



In Focus

Guardianship (Missing Persons) Bill (HL Bill 117 of 2016–17)

The [Guardianship \(Missing Persons\) Bill](#) is a House of Commons private member's bill introduced by Kevin Hollinrake (Conservative MP for Thirsk and Malton), and is sponsored in the House of Lords by Baroness Hamwee (Liberal Democrat). The Bill has completed all stages in the House of Commons without amendment and is scheduled to have its second reading in the House of Lords on 6 April 2017. Baroness Hamwee also introduced a [Missing Persons Guardianship Bill](#) in the House of Lords in this session. It received its first reading on 14 June 2016, but made no further progress. Baroness Hamwee has withdrawn that Bill in order to allow the Guardianship (Missing Persons) Bill to proceed in its place.¹

The Ministry of Justice has prepared [Explanatory Notes](#) to the present Bill, with Baroness Hamwee's consent. These give a clause-by-clause commentary on the Bill. Key provisions of the Bill are summarised below. The Ministry of Justice has also prepared a [delegated powers memorandum](#) for the Delegated Powers and Regulatory Reform Committee, and an [impact assessment](#) on the policy option of legislating to create a new legal status of guardian of the property and affairs of a missing person.

Key Provisions

The Bill would enable applications to the courts to appoint a guardian to act on behalf of a missing person in respect of the missing person's property and financial affairs. The Bill would also create a regime for supervising and regulating the way that guardians exercise their powers. It would apply to England and Wales only. The Bill sets out the circumstances in which the court could make an order:

- The application would have to relate to the property or financial affairs of a missing person (clause 3(2)(a)). Clause 1 would define a person as missing if they were absent from their usual place of residence and activities, and:
 - Their whereabouts were unknown, or were not known sufficiently precisely to enable the person to be contacted to obtain decisions about their property and financial affairs; or
 - They were unable to make or communicate effective decisions about their property or financial affairs, for reasons beyond their control, other than illness, injury or lack of capacity. According to the Explanatory Notes, this circumstance might for example "be applicable in a hostage or kidnap situation".²
- The missing person must have been domiciled or habitually resident in England and Wales prior to going missing, or the application must be made by the missing person's spouse or civil partner who is domiciled or habitually resident in England and Wales (clause 2).
- The person had been missing for at least 90 days (clause 3(2)(b), the 'absence condition'); or a decision was needed or likely to be needed in relation to their property or financial affairs before they had been missing for 90 days (clause 3(3), 'the urgency condition').

- Appointing a guardian was in the best interests of the missing person (clause 3(2)(c)). Clause 18 sets out the matters that the court and the guardian would have to consider when determining what was in the missing person's best interests.
- There was a person who could be appointed as guardian (clause 3(2)(d)).
- The application would have to be made by someone with "sufficient interest" in the missing person's property or financial affairs (clause 19).

The Bill also sets out various requirements relating to the choice of guardian. A guardian would have to be an individual over 18 or a trust corporation, and would have to be suitable to act as a guardian—for example, the court would have to be satisfied that there was no conflict between the interests of the guardian and of the missing person (clause 4). The guardian would also be required to act in the best interests of the missing person (clauses 4, 8 and 18). Clause 16 and the schedule to the Bill set out provisions that would apply if the court appointed two or more guardians in relation to one missing person's property and financial affairs.

Clause 6 would allow the court to impose duties, conditions or restrictions on the guardian. The Explanatory Notes state that this would allow the court to "tailor the terms of the appointment to the circumstances of the missing person", by giving the guardian powers to exercise a wide range of rights and powers, or conversely to exercise only a "narrowly confined" power.³ Clause 6 gives examples of the types of rights and powers that a guardian might be appointed to exercise such as: selling, letting or mortgaging the missing person's property; making investments; recovering money owed to the missing person; discharging the missing person's debts; and making gifts to a dependent of the missing person, who would reasonably rely on the missing person to provide for their maintenance. Under clause 7, a guardianship order would have to specify the length of the guardian's appointment. The maximum would be four years, but subsequent orders could reappoint the same guardian or appoint a new guardian. Clause 9 would allow the guardian to be paid reasonable expenses from the missing person's property.

Clause 10 would allow the court to make directions to the guardian about whether and how to act, and would allow the guardian to apply to the court for such directions. Clause 11 would allow the court to make an order regarding remedies—such as repaying money to the missing person—if the court determined that the guardian had acted outside his or her authority. Clause 12 would give the court the power to vary a guardianship order (but not to extend it beyond four years). Under clause 13, the court could revoke a guardianship order, for example if the missing person returned. The guardian would be obliged to apply for the guardianship order to be revoked if he or she had reasonable grounds to believe that the missing person was no longer missing. The guardianship order would be automatically revoked on the death of the missing person, or the making of a declaration of presumed death under section 2 of the Presumption of Death Act 2013 (clause 14). Clause 15 sets out legal protections that would apply to the guardian and to third parties dealing with the guardian if they were unaware a guardianship order had been varied or revoked.

Clause 17 would amend the Mental Capacity Act 2005 to bring guardians under the supervision of the Public Guardian. The Office of the Public Guardian is responsible for supervising deputies appointed by the Court of Protection and making sure they carry out their work in line with the Mental Capacity Act 2005.⁴ The Explanatory Notes to the Bill explain that guardians would be supervised by the Public Guardian in a very similar manner to deputies appointed by the Court of Protection under section 16 of the Mental Capacity Act 2005 in relation to the property and affairs of a person lacking mental capacity.⁵ Clause 22 would require the Lord Chancellor to issue statutory codes of practice to guide guardians and to guide people making applications to the court.

Background

As the law stands, when a person disappears nobody has legal authority to protect or manage their property or financial assets while they are missing. Such disappearances can lead to the dissipation of assets (for example, through direct debits that cannot be cancelled) and their deterioration or loss (for example, through lack of maintenance or failure to meet mortgage payments).⁶ The person's disappearance can also deprive dependants of support they may be used to receiving from the missing person, and leave third parties unable to conclude ongoing business with the missing person or to make sensible arrangements with those left behind. The Bill aims to resolve this by creating a procedure for obtaining authority to protect the interests of the missing person, similar to arrangements that already exist for individuals to create a Lasting Power of Attorney to come into effect when they can no longer manage their own affairs, or for the Court of Protection to appoint a deputy to manage the affairs of a person who has lost mental capacity. The Ministry of Justice estimates that it is likely there would be between 50 and 100 applications a year for a guardianship order, with the possibility of an early spike when the system was introduced, covering applications for existing cases.⁷

The Bill is supported by the charity Missing People, which has been campaigning for a law on guardianship since 2008.⁸ The All-Party Parliamentary Group for Runaway and Missing Children and Adults recommended in 2011 that the Ministry of Justice should provide a framework for consultation on guardianship provisions, and in 2012 the House of Commons Justice Committee recommended that the Government should legislate for guardianship orders.⁹ The Coalition Government ran a consultation on the guardianship of the property and affairs of missing persons in 2014.¹⁰ Responding to the consultation in March 2015, the Coalition Government noted that “the response was overwhelmingly positive both to the principle of guardianship and the provisional proposals for implementing it”, which were similar to those now contained in the Bill.¹¹ The Coalition Government undertook to bring forward legislation to create a new legal status of guardian for a missing person “as soon as possible”.¹²

The Bill has come to be referred to informally as “Claudia’s Law” in reference to Claudia Lawrence, a chef who went missing in 2009 and has not been seen since. Kevin Hollinrake has been working with her parents, who have been campaigning for a guardianship law “after seeing first-hand the unnecessary obstacles which families of missing people face when a loved one goes missing”.¹³

Consideration in the House of Commons

Kevin Hollinrake introduced the Bill in the Commons under the Ten Minute Rule on 11 January 2017.¹⁴ He described how the “desperate situations” of the families of missing persons were “worsened by the need to pick up the pieces of their lives, such as paying the mortgage, the rent, the car loan or insurance”. He argued that the Bill would fill the current legal “void” and “provide a sensible and helpful solution to the practical and financial difficulties faced by families and others following a disappearance”.

The Bill had its second reading without debate on 3 February.¹⁵ No amendments were tabled at committee stage. Richard Burgon, Shadow Secretary of State and Shadow Lord Chancellor and Philip Lee, Parliamentary Under Secretary of State for Justice, both indicated that their parties supported the Bill.¹⁶ Dr Lee said that he envisaged secondary legislation created under the Bill would be subject to consultation with stakeholders and experts. He hoped this could be done within a year of royal assent, so that the Bill could be brought into force in 2018.¹⁷

Philip Davies (Conservative MP for Shipley) tabled four probing amendments at report stage, although he said he supported the principle of the Bill.¹⁸ The first sought to establish the reasoning behind subsection 1(4), which provides that: “A person who is detained, whether in prison or another place, is to be treated for the purposes of this Act as absent from his or her usual place of residence and usual day-to-day activities”.¹⁹ Kevin Hollinrake explained that it was intended to cover a hostage or similar situation, citing the example of Terry Waite, who was held in Beirut for five years.²⁰ Mr Davies’s second

probing amendment sought to ensure that all reasonable steps would have to be taken to locate the missing person before the court could hear an application for a guardianship order.²¹ Sam Gyimah, Parliamentary Under Secretary of State for Justice, said that rules of court governing the procedure for hearing guardianship applications had not yet been written, but they would specify the information to be provided to the court with the application. This was likely to include a requirement that the application was supported by evidence of the various issues on which the court must be satisfied before making a guardianship order.²² Clause 3 would provide that the court must be satisfied a person was missing before it could make an order.

Mr Davies's other amendments sought to probe why 90 days was set as the period of absence required to satisfy the absence condition and why four years was set as the maximum length of a guardianship order.²³ Kevin Hollinrake said that other territories around the world with similar legislation, such as New South Wales, Victoria and British Columbia, used 90 days and it was a "sensible starting point".²⁴ Sam Gyimah explained that both 90 days and four years had been well supported in responses to the Government's consultation on guardianship proposals.²⁵

At third reading, Kevin Hollinrake said that this "simple piece of legislation" would "fill the gap in the existing law".²⁶ He commended Mr and Mrs Lawrence for their "commitment to championing the cause of guardianship". Sam Gyimah repeated the Government's support for the Bill, and said that the Government would do everything in its power to introduce the necessary regulations to enable the Bill to come into force by 2018.²⁷

¹ ['Guardianship \(Missing Persons\) Bill 2016–17'](#), accessed 30 March 2017.

² [Explanatory Notes](#), para 11.

³ *ibid*, para 22.

⁴ Office of the Public Guardian, ['About Us'](#), accessed 30 March 2017.

⁵ [Explanatory Notes](#), para 50.

⁶ Ministry of Justice, [Impact Assessment: Guardianship of the Property and Affairs of Missing Persons](#), February 2017, p 3.

⁷ *ibid*, p 15.

⁸ Missing People, ['Landmark Moment in Guardianship Campaign'](#), 24 March 2017.

⁹ All-Party Parliamentary Group for Runaway and Missing Children and Adults, [Inquiry: Support for Families of Missing People](#), July 2011, p 4; and House of Commons Justice Committee, [Presumption of Death](#), 22 February 2012, HC 1663 of session 2010–12, pp 22–3.

¹⁰ Ministry of Justice, ['Guardianship of the Property and Affairs of Missing Persons'](#), 27 August 2014.

¹¹ Ministry of Justice, [Guardianship of the Property and Affairs of Missing Persons—A Response to Consultation](#), 23 March 2015, p 3.

¹² *ibid*.

¹³ Kevin Hollinrake MP, ['Claudia's Law'](#), accessed 31 March 2017.

¹⁴ [HC Hansard, 11 January 2017, cols 332–4.](#)

¹⁵ [HC Hansard, 3 February 2017, col 1372.](#)

¹⁶ [Public Bill Committee, Guardianship \(Missing Persons\) Bill, 21 February 2017, session 2016–17, 1st sitting, cols 4 and 5.](#)

¹⁷ *ibid*, col 7.

¹⁸ [HC Hansard, 24 March 2017, col 1100.](#)

¹⁹ *ibid*, col 1099.

²⁰ *ibid*, col 1103.

²¹ *ibid*, col 1100.

²² *ibid*, col 1103.

²³ *ibid*, col 1101.

²⁴ *ibid*.

²⁵ *ibid*.

²⁶ *ibid*, col 1105.

²⁷ *ibid*, cols 1105–6.

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