

Law Reform Commission

Consultation Paper: Civil Law Aspects of Missing Persons

Introduction

Missing People is a UK charity that provides a lifeline to the many thousands of adults and children who go missing each year and the families they leave behind. The charity works on a number of missing person cases involving Irish nationals who reside in, or are thought may have travelled to, the UK, in providing case publicity, family support and police liaison as appropriate.

The charity welcomes the Law Reform Commission's (the 'Commission') consultation on law related to missing persons. The overarching recommendations to revise presumption of death provisions and introduce Administrators are both issues that Missing People has been calling on the UK Government to implement within the Missing Rights campaign.¹ They also cohere with those recently made by the UK Parliament's Justice Select Committee following its inquiry into presumption of death provisions in England and Wales.²

As part of the Missing Rights campaign, Missing People has worked with its pro bono lawyers at Clifford Chance LLP to draft a Bill covering both these areas of law. This contains presumption of death provisions based on those in place in Scotland and Northern Ireland, and clauses around administrators (or what the charity calls 'guardians') based on the law in Australia, as the charity sees these as appropriate models to follow. Missing People is therefore pleased the Commission has looked to the same legislation when making its own assessments; not least as such a harmonious approach will undoubtedly be beneficial with the level of migration between UK nations and Ireland.

Recommendations

Below are Missing People's comments on the recommendations that fall within its remit of experience and expertise. As the charity's knowledge of the practical issues families can face following a disappearance is grounded in UK systems (e.g. in dealing with financial institutions, etc), many of the responses provided are with the assumption that these systems operate similarly in Ireland.

¹ For information on the campaign, visit www.missingpeople.org.uk/missingrights.

² The Committee's report and transcripts of oral and written evidence can be found at <http://bit.ly/HfXtdC>. Missing People gave evidence at the first session, and you can see the charity's written submission at <http://bit.ly/HdQaSk>.

5.01. Missing People agrees with the Commission’s suggested definition of a missing person for use within a civil law context. It is a succinct and fair assessment of why a person should be termed as ‘missing’.

5.02. It is Missing People’s experience that misconceptions around the so-called ‘seven year rule’ can lead to families unnecessarily waiting for years before accessing presumption of death provisions, and agencies being unsure as to whether to support applications ahead of the seven year point. Furthermore, confusion exists around what circumstances are appropriate for families to seek a declaration earlier than seven years (for example, whether the person needs to have gone missing within some form of disaster, e.g. a plane crash, house fire, etc, or whether indications of suicide are sufficient) and whether these cases should be referred to the Coroner.

Having two categories of missing person whereby death is either ‘virtually certain’, or ‘highly probable’, if well defined, could therefore help families and professionals to better understand exceptions to the seven year rule, and which cases are appropriate for the Coroner to deal with. In turn this should help families to make applications at an appropriate time following a disappearance and to access provisions most suited to their circumstances.

5.03. The matters listed for a sworn affidavit are comprehensive; however in relation to information on activity by ‘search-and-rescue’ authorities, this term should either be defined in the text or exchanged for other wording such as ‘searching organisations’. This is because it may otherwise miss information from other searching organisations that may not strictly fall under this category. Missing People, for example, uses non-physical methods of searching, including media appeals and tracing services, which may also be of interest to the courts.

5.05. Missing People very much supports the Commission’s recommendation to introduce the role of court appointed administrators with limited powers to manage a missing person’s estate. Our work with families demonstrates that the absence of such a provision can make it difficult for families to safeguard their relative’s affairs whilst they are away, and that this can exacerbate an already emotional time. It is clear the absence of law in this area also hinders institutions, as they do not have a framework through which to work with these families and thus can be unclear as to whether they have the mandate to help. Together, these factors can result in families receiving inconsistent support from institutions, which can be upsetting and confusing.

An administrator position would therefore be of benefit to both families and institutions, and is a matter Missing People has been campaigning on over the past year in our calls for guardianship legislation.³ The charity has worked with Clifford Chance LLP (the charity’s pro bono lawyers) to draft a Bill with provisions for both

³ Missing People’s briefing paper on the call for guardianship provisions can be found at <http://bit.ly/GOeR73>.

presumption of death and guardianship; with the latter clauses along the lines of legislation in Australia. The charity would be happy to share this Bill with the Commission if it would be helpful in its work on this area.

5.06. Missing People agrees with the criteria established for appointing such an administrator to a missing person's estate. This mirrors what has been put in the charity's draft Bill, and should work to ensure that administrators are only appointed in appropriate cases, i.e. not in instances where a person has purposefully gone missing.

5.07. The charity supports the list provided of people who will be able to apply to administer a missing person's affairs. Missing People is particularly pleased that the Commission has formally recognised 'cohabitants', as the charity works with a number of unmarried partners who are looking to deal with their missing loved one's practical affairs. The charity also welcomes the inclusion of 'the State' as a possible applicant, as there may be cases in which the missing person was under state care or where personal contacts of the missing person are unwilling or unable to take on the role of administrator.

5.08. The charity's draft Bill includes provision for administration to be granted for two years, which can then be renewed for a further two years, as outlined in the Commission's recommendations. There are currently discussions within the organisation however as to whether this should be increased (i.e. to three or three and half years), or streamlined so that a new application does not need to be filed at the four year point.

Whilst there are benefits of the two year proposal in that activity would be regularly monitored, it risks draining the missing person's estate and placing an administrative burden on the administrator at an already emotional time. This is because as there will be instances in which an individual will need to go to court perhaps every two years until presumption of death is sought.

Whilst the charity is yet to come to a conclusion here, sharing these comments may help the Commission in its considerations.

5.09. Missing People agrees that where death is virtually certain, there should be no minimum waiting period before a declaration of presumed death can be sought. In addition, the types of death considered by the Commission to fall within this category appear to be appropriate for both a Coroner's inquest and a standard Death Certificate, and the charity agrees that such a registered death should have the same legal consequences as if the person's body was present.

Such a system complements that which Missing People is hoping for in the UK, where there are calls to alter the coroner system so that it is more straightforward to hold a Section 15 inquest (that with no body) for a missing person.

5.10. The charity welcomes the Commission’s proposal to enable missing persons whose deaths are highly probable to be declared presumed dead by the court, and for this to be registered in an official Register of Presumed Deaths with the same legal impact as a regular registered death.

These proposals are the same as those contained in the charity’s draft Bill on presumption of death and guardianship provisions, with the former based on the Act in place in Northern Ireland.⁴

5.11. For purposes of harmonisation with the neighbouring UK, and in view of the role of administrators proposed to assist with managing a missing person’s affairs in the intervening period, Missing People supports the Commission’s recommendation of maintaining the significance of the seven year period following a disappearance.

However, the charity would be interested to know whether the present flexibility allowed within this common law (found, at least, within the UK) would be exercised, so that those connected to cases in which there is some indication of death would be able to apply earlier than seven years. This would take in those case that fall between death being virtually certain (e.g. passengers of a sunken ship) and highly probable (e.g. no proof of life for seven years); perhaps where there are indications of suicide or the missing person is thought to have been murdered.

It is Missing People’s view that those connected to such ‘middle ground’ cases should be able to access the flexibility of this common law as it applies in the UK.⁵

5.12. The charity agrees with the list of provided of people that could apply for a declaration of presumed death.

5.13. Missing People supports the recommendation that a declaration of presumed death should end any relevant marriage or civil partnership. This is in line with the charity’s draft legislation, and works to consolidate proceedings so that only one court process is required to resolve a person’s affairs. In turn this both simplifies the system and makes it less arduous and costly for those left behind.

5.14. Variation orders are an important part of provisions in safeguarding the missing person’s interests in case of a return. The recommendations in connection to how these could work in practice and their effects on property mirror those in Missing People’s draft Bill for England and Wales and therefore are welcomed by the charity.

5.15. and 5.16. The area of marriage / civil partnership dissolution and presumption of death can be divisive as the charity appreciates that some families have conflicting

⁴ Missing People’s briefing paper on presumption of death and its work on it can be found at <http://bit.ly/GMkowJ>.

⁵ The charity’s briefing on the significance of seven years, and exceptions to it, can be found at <http://bit.ly/GGx11j>.

feelings around this. Subject to a variation order being made however, Missing People's view is that a presumption of death declaration should have the same impact of a regularly registered death, and therefore that it should dissolve any such union conclusively.

If the Commission would like Missing People to expand on any of the content of this paper, please contact Holly Towell, Policy Advisor, at holly.towell@missingpeople.org.uk or on 020 8392 4566.