

Missing People: Justice Select Committee inquiry into presumption of death

'The loss of one's partner is one of the worst things in life; to lose your partner without knowing for sure what happened to them, not to have their body, not to be able to organize a funeral, is unbearable. There is no sense of closure. The lack of clear guidance since my partner's disappearance has been incredibly frustrating; I feel utterly abandoned, and my uncertainty about the future causes me a great deal of stress. At this time I have no idea when my partner's estate may be settled. I wish to see things resolved primarily for my partner's sake, but also to allow me at least to attempt to get on with my life without this constant worry about his affairs.'

Partner of a missing man¹

1. Executive summary

1.1. Missing People is a UK charity providing support to missing people of all ages and the families they leave behind. Last year we took more than 114,000 calls to our helplines, and worked with approximately 1,000 families at any one time.

1.2. The charity has been campaigning for a Presumption of Death Act for England and Wales since 2008. This stems our research report 'Living in Limbo: the experiences of, and impacts on, families of missing people,'² which demonstrates the deep legal and financial problems families can face following a disappearance.³

1.3. 'Living in Limbo,' along with our wider policy and research work with families, demonstrates how families in England and Wales can find the presumption of death system confusing, costly and cumbersome. It requires some to go to court several times to deal with their missing relative's affairs, which can exacerbate an already difficult time. Our work also indicates low awareness of the system across all sectors, including those that support families through the measures and those delivering a service within them.

1.4. These issues were explored in the APPG for Runaway and Missing Children and Adults' inquiry into support for families of missing people. Missing People provides secretariat to this group.

1.5. Missing People understands the Scottish and Northern Irish Presumption of Death Acts have functioned successfully since introduced in 1977 and 2009 respectively – for both families and institutions. This noteworthy, as the absence of safeguards in the disparate English and Welsh system can lead to failed applications and institutions being unwilling to accept the documentation it yields.

1.6. Missing People believes all families should have access to a straightforward presumption of death system – regardless of where they live in the UK. A Presumption of Death Act for England and Wales would additionally clarify the law for

¹ Excerpt from a Select Committee submission shared with Missing People.

² Holmes, L. *Living in Limbo: the experiences of, and impacts on, families of missing people*. Missing People, 2008.

³ *Ibid*, pp. 31-4.

institutions families approach for support, as well as introduce safeguards to assist the public and financial sectors.

2. Does the current system work effectively?

2.1 Missing People's policy and research work and direct contact with families clearly demonstrates that the present presumption of death system does not work effectively.

2.2. Families report the current systems to be confusing, costly and complex, and that the institutions they approach for help can struggle to provide them with accurate advice. The charity understands public sector institutions can also be cautious in working with families because of the lack of safeguards in the system, and some financial institutions are unsure what documentation they should request to administer a missing person's assets.

2.3. Missing People believes presumption of death provisions in England and Wales are fragmented and not fit for purpose. It is imperative that a clear, effective and accessible system is introduced.

3. Does the current system create difficulties for families, and if so, how can these be resolved?

3.1. Whilst only a relatively small proportion of families accessing our services will want – or indeed need – to declare their relative as presumed dead, those that do report a number of problems associated with the current English and Welsh system.

3.2. Research demonstrates the pain associated with having a loved one go missing is unlike other forms of loss, such as death where there is a body.⁴ Termed 'ambiguous loss', this does not alleviate with time, as families are unable to grieve without answers of what has become of their relative. Therefore whilst many families wait some years before pursuing presumption of death, the pain of their situation will not necessarily lessen, and thus it can be a particularly difficult time.

3.3. The majority of families pursue presumption of death out of necessity rather than want, with many reporting it as borne from the need to administer their relative's estate. As each missing person case is different this can be for any number of reasons, yet those most cited are to: resolve joint ownership / liability issues; access monies to overcome debt caused by the loss of the missing person's income, or; halt debts the missing person may be accruing whilst away. Others may access the system to remarry.

3.4. Acting from necessity rather than need, families describe conflicting emotions. Many report feeling guilty, fearing they may be perceived as 'giving up' on their relative, whilst also relief from the thought that financial complications may finally be resolved. With such emotionally fraught circumstances, it is vital families can access a straightforward system that sensitively meets their needs. Unfortunately however, this is often not the case, as families can encounter a range of issues when attempting to access the present system:

3.5. Lack of awareness of present measures

⁴ 'Ambiguous loss' was identified by psychologist Dr. Pauline Boss, as discussed in Living in Limbo, p.17, 25-26.

3.5.1. Awareness of the presumption of death system, what it comprises of, and what it can yield, is low amongst families and professionals. At the outset many assume there is a single court process through which a person can be declared 'presumed dead' for all purposes and their affairs administered. Many also believe Certificates of Presumed Death are widely issued and can be used in place of a Death Certificate when required. Neither assumption is correct.

3.5.2. Families often only discover the complexities of the system – and their proactive role – through their own research. With cost, time, and emotional implications, this can be very daunting, and not all families will have the financial or intellectual resources to take such a proactive approach.

3.6. Onerous system

3.6.1. Depending on circumstances, families may need to go through several court processes to resolve a missing relative's affairs. For example, if a missing person's spouse wants to administer their loved one's estate and dissolve their marriage, they need to seek Leave to Swear Death, Probate, and a Decree of Presumption of Death and Marriage Dissolution Order. This demonstrates the fragmented nature of the system; indeed, the Ministry Justice described it as 'onerous' in its submission to the APPG inquiry into support for families of missing people.⁵

3.6.2. The system is cumbersome, with cost implications stemming from multiple court proceedings, which can exacerbate an already emotionally difficult time. The disjointed system also leaves open the possibility that while one court may rule a missing person as presumed dead, another may not, resulting in a very contradictory legal predicament.

3.6.3. With little public information as to which processes families should follow, Missing People understands families can be advised to pursue a range of different legal paths to achieve broadly similar ends. This tends to be influenced by what their solicitor believes is the most appropriate route, and what paperwork is required by financial institutions to administer a missing person's assets (e.g. life insurance). Yet with low awareness of the system, errors can be made.

3.6.4. Families aware of the more straightforward systems in Northern Ireland and Scotland can find their situation particularly frustrating, as it presents a 'postcode' element to it.

3.7. Absence of knowledgeable support

3.7.1. Missing People understands legal professionals can also find the system challenging, with our policy and research team receiving information requests from firms seeking advice on how to work with families.

3.7.2. Family accounts cohere with this as they can struggle to find knowledgeable legal assistance. Some describe approaching several solicitors before feeling confident they have found one capable of unravelling the confusion of the present system. Others describe being turned away by firms, and some have even been told the costs associated with pursuing an order would not make it worth the family's time or money – even when an estate is worth tens of thousands of pounds.

⁵ APPG inquiry transcript, session two, p. 13: www.missingpeople.org.uk/appg.

3.7.3. Other institutions, such as the police, can also struggle with presumption of death. Sean Sutton, Head of the NPIA Missing Persons Bureau told the APPG inquiry his team has “identified a lack of knowledge in police officers in this area.”⁶ This can have serious repercussions for families. For example, some forces may not be cooperative when asked to evidence the search for applications.

3.7.4. The charity has been looking at presumption of death from a policy and practice perspective for several years whilst fielding calls from families and professionals alike, and yet we still lack the legal clarity we would like and which would enable us to more effectively support our service users. For example, we would like better knowledge of what circumstances would enable families to instigate proceedings ahead of the seven year common law rule, however this information (to our knowledge) is not available. It is likely other voluntary advisory organisations are in a similar position.

3.7.5 Overall, this lack of knowledgeable support can lead to families being given misguided advice, which can impact on crucial matters such as *when* they pursue presumption of death and which paths they follow. This can lead to families waiting unnecessarily for seven years before making an application,⁷ perhaps accruing debt in the meantime, or failed applications.

3.8. Legal documentation

3.8.1. The fragmented system can result in families having a range of different legal documents depending on the route they pursue. This lack of standardisation can be problematic, as different institutions may require different documents from a family before they will administer a missing person’s assets.

3.8.2. Low awareness of the system also means institutions may request documentation families cannot provide. For example, whilst Certificates of Presumed Death are not available from the courts,⁸ families report some institutions still requesting these before administering a missing person’s assets. As many families are only able to obtain Probate, this can effectively leave them at a frustrating and upsetting legal dead-end.

3.9. Time, expense and failed applications

3.9.1. Some families wait unnecessarily for years before instigating proceedings as they have no information to clarify the exceptions to the so-called “seven year rule”. This wait may be financially damaging for families if they are liable in maintaining their relative’s payments in the meantime, e.g. a joint mortgage.

3.9.2. Once families embark on presumption of death, finding out information and processing applications can be very slow; Missing People is aware of families who have been tackling the system for more than seven years. This stems from low awareness of provisions and the lack of safeguards built into the system leading approving agencies to move very tentatively.

⁶ Ibid, p. 39.

⁷ Missing People understands that when there is evidence to suggest a person faced immediate peril at the point of going missing, their family can apply for presumption of death before seven years have passed.

⁸ APPG inquiry transcript, session two, p. 12-3

3.9.3. This latter point can also lead to applications failing, or Probate Registrars requesting families to seek insurance before they will consider approving an application. This adds another layer of complexity for families, and costs them additionally in time, money and their emotional wellbeing.

3.10. Concerns not addressed by the current system

3.10. The overall lack of clarity around the system can cause deep concern for families, and many have problems that fall through the cracks of the current patchwork of provisions. For example, families have asked Missing People about whether the police continue to look for a missing person if they are legally presumed dead, and whether they will remain as next of kin and kept abreast of any developments stemming from the search if their marriage is dissolved. These questions are not addressed in the present system and must be for families and professionals alike.

3.11. Whilst families continue to face these issues, their financial and emotional wellbeing can be severely compromised, with Missing People aware that some have faced the risk of having their homes repossessed as they wait for a resolution. The current system does not provide a clear and coherent legal pathway to resolution. In addition the current system is not understood by professionals within the legal, financial and law enforcement sectors and varieties of interpretation often prejudice the best interests of the families and the estates of missing persons. The charity proposes a Presumption of Death Act for England and Wales is introduced to overcome these concerns.

4. What can we learn from the experiences of Scotland and Northern Ireland which have presumption of death Acts?

4.1. Missing People understands the Scottish and Northern Irish legislation is working efficiently; indeed, the charity has not received a request for guidance from families or professionals around how to use it.

4.2. The charity has also spent some time assessing their legislation with its pro bono lawyers, Clifford Chance LLP, by way of ascertaining whether it is suitable for families. We agreed it is, as it brings all existing provisions together into one streamlined process. It also contains inbuilt safeguards (such as an indemnity insurance requirement for applicants), and provisions which create a central register of presumed deaths and a Certificate of Presumed Death to act as a Death Certificate. These elements overcome many issues created by the current system.

4.3. The Acts in Scotland and Northern Ireland also overcome the existing loophole that one court may rule the person as presumed dead whilst another may not.

4.4. As a result of this assessment, Missing People worked with Clifford Chance and Tim Boswell MP (now Lord) to table a Presumption of Death Act for England and Wales in 2009. Whilst this fell, the charity has continued to call for the legislation through other avenues since this date with the support of families using our services.⁹

⁹ Please see <http://bit.ly/pTSGR7> for a full account of our campaigning on presumption of death.

4.5. Missing People believes that both families and professionals would benefit if the presumption of death system in England and Wales be reformed along the lines of the Scottish and Northern Ireland Acts.

5. Is there a need for legislative or procedural change in England and Wales? If so, what form should these changes take?

5.1. This submission outlines how the current system does not provide for an equitable or transparent legal process. The legislative provision of a Presumption of Death Act for England and Wales in line with other nations within the United Kingdom and developed nations all over the world is the just next step. The outline of this act has been considered in detail by the Ministry of Justice and a consultation paper has been drafted to take it through to a legislative process.¹⁰

5.2. The scale of need – families

5.2.1. Recent Parliamentary questions tabled by Lord Boswell demonstrate there is no complete, centralised data held on the number of presumption of death applications made annually under existing legal provisions.¹¹ Whilst this means there are no firm numbers of how many people are affected by this issue each year, Missing People has estimated numbers based on Scottish data.¹²

5.2.2. The charity understands that, on average, approximately five deaths are registered in Scotland each year under the provisions of the Presumption of Death (Scotland) Act 1977.¹³ In relation to population statistics, it can be estimated that similar measures in England and Wales would result in approximately 50 registered deaths each year. It is possible that other cases might reach the courts but not be granted.

5.2.3. Yet as seen in Scotland, it is likely that this number would be higher in the immediate years following legal reform, with a peak of 14 deaths being registered in Scotland in one year. Missing People anticipates a similar trend in England and Wales, as families and professionals struggling with the present system would have clarity on how to proceed. Those with previously failed applications are also likely to re-apply. Proportionate to the uplift in Scottish deaths registered, Missing People estimates registered deaths in England and Wales could reach approximately 150 in the years immediately following legal reform.

5.3. Scale of need – professionals

5.3.1. Further to families, it is clear that clarifying the law would also benefit professionals, including:

- Institutions approached for advice, such as solicitors, the police and voluntary sector organisations, as evidenced in the APPG inquiry

¹⁰ Ibid.

¹¹ Please see questions HL11855, HL11707 and HL11643 for examples of these.

¹² As families are able to apply at any time depending on the circumstances of the disappearance, simply looking at cases open for seven years or longer would provide an underestimation.

¹³ Statistics obtained through direct contact with the National Records of Scotland.

- Organisations with a role within the system, including Probate registry staff,¹⁴ courts, and agencies required to evidence the search.
- Financial sector organisations holding missing people's assets.

5.4. Missing People's view is that the simplest way of achieving a more straightforward system – whilst also achieving legal parity across the UK – would be through a Presumption of Death Act for England and Wales. We urge the Committee to recommend that the Government explore this option.

¹⁴ Former District Probate Registrar Keith Biggs stated to Missing People that he received 'many applications where there was no body and no proof of actual death. It is not a common event but when it does occur is always difficult for family and for the court.' (via private correspondence).