conducted.
Remissions	In this context where a court or other fee is reduced due to the financial position of the person responsible for paying it.

Revocation Order	An order made by the Court to remove a guardian from their duties. See section 13 of the Act.
Rules of Court	The rules that govern how courts operate, and which parties using the court must follow and comply with. Rules of court are supplemented by practice directions (see above).
Service	This is the procedure by which a party in a case formally informs other parties of legal action to another party to enable that person to respond to the proceeding before the court, body, or other tribunal. Service is performed by delivering a notice about or set of court documents to the person to be served in the way required by rules of court.
Sufficient interest	See paragraphs 3.11 – 3.16 of the draft code of practice.
The Act	Guardianship (Missing Persons) Act 2017
The 2005 Act	Mental Capacity Act 2005
The 2007 Regulations	Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007
Trust corporation	A trust corporation is in general terms a corporation set up to carry on trust business. In practice they are frequently subsidiaries of banks and financial institutions, but are also charities or legal firms. There are technical requirements that a corporation must satisfy to be a trust corporation. Trust corporation status confers certain legal advantages, for example, acting as Court of Protection deputies and attorneys.
Trustee	A legal person to whom property is transferred to be administered for the benefit of beneficiaries designated by the terms of the trust (such as a person or a charitable organisation). The trustee must act in accordance with the terms of the trust.
Urgency condition	The urgency condition is only met on an appointment if the court is satisfied an appointment could be made if the absence condition was met and a decision is or is likely to be needed before it would be. See section 3 (3) of the Act.
Variation Order	An order made by the Court to vary the terms of a guardian's powers and duties. See section 12 of the Act.

The proposals

Introduction

In this part of this consultation paper we describe the content of the proposals for implementation of the Act and ask specific questions about the approach we are proposing to adopt in making guardianship a practical remedy available to people caught up in the consequences of the disappearance of an individual whose property and financial affairs require management.

As the code of practice will relate to all aspects of the guardianship proposals, we consider it first, followed by the proposed rules of court and practice directions, Public Guardian regulations, and fee orders respectively.

Code of Practice

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.

Guidance in relation to the concept and status of guardianship is intended, on the one hand, to help guardians understand how to carry out their duties properly and efficiently; and, on the other, to help people who come into contact with guardians to understand the position of the guardian, what they can expect of the guardian, and, what they can do if they are concerned about the conduct of the guardian.

The guidance is important not only because guardians will be under a legal obligation to have regard to the code, but also because courts and tribunals conducting legal proceedings will have regard to the content of the code and any breach of it.

To achieve its objectives, the code of practice must provide guidance in relation to a wide range of circumstances. It will cover the content of the Act and the secondary legislation to be made under it. As much of the secondary legislation is the subject of this consultation, the provisions of the draft code of practice related to it can only be completed when the content of the rules, practice directions and regulations to be made in preparation for the coming into force of the Act have been finalised.

There are nonetheless aspects of guardianship that are settled and in respect of which the content of the code of practice is unlikely to change significantly other than in response to points made on consultation. The consultation paper invites comments on the draft of these parts of the code of practice, which is set out in Appendix 1.

In addition to carrying out this public consultation, the Lord Chancellor proposes to consult the following persons and organisations about the content of the draft code of practice before it is laid before Parliament: the Welsh Government; the Public Guardian, Her

Majesty's Courts and Tribunal Service; the Foreign and Commonwealth Office; the Home Office, the National Crime Agency, the UK Missing Persons Unit (police), and Land Registry; the charities, Missing People, Prisoners Abroad and Hostages UK, and Citizens Advice; The Law Society of England and Wales, ILEX and the Bar Council; the Association of British Insurers, UK Finance, CIFAS , the Building Societies Association, the Council of Mortgage Lenders, the Small Business Federation; and other organisations and individuals who responded to the 2014 consultation on guardianship. We would welcome suggestions as to any other potential consultees

The Act also provides that the code must be issued in such a way as the Lord Chancellor considers appropriate for bringing it to the attention of those likely to be concerned with its provisions. The intention is that code will be published in hard copy and on gov.uk in both English and Welsh. It will be available in a range of formats. It will be laid in draft before Parliament for at least 40 days before it is published and it will be published no later than the time the Act comes into force. We expect that the primary means of accessing the code will be the internet. We would welcome views on any other ways in which the code should be issued.

When complete, the draft code of practice is expected to set out guidance on the following topics:

- The nature and purpose of the code of practice;
- The problem the Act is intended to address;
- The key concepts, including missing, sufficient interest, best interests and conflict of interest;
- Guardianship and the role of the guardian;
- Court proceedings related to guardianship; and
- The role of the Public Guardian.

The draft provisions of the partial code of practice at Appendix 1 cover the first four topics listed, but the responses to the consultation, particularly to the questions asked relating to style and presentation, will inform the drafting of the whole of the code of practice.

As will be seen from Appendix 1, the draft code is expected to be written largely in question and answer format. This follows the format used in the code of practice under the Mental Capacity Act 2005. As with the code published under the 2005 Act, the content of the draft code is intended to be sufficiently clear and self-explanatory to be used by people who do not have any specialist knowledge of the subject matter. The draft provisions are intended to be indicative of the final content, but are not final and are subject to change.

All the information in the code must be technically accurate. The department invites comments on the accuracy of the specimen provisions in Appendix 1.

The information must also be presented in a way that is helpful. The department invites comments on generic issues of approach, language and presentation. Themes on which comments would be welcome include the following:

Extent, appropriateness and usefulness of content – Does the code meet the objectives that it sets itself at the start of each chapter? Considering the circumstances in which the

guidance may be applied, is it likely to meet the needs of the user? Is the code covering the right subject matter? Are there subjects that ought to be covered, but are not? Is the coverage of each topic adequate? Does the code of practice address the issues from all the different standpoints that are needed (for example, does it speak to the guardian and a person who is critical of the actions of the guardian?).

Clarity of structure and language – Is the document likely to be easy to use? Is information succinctly and clearly expressed? Is the level of detail appropriate?

Format and presentation – Is the question and answer format helpful? Are the examples given helpful and realistic? Are the examples too simple or too complex? We would be particularly grateful for suggestions of examples to illustrate points that should be made and for suggestions as to where examples should be given or improved.

Following the completion of all the consultations and the analysis of comments received, the draft code of practice will be finalised and laid before Parliament.

Q.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.

Q.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?**

Applications to the Court - Rules of Court and Practice Directions

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, if appropriate, 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.

The distribution of content between rules of court and practice direction will depend on the ultimate content to be included. For the purposes of this consultation we are seeking views on the content overall rather than whether it should be included in a rule or practice direction.

For the most part, we expect that existing rules of court and practice directions will provide generic procedures that can be applied and followed: for example, in relation to the verification of facts by a statement of truth*; how documents are to be served; or, how to appeal against a decision of the court. Applying this approach, if the High Court is designated, applications would probably be made under Part 8 or Part 23 of the Civil Procedure Rules. There will, however, be other instances where the existing rules of court need to be modified to apply to the particular circumstances of guardianship applications. This may be to address a question of language: for example, rules may refer to a defendant, which may not be an appropriate term in an application for an order appointing a guardian. There will also be situations where the existing rules will be inadequate to cover guardianship cases, because the Act provides for new matters to be specified in rules of court, such as in relation to service of notice of proceedings, or where it would be helpful to make specific provision, such as in relation to the procedure for obtaining a guardianship order, where the court will require specific information to be able to deal with the application. In these cases, additional rules will be required.

The Act provides that applications may be made to the court for the appointment of a guardian (“guardianship orders”), the variation of a guardianship order (“variation orders”*) and the revocation of a guardianship order (“revocation orders”**).

The Act also provides for certain other applications to be made to the court. These are applications:

- for accounts and other information relating to the exercise of guardianship functions to be made available to the applicant in the form and manner specified in the court order;
- for directions to a guardian as to how to act in a particular case or as to the scope of his or her authority; and,
- for a declaration that an act was within or without the scope of the guardian’s authority or that a guardian had failed to perform a duty.

The precise details of the rules and practice directions required will depend in part upon how they are integrated into existing rules, but there are issues specific to applications under the Act will need to be addressed in the rules in any event. We are therefore seeking views on our proposals for the subject matter of rules of court and practice directions in relation to the following questions:

- How are applications for guardianship orders, variation orders and revocation orders to be made?
- How are potentially interested parties to be informed of these applications?
- What must potentially interested parties do to take part in the proceedings?
- How are the applications that may be made under the Act for accounts or other information, directions to a guardian or a declaration to be made?
- How are potentially interested parties to be informed of these applications?
- What must potentially interested parties do to take part in these applications?

We propose that the main stages in guardianship proceedings, where special provision may be needed in rules of court are:

- The preparation of the application and the evidence, including the identification of any persons to whom notice of the application should be given.
- The filing* of the application or claim with the court and its issue by the court.
- The service of notice of the application on the specified persons and its advertisement by the applicant within seven days of the claim being issued.
- The filing with the court of notices by potential interveners of intention to intervene* or applications to the court for permission to do so.
- The service of the notices of intention to intervene* and of the applications for permission to do so by potential interveners on the applicant and other potential interveners.
- The court's decision on applications for permission to intervene.
- The service of the application on interveners by the applicant.
- The exchange of evidence not otherwise provided (verified by a statement of truth).
- The making of case management* directions (more than 28 but where practicable less than 56 days after issue).

In the following paragraphs in this section we describe our proposals relating to these stages.

How are applications for guardianship orders to be made?

The application form for a guardianship order should give the court the information it needs to consider the claim or application. This will be defined by the requirements set out in the Act for the hearing and making of an order. The code of practice should help people in selecting relevant information to include

Our expectation is that the rules will specify the court form to be used and the information to be provided and that the applicant will have some flexibility as to how the information is presented. It may be helpful to develop checklists to help in the preparation of documents and to include them in the code of practice.

We propose that the application must include or be accompanied by documents stating the following information (where known):

1.
 - a. the claimant's name and address;
 - b. the relationship of the claimant to the missing person; and
 - c. why the claimant considers that he or she has a sufficient interest in the missing person's property or financial affairs;
2. why the claimant considers the court has jurisdiction to hear and determine the claim, and evidence to support this justification;
3. details about the missing person sufficient to enable him or her to be identified;
4. details of the missing person's property and financial affairs in respect of which the order is sought;
5. why the applicant considers the requirements for making a guardianship order in the 2017 Act are met;
6. details of any proposed guardian and why that person is a suitable person to be appointed; and
7. details of persons to be served with notice of the application and how the application is to be advertised.

How are applications for variation orders and revocation orders to be made?

We propose a similar approach for applications for variation orders and revocation orders.

The application for a variation order or a revocation order should therefore be accompanied by the equivalent information as is to be included in an application for a guardianship order as to the claimant, service and advertisement together with (where known):

1. Details of the guardianship order which the claimant seeks to have amended or revoked and the particulars of the remedy sought;
2. The reasons why the applicant considers the requirements for making a variation order or a revocation order in the Act are met, and any evidence which supports this.

How are potentially interested parties to be informed of the application?

The Act requires an applicant for a guardianship order, a variation order or a revocation order to give notice of the application to persons specified in rules of court and to advertise the application in accordance with rules of court. We now consider how these provisions should be given effect.

Who must be served with a claim for a guardianship order, a variation order or a revocation order?

Once an applicant has given the application to the court, the court will issue it. The Act requires that the applicant must then give notice of the application to persons specified in rules of court. This will notify potentially interested parties about the application and give them, whether or not they share the opinions of the applicant about the situation of the missing person or any other aspect of the application, the opportunity to join in the

proceedings and give their views to the court. People who join in the proceedings in this way are referred to as interveners.

We propose that in these cases the applicant must within seven days (or such longer period as the court directs) of the issue of the application by the court give notice of the application by serving a copy of it on the following persons (unless the person specified in the list is the applicant):

- a) the spouse, civil partner, parent, child or sibling (which includes half-blood siblings) of the missing person;
- b) if there are no such persons, the nearest relative of the missing person known to the applicant;
- c) any guardian or former guardian of the missing person;
- d) if the missing person has returned, the missing person;
- e) if the missing person has died, the missing person's personal representative; and
- f) if there are any, any other persons appearing to the applicant to have a sufficient interest in the claim (for example, step-children or cohabiting partners who are not married or civil partnered).

In addition, we propose that where the claim is for a variation order or a revocation order, the claimant must give notice of the claim by serving a copy of it on the Public Guardian. This will alert the Public Guardian to the existence of a potential issue with the guardianship. The Public Guardian can then decide whether to intervene. Even if the decision is not to do so, the Public Guardian will receive a copy of the order from the court.

Can permission be obtained to omit service of notice of the application for a guardianship order, a variation order or a revocation order?

As there may be circumstances (perhaps particularly if the missing person's lifestyle was reclusive) in which the applicant is unable to identify any persons on whom notice of the application should be served (other than the Public Guardian), we propose that rules of court should provide for the court to be able to dispense with the requirement for serving notice if an application is made to the court asking for permission to dispense with service. We propose that the application for notice for permission must explain why the applicant believes there are no relevant persons. In these cases, where the court gives permission, we propose it should give directions about the future management of the claim.

We do not propose that there should be any other specific grounds on which service could be excused. General provisions in rules of court as to dispensing with service in certain circumstances or concealing personal details in appropriate cases, such as those affected by domestic abuse, will continue to be available.

When and how must the claim for a guardianship order, a variation order or a revocation order be advertised?

The Act also provides that in addition to serving notice of the application on the persons known to the applicant in accordance with the prescribed list, the applicant should be required to advertise the application so that other people who may be interested have the opportunity to join in the proceedings. This reduces the risk that persons who would have

a legitimate interest but who might not be known to the applicant will at least have the opportunity to learn of the application.

We propose that the applicant for a guardianship order, a variation order or a revocation order must, within seven days of issue of the claim by the court, ensure that notice of the claim is published in an appropriate form in at least one newspaper circulating in the vicinity of the last known address of the missing person. This proposal is modelled on the procedure under the Presumption of Death Act 2013, where it appears to work satisfactorily even though the number of local newspapers is in decline. It may be appropriate to advertise on the internet in some cases. It will be open to the court under its general powers to require further advertisement or inquiry through directions if the circumstances point to it being necessary.

We also propose that the advertisement must be in the form set out below, or contain the equivalent information about the claim or application and the possibility of applying, and where and by when to apply, to the court:

**IN THE MATTER OF AN APPLICATION FOR A [INSERT TYPE OF ORDER,
DIRECTIONS OR DETERMINATION SOUGHT] IN RESPECT OF (INSERT NAME)**

A claim has been issued / an application has been filed (delete as appropriate) in the [INSERT DETAILS OF COURT], for a [INSERT ORDER/APPLICATION TYPE] in respect of (insert name of missing person), whose last known address was (insert address). Any person having an interest may apply to the Court to intervene in the matter.

If you wish to apply to the Court, you should do so at [Court address] as soon as possible, and if possible within 21 days of the date of this notice. Delay may harm your prospects of being able to intervene.

[If the claimant or applicant is legally represented]

(Name)

Claimant or applicant's Legal Representative

(Address)

[If the claimant or applicant is not legally represented]

(Claimant or applicant's address for service)

We also propose that having placed the advertisement the claimant must, at least five days before the court is to deal with the application, file a copy of the page of the newspaper bearing the advertisement and the date on which it was published with the court. If newspaper advertisement was not appropriate or not possible, other proof of advertisement may be required.

What must potentially interested parties do to take part in the proceedings for a guardianship order, a variation order or a revocation order?

The steps required of a potentially interested party will depend on their relationship to the missing person.

The Act provides that the missing person's spouse, civil partner, parent, child or sibling may intervene in these applications as of right, but anyone else must show the court that they have a sufficient interest in the property and financial affairs of the missing person to be entitled to intervene and can only intervene with the court's permission. The evidence required to demonstrate a sufficient interest is discussed in the draft code of practice appended to this paper. We anticipate that a person with a long-standing close personal relationship with the missing person would find it relatively easy to persuade the court, but a very recent acquaintance could find it difficult. We also envisage that the Public Guardian would readily demonstrate an adequate interest to intervene given his overall responsibility for supervision of guardians.

We propose that the recipient of a notice of a claim for a guardianship order, a variation order or a revocation order who wishes to take part in the proceedings (that is, intervene) must file a notice of intention to intervene or make an application for permission to intervene (as the case may be) not more than 21 days after service of the claim form.

We also propose that the potential intervener must serve their notice of intention to intervene or their application for permission to intervene (as the case may be) on the claimant and any other party within the 21-day period.

The notice of intention to intervene must give sufficient information to alert the claimant, to establish a means of communication between the parties, and to explain why the intervener wants to join in the proceedings. At this stage of the process, given the time limits and the possibility that the parties may find common ground, we do not think it necessary to require the putative intervener to provide full particulars of their case. Instead, a general description should suffice as it will enable the parties to establish the extent to which there is any general difference of approach between them. If they agree on the purpose of the application and the desired outcome then they may well rely on the same evidence. This will ease the task of the court. If the parties do take a different view of an issue then the evidence can be exchanged and presented to the court later.

We therefore propose that the notice of intention to intervene must:

- identify the intervener and their relationship to the missing person;
- state the reasons for intervening and
- state what determination, order or directions he or she is seeking.

In the case of persons applying to the court for permission to intervene, the service of the application for permission to intervene will act as notice, no separate form of notification is proposed. We propose that the application for permission to intervene should contain similar information: the intervener's name and address; details of the intervener's interest in the determination of the claim or application; the intervener's relationship to the missing person or other interest in the proceedings; the reasons for applying for permission to intervene; and particulars of any determination, order or directions sought.

Following the service all parties who ought to be aware of the application should have the necessary details to take part in the proceedings – or to decide on an informed basis not to do so.

We do not propose that there should be any special rules relating to the application to the court for permission to intervene. This will be dealt with by the court as an application ancillary to the main application and the court will issue any directions that are necessary for it to be concluded.

What must the applicant do on receipt of a notice to intervene or of notice of an application for permission to intervene take part in the proceedings for a guardianship order, a variation order or a revocation order?

The precise requirements on the applicant will be detailed in the rules of court or practice directions. However, in general terms we expect the requirements to be as follows:

- On receipt of a notice to intervene, the applicant should serve a copy of the application on the intervener (if not already served in another capacity).
- On receipt of a copy of the application for permission to intervene, the applicant should acknowledge receipt and decide whether to agree to or oppose the application. If the court grants permission the applicant should serve a copy of the application on the person to whom permission to intervene has been granted.

How are the other types of application that may be made under the Act for accounts or other information, directions to a guardian or a declaration to be made?

The Act also provides that certain specified types of applications may be made to the court in relation to a guardian. These are applications for:

- the delivery of accounts and other information relating to the exercise of guardianship functions to be made available to the applicant in the form and manner specified in the court order;
- the issue of directions to a guardian as to how to act in a particular case or as to the scope of his or her authority; and,
- a declaration that an act was within or without the scope of the guardian's authority or that a guardian had failed to perform a duty.

These applications are ancillary to the existence of a guardianship order and will all relate to the manner in which the guardian is to perform, or has performed, his or her duties. Some may be made by the guardian or an interested person. The issues giving rise to the application could arise independently or in the course of proceedings for the making of a guardianship order (in particular on a re-appointment), a variation order or a revocation order. The applications will have to set out the information the court needs, but the facts involved will vary greatly.

To strike the right balance of giving the court sufficient information without overburdening it with all the evidence on which the applicant will rely at the outset, we propose that all such applications should include the following information:

1. Information about the applicant (as for applications for guardianship orders) and details of the guardianship order to which the application relates.

2. Details of the order, directions or declaration sought and the reasons for wanting it.
3. Details of the persons (if any) to whom the applicant will give notice of the application and, if applicable, the advertisement of the application.

The existence of these applications specifically referred to in the Act does not of course prevent applications being made on other grounds to seek different remedies from the court: for example, the Public Guardian or a third party might take court action to enforce a security provided by a guardian.

How are potentially interested parties to be informed of these other types of application for accounts or other information, directions to a guardian or a declaration?

The Act provides that rules of court may be made requiring notice of these applications to be served and advertised.

We propose that, unless the court directs otherwise, the applicant must, within seven days of the filing of the application with the court, give notice of the application by serving a copy of it on the same categories of persons who would be served in the case of an application for a guardianship order and the Public Guardian.

We also propose that, unless the court otherwise directs, the applicant must advertise the application in similar manner to applications for guardianship orders. Advertisement may not be appropriate, for example, in cases concerning an application for directions as to whether a proposed act is within the authority of the guardian.

Whilst the list of persons to be served is the same as for applications for guardianship orders, variation orders and revocation orders, save that the Public Guardian is to be served in all cases, we propose that the court should be able to give directions altering the persons whom the applicant must notify. This is because the situations covered by these additional types of application will be more varied and may arise in situations where requiring service would be unnecessary. For example, a guardian seeking either directions from the court as to how to act in a particular circumstance or a declaration as to whether a proposed act is within his or her authority may already have obtained agreement from the potentially interested third parties; or there may be parties who would otherwise have to be notified that have made clear that they no longer wish to be involved in the case.

We also propose that the court should have power in these additional cases to provide that the time limit for service of the notice should be other than within seven days.

What must potentially interested parties do to take part in applications for accounts or other information, directions to a guardian or a declaration?

We propose that the procedure for intervention in applications for accounts or other information, directions to a guardian or a declaration should be the same as for intervention in relation to applications for a guardianship order.

The potentially interested parties must therefore serve notice or apply for permission to intervene and the applicant must serve a copy of the application at the appropriate time.

When must the applicant for guardianship orders, variation orders, revocation orders and other types of application for accounts or other information, directions to a guardian or a declaration present the evidence on which he or she intends to rely to the court and when must the applicant serve it on interveners?

We propose that the applicant must file with the court any written evidence (verified by a statement of truth) on which he or she intends to rely when he or she files the application. This will help ensure that the applicant has prepared the case properly.

We also propose that the applicant must serve the applicant's evidence (verified by a statement of truth) on the person giving notice of intention to intervene or applying for permission to intervene (as the case may be) on the intervener with the application. This will follow the receipt by the applicant of the intervener's notice of intention to intervene or the determination by the court of the request for permission to do so. The timing of the actual service of the evidence may be determined by the court through directions.

When must an intervener give the written evidence on which he or she intends to rely to the court, the applicant and others?

A person giving notice of intention to intervene or applying for permission to intervene (as the case may be) who wishes to rely on written evidence must file it with the court when he or she files his or her notice of intention to intervene or application for permission to intervene (as the case may be).

The person giving notice of intention to intervene must serve a copy of his or her evidence on the applicant following receipt of the application and on other interveners following receipt of notice of their intention to intervene or of their having permission to intervene from the court.

When may the applicant file further evidence after the person giving notice of intention to intervene or applying for permission to intervene (as the case may be) has filed evidence?

We propose that as in other similar court procedures the applicant may, within 14 days of service on him or her of the evidence of the person giving notice of intention to intervene or applying for permission to intervene (as the case may be), file further written evidence in reply. If he or she does so, he or she must also, within the same time limit, serve a copy of his or her further evidence on the other parties.

Can the time limits for service of evidence be changed?

The time limits for the service of evidence are intended to promote the efficient conduct of the proceedings for the benefit of the parties. If, however, the parties wish to agree a different time-limit we consider that they should be free to do so, subject to the general rules.

What evidence can be relied on during the proceedings?

In accordance with general rules governing similar court proceedings, we propose that no written evidence may be relied on at the hearing of the claim unless it has been served in the manner described or the court gives permission. However, we propose that the court may require or permit a party to give oral evidence at the hearing; and, may give

directions requiring the attendance for cross-examination of a witness who has given written evidence. This will ensure that evidence can be tested by the court.

When will the court give directions for the conduct of the proceedings?

We think it important that guardianship proceedings should progress promptly. The nature of guardianship applications, where the parties may not be identified until the intervening stage is complete, means that some time should be allowed to elapse between the making of the application and the definition by the court of the timetable that the litigation is to follow. We propose that there should therefore be a consideration of case management directions at an early stage, but not too early. We propose that a hearing should be held no more than 28 days (but where practicable no more than 56 days) after issue as in the case of presumption of death applications. However, to avoid unnecessary costs, we also propose that the court may make case management directions without a hearing if the court does not consider that a hearing would be necessary or appropriate.

These time limits may be too tight where the application has been served outside England and Wales, particularly overseas. In these cases, we propose that the start of the period for listing the hearing should be extended by more than seven days from the end of the period allowed by the rules of court for filing notice of intention to intervene or application for permission to do so, and any written evidence. Ideally, as in relation to presumption of death applications, we consider that the extension should not be more than 35 days so that the overall process is not delayed longer than is reasonably necessary.

Q.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.

Q4. 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.

Q5. Are there any matters omitted from the proposals for rules of court and practice directions that you consider should be included?

Q6. Are there any other points relating to rules of court and practice directions that you wish to make?

What will a guardianship order specify?

A guardianship order will set out the grounds on which the appointment is being made and the terms of the appointment of the guardian. It will be relied on by people dealing with the guardian to prove that the guardian has authority to act for the missing person.

The content of guardianship orders will be decided by the court. It is. However, useful to consider what the content might be as it may be helpful for the court to develop a uniformity of approach on some or all of the content of the order.

Without restricting that the content might be, we anticipate that a guardianship order will contain the following information:

- The identity of the missing person.
- The identity of the guardian(s)
- If there is more than one person appointed as guardian, whether they are to act jointly or separately, and if separately, what property and financial affairs they are respectively responsible for.
- The property and financial affairs in respect of which the appointment is being made.
- Any duties being imposed on the guardian.
- Any rights and powers that the guardian is being appointed to exercise.
- Any restrictions and conditions being imposed on the guardian.
- The start date for the appointment.
- The length of the appointment.
- Any provision for suspending the guardian's power to exercise rights and powers conferred for a period.
- Whether the guardian is required to provide a financial bond as security for the proper performance of his or her duties and if so on for what amount and on what terms; whether the security must be "on risk" before the guardian can act as such; or whether proof of professional indemnity insurance or some other protection must be provided instead.
- Whether the guardian is required to provide reports to the Public Guardian and if so what and when.
- Whether the guardian can charge the estate of the missing person for his or her services and if so what charges he or she may make.
- Whether the guardian can make gifts* from the estate of the missing person and if so which of the categories specified in the Act is to apply: the making of a gift; gifts of a description; or gifts generally.

Some of the information will be unique to the application in question. Other information may be common to numerous guardianship orders. To facilitate uniformity and clarity, which will assist users and OPG, we anticipate that the court will develop standard wording for provisions in orders. It may, for example, be that the reporting obligations are expressed in terms that require the guardian to comply with requirements made by the Public Guardian. Other areas in which standardisation may assist is in relation to the making of gifts and the taking of remuneration. In respect of gifts, clear authority to give

presents of up to designated values at Christmas and birthdays to identified persons could clearly remove arguments and facilitate supervision. In relation to remuneration, it would be helpful to avoid disputes about excess charging. It might be possible to do this by specifying rates of remuneration in the order. Another more flexible approach that would not tie the issue down so much would be for the guardian to be authorised to make reasonable charges. This might be combined with an obligation to give the Public Guardian advance notice of hourly rates and estimates of expected charges. This would help the Public Guardian assess the reasonableness of the charges when they are made.

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

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

What information should the Public Guardian receive from the court?

The Public Guardian is responsible for the supervision of guardians, but may not be a party to proceedings for the appointment of the guardian. The Public Guardian will receive a copy of the guardianship order but not other information. To facilitate and improve the process of supervision, particularly in understanding the background to an individual case at the beginning of the appointment, when records are being established at the OPG, it could be provided that in addition to receiving a copy of the guardianship order from the court, the Public Guardian should be entitled to receive documents from the court that are relevant to the decision to appoint the guardian and any powers and duties given to the guardian. An alternative approach would be to allow the Public Guardian to request papers from the court.

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

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 Act provides that the Public Guardian has the following functions in relation to guardians:

- establishing and maintaining a register of guardianship orders,
- supervising guardians,
- receiving security which the court requires a guardian to give for the exercise of the guardian's functions,

- receiving reports from guardians,
- reporting to the court on such matters relating to proceedings under the Guardianship (Missing Persons) Act 2017 as the court requires,
- dealing with representations (including complaints) about the way in which a guardian is exercising the guardian's functions, and
- publishing, in any manner the Public Guardian thinks appropriate, information about the exercise of his or her functions in connection with guardians and guardianship orders.

These functions are modelled on the Public Guardian's functions in relation to deputies appointed under the Mental Capacity Act 2005 in relation to which regulations are set out in Part 4 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.

This is appropriate because many of the problems that can arise with the conduct of deputies dealing with property and financial affairs of the person lacking capacity will be very similar to those that arise in relation to guardians. Both deputies and guardians are concerned with the proper management and use of the property of the person for whom the agent, whether guardian or deputy, is acting. There are of course differences in the roles and responsibilities, not least that the missing person is by definition absent, whereas the person lacking capacity must be engaged as far as is practicable in decision-making, but they do not affect the suitability of the provisions in the 2007 regulations as a model for the equivalent provisions in the guardianship regulations.

The provisions in the 2007 Regulations relating to the visits to deputies by the Public Guardian will therefore apply to visits to guardians. The Public Guardian will therefore have to notify the person to be visited of when the visit will take place and of the specific matters to be covered in the visit. The 2007 Regulations also provide that the Public Guardian may make applications to the court in connection with his or her functions under the Mental Capacity Act 2005. This enables the Public Guardian to compel deputies acting improperly to account for their actions and to require them to make good any damage to the estate of the person lacking mental capacity. For the same reason as in relation to the Public Guardian's functions generally, we would expect this power to be replicated in relation to guardians.

The content of the guardianship regulations to be made under the Mental Capacity Act 2005 is therefore proposed to be very similar to the content of the deputyship regulations. In the following paragraphs we describe what we envisage that the regulations under the Act will provide.

Registration

The Public Guardian is to maintain a register of guardianship orders. Every guardianship order will be sent by the court making the order to the Public Guardian. As in relation to deputyship, the Public Guardian will determine the content of the register and way in which the register is kept and entries may relate to an instrument or order for which registration has been cancelled.

Searching the register

The register will provide a record of all guardianship orders, variation orders and revocation orders. This is important because third parties may want to find out if a person has been appointed a guardian of a missing person. The register will therefore be searchable. For administrative reasons the information will be maintained, organised and searchable in the same manner as the information in the other registers maintained by the Public Guardian.

Searches will be carried out by the Public Guardian at the request of an applicant. The application will have to state the search relates to the guardianship register; the name of the person to whom the application relates; and such other details (including documents) about that person as the Public Guardian may require for the purpose of carrying out the search.

The Public Guardian will carry out the search and notify the applicant of the result as soon as reasonably practicable after receiving the application.

If the experience of searches in relation to deputyship is a good guide, it is likely that most of the searches will be requests for information as to whether a guardian has been appointed rather than about the terms and conditions of the appointment, which are likely to be resolved by examination of the court order itself.

As in relation to information on the other registers, a search applicant who has obtained information about a guardianship order from a search will also be able to request additional information relating to the missing person that the Public Guardian has obtained in exercising the functions under the Act, but which does not appear on the register.

This application must state the name of the missing person and the reasons for making the application. Unlike the equivalent provision in relation to deputies, who are required to state what steps they have taken to obtain the information from the person lacking capacity, there will be no such requirement in relation to the missing person.*

In considering the application for further information the Public Guardian may request such further information or documents from the applicant as he or she reasonably considers necessary to enable him or her to determine the application. In reaching a decision on whether to disclose any additional information relating to the missing person, the Public Guardian must, in particular, have regard to the connection between the missing person and the applicant; the reasons for requesting the information; the benefit to the missing person, or any detriment he or she may suffer, if a disclosure is made; and any detriment that another person may suffer if a disclosure is made.

Providing Security

In relation to deputyship, the court orders most deputies to get a ‘surety bond’ (also called a ‘security bond’). The bond is insurance that protect the assets of the person whose affairs and property the deputy is managing. It does not protect the deputy. The Public Guardian can apply to the court to enforce the bond where the deputy is in breach of duty.

Under section 6 of the Act the court can require a Guardian to give the Public Guardian security for the exercise of the guardian’s functions. The purpose of the security – usually a financial bond issued by a financially secure provider – is to protect the missing person’s estate from financial loss in the event of misbehaviour by the Guardian. In practice, based

on experience with deputies, we expect that a bond will be required in all cases with the possible exception of guardians who are professionals with adequate indemnity insurance cover. A premium is expected to be payable to the issuer of the bond. In all cases, we anticipate the guardian will be required to satisfy the Public Guardian that the required security has been given and is in force.

The terms of the guardianship order may also provide that the security must be “on risk” before a guardian may exercise any of the functions conferred by the guardianship order.

In addition, the following provisions in the 2007 regulations should also extend to guardianship:

- the Public Guardian may make arrangements with authorised insurance companies* or authorised deposit-takers* with a view to facilitating the provision by them of bonds for use by persons required to give security to the Public Guardian.
- the ability to enter into a security other than one within the arrangements with authorised insurance companies* or authorised deposit-takers*.
- where the court orders the enforcement of an endorsed security, the Public Guardian must notify any person who endorsed the security of the contents of the order; and notify the court when payment has been made of the amount secured.
- An endorsed security may be discharged by court order, but otherwise the regulations restrict the ability of the deputy to replace or discharge a security.

Reporting to the Public Guardian

Property and financial decisions deputies are required to report to the Public Guardian on the performance of their duties. Such reports are usually provided annually and may be requested on the termination of the appointment.

The report gives the Public Guardian financial accounts of the deputyship and information about decisions made by the deputy. If the Public Guardian needs extra information he or she may ask the deputy for it. Failure by a deputy to send a report may lead to the Public Guardian to review the deputyship and, if necessary, to apply to the court for the deputy's replacement. This reporting procedure helps the Public Guardian to supervise deputies, to provide advice to deputies as to how they might improve the service they give to the persons they represent, and to protect the interests of persons lacking capacity. We intend that there should be a similar system for guardians.

Guardians may therefore also be required to submit reports to the Public Guardian on the performance of their duties. The court will specify in the guardianship order when the report is to be provided. In practice we expect all guardianship orders to include reporting requirements, even if the appointment is for a relatively short period.

We propose that any report which the court requires a guardian to submit to the Public Guardian must include such material as the court may direct. Subject to this and to any directions given by the court, the Public Guardian may by written notice to the guardian require that he or she provide additional information and documents, including accounts, in such format in such a way as the Public Guardian may require.

Where the court requires a guardian to submit a report to the Public Guardian and specifies a time or interval for it to be submitted, the guardian may apply to the Public

Guardian requesting more time for submitting a particular report. The application must give the reason for seeking time for an extension and contain or be accompanied by such information as the Public Guardian may reasonably require. In response to an application the Public Guardian may undertake to hold off action to secure delivery of the report until such date as he or she may specify.

Where a guardianship order has been automatically revoked, e.g. by a presumption of death declaration, or a variation order or a revocation order has been made, the Public Guardian may require the guardian (or, in the case of the guardian's death, his personal representatives) to submit a final report on the discharge of his or her functions before the end of such reasonable period and at such place as may be specified by written notice. The Public Guardian must consider the final report, together with any other information that he may have relating to the discharge by the guardian of his functions. Where the Public Guardian is dissatisfied with any aspect of the final report he may apply to the court for an appropriate remedy (including enforcement of security given by the deputy or the guardian).

Complaints against guardians

The intention is that the guardianship regulations (will provide for the Public Guardian to deal with representations (including complaints) about the way in which a guardian is exercising his or her powers. If the Public Guardian becomes concerned about the conduct of the guardian (including any failure to act), the Public Guardian may by written notice require the guardian to provide information and documents. The Public Guardian will then decide (as in the case of deputies) how to proceed, including whether court action should be taken.

Review of decisions made by the Public Guardian

A deputy may require the Public Guardian to reconsider any decision he has made in relation to him or her by giving notice to the Public Guardian within 14 days beginning with the date on which notice of the decision is given to the deputy. We intend that similar provisions will apply to guardians.

The notice of exercise of the right must state the grounds on which reconsideration is required; and contain or be accompanied by any relevant information or documents. At any time after receiving the notice and before reconsidering the decision to which it relates, the Public Guardian may require the guardian to provide him with such further information, or to produce such documents, as he reasonably considers necessary to enable him to reconsider the matter.

Having reconsidered the decision, the Public Guardian must give to the guardian written notice of his decision, and, if he upholds the previous decision, a statement of his reasons for doing so.

Q.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.

Q.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.

Q.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.

There are clearly administrative advantages for the Public Guardian in having similar powers and applying similar procedures in relation to the supervision of guardians as he has in relation to the supervision of a deputy with responsibility for the property and financial decisions of a person lacking mental capacity. Adapting existing systems rather than creating new ones would also reduce the cost of implementing a guardianship supervision system. Considerable justification would therefore be required to create new systems.

Q.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.

Fees

This part of the paper considers issues relating to the payment of fees.

The purpose of appointing a guardian is to secure the proper management of the property and financial affairs of a missing person. This implies that the missing person will have assets that need to be managed either by their nature or because of the needs of persons for whom the missing person would have provided. We anticipate, however, that the appointment of a guardian will only be sought when it is cost-effective to do so. In other words, where the best interests of the missing person justify the cost of making the application and the benefits that it is expected to bring.

The explanatory notes to the Guardianship (Missing Persons) Bill stated that it was “expected that court fees will be charged for all applications subject to standard remissions and exemptions. Similar applications attract court fees of £400-£530. Fees will also be payable to the Public Guardian. The analogous supervision fee for Deputies appointed under the Mental Capacity Act 2005 is £320 p.a. No decision has been taken on the basis or level at which fees in relation to guardianship will be set but is expected they will be set on a basis that is no lower than full cost recovery.” This expectation developed the proposals outlined in the 2014 consultation paper which noted that [court and OPG] fees “will be set on a cost recovery basis in line with other court and OPG fees.”

We propose that fees will be payable to the court and OPG. Applicants may also need to pay for professional advice in preparing and making the application. The fees and reasonable costs of making the application for a guardianship order should be recoverable from the estate of the missing person. The court order should address this point. Setting the fees at an appropriate level for a new service is dependent on estimates of the use that will be made of the services and other projections. If the actual turnout is significantly different adjustments may have to be made. The department and OPG will monitor costs and take up following implementation with a view to making any adjustments that are necessary. If necessary, this may lead to a further consultation on fee levels.

Court Fees

Applications to a court are generally subject to the payment of a fee; although, in some cases, no fee is payable. There are also some cases in which the fee may be reduced or waived by reason of the circumstances of the applicant. The fees and the remissions and exemptions are set out in fees orders made by the Lord Chancellor with the agreement of HM Treasury. The fees specified are set in a number of different ways, including full cost recovery and on an “enhanced” basis where the fee is not linked to the cost of the proceedings and contributes to the overall running costs of the justice system.

The precise level of the fees to be charged by the court for guardianship related applications will depend upon the court chosen and the procedure that has to be followed, but we do not consider that there is any persuasive reason to depart from the approach described during the passage through Parliament of the Bill.

On this basis, we expect that guardianship related applications to the High Court will be treated in the same way as applications by other applicants to the division of the High Court, Chancery or Family, to which the applicant chooses to apply, so that the amount of fee will vary according to the type of application being made.

The application types are set out in the following table.

Table of fees

Fee Category	High Court Civil	High Court Family
Commence proceedings	£528	£245
Application within proceedings (on notice)	£255	£155
Application within proceedings (by consent/without notice)	£100	£50

The usual exemption and remission scheme which applies to the relevant court fees will apply equally in respect of guardianship applications. With respect to applications to the High Court, the remissions scheme is means tested based on the income and capital circumstances of the applicant. We do not propose to create any additional remissions or exemptions in relation to those applications.

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

OPG Fees

The registration and supervision of guardians will be a new function for the Public Guardian. The work entailed in the delivery of this function will need to be funded. The Public Guardian is funded by fee income. The intention is that fees will be charged in relation to the services provided in relation to guardianship. These fees will have to be prescribed in regulations in the same way as the existing fees.

The precise amount of the fees to be charged in relation to guardianship will largely depend upon the services to be offered, the expected workload and the extent to which the new services can use the same systems as existing services. The fee level may also be affected by the application of surplus income from other OPG fees if it is appropriate to cross-subsidise from other fee income.

We anticipate that the services to be offered for guardianship will be similar to those offered in relation to deputyship and that the amounts and structures of the fees are likely to be similar. There is, however, likely to be some difference because some deputyship services, such as visits, are related to the person lacking capacity's presence and the missing person cannot be visited. In addition, a different court will be used, involving the set up of new processes, which will affect the level of costs for OPG. There are also always likely to be considerably more deputies than guardians, so some of the economies of scale applicable to deputies may not be applicable to guardians. At present, for example, the cost of meeting the general supervision service in relation to deputies is being met from the income generated by the deputy supervision fees and the fees paid in relation to Lasting Powers of Attorney (these latter fees are set on an enhanced fee basis to generate funds for other OPG services).

The fees charged to deputies, which are based on cost recovery principles, are at present:

- £100 deputy assessment fee (this fee is payable at the start of the deputyship).
- £320 general supervision fee (this fee is typically paid annually).
- £35 minimal supervision fee (this fee is an alternative to the general supervision fee in very simple cases, it is not expected that it will apply in guardianship cases).

Remissions and exemptions are available on a means tested basis (other than in relation to the minimal supervision fee) if the person lacking capacity is of limited means.

Exemptions apply, for example, if the person lacking capacity is in receipt of qualifying benefits. These include: Guarantee Credit element of Pension Credit, **Income-based** Employment and Support Allowance (ESA), **Income-based** Jobseeker's Allowance (JSA), Income Support, Housing Benefit, Council Tax Benefit (not the 25% single person reduction or any other exemptions), Local Housing Allowance, and Universal Credit.

Remissions at 50% are available (except in relation to the minimal supervision fee) if the income of the person lacking capacity before tax is less than £12,000 a year.

These remissions and exemptions apply to all deputyships. We do not propose creating any new remissions or exemptions in relation to guardianship applications. We consider that the same remissions and exemptions should be available in relation to guardianship applications as to deputyship applications save that they should be based on the financial situation of the missing person as it was before he or she went missing. As in relation to deputyship we do not consider that the financial situation of the person applying for the guardianship order should be taken into account.

Although we expect that, subject to any significant difference in the cost of the systems for the supervision of guardians as against those used for deputies, the assessment and general supervision fees payable for guardianship will be similar to those payable for deputies, the fees now payable for deputies are under review and may, following due process, change. If this occurs then, subject to the same caveat, we would expect the fees for guardianship to be similar to the new fees. We do not propose that the minimum supervision fee will be available for guardianship cases.

The initial setting of fees for guardianship will be based on the expected volumes of cases. Should actual caseloads be significantly different then the initial fees may need to be reconsidered.

Q.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.

Assessment of Impact

This part of the consultation paper considers the expected impact of the proposals. The impact is 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). Views are invited on all aspects of the assessments. They will be reviewed in the light of information obtained in response to the consultation and engagement with stakeholders during the consultation period.

Impact Assessment

The impact assessment concludes that although it has not been possible to monetise all the costs or any of the benefits of the proposals, the benefits are expected to outweigh the costs. If this conclusion is correct, the costs incurred will provide value for money overall. The assessment estimates that the net present value over a ten-year period will be about minus £1.9m (in a range of minus £0.7m and minus £3.1m). A copy of the impact assessment is available at: <https://consult.justice.gov.uk/digital-communications/guardianship-missing-persons-act>

The assessment will be revised in the light of the response to the consultation and the agreed approach to funding the cost of implementation.

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

Equalities Assessment

The equalities assessment concludes that the proposals are consistent with the Public Sector Equality Duty. A copy of the assessment is set out at Appendix 2.

The assessment concludes with two additional questions that are repeated here for ease of reference.

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

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

Family Impact

We have considered how the creation of guardianship will affect families. We have concluded that it will help families of all kinds, but anticipate it will only be used where there are sufficient assets that cannot be otherwise accessed and which are important to the financial viability of the family or others. This is largely because we expect potential applicants will weigh the cost of obtaining an order against the costs of doing so. The choice of whether to apply for a guardianship order will need to be made in the light of all the circumstances. We consider the proposals will support families and family life in a small but important set of circumstances.

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

Questionnaire

We would welcome responses to the following questions set out in this consultation paper. These questions are also available online at:

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

Thank you for participating in this consultation exercise.

Q.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.

Q.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?

Q.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.

Q.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.

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

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

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

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

Q.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?

Q.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.

Q.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.

Q.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.

Q.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.

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

Q.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.

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

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

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

About you

Please use this section to tell us about yourself

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

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

Contact details/How to respond

Please send your response by 12 February 2019 to:

Guardianship Consultation 2018

Ministry of Justice

Civil Law

9.25

102 Petty France

London SW1H 9AJ

Tel: 020 3334 3198

Email: 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.

Extra copies

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

Publication of response

A paper summarising the responses to this consultation is due to be published within three months of the closing of the consultation (that is, on or before 12 May 2019). The response paper will be available on-line at: <https://consult.justice.gov.uk/digital-communications/guardianship-missing-persons-act>

Representative groups

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

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory code of practice with which public authorities

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

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

Consultation principles

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

<https://www.gov.uk/government/publications/consultation-principles-guidance>

Appendix 1 – Draft code of practice

1. Code of practice – general

- 1.1 This section describes the nature and purpose of the code of practice.

What is a code of practice?

- 1.2 A code of practice is a form of guidance that is intended to guide the people using it to make the appropriate decisions rather than giving them instructions as to what to do.

Does there have to be a code of practice?

- 1.3 The Act requires the Lord Chancellor to issue one or more Codes of Practice for the guidance of guardians, persons making applications under the Act, and such other matters relating to the Act as the Lord Chancellor considers appropriate.

Why is the code of practice issued under the Act important?

- 1.4 The guardianship code of practice is important not only because it will help guardians carry out their responsibilities properly, but also because it will help people, businesses and organisations dealing with them or who are interested in the affairs of the missing person understand those responsibilities.
- 1.5 The guardianship code of practice is also important because the Act gives it legal force. The Act provides that guardians must have regard to any code of practice that is relevant and that in any court or tribunal case where compliance with the code may be relevant, the court or tribunal must take the code into account.

2. Why was guardianship created?

This section of the code of practice explains why the Guardianship (Missing Persons) Act 2017 was created.

What is the problem that the Act addresses?

- 2.1 Under the common law of England and Wales, when individuals disappear they are assumed to be alive and to have full mental capacity unless it is proved to the contrary. In the absence of a presumption of death or proof of lack of mental capacity, their property is effectively left ownerless. Before the Act came into force, it was possible that no-one had legal authority to protect or use the property of a missing person. This could lead to assets dissipating, property falling into disrepair and dependants facing legal and financial problems because they no longer had access to the financial support that the missing person provided, exacerbating the emotional and personal shock caused to family members and others when a person disappears.
- 2.2 The absence of the missing person can also cause problems for the creditors of the missing person, who may not be able to obtain payment because of the disappearance, and for businesses and institutions holding the missing person's assets or liabilities, who are faced with the difficulties of dealing with those left behind, who are not able to gain access to fund or to settle liabilities.

How does the Guardianship (Missing Persons) Act 2017 solve these problems?

- 2.3 The Guardianship (Missing Persons) Act 2017 ("the Act") creates a new legal status – guardianship of the property and financial affairs of a missing person. It provides a legal framework to control and use the property and financial affairs of a missing person in his or her best interests. The framework is, however, inspired by and builds on both the common law relating to agency and other statutes, particularly the Mental Capacity Act 2005, relating to deputies appointed by the Court of Protection and the Presumption of Death Act 2013.

When can a missing person be presumed dead?

- 2.4 The Act complements the Presumption of Death Act 2013 by providing a way to manage the property and financial affairs of the missing person in cases where a missing person is thought to be alive.
- 2.5 There is no minimum period of years from a disappearance to when a presumption of death declaration can be sought. If the circumstances of the disappearance make death overwhelmingly likely, some families may choose to make an application for a declaration for presumed death.

3. Key concepts

This section explains some of the key concepts in the Act: “missing”, “property and financial affairs”, “sufficient interest”, “best interests”, and “conflict of interest”.

What does “missing” mean under the Guardianship (Missing Persons) Act 2017?

- 3.1 The concept of being “missing” is central to the working of the Act. Unless a person is missing a guardian cannot be appointed. If a person ceases to be missing a guardian must take steps to end the guardianship.
- 3.2 A person is “missing” for the purposes of the Act in two circumstances only. In both circumstances, the individual must be absent from their usual residence and activities. For this purpose, it does not matter that a person is absent for reasons beyond their control. A person being detained in prison, for example, would be considered absent from their usual residence and activities.
- 3.3 In the first circumstance, the person’s whereabouts is unknown or not known precisely enough to enable contact to be made to obtain decisions. This is expected to apply where a person has simply disappeared without explanation. The second circumstance is likely to be of more limited application. It occurs when, for reasons beyond his or her control, a person is unable to make effective decisions or to communicate such decisions, or both. This circumstance might, for example, be applicable in a hostage or kidnap situation. It does not apply in instances of detention where the detained person remains able to make and communicate decisions or where the missing person is prevented from making or communicating the necessary decisions regarding his or her property and financial affairs by reason of illness, injury or a lack of mental capacity.

Neighbours of Gabrielle have noticed that she has been absent from her home for three continuous weeks, with no explanation of her whereabouts. After growing more concerned, they contact her workplace and her sister and mother, who confirm that they have not heard from her in those three weeks. In this instance, Gabrielle could be missing under the first category of the definition.

On checking with the police, Gabrielle’s sister finds that Gabrielle has travelled to the Middle East and been taken hostage by a militant group of terrorists who have just made a ransom demand. There is video footage that establishes Gabrielle is alive and held in an identifiable location. The kidnappers do not allow Gabrielle to talk and so she cannot give instructions. Gabrielle could satisfy the second category in the definition.

What does the term the property and financial affairs of a missing person mean?

- 3.4 Property includes all kinds of assets and liabilities. The guardian may be given authority over whatever the missing person owns. Assets might include land, houses, flats and other buildings; possessions, such as cars, furniture, art, jewellery; intangible assets, such as patents and copyright, liens* and potential rights of action; investments, loans, balances in bank accounts and cash. Liabilities might include outgoings, such as mortgage and insurance payments, debts, standing orders and direct debits to utilities supplies, subscriptions for publications and memberships.
- 3.5 The assets and liabilities may be personal or owned in connection with a business.

- 3.6 Financial affairs include all issues relating to money and money's worth. These might include payment of debts, making investments, managing property and running a business.
- 3.7 Financial affairs do not extend to welfare or health decisions. There must be a financial element. A guardian may be able to make payments such as school fees or private medical fees for a child of the missing person or the care home fees of a dependant adult, but does not have any parental responsibility for the child or the personal care of the dependant adult.

Elizabeth has been missing for one year. In her absence, her two sons are under the care of her mother. Elizabeth's brother, Pascal, has been appointed as her guardian. One of Pascal's responsibilities as guardian of Elizabeth's property and financial affairs is to continue to pay Elizabeth's sons' school fees. In his capacity as guardian, Pascal has to assess whether paying the fees is in Elizabeth's best interests, but Pascal is not responsible for the welfare of the two sons and cannot make any decisions regarding their welfare.

- 3.8 The interests of third parties, including co-owners, mortgagees and other creditors, in the missing person's property and financial affairs are not affected by the appointment of a guardian. A mortgaged property, for example, remains mortgaged to the same extent and on the same terms as before the missing person disappeared.
- 3.9 Nor is the nature of the missing person's interest in the property changed by the appointment of a guardian. Property in respect of which the missing person has created a trust will remain trust property. If the missing person is a beneficiary the trustees* will continue to owe the same duties to the missing person as before the disappearance. The duties of the trustees to other beneficiaries will not be affected by the appointment. A guardian will be able to act on behalf of the missing person in relation to the missing person's interest as a beneficiary under the trust.
- 3.10 In some cases, a missing person may have transferred money and assets to a trust for the benefit of named persons, perhaps family members, in accordance with the terms of the trust. The trust is not affected by the appointment of a guardian, unless the trust deed states that it is.

What is meant by “sufficient interest” in the property and financial affairs of the missing person?

- 3.11 A person's ability to make an application to the court under the Act or to intervene in proceedings related to guardianship under the Act may be dependent on having a sufficient interest in the property and affairs of the missing person.
- 3.12 The court must refuse to hear an applicant without a sufficient interest in the property and financial affairs of a missing person in relation to the following applications:
 - applications for a guardianship order;
 - a variation order, or a revocation order;
 - applications for directions to the guardian;

- applications for a declaration as to the extent of the authority of the guardian; and
 - applications for the provision of accounts and information.
 - refuse permission to intervene.
- 3.13 The sufficiency of any particular interest will depend on the specific circumstances of the application. The party claiming to be sufficiently interested will have to provide sufficient evidence to demonstrate that this is the case.
- 3.14 The sufficiency of an interest may vary depending on the remedy being sought. The more significant the remedy, the greater the interest required is likely to be. An appointment might be sought in respect of all the property and financial affairs of the missing person by his or her long-term cohabiting partner. He or she could be concerned that the house and other property of the missing person is properly looked after until his or her return. Their close involvement in the life of the missing person would be very likely to qualify their interest as sufficient even if there was no jointly-owned property. An appointment might also be sought by a creditor, who is otherwise unable to get a debt paid. The sufficiency of the creditor's interest may, for example, justify an appointment of limited authority but not to obtain control of all the missing person's assets; or, an instruction to a guardian from the court to deal with a particular matter in a specified way.
- 3.15 The Act deems certain people have a sufficient interest for the purpose of making or taking part in an application. They are as follows:
- For applications for a guardianship order, a variation order, or a revocation order; applications for directions to the guardian; applications for a declaration as to the extent of the authority of the guardian; and applications for the provision of accounts and information, the following people are deemed to have a sufficient interest without further proof being necessary: the missing person (in practice he or she would have to have returned) and the missing person's personal representatives; and the missing person's spouse, civil partner, parent, child or sibling.
 - In relation to an application for a guardianship order, a person who was previously a guardian appointed under the Act in respect of some or all of the missing person's property and financial affairs at any time during the period of one year ending with the day on which the application is made.
 - In relation to an application for directions, variation order or revocation order, the guardian.
 - In relation to applications for guardianship orders, variation orders and revocations orders and other proceedings relating to the exercise of the guardian's functions, anyone who is the spouse, civil partner, child or sibling of the missing person, but has not made the application, may join in the court proceedings (referred to as "intervening") without having to get the permission of the court to do so.

Individuals who do not fall into these categories, such as those in co-habiting relationships other than marriage and civil partnerships, will have to satisfy the court that they have a sufficient interest in the property and financial affairs of the missing person before they can take part in the legal proceedings. Demonstrating a sufficient

interest to make an application or to intervene is one step in the procedure, but does not mean that the application or intervention will succeed.

- 3.16 The Public Guardian, who is responsible for the supervision of guardians, does not automatically qualify as having a sufficient interest, but is likely to be able to demonstrate sufficient interest to qualify if his wish to intervene relates to the performance of its supervisory functions.

Jen and Suki were co-habiting partners for 18 years with their children, living as a single household, and expecting to spend the remainder of their lives together up to the time of Jen's disappearance. They are not married or civil partners. Suki wants to be the guardian of Jen's property and financial affairs. She uses the longevity and closeness of their relationship to demonstrate that she has a sufficient interest in Jen's property and financial affairs to make an application.

Marie has lived next door to Marge, who is an elderly lady of independent means, but has no family and has gone missing. Marie has a history of caring for Marge and helping her with her affairs. Marie may be able to demonstrate a sufficient interest even though she has no family relationship.

What is the “best interests” principle and who does it apply to?

- 3.17 The Act provides that a guardian must act in what they reasonably believe to be the missing person's best interests. This is a key principle of the Act. Any act done for, or any decision made by a guardian on behalf of a missing person must be done, or made, in that person's best interests.
- 3.18 The Act also provides that the court must be satisfied before appointing a guardian that the appointment of a guardian in respect of the property and financial affairs of the missing person is in the missing person's best interests and that the person proposed for appointment will, if appointed, act in the missing person's best interests; and that a guardian must act in what they reasonably believe to be the missing person's best interests.

Michael is George's brother and would like to apply for a guardianship order to manage George's financial affairs as he has been missing for 6 months. However, they have had a history of disagreements, particularly with regards to money. Before George's disappearance, Michael had stolen George's money to pay off his gambling debts. In this instance, the court may well not be satisfied that Michael would manage George's finances in a way which would be in his best interests, and therefore might not appoint Michael as George's guardian.

- 3.19 The concept of a best interests test is also used in other legislation, but in relation to guardianship has to be assessed in the light of the provisions of the Act. It cannot be assumed that because a course of action was in the best interests of, for example, a person lacking capacity under the Mental Capacity Act 2005, that the same course of action will be in the best interests of a missing person.

How are the missing person's best interests to be worked out?

- 3.20 Working out what is in someone else's best interests may be difficult, but the Act sets out certain steps to help guardians work out whether a particular act or decision is in the missing person's best interests. This checklist is set out in section 18 of the

Act. This framework is not exhaustive, but it provides that a guardian attempting to determine the best interests of a missing person the guardian must:

- Consider all the relevant circumstances of which the guardian is aware.
- Consider, so far as is reasonably ascertainable:
 - any relevant wishes and feelings expressed by the missing person at any time, including any relevant written statement made by the missing person;
 - the beliefs and values that would be likely to influence the missing person; and any other factors that the missing person would be likely to consider
 - take into account, where it is reasonably practicable and appropriate to do so, the views of any persons of whom the guardian is aware with a relevant interest in the missing person's property or financial affairs.
 - consider the consequences of taking a proposed action.

3.21 Guardians have to reach their own decisions. They do not have to decide a matter by reference to what they think the missing person would have been likely to decide had he or she been there to make the decision. Nor are they required to consider any question as to whether or when the missing person might cease to be missing. They do not have to make a decision on the basis that the missing person might return sooner or later.

Claire has been acting as her cousin Jasmine's guardian for two years. Acting with Jasmine's best interests in mind, Claire has taken the decision to sell Jasmine's house to increase the amount of money available for the maintenance of Jasmine's children. In making the decision, Claire set aside the possibility that Jasmine might return within three months before the cash situation become absolutely critical and would have found it convenient to live in the house. Claire was entitled to do this and will not incur liability for the consequences of not considering this factor if Jasmine were to return in two months and try to take action against Claire for selling the house.

3.22 The Act also provides that before taking a decision in relation to which it would be reasonable to expect the missing person to consult a particular person, the guardian must consult that person unless it is not reasonably practicable to do so.

What must be taken into account when trying to work out someone's best interests?

3.23 Because every case – and every decision – is different, the law can't set out all the factors that will need to be taken into account in working out someone's best interests. But section 18 of the Act sets out some common factors that must always be considered when trying to work out someone's best interests. These factors are summarised in the checklist set out above.

3.24 It is important not to take shortcuts in working out best interests, and a proper and objective assessment must be carried out on every occasion. If the decision is urgent, there may not be time to examine all possible factors, but the decision must still be made in the best interests of the person who is missing by reference to the checklist.

3.25 Not all the factors in the checklist will be as relevant to all types of decisions or actions.

- 3.26 What is in a person's best interests may well change over time. This means that even where similar actions need to be taken repeatedly in connection with the missing person's financial affairs, the person's best interests should be regularly reviewed.

Before her disappearance, Ines paid a monthly sum of £10 to a charity which provided direct and unconditional support to homeless people by providing daily shelter and food to those in need. As this was a cause Ines was passionate about supporting, acting in her best interests, Calum, her guardian, has continued these payments. However, it has recently come to light that the charity is no longer providing unconditional shelter to the homeless. On reviewing the situation, Calum has concluded that since the charity's values no longer sit in line with Ines's, it would be in her best interests to cancel the monthly payments to the charity.

How does a decision-maker work out what 'all relevant circumstances' are?

- 3.27 The relevant circumstances will of course vary from case to case. When trying to work out someone's best interests, a guardian should try to identify all the issues that would be most relevant to the missing person and to the particular decision. Clearly, it is not always possible or practical to investigate in depth every issue which may have some relevance to the person who is missing or the decision in question.

How do the chances of a missing person returning affect working out what is in their best interests?

- 3.28 The Act provides that guardians are not required to consider whether or when the missing person might cease to be missing. This recognises the fact that the timing of any return by the missing person is uncertain, but does not prevent them from taking this factor into account. The guardian can therefore assess each decision on its own merits uncoloured by assumptions that the missing person might cease to be missing sooner or later. A guardian considering how to invest might be attracted by a higher rate of interest offered by a slightly longer term deposit. The decision whether to tie the money up for an additional period can be made without considering if it is likely the missing person will cease to be missing within the period.

How do a person's wishes and feelings, beliefs and values affect working out what is in their best interests?

- 3.29 The Act requires guardians to consider, as far as they are 'reasonably ascertainable':
- any relevant wishes and feelings expressed by the missing person at any time, including any relevant written statement made by the missing person;
 - the beliefs and values that would be likely to influence the missing person;
 - and any other factors that the missing person would be likely to consider.
- 3.30 But the wishes and feelings, beliefs and values of the missing person will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the missing person's best interests.

Ruth and Matt are brother and sister. When Matt went missing Ruth was appointed guardian of his assets. Ruth must, as the decision-maker, consider Matt's beliefs and values before deciding how to invest the assets. Matt previously voiced his strong support against animal testing. After speaking to his friends Ruth also understands Matt was also very environmentally conscious. Taking this into account, Ruth employs an ethical investment adviser to help choose companies in line with Matt's beliefs.

What is 'reasonably ascertainable'?

- 3.31 How much someone can learn about a person's past and present views will depend on circumstances and the time available. 'Reasonably ascertainable' means considering all possible information that could be reasonably be expected to be obtained in the time available given how it would have to be obtained. What is available in an emergency will be different to what is available in a non-emergency.

What role do a person's past and present wishes and feelings play?

- 3.32 The person may have held strong views in the past which could have a bearing on the decision now to be made. All reasonable efforts must be made to find out whether the person has expressed views in the past that will shape the decision to be made. This could have been through verbal communication, writing, behaviour or habits, or recorded in any other way (for example, social media, correspondence, home videos or audiotapes).

Harry has been missing for eight months. Kaying, acting as Harry's guardian, considers it in Harry's best interests to invest his assets, and speaks to a financial adviser to ensure that her money is kept separate to Harry's and is invested appropriately. Before he went missing, Harry often expressed his views against the use of palm oil, often by sharing discussions and debates surrounding palm oil. Taking this into consideration, when discussing with the financial advisor which stocks would be suitable to invest Harry's assets in, Kaying recommends that Harry's assets are not invested in a company which promotes or uses palm oil. In this instance, Kaying is considering Harry's past feelings and using this to help make her decision.

- 3.33 These permanent sources could provide a lot of information about a person's wishes. A guardian should consider these types of evidence carefully. If their decision does not follow something a person has recorded, they should record the reasons why. They should be able to justify their reasons if someone challenges their decision.

What role do beliefs and values play?

- 3.34 Everybody's values and beliefs influence the decisions they make. Evidence of a person's beliefs and values can be found in the same sources as evidence of their wishes and feelings as well as in things like their:
- cultural background
 - religious beliefs
 - political convictions, or
 - past behaviour or habits.

What other factors should a decision-maker consider?

- 3.35 The Act requires decision-makers to consider any other factors the missing person would be likely consider. This might include the effect of the decision on other people, obligations to dependants or the duties of a responsible citizen.
- 3.36 The Act allows actions that benefit other people, as long as they are in the best interests of the missing person. In deciding whether to do so, guardians will need to consider how the missing person would be likely to have responded to the needs of the person in question. However, benefitting other people is not in itself proof that the action is in the best interest of the missing person. Guardians will need to take their decisions in the light of all the circumstances, including the extent to which the missing person's assets should be preserved for the future. This may require balancing immediate needs and long term possibilities.

Who should be consulted when working out someone's best interests?

- 3.37 The Act requires guardians to take into account, where it is reasonably practicable and appropriate to do so, the views of any persons of whom the guardian is aware with a relevant interest in the missing person's property or financial affairs. The Act does not specify who these people may be. They might include anyone previously engaged in caring for the person, their dependants, or who has taken an interest in their welfare.
- 3.38 But, the Act does specify that before taking a decision in relation to which it would be reasonable to expect the missing person to consult a particular person, the guardian must consult that person unless it is not reasonably practicable and appropriate to do so.
- 3.39 Guardians must be able to show they have thought carefully about who to speak to. If it is practical and appropriate to speak to the above people, they must do so and must take their views into account. They must be able to explain why they did not speak to a particular person – it is good practice to have a clear record of their reasons.

Before he went missing three years ago, Mohammed had built up an extensive car collection which he had spent many years curating. His sister Hana, who is Mohammed's guardian, has been considering whether it would be in Mohammed's best interests to sell his car collection. Before making this decision, Hana decided to consult their parents and siblings regarding what they think would be in Mohammed's best interests in this matter. Hana decided that their parents and siblings were the most appropriate people to speak to as his family members are likely to be able to provide the most insight regarding his wishes and feelings towards his car collection. Hana decided that it was not in Mohammed's best interests to consult his ex-girlfriend, as she had not been involved in Mohammed's life for many years.

Mohammed's family suggested that if he were to return, he would be devastated to find that his car collection had been sold. Taking their views into account, but considering all the circumstances, Hana has decided that it would not currently be in Mohammed's best interests to sell his car collection.

Guardians should try to find out:

- what the people consulted think is in the person's best interests in this matter, and
- if they can give information on the person's wishes and feelings beliefs and values.

3.40 People who are close to the missing person, such as close family members, are likely to know them best.

How can guardians respect confidentiality?

3.41 Guardians must balance the duty to consult other people with the right to confidentiality of the missing person. So, if confidential information is to be discussed, they should only seek the views of people who it is appropriate to consult, where their views are relevant to the decision to be made and the particular circumstances.

Reasonable belief about a person's best interests

3.42 The Act provides that guardians must act in what they reasonably believe to be the best interests of the missing person. Guardians must therefore be able to show that it was reasonable for them to think that they were acting in the missing person's best interests at the time they made their decision

3.43 This does not mean that guardians can simply impose their own views. They must have objective reasons for their decisions – and they must be able to demonstrate them. They must be able to show they have considered all relevant circumstances and applied all elements of the best interests checklist.

What problems could arise when working out someone's best interests?

3.44 It is important that the best interests principle and the statutory checklist are flexible. Without flexibility, it would be impossible to prioritise factors in different cases – and it would be difficult to ensure that the outcome is the best possible for the missing person. Some cases will be straightforward. Others will require guardians to balance the pros and cons of all relevant factors.

What happens when there are conflicting concerns?

3.45 Guardians may be faced with people who disagree about a person's best interests. Family members, partners and carers may disagree between themselves. Or they might have different memories about what views the person expressed in the past. It may be that it is possible to resolve these differences but that is not critical to assessing the best interests in question. In weighing up different contributions, a guardian should consider:

- how long an individual has known the missing person,
- and
- what their relationship is.

But, the responsibility for the decision lies with the guardian.

What if the guardian is uncertain what is in the “best interests” of the missing person?

- 3.46 Given the flexibility of the definition of “best interests” there are bound to be instances in which a guardian is uncertain how to act. The guardian may be able to reach a satisfactory decision by considering the issues with other interested people. The guardian might take legal or other professional advice or consult the Office of the Public Guardian, which can give general guidance, and this may be adequate. Ultimately, the guardian may apply to the court for directions as to whether or how he or she should act in a given case. This should, however, not be necessary frequently.

Can it be in the best interests of the missing person to make payments that will reduce their wealth?

- 3.47 Whether a financial decision is in the best interests of the missing person will depend on the circumstances of the case, but there will be cases in which guardians can legitimately make payments by way of gift, including for the living expenses of individuals who are financially dependent on the missing person.

When John went missing two years ago his eldest son, Joe, became the guardian of his assets. The loss of John’s income meant that the living expenses of the family would use up the cash assets in the estate within a year. Joe assessed the overall state of John’s financial affairs, looking at outgoings, income and assets and prepared alternative courses of action. He considered the factors that he thought would have influenced John had he been present – not least that he had been born in the house and had a strong pride in his family’s presence there. He discussed the options and his conclusions with the wider family. Having weighed up all the factors, Joe decided to sell the family home. A sale would release a significant capital sum that could be invested, preserving John’s wealth as far as practicable whilst ensuring John’s family had sufficient money for their living expenses for the foreseeable future.

When Domenico went missing, his wife Sharon was appointed guardian. She had been the principal carer for their disabled son, Luca, whilst Domenico had been the family breadwinner and owner of the family home. Sharon knows that Luca will soon have outgrown some of the specialist equipment he needs around the home and that a significant sum will be needed to pay for replacements. She assesses Domenico’s financial position and considers the priority that he had given to ensuring Luca had had the best possible provision over the years. She discusses her conclusions with their other adult children and together they decide that Domenico would have thought it in his best interests to ensure Luca had the new equipment. They also consider how the purchase would affect Domenico’s financial situation in the new circumstance of his disappearance, where future income is uncertain. Weighing this all together Sharon decides that Domenico’s best interests would still be best served by buying the equipment.

At the same time Sharon was asked to use Domenico’s money to pay for the cost of a family holiday for one of her adult children. Domenico had generally been happy enough to make a contribution in the past. However, having assessed his financial situation and having discussed the proposal with all her adult children, she decided that it was not appropriate to reduce Domenico’s funds in this way given the uncertainty of the future.

Can a guardian make a personal gain from actions taken on behalf of the missing person?

- 3.48 Related to the concept of acting in the “best interests” of the missing person, but distinct from it, is the concept of conflict of interest. A guardian is appointed as an agent of the missing person. This means that he or she cannot profit personally from the appointment unless authorised to do so by the terms of the appointment.

Damien is a lawyer appointed as guardian. The court order provides that he may charge fees for his legal work as a guardian. If it had not done so he would only have been able to claim reasonable expenses in connection with the exercise of his functions as a guardian, such as travel expenses to attend at court.

Maja is the wife and guardian of her missing husband. She applies to the court for directions as to whether she can use a considerable sum of his money for a luxury cruise. The court considered whether this would be in her husband’s best interests. It concluded in the light of the evidence of their life together, including their choice of holidays, generally a fortnight in a caravan at the seaside, and the modest amount of assets left within the estate, that it would not.

- 3.49 The Act provides that in appointing a guardian the court must, amongst other things, have regard to whether there is a conflict between the proposed guardian’s interests and the missing person’s interests. The Act requires the court to consider, among other things, any connection between the proposed guardian’s property and financial affairs and the missing person’s property and financial affairs, and how any such connection might affect the taking of decisions by the proposed guardian if appointed.

Iona has been missing for 9 months. The court is considering whether Alice, the owner of a technology company that has recently been in financial difficulties, would be an appropriate guardian. The court may want to be sure that Alice will keep her financial affairs separate from Iona’s; and, if not, to consider other possible appointees.

- 3.50 It is likely that in some cases there will be a potential conflict of interest. A guardian may need to use the missing person’s assets to meet living expenses for themselves and perhaps also for the children of the missing person. This may mean that the estate of the missing person has to be diminished and, in time, perhaps, exhausted. This may, however, be the decision that is in the best interests of the missing person as otherwise his or her family may have to live out the period of disappearance in poverty. The guardian in such cases may be the spouse or civil partner of the missing person or a long-term partner whose affairs are intrinsically connected to those of the missing person and may be dependent upon them.
- 3.51 The Act therefore makes clear that there is not a conflict between the proposed guardian’s interests and the missing person’s interests **merely** because: the proposed guardian is the missing person’s spouse, civil partner, parent, child, sibling or other relative; was living with the missing person immediately before that person became a missing person; or may benefit from being appointed as guardian, whether directly or indirectly.

- 3.52 Conflicts of interest can arise in relation to large financial questions and small. A guardian who is constantly dipping into the missing person's funds for living expenses must still satisfy the best interests test.
- 3.53 To avoid inadvertent breach of duty and to provide proof that they have acted properly, guardians should keep the missing person's money and property separate from their own or anyone else's. There may be occasions where guardians and missing persons have agreed in the past to keep their money in a joint bank account (for example, if husband and wife). It might be possible to continue this under a Guardianship Order but in most circumstances, Guardians will be very well advised to keep their finances and those of the missing person separate to avoid any possibility of mistakes or confusion.
- 3.54 Guardians should therefore keep accounts of transactions carried out on the missing person's behalf. If the guardian is not a financial expert and the affairs are relatively straightforward, a record of income and expenditure (for example, through bank statements, bills and receipts) may be enough. The more complicated the affairs, the more detailed the guardianship accounts will need to be.

4. Guardianship Orders

This section of the code of practice explains the concept of guardianship and the role of a guardian. It provides information and guidance for guardians and other persons on the general characteristics of guardianship orders.

Who can appoint a guardian?

- 4.1 Guardians of the property and financial affairs of missing persons can only be appointed by the court in accordance with the terms of the Act. The appointment is made by a court order known as a guardianship order. The terms of the appointment may be varied or revoked by the court.

Why are guardians to be appointed?

- 4.2 The Act empowers the court to appoint one or more persons to act as the guardian of the property and financial affairs of an individual, who is, due to being missing, not able to act in relation to his or her property and financial affairs. The missing person may be a child. The guardian may be a spouse, civil partner, cohabiting partner or family member or have no previous relationship to the missing person, such as a professional person appointed by the court, who may act as guardian in several cases. The guardian does not need to have a prior sufficient interest in the missing person's property or financial affairs.

Lawrence has been missing for two years and has therefore been unable to act in relation to his property and financial affairs. This includes making the monthly mortgage payments for his house. A guardian was appointed to act in relation to Lawrence's property and financial affairs, including making mortgage payments, six months after the disappearance. The payments made by the guardian have ensured that Lawrence's house has not been repossessed by the lender.

Who can apply for a guardianship order?

- 4.3 Anyone can apply for a guardianship order, but the court must refuse to hear the application if it considers the applicant does not have a sufficient interest in relation to the missing person's property or financial affairs. The Act provides that the spouse, civil partner, parent, child and sibling of the missing person are deemed to have a sufficient interest, as has a person who was a guardian of the missing person at any time in the year preceding the day on which the application is made. Other applicants will have to demonstrate to the court why they have a sufficient interest.²

When can the court hear an application for a guardianship order?

- 4.4 The court can only hear an application for a guardianship order if one of the following applies:
- The missing person was domiciled in England and Wales the day before he or she was first known to be missing (if he or she has been missing for two or more periods, the day in question is the day before the most recent disappearance). Domicile is a common law concept used to connect a person to a legal

² See paragraphs 3.11-3.16.

jurisdiction, such as England and Wales. It defines where a person is deemed to have his or her permanent home.

- Secondly, if the missing person had been habitually resident* there throughout the year ending on that day. Habitual residence is another legal concept that is widely used in establishing a connection between a person and a legal jurisdiction.
- Thirdly, if the applicant is the spouse or civil partner of the missing person and the applicant is domiciled* in England and Wales on the day the application is made or has been habitually resident there throughout the year ending on that day.

4.5 These situations are the essentially the same as those applying under the Presumption of Death Act 2013.

Alex has been missing for one year. Alex is domiciled in Spain but had been working in England for five years, where he subsequently married his British wife, Fiona. Fiona would like to apply for a guardianship order to ensure that his property and financial affairs are being managed effectively. Although Alex was domiciled in Spain before going missing, Fiona has been domiciled in England for over 30 years up to and including the date of the application. Even if Fiona had not qualified on domicile, her continuous residence over the last three years in England and Wales up to that date would qualify her. The application can therefore be heard.

When can the court make a guardianship order?

4.6 The court may make a guardianship order in two situations:

- The first is when the court is satisfied that:
 - the person in respect of whom the application is made is missing³ and has been missing for at least 90 days (including and ending with the day on which the application is made);
 - the appointment of a guardian is in the best interests of the missing person; and
 - there is a satisfactory person who could be appointed as guardian.
- The second is when a decision in relation to the property or financial affairs of a missing person is needed or likely to be needed urgently before the 90-day absence period requirement has been satisfied. In this case the 90-day requirement does not apply, but, the remaining requirements have still to be satisfied. This is known as the urgency condition. It might, for example, apply where there is an urgent business decision to be taken or a repossession order application to challenge.

How will the court know that the missing person has been missing for 90 days?

4.7 The applicant for a guardianship order will have to demonstrate that the missing person has been missing for 90 days. To show this the applicant will have to produce evidence of absence from the usual place of residence and activities. This may require corroborative statements from friends and family, from work colleagues

³ See paragraph 3.1-3.3 of the draft code of practice.

and social acquaintances; and from remotely accessible service providers, such as banks and telephone companies. A useful starting point may be a statement from the police confirming that the person is missing as the court is likely to expect there to have been a police investigation of some kind.

Kaito normally visits his mother every Sunday. However, Kaito has not visited her for over three months. Kaito also usually plays football for a local side on Sunday mornings and badminton on a Thursday evening but the clubs have not had any response from him for a similar period. His sister, Sally, who is applying to be his guardian, collects statements from her mother and the club secretaries to add to the evidence provided by the police missing person's report in respect of Kaito and by the corroboration of friends and colleagues that they have not been able to contact him over this period.

Who can be appointed a guardian by the court?

- 4.8 Only individuals aged 18 and over and trust corporations*, who consent to the appointment, can be appointed as guardians. The appointee does not have to be the person nominated in the application to the court and does not have to be related to the missing person. Professionally qualified persons, such as lawyers or accountants, can be appointed, as can friends or creditors.
- 4.9 The position of a guardian is, however, one of great responsibility and trust. The court must therefore be satisfied that the appointee meets the requirements of the Act, is suitable to appoint, and will act in the best interests of the missing person.

Jake applies to be the guardian of Steven's assets after he has been missing for 4 months. Jake and Steven are brothers and live together. They are both wealthy. Jake is, however, viewed as financially irresponsible in his family and his uncle intervenes to argue that Jake lacks the financial skills and knowledge to be a guardian and that a financially competent guardian is required.

What is a trust corporation?*

- 4.10 A trust corporation is in general terms a corporation set up to carry on trust business. In practice they are frequently subsidiaries of banks and financial institutions, but are also charities or legal firms. There are technical requirements that a corporation must satisfy to be a trust corporation. Trust corporation status confers certain legal advantages.

Can a guardianship appointment relate to the property and financial affairs of more than one missing person?

- 4.11 An order making the appointment of a guardian may only relate to the property and financial affairs of one missing person.

Can two or more guardians be appointed in relation to one missing person?

- 4.12 Two or more persons may be appointed as a guardian in relation to the property and financial affairs of a missing person, regardless of whether an application was made for two guardians.
- 4.13 If two or more guardians are appointed, the appointments may be joint appointments in respect of all the property and financial affairs within the scope of the proposed

appointment or may be separate appointments in relation to different parts of the missing person's property and financial affairs. For example, one person could be appointed to manage real estate assets, such as houses and flats, and, another to manage investments and savings; or, one might be appointed in relation to property in the UK and one in relation to property overseas.

- 4.14 Appointments combining these two arrangements in relation to different parts of the property and financial affairs are also possible. For example, there may be a joint appointment in relation to investments and savings and a single appointment in relation to the management of other property.
- 4.15 The appointments may also be for different periods. This may be appropriate where it is clear that some assets will be sold in the short term and others will be retained.
- 4.16 Where there are two or more guardians and the guardians are responsible for different property and financial affairs, the guardians may be appointed on different terms. If the appointment is joint then the terms must be the same. Where guardians are to act jointly they must make decisions together and act unanimously in making their decisions and all of them will be bound by the terms of the appointment and any direction of the court.
- 4.17 The Act does not permit guardians in relation to the same missing person to be appointed as joint and several guardians (that is guardians who can act jointly or separately). This restriction avoids a source of conflicting decision making by the guardians acting independently in relation to the same subject matter.

Joselyn has been missing for a month. Her two sons, Max and Jamie are appointed as separate guardians. Max is appointed to look after his mother's finances, whilst Jamie is appointed to sell a number of houses and flats. Max is appointed for four years, but Jamie is appointed for 18 months. Max and Jamie do not have to act jointly.

What conditions must be satisfied before a person can be appointed a guardian?

- 4.18 The court must be satisfied the prospective guardian is suitable to be appointed. In considering this, the court must also take into account the views of any persons of whom the court is aware that have a relevant interest in relation to the missing person's property or financial affairs, where it is reasonably practicable and appropriate to do so. These persons might, for example, come forward as a result of the notices served by the applicant or the advertisement placed by him or her, but are not limited to these sources.
- 4.19 In deciding if a person is suitable, the court is to consider:
 - the proposed guardian's relationship with the missing person;
 - the views of the missing person on the proposed guardian, so far as they are known to, or reasonably ascertainable by the court;
 - whether the proposed guardian has the skills and knowledge necessary to carry out the functions proposed by the guardianship order;
 - and any conflict between the proposed guardian's interests and the missing person's interests.

- 4.20 In deciding whether there is a conflict of interest,⁴ the court has to consider:
- any connections between the property and affairs of the missing person and the property and affairs of the proposed guardian; and,
 - how any connection in relation to property or financial affairs between the missing person and the proposed guardian might affect decisions that the guardian may take.
- 4.21 For the purposes of the appointment, there is not a conflict of interest simply and only because the proposed guardian is:
- the spouse, civil partner, child, sibling or other relative of the missing person;
 - was living with the missing person immediately before the disappearance;
 - or may benefit from the appointment directly or indirectly.
- 4.22 The court must also decide that the person who is appointed will act in the best interests⁵ of the missing person. In reaching this decision the court must consider all the relevant circumstances and consider the consequences of the possible decision that it might reach (for example, comparing possible outcomes of different decisions). This may include appointing the applicant or a different guardian, making joint appointments or restricting the appointment to certain property, or not appointing a guardian.
- 4.23 The circumstances will vary from case to case, but so far as is reasonably ascertainable the court must consider any relevant wishes and feelings expressed by the missing person at any time, including any relevant written statement made by the missing person; the beliefs and values that would be likely to influence the missing person; and, any other factors that the missing person would be likely to consider. The applicant will therefore have to consider and collect evidence of these matters in support of the application.

Hamad is appointed guardian of Faye's assets. Before Faye went missing they lived together. Hamad also owns an IT business, which is suffering financial hardship. If Hamad is appointed there appears, on the evidence, to be a strong likelihood that he would use Faye's assets to support his business and that Faye had always been at pains to keep her money away from his business. The court may conclude that in this case Hamad is too likely to act in his own best interests not Faye's. The court might decide to appoint an independent person.

- How long can a guardianship order last?*
- 4.24 The period for which the guardian is appointed will be stated in the court order. The maximum is four years from and including the date of the order of appointment. However, this will not prevent the court from making further guardianship orders, including orders reappointing a person as guardian, in respect of the missing person.

⁴ See paragraphs 3.48-3.54.

⁵ See paragraphs 3.17-3.47.

- 4.25 There is no limit on the number of times that the appointment of a guardian may be renewed. Ideally, if there is to be a renewal the start of the later period should be the end of the earlier period, but this is not essential, so there may be gaps when there is no guardian.
- 4.26 The ability to make a new appointment does not mean that the court will continue to make guardianship orders indefinitely. The likelihood is that the longer a person is missing and their whereabouts is unknown the greater the likelihood that the missing person is dead. This is one of the factors the court may consider in deciding if a guardianship order should be made, but the court will only make a declaration of presumed death on an application under the Presumption of Death Act 2013.
- 4.27 Guardians and other interested persons should consider when a guardianship appointment is nearing its end whether it would be in the best interests of the missing person to seek a new guardianship and if so who might be appointed. This will enable an application to be made to the court in good time.
- 4.28 The time at which these decisions should be made may vary from case to case but in a four-year appointment, consideration of the issues should probably start no later than the end of the third year.
- 4.29 The appointment of a guardian on the expiry of a term will require an application to the court, just as for the initial appointment. The evidence of the guardianship may however make the proof of the grounds easier.

When does the appointment of a guardian take effect?

- 4.30 The guardian is appointed for the period specified in the order made by the court. The terms of the order will define when the guardianship will commence.

What is the legal relationship of the guardian and the missing person?

- 4.31 A guardian is the agent of the missing person in respect of the property and financial affairs included in the scope of the appointment. The guardian's powers as agent are defined by the Act and the terms of the guardianship order. Being an agent means that the guardian has legal duties to the person they are representing. It also means that when guardians carry out tasks within their powers, they are not personally liable to third parties.
- 4.32 As the guardian is the agent of the missing person, the appointment does not affect the powers of the missing person to act in relation to his or her property and affairs, these powers remain alongside the new powers of the guardian.

What is the legal effect of the guardian being the agent of the missing person?

- 4.33 The application of the law of agency means that guardians must carry out their duties carefully and responsibly. They have a duty to:
- act with due care and skill (duty of care);
 - not take advantage of or profit from their situation without authorisation (fiduciary duty);
 - not delegate duties unless authorised to do so;
 - act in good faith;

- respect the person's confidentiality;
 - comply with the directions of the court;
 - keep accounts; and
 - familiarise themselves with the property and financial affairs.
- 4.34 These duties deriving from the general law of agency are explained in the following paragraphs. Guardians are also subject to other duties derived from the Act and the other legislation. These are described after the agency duties.
- 4.35 **Duty of Care:** 'Duty of care' means applying a certain standard of care and skill, including taking and considering expert advice when appropriate. The level of care and skill depends on whether the guardian is paid for their services or holds relevant professional qualifications. Guardians who are not being paid must use the same care, skill and diligence they would use when making decisions for themselves or managing their own affairs. If they do not, they could be held liable for acting negligently. However, carelessness in managing one's own affairs does not justify carelessness in managing those of the missing person. If it would be reasonable to expect a person with the guardian's background and qualifications to take professional advice, a guardian should do so, irrespective of whether the individual guardian in question would take advice on the same issue in relation to his or her personal affairs. Such advice might be taken from a lawyer or other professional with relevant expertise, an advice agency or a relevant charity.
- 4.36 A guardian who claims to have particular skills or qualifications must show greater skill in those particular areas than a person who does not make such claims.
- 4.37 If guardians are being paid for their services, they are expected to demonstrate a higher degree of care or skill when carrying out their duties. A solicitor appointed as guardian would, for example, be expected to bring a higher degree of legal skill than a person not legally qualified. Guardians whose duties form part of their professional work (for example, solicitors or accountants) must display normal professional competence and follow their profession's rules and standards.
- 4.38 **Fiduciary Duty:** the fiduciary duty means guardians must not take advantage of their position unless authorised to do so. Nor should they put themselves in a position where their personal interests conflict with their duties. For example, guardians should not buy property that they are selling for the person they have been appointed to represent. They should also not accept a third-party commission in any transactions.
- 4.39 Guardians should be alert to potential conflicts of interest.
- 4.40 Guardians may be entitled to remuneration for their services if this is authorised by the court. They are in any case entitled to be reimbursed from the missing person's estate for their reasonable expenses incurred in connection with their functions.
- 4.41 Some guardians may be entitled to draw on the assets of the missing person for their own living expenses and upkeep, because they were dependant on the missing person, but these drawings must still be demonstrably in the best interests of the missing person. Guardians will need to be able to account for and justify expenditure, particularly if they are the beneficiary.

Sally is married to James and is his guardian. She had stayed at home to raise the children whilst he worked. Without his salary, she has no income. She and the children need to access savings and investments in James's name to cover their living expenses. Her appointment as guardian does not prevent her receiving this benefit. She must, however, still assess whether the particular decisions made in relation to the expenditure are in James's best interests.

- 4.42 Duty not to delegate: A guardian may seek professional or expert advice (for example, investment advice from a financial adviser). But they cannot give their decision-making responsibilities to someone else.

Kelechi, who is a guardian, has decided, having taken advice and consulted appropriate advisers, to sell an investment property. She may delegate administrative tasks connected with the sale, for example, the marketing and selling of a house to an estate agent, but the decision whether to sell at a price is in the best interests of the missing person is for her to make and cannot be delegated.

- 4.43 Duty of good faith: Acting in good faith means acting with honesty and integrity.

Piotr has been missing for a year. Suzy, his sister, has recently become the guardian of his assets. Suzy must act in good faith as a guardian. She seeks professional advice from a financial adviser and ensures Piotr's money is kept separate to her own. A friend suggests to Suzy that she should invest her own and Piotr's money in the friend's business. Suzy is happy to invest for herself, but having taken advice decides Piotr's best interests mean he should not invest. Suzy would not be acting in good faith if she invested his money in the friend's business.

- 4.44 Duty of confidentiality: guardians have a duty to keep the missing person's affairs confidential, unless:

- before they went missing, the person agreed that information could be revealed where necessary;
- there is a legal requirement to do so; or
 - there is some other good reason to release information (for example, it is in the public interest or in the best interests of the missing person, or where there is a risk of harm to the missing person concerned or to other people).

- 4.45 In these circumstances, it may well be advisable for the guardian to contact the OPG for guidance (OPG provides general information about revealing personal information) or to get legal advice.

- 4.46 Duty to comply with the directions of the court: The court may give specific directions to guardians about how they should use their powers. It can also order guardians to provide reports (for example, financial accounts or reports on the property and financial affairs of the missing person and their stewardship) to the Public Guardian at any time or at such intervals as the court directs. The Public Guardian may also require the production of information and accounts as specified in regulations.

- 4.47 Duty to keep accounts: a guardian is expected to keep, and periodically submit to the Public Guardian, correct accounts of all their dealings and transactions on the person's behalf. If the guardian is not a financial expert and the affairs are relatively straightforward, a record of income and expenditure (for example, through bank statements, bills and receipts) may be enough. The more complicated the affairs, the more detailed the accounts will need to be. These financial accounts should be complemented by records of decisions taken and the reasons for those decisions. These records should include details of the persons consulted and any advice taken. They will help the guardian respond to the usual request of the Public Guardian, if the same procedure is followed as for deputyship, for the completion by the guardian of a standard report form detailing the missing person's income and expenditure and decisions made during the reporting period.
- 4.48 Duty to keep the person's money and property separate: guardians should usually keep the missing person's money and property separate from their own or anyone else's. This is to avoid any possibility of mistakes or confusion in handling the person's affairs. Sometimes there may be good reason not to do so (for example, a husband might be his wife's guardian and they might have had a joint account for many years), but even in these cases the guardian must be ready to account for the money expended.

Raj is the guardian of the assets of his sister, Cathy, who is missing. Cathy was an experienced investor in stocks and shares and has large holdings of them. Raj, who is considerably less wealthy than Cathy, has no experience of owning or managing investments. On his appointment Raj took steps to find out what Cathy owned and how she had managed her investments in the past. He took advice from a legal adviser as to how he should carry out his responsibilities. He opened separate bank accounts for his guardianship and informed all the holders of the investments of his appointment. He held an initial review with a financial adviser and discussed the proposed strategy with other family members. He then implemented the strategy and kept all Cathy's money and investments separate from his own, taking further advice as major decisions had to be made. He kept a careful record of the transactions made and the reasons for them. He paid for the advice taken from Cathy's money, but received no personal benefit from his activities other than reimbursing some necessary incidental expenditure on travel to consult a lawyer. He reported to the Public Guardian on his administration of Cathy's affairs in a timely and appropriate fashion. Raj thereby performed the responsibilities of being a guardian properly.

- 4.49 Duty to familiarise themselves with the property and financial affairs
- Guardians must familiarise themselves with the property and affairs to which the appointment relates. The Public Guardian is likely to ask for an inventory in the course of supervision when assessing the case.
- What other duties will a guardian be subject to?*
- 4.50 A guardian will be subject to any duties imposed by the guardianship order, the Act or any secondary legislation made under or through the Act and the general law, for example in relation to data protection.
- 4.51 The duties specified in the order will be particular to the guardian in question and will depend upon the circumstances of the case.

4.52 The Act imposes some duties applicable to all guardians:

- A guardian must act in what he or she reasonably believes to be the missing person's best interests.
- Before taking a decision in which it would be reasonable to expect the missing person to consult a particular person, the guardian must consult that person unless it is not reasonably practicable to do.
- A guardian must keep records of the exercise of functions as a guardian, including accounts relating to the exercise of those functions.
- On ceasing to be a guardian, the guardian must give a copy of the records to such persons as the court directs. When giving such a direction, which may include restrictions and conditions, the court must have regard to the need to keeping the missing person's affairs confidential, and the need to impose only such requirements as are reasonable in all the circumstances. The guardian will also be required to report to the Public Guardian, who may require records and supporting documents and a final report.
- A guardian who has reasonable grounds to believe that the missing person no longer qualifies as missing must apply to the court for the revocation of the order as soon as reasonably practicable. This may, amongst others, be the result of reports from third parties or the guardian meeting the missing person.
- A guardian (or other person) becoming aware that a guardianship order has been revoked by death or presumed death must inform the Public Guardian as soon as reasonably practicable. The Public Guardian may request a final report.
- The guardian must also have regard to the content of any code of practice issued under the Act, including this one.

4.53 Guardians will also be subject to duties imposed by the Public Guardian deriving from the Public guardian's function of registering and supervising guardians. These will include: supplying records and accounts; providing reports during and after the guardianship; responding to requests from the Public Guardian for information and explanations; ensuring an appropriate level of security for the proper performance of the guardian's duties is maintained; and keeping the Public Guardian informed of any change in contact details of the guardian. Some of these duties will be specified in the regulations to be made under section 58 of the Mental Capacity Act 2005: for example, in relation to the provision of reports to the Public Guardian.

What powers does the guardian have in relation to the property and financial affairs of the missing person?

4.54 The overall intention is that in relation to the property and financial affairs for which a guardian is responsible under the guardianship order, the guardian should "stand in the shoes" of the missing person. This means that the guardian could do the same things as the missing person could were he or she not missing. The court may however impose restrictions and conditions in the guardianship order and the guardian must act in accordance with the proper performance of the duties imposed by the appointment.

4.55 The Act states that the rights and powers of a guardian may include:

- selling, letting or mortgaging the missing person's property;

- making investments;
- executing deeds and other documents;
- recovering money owed to the missing person;
- discharging debts and other obligations of the missing person (whether legally enforceable or not);
- resigning trusteeships held by the missing person;
- bringing or conducting legal proceedings; and
- making a gift out of the missing person's property.

Are there any decisions that the guardian cannot take on behalf of the missing person?

- 4.56 Yes. Restrictions and conditions may be specified in the guardianship order. There are also general restrictions on a guardian's power to make gifts and to act as a trustee. A guardian cannot make a will or codicil for the missing person. These are discussed in the following paragraphs.

When can a guardian make a gift?

- 4.57 A guardian may only make a gift out of the missing person's property if it is for the benefit of a dependant of the missing person or if authorised by the guardianship order. A dependant is a person who, if the missing person were not missing, would reasonably rely on the missing person to provide for his or her maintenance. A gift is something given without expectation of return. It might be a birthday or Christmas present. It might equally be money for living expenses, school fees or health care.
- 4.58 Even if the missing person used to give birthday and Christmas presents to individuals regularly, the guardian will only be able to do so if authorised by the terms of his or her appointment. Charitable donations will be subject to the same test.

Theresa has been missing for several months. Her eldest son Michael is acting as a guardian for her assets. Theresa also has a young son, Jacob. If Theresa was not missing, Jacob would solely rely on her to provide for him. In his role as guardian, Michael may use Theresa's assets to pay appropriate amounts for Jacob's living expenses (subject to the best interests test⁶).

Can a guardian make a will for the missing person?

- 4.59 A guardian cannot make or alter a will for the missing person, whether by way of a new will or a codicil*.

Can a guardian exercise a missing person's powers as a trustee?

- 4.60 A guardian cannot act as trustee in place of the missing person unless the trust is solely for the benefit of the missing person. The guardian can, however, resign trusteeships held by the missing person.

⁶ See paragraphs 3.17-3.47.

What are the powers of a guardian in relation to a jointly owned home?

- 4.61 One of the most commonly encountered types of trust is the trust of land. This is because the law requires that jointly owned houses and flats are owned on a trust of land. A missing person might therefore be a trustee of the house or flat with his or her spouse or civil partner. This could be problematic in the case of a missing person because trustees must act unanimously. A decision to sell or mortgage the home to raise money could therefore be hindered because the missing person cannot take part in the making of the decision and a guardian cannot act for the missing person in relation to property held on trust for another person (for example, his or her spouse, civil partner or co-habitant).
- 4.62 If the continuing presence of the missing person as a trustee is creating problems for those left behind, the guardian can resign the trusteeship and thereby free the other trustee or trustees to deal with the property.

Sam and Niall are brothers who own a house in equal shares. When Niall goes missing Sam is appointed the guardian of Niall's assets. Sam needs to sell the house because he cannot keep up with the mortgage payments without Niall's income. It is in Niall's best interests that the house is sold as otherwise it will be repossessed. Sam can resign Niall's trusteeship but that will leave him as the only trustee. Sam therefore appoints a solicitor who has advised him in the past as a second trustee. This will enable the sale to proceed removing the threat of legal action by the mortgagee.

Jeremy and Joanna are husband and wife. Joanna disappears, Jeremy becomes her guardian. His own income is insufficient to keep up the mortgage payments on the family home. Jeremy decides it is necessary to sell. To complete the sale Jeremy must be joined by another trustee. To achieve this, he resigns Joanna's trusteeship (without affecting the extent of her ownership in the property) and appoints their eldest adult daughter as the second trustee. The sale can then proceed to completion.

- 4.63 If a family home is owned in the sole name of the missing person and is his or her property entirely, but is nominally held on trust for the missing person, the guardian would be able to act in place of the missing person in relation to the property as it is only held on trust for the missing person.

When are guardians personally liable for their decisions?

- 4.64 A guardian acting within the scope of his or her authority as agent and in compliance with his or her duties will not be personally liable for actions taken as guardian. The cost of any liability incurred in these cases will be met by the estate of the missing person.
- 4.65 A guardian acting outside the scope of his or her authority or in breach of his or her duties may be personally liable to the missing person or any third party for loss occasioned. 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.

- 4.66 In considering whether to relieve a guardian of personal liability in these circumstances, the court must have regard to the care and skill that it is reasonable to expect the guardian to have exercised in the circumstances, and, in the case of a person acting as a guardian in the course of a business or profession, any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession (such as a lawyer, accountant or financial adviser).

Will providing a security bond exempt a guardian from having to pay compensation?

- 4.67 This will depend on the terms of the bond, but in most cases the bond issuer would expect to try to recover sums paid out under the bond from the guardian.

What can a person do if they are unhappy with a guardian's decisions?

- 4.68 Persons concerned that a guardian is not acting properly can take various forms of action against the guardian to hold him or her to account.

- 4.69 As a guardian is treated as the agent of the missing person, any acts outside his or her authority do not bind the missing person. This means it may be crucial to be able to define the scope of the guardian's authority. In some cases this will be clear, but in others the guardian may want to discuss the proposal with other interested persons to help inform his or her view, to seek guidance from OPG, or to take professional advice.

- 4.70 The Act gives the court power to decide whether the guardian has acted within the scope of his or her authority and complied with his or her duties (for example, to act in what the guardian reasonably believes to be the best interests of the missing person). Applications to the court can, however, be costly and should be a last resort. The court can make a declaration about the guardian's authority in the course of proceedings or on application. If the court makes a declaration it may, in addition to any other powers it has, make:

- an order disallowing expenses incurred by the guardian or remuneration to which the guardian would otherwise be entitled;
- an order requiring the guardian to make a payment of an amount determined by the court to the missing person or the missing person's estate; or
- such other order as the court considers appropriate for the purpose of compensating the missing person or the missing person's estate for any loss resulting from the action or failure in question.

- 4.71 The court may, on an application to review the authority of the guardian, order a person (including a guardian) to provide the applicant with accounts or other information relating to the person's exercise of functions as a guardian in the form and manner specified in the order, which may include conditions and restrictions. When considering such an application the court must have regard to the need to keep the missing person's affairs confidential, and the need to impose only such requirements as are reasonable in all the circumstances.

Charles went missing two years ago. As Charles' solicitor before he went missing, David is not satisfied that Charles' guardian is complying with the functions specified in the original court order. He has made an application to the court to review the actions and authority of the guardian. In support of his application he has provided the court with evidence which he believes makes a case for a review of the guardian. The court then reviews David's application and evidence in support of his application and concludes that the guardian has not acted in accordance with the functions specified original court order. The court therefore decides to revoke the guardianship order.

- 4.72 These methods of holding the guardian to account are in addition to the supervision of guardians by the Public Guardian, who may investigate and deal with representations, including complaints, about the way in which a guardian is exercising his or her functions: this includes making applications to court where necessary, for example, for the termination of a guardianship, for the court to give directions, or for a security bond to be enforced.

Do third parties have any protection if they don't know about a revocation or variation of a guardianship order?

- 4.73 Third parties may deal with a guardian when unknown to them the guardianship order has been revoked, whether by an order or not, or varied in a way that takes the dealing outside the authority of the guardian.
- 4.74 The Act protects third parties in these circumstances by providing that where a person deals with a guardian at a time when the guardianship order has been varied or revoked, but the person does not know that, the transaction between them is, in favour of that person, as valid as if the guardianship order had not been varied or revoked.
- 4.75 There may, however, be situations in which the transaction between the guardian and a third party protected in this way is only part of a series of transactions and that subsequent owners of the property in question may need to depend on the validity of the transaction between the guardian and another person.
- 4.76 In these cases, the ownership of something that was bought by one person ("the buyer") from another may depend on whether an earlier transaction between a guardian and another person was valid. To help avoid potentially extensive investigations by the buyer into the circumstances of the earlier transaction involving the guardian to answer the question of whether the guardian had authority to sell the thing in question, the Act creates a conclusive presumption in favour of the buyer that the person with whom the guardian dealt did not know of the variation or revocation of the guardianship order at the material time (that is usually when the thing was sold by the guardian). The presumption applies if the transaction between the guardian and the person with whom the guardian dealt was completed within 12 months beginning with the day on which the guardianship order was made; or, alternatively, if, before the completion of the buyer's purchase, or within 3 months beginning with the day of its completion, the person with whom the guardian dealt makes a statutory declaration that he or she did not at the material time know of the variation or revocation of the guardianship order. Similar provisions have operated successfully for many years in relation to powers of attorney.

Can a guardian seek guidance as to how to act?

- 4.77 Guardians may be faced with difficult decisions about how to act and whether they have authority to act. A guardian should consult other potentially interested parties and may wish to take legal advice as to whether a proposed course of action would be within his or her power. The Office of the Public Guardian may also be able to give guidance. This may be sufficient to answer any questions. Ultimately, however, the guardian can apply to the court for directions as to how or whether to act and about the scope of his or her authority. The court may make a direction of this kind whether or not an application is made, meaning that a guardian can seek the view of the court in the course of proceedings that are ongoing as well as by making a separate application to the court.

Can the terms of a guardianship order be varied?

- 4.78 During the currency of a guardianship order, events may occur that indicate that the terms of the order are no longer appropriate. The Act allows the court to vary the order if it is satisfied that the person whose property or financial affairs are the subject of the guardianship order is missing; that the absence condition* or the urgency condition* is met (if the urgency condition applies the court may only make provision in the variation order in respect of property or financial affairs in respect of which it is satisfied that the urgency condition is met), and, that, in all the circumstances, the proposed variation is in the missing person's best interests.
- 4.79 The variations made will depend on the circumstances of the case, but may include:
- appointing a different person to be the guardian;
 - adding or removing property or financial affairs;
 - adding, removing or altering conditions or restrictions;
 - alter the period for which the guardian is appointed;
 - doing anything else that the court could do on making a guardianship order
 - where two or more guardians have been appointed, remove one or more of them without appointing a replacement provided that at least one guardian remains.
- 4.80 A variation order may be made as a result of an application or by the court of its own motion in other proceedings (perhaps following an application for directions* as to how to act by the guardian or an application for a revocation order).
- 4.81 A copy of the variation order must be sent by the court to the Public Guardian, who is responsible for maintaining the register of guardianship orders. The details of the variation order will be entered by the Public Guardian on the register of guardianship orders.
- 4.82 A variation of the period for which the guardian is appointed cannot extend the period of the appointment beyond the end of the period of four years beginning with the day when the guardianship order being varied was made.

Tomas was appointed to act as a guardian on 1 August 2019, with the appointment finishing on 31 July 2021 as the missing person's estate was expected to have been exhausted by then. During the period of a guardianship order the missing person inherited significant assets. Tomas applied for an extension of the guardianship. The court cannot extend the current guardianship order beyond 31 July 2023.

Can a guardian resign?

- 4.83 A guardian may resign but will need to obtain a variation order or a revocation order to do so. This will involve an application to the court.

Can a guardianship order be terminated?

- 4.84 Circumstances may also occur in which it is no longer appropriate for the guardianship to continue: for example, the missing person may return or the guardian may no longer be able to act due to ill health or other commitments. The court is therefore given power to revoke an order if it is satisfied doing so is in the best interests of the missing person or that the missing person is no longer missing.

Richie, a guardian, has recently been taken into hospital due to a long-term condition. Richie must stay in hospital for the foreseeable future, which means he isn't able to fulfil his guardianship duties. The court decides that it is inappropriate for Richie to continue being Jason's guardian, so terminates his appointment by making a revocation order in response to Richie's application.

- 4.85 A guardian who has reasonable grounds to believe that the missing person no longer qualifies as missing must apply to the court for the revocation of the order as soon as reasonably practicable. Notice of the application must be served on the Public Guardian and the other persons specified in the rules of court. The court will send a copy of the order to the OPG.
- 4.86 As in relation to variation orders, a revocation order may be made as a result of an application, or by the court of its own motion in other proceedings. A copy of the order must be sent by the court to the Public Guardian, who is responsible for maintaining the register of guardianship orders, the Public Guardian will register the revocation order in the register of guardianship orders.
- 4.87 On any termination of the appointment the guardian or the guardian's personal representatives will have to report to the Public Guardian.

When does a person cease to be a guardian?

- 4.88 The appointment of an individual as a guardian may be ended by a variation order or a revocation order.
- 4.89 In addition, a guardianship order is revoked automatically on the occurrence of the following events:
- (a) on the death of the missing person;
 - (b) on the making of a declaration of presumed death in respect of the missing person under section 2 of the Presumption of Death Act 2013;
 - (c) on the death of the guardian; and

- (d) on the expiry of the guardian's period of appointment.
- 4.90 It is possible that a guardianship order will have been made after the death of the missing person. When the death is subsequently discovered, the guardianship order is to be treated as having been immediately revoked on the death.
- 4.91 The date of death may only be known approximately, but where a guardianship order is revoked automatically without the guardian knowing, the guardian does not incur any personal liability in respect of decisions made before the guardian knew of the event triggering the revocation (see paragraph 4.96-4.98). The Act also provides protection for people whose transactions depend upon the validity of decisions taken by the guardian (see paragraph 4.73-4.76).

Can a guardian arrange the funeral of a missing person?

- 4.92 The appointment of a guardian is ended by the death of the missing person. The guardian must then cease to act for the missing person. Responsibility for the late missing person's property and financial affairs will pass to the executors or administrators of the estate.

How does the Public Guardian learn of a person ceasing to be a guardian?

- 4.93 The court will send a copy of every revocation order or variation order to the Public Guardian. It will also send the Public Guardian a copy of every declaration of presumed death.
- 4.94 Additionally, where a person becomes aware that a guardianship order appointing the person as guardian has been revoked, due to the death or presumed death of the missing person, the person that becomes aware of the event must inform the Public Guardian as soon as reasonably practicable.
- 4.95 Where a guardianship appointment expires by passage of time it will be apparent to the Public Guardian from the register of guardianship orders.

What happens if the guardian does not know the guardianship order has been revoked?

- 4.96 Where a guardian acts within the scope of the authority conferred by the guardianship order and the Act at a time when the guardianship order has been revoked by death or presumed death of the missing person, but at the time the guardian does not know that the order has been revoked by that event, the guardian does not incur any personal liability (either to the missing person or any other person) because of the revocation.

Karen has been acting as guardian for the property and financial affairs of her sister, who has been missing for three years. Her sister's body has recently been discovered and it is clear from forensic examination that she died about a year earlier. Karen was unaware of the death and continued to act in her capacity as guardian for her sister, until she learned of the discovery of the body. In this instance, Karen would not be liable for any actions within her authority as guardian taken during this period.

- 4.97 The same principle would apply to revocations caused by the death of the guardian or the expiry of the guardian's period of appointment, but in practice these may not

arise because a guardian cannot act after death save in so far as an action takes place after death because of pre-death commitments; and it is hard to conceive of a circumstance in which a guardian will not know or be deemed to know the date when the appointment expires.

- 4.98 Knowledge that a guardianship order has been revoked for these purposes includes knowledge of the occurrence of an event that caused the guardianship order to be automatically revoked.

What must a guardian do when the guardianship is terminated?

- 4.99 On termination of the appointment a guardian must cease to act for the missing person and must provide the Public Guardian with a final report if required.

Where will the Act apply?

- 4.100 The Act applies in England and Wales only. There are no directly equivalent provisions in Scotland and Northern Ireland.

Appendix 2 – Equalities Assessment

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

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

For the purposes of the equality impact statement the relevant protected characteristics under the EA are: race; sex; disability; sexual orientation; religion and belief; age; marriage and civil partnership; gender reassignment; pregnancy and maternity.

Summary

Consideration has been given to the impact of the proposals to implement the Guardianship (Missing Persons) Act 2017 (“the Act”) against the statutory obligations under the EA. These impacts are outlined below. The proposals to bring the Act into force will be given effect through rules of court, regulations and a code of practice. The High Court will be used for guardianship related applications. The court will have power to make, vary and revoke guardianship orders, to require the provision of information by guardians, to give instructions to guardians and to decide whether a guardian is acting without authority.

Once an appointment is made, the court will send a copy of the order making the appointment to the Public Guardian, who will maintain a register of orders and take on responsibility for the supervision of the guardian. The role of the Public Guardian in this respect will be similar to his role in relation to the supervision of deputies appointed in respect of persons lacking mental capacity under the Mental Capacity Act 2005. Deputies manage and deal with the property and financial affairs of individuals, who lack mental capacity and are no longer able to do so for themselves. They provide reports on their activities to the Public Guardian.

Individuals affected by the proposals

People disappear for many and various reasons. Some disappearances are voluntary some are not. Such people are not restricted to any category of society or to groups defined by the absence or presence of any protected characteristic. Similarly, anyone could be affected by the disappearance of a person.

The Act and the proposals to implement it will enable persons affected by a disappearance to act as a guardian of the property and financial affairs of the missing person. The Act will not apply to missing people who do not have any property or financial affairs that require management. Prospective applicants will also need to consider the cost of making an application and the cost of supervision of the guardian by the Public

Guardian in deciding whether to make an application for the appointment of a guardian. Those who may potentially experience discrimination under the Act as implemented are the missing people whose property and affairs may be subject to the guardianship order, the people who are financially dependent on them and the guardians themselves.

Direct discrimination

Our assessment is that the proposals in the Act and to implement the Act are not directly discriminatory within the meaning of the EA as they apply equally to all missing people. The same can be said for guardians applying to act on behalf of the missing person save that a guardian has to be over 18 years of age, which is determined by age. Legal minors cannot own property such as houses and flats and have only limited powers to enter contracts. They would not be therefore be suitable for appointment as guardians. The power for a guardian to provide for people dependant on the missing person out of the missing person's estate also applies equally to all dependants. We do not consider that the implementation of the Act would result in people being treated less favourably because of their protected characteristic.

Indirect Discrimination

Our assessment is that the proposals to implement the Act are unlikely to amount to indirect discrimination within the meaning of the EA since any actions taken under or in connection with the Act are unlikely to result in anyone sharing a protected characteristic being put at a particular disadvantage, compared to those who do not share that protected characteristic.

Discrimination arising from disability and duty to make reasonable adjustments

Our assessment is that it is unlikely that the implementation of the Act will put a disabled person at a disadvantage in relation to a relevant matter. The Government is also working with the relevant interested parties to ensure that users who have difficulty engaging with digital services are provided with appropriate support designed to prevent them from being excluded, and enable them to secure access to justice.

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

As stated below, there is also some evidence that those who disappear may have a mental health disability at the point of disappearance. As there is some evidence that missing people and their families may be more likely than not to share these protected characteristics, they may be more likely than others to benefit from the proposals. The

benefits will however be the same as those provided to others that don't share these protected characteristics.

Harassment and victimisation

Our assessment is that it is very unlikely that the implementation of the Act will give rise to any harassment and victimisation within the meaning of the Equality Act 2010.

Advancing equality of opportunity

The new status of guardianship will create opportunities for persons with and without protected characteristics to act to protect the best interests of a missing person, who may or may not have protected characteristics, and so long as the proposed action is in the best interests of the missing person to assist persons with and without protected characteristics. It is therefore difficult to assess whether the new status will advance equality of opportunity but it is clear the proposals do not undermine attainment of that objective.

Fostering good relations

We consider that it is very unlikely that the implementation of the Act will impact on this obligation. The Office of the Public Guardian will supervise guardians in broadly the same way as it supervises deputies appointed under the Mental Capacity Act 2005. Its supervision will help to avoid misuse of power by guardians, which may protect the interests of persons with protected characteristics who are affected by guardianship.

The Government will work with key stakeholders, including interested advice agencies, to provide necessary support for individuals applying to the court as litigants in person. This will include greater use of assisted digital support measures, the use of which help ensure access to justice is maintained for all claimants.

Methodology and analysis

The Government acknowledges that it does not collect comprehensive information about the protected characteristics of missing people or those who may be dependent upon them. This limits Government understanding of the potential equality impacts of the proposals.

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

the proposals. The benefits will however be the same as those provided to others that don't share these protected characteristics.

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

Missing persons

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

Table 1 shows the protected characteristics of missing persons in 2015/16 from the Missing Persons Data Report 2016/16 – UK Missing Persons Bureau. We have compared the data to the protected characteristics of the England & Wales national population, Census 2011.

In respect to gender, male missing persons (52%) are over-represented compared to the general population (49%) in England and Wales.

Within the youth population (under 18-year olds), 15-17 year old missing persons are over-represented compared to the general youth population in England and Wales (4%). Within the adult population (over 18-year olds) which the guardianship proposal will affect, 22-39 year old missing persons are under-represented compared to the adult population in England and Wales.

In relation to race, black people are over-represented as are “other”. We do not know the reason for this.

Table 1: The protected characteristics of missing persons 2015/16.

		<i>Missing Persons 2015/16</i>	<i>England and Wales Population</i>
Gender			
Male		52%	49%
Female		47%	51%
Age			
0-14yrs		24%	18%
15-17yrs		36%	4%
18-21yrs		7%	5%
22-39yrs		16%	24%
40-59yrs		10%	27%
60+yrs		5%	22%
Race			
White		69%	86%
Mixed		No Data	2%
Asian		5%	7%
Black		12%	3%
Other		14%	2%

Note: 0.6% of gender unassigned or unknown from missing person data.

Families and other individuals affected by a disappearance

We do not have statistical information or other evidence as to the numbers or protected characteristics of the people left behind by missing persons or as to the wealth of those who disappeared or the extent to which other people may have been financially dependent on them.

The implementation of the Act may affect those left behind in three possible ways: first, in their capacity as appointed guardians of the property and affairs of the missing person; second, as dependants who can be provided for out of the missing person's estate; and third, those who had some kind of financial or other dealings with the missing person and who cannot act in the person's absence.

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

Dependants are more likely to have protected characteristics, either in terms of age (being minors) or disability or possibly marital/civil partnership status. The impact of the Act on dependants of a missing person will be beneficial, providing a mechanism for them to be provided for out of the missing person's assets where none exists at present, or neutral where a guardianship appointment is not made. The Act may therefore provide benefits for these groups.

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

Conclusion

On the basis of the evidence available, we consider that the implementation of the proposals for bringing the Act into force are consistent with the EA. The Government will, however, review the effect of the Act after it has been in force for five years and assess whether any changes are needed.

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

Q.17. Do you agree that we have correctly identified the range of equalities impacts under each of the proposed reforms set out in the implementation proposals? Please give reasons.



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