



**tisa**

Leading on Investments and Savings

**Response by TISA to  
Guardianship (Missing  
Persons) Act 2017:  
Implementing the Act**

February 2019

### About TISA

TISA is a unique, rapidly growing, consumer focused membership organisation. Our ambition is to improve the financial wellbeing of all UK consumers. We work with our members to deliver practical solutions and devise innovative, evidence-based strategic proposals for government, policy makers and regulators that address major consumer issues.

TISA membership is representative of all sectors of the financial services industry. We have over 200-member firms involved in the supply and distribution of savings, investment products and associated services, including the UK's major investment managers, retail banks, online platforms, insurance companies, pension providers, distributors, building societies, wealth managers, third party administrators, Fintech businesses, financial consultants, financial advisers, industry infrastructure providers and stockbrokers.

Complementing our consumer policy development, TISA has become a major industry delivery organisation for consumer focused, digital industry infrastructure initiatives (TeX/STAR, Digital ID, MiFID II and Open Savings & Investment). This reflects TISA's commitment to open standards and independent governance.

TISA's current strategic policy and industry solution developments include:

- **Financial Guidance:** Making guidance more widely available to support financial decision making for those consumers who currently do not have access to advice.
- **Digital ID:** Development of a secure Digital ID for consumers of UK financial services. This will be key enabler for the digitisation of financial services.
- **Open Standards Development - Digitisation:** Building on TISA's range of open standards development projects (inc. TeX, MiFID II), TISA's members have launched a project to further open up UK financial services to consumers. This project - Open Savings & Investment – is aligned to the aims of Open Banking and has the core objective of enabling access to all savings and investments through the development/governance of industry open standards.
- **Financial education:** Helping young people manage finance, including KickStart Money - a three-year programme delivering financial education to 18,000 primary school children.
- **Retirement saving:** Strategic proposals for a holistic approach to saving for retirement.
- **Consumer engagement:** Focusing on vulnerable customers and millennials.

TISA also provides its members with support on a range of operational and technical issues targeted at improving infrastructure and processes, standards of good practice and the interpretation and implementation of new rules and regulations. This work currently includes: MiFID II, CASS, SM&CR and addressing cybercrime.

We welcome the opportunity to respond on the consultation of the implementation of the Guardianship (Missing Persons) Act 2017 and do so in relation to considerations for financial services firms. Our response is divided into two parts, the first being a general response including some technical areas not covered by the consultation questions and the second in response to the consultation questions relevant to financial services firms.

### **Part 1 – General Response**

We support the aim to, wherever possible, reflect existing processes and structure of Powers of Attorney and Deputy Orders in the implementation of the Guardianship (Missing Persons) Act 2017. This will provide a more familiar platform for financial services firms and administration staff who in practice may see at most one or two Guardianship orders per year. It is likely that Guardians will be experiencing a difficult time when using a Guardianship Order and it is important that financial services firms can make the process as smooth and straightforward as possible to provide a good consumer outcome. This is most likely to be achieved by leveraging existing administration processes and staff knowledge.

As noted in the overview, the consultation is aimed at the consumer and the court process. To ensure implementation is practicable for financial services firms there are some key technical areas listed below that need to be addressed or considered before implementation.

#### *Proof of Identity*

Due to the identification and verification work carried out by the court, Deputy Orders may be used as proof of identity for the Deputy and underlying person. We believe this will also be applicable for proof of identity for the Guardian however there is no proof of address for the missing person as it is unknown or unproven.

Financial services firms are required to verify the identity of the person acting on an account as their customer (in this case, the Guardian) and the beneficiary (in this case, the missing person), this involves obtaining proof both identity and address. Without this proof, firms are unable to open or operate new accounts which will restrict the ability of Guardians to operate freely.

The TISA Digital Identity scheme will enable the verification and authentication of an identity and the relevant permissions related to that identity (such as Power of Attorney) and is being designed to meet all the regulatory requirements, regarding KYC and AML. The Digital Identity will include a range of attributes (such as address).

We believe this issue could be resolved by providing a legal statement in the Guardianship Order that for identification and verification purposes, the address of the missing person is considered to be [last known address]. To ensure this is acceptable by all firms and meets all legislative and regulatory requirements we would recommend further discussions with the Joint Money Laundering Steering Group (JMLSG) on this point.

#### *Gifting*

This is a widely misunderstood and complex area in the use of Powers of Attorney and Deputy Orders and any additional clarity that can be included in the Guardianship Order would be beneficial to firms as this aids understanding due to consistency. Clarity in the guidance and in the Order to include detailed information on what is and what is not permissible to remove any ambiguity in what

is covered, including the use of discretionary trusts would also be helpful as there is often a disconnect between consumer expectations and what is possible. It would also be useful to note that many firms have additional internal controls and processes in place in relation to withdrawals and in many cases a third party withdrawal (i.e. a payment to a person who is not the beneficial owner) is not allowed.

### *Discretionary Arrangements*

The current process and requirements in Powers of Attorney and Deputy Orders in relation to discretionary arrangements provides a problem, and we believe an unfair outcome, for consumers. The current process is that discretionary arrangements cannot be entered into or continued without express consent in the document, i.e. it must be stated in the Power of Attorney or the Deputy Order that discretionary arrangements can be entered into or continued or by default they cannot.

This results in financial services firms being unable to continue existing arrangements (e.g. managing an account on a discretionary basis, benefiting from professional investment experience) and requiring a new, advisory arrangement where the Attorney has the decision making authority. Additionally where the Attorney may wish to enter into a discretionary arrangement as they do not have the same level of investment experience as the Donor, they are unable to do so.

The consultation proposes this current process is adopted for Guardianship orders and we strongly believe this should not be the case. By default, discretionary arrangements should be allowed to be entered into or continue by the Guardian.

Where existing discretionary arrangements are in place this would ensure the missing person's wishes and feelings are taken into consideration by allowing such arrangements to continue and where new arrangements are entered into this will provide protection to the missing person's assets as few Guardians will have the knowledge and investment experience of an industry professional.

### *Acting Jointly / Jointly and Separately / Separately*

There is likely to be confusion to consumers and firms in cases where mixed authorisations are permitted (e.g. acting jointly in some cases but jointly and separately in others). A simpler option for firms and consumers would be to allow only one authorisation type to ensure consistent understanding and application, reflecting existing processes for Powers of Attorney and Deputy Orders.

If there are to be exceptional cases where a mixed authority is required by the Court we recommend this is explicitly stated in the Guardianship Order with explanatory wording and clear boundaries included to ensure no misunderstandings (e.g. decisions must be taken jointly with [named Guardian] in relation to the sale or equity release of [missing person's] residential home).

### *Number of Guardians*

No maximum number of Guardians is indicated in the consultation, we believe this should reflect existing practice on Powers of Attorney and the restriction on the number of Trustees in the Companies Act where no more than 4 persons may act at any time. Allowing a greater number of Guardians is likely to cause administration issues for many firms where many systems limit to 4 named contacts.

### *Permissible Trusts*

Trust deeds would be required by firms to facilitate any processing under permissible trusts (i.e. trusts only for the benefit of the missing person). This seems to require an overly complicated process for what may be little benefit. We request further review and guidance in this area to make it simpler to understand and administer for consumers and firms, perhaps by naming certain types of trust or by excluding permissible trusts depending on the review outcome.

### *Joint Holders*

Additional guidance should be included for consumers of joint accounts to highlight what may and may not be possible before and when acting under a Guardianship Order. Some accounts may not permit withdrawals or operation where the whereabouts of one party is unknown due to the legal structure, similar to a person who has lost capacity.

### *Residency*

We would welcome clarification on whether only UK residents will be permitted as Guardians. Overseas Guardians may cause some territory issues for some financial services firms due to restrictions and differing regulations. Further clarification would also be welcome where a Guardian changes address, would a Variation Order be required in such cases and again whether an overseas address would be permitted.

Further clarification will be needed from HMRC on the ability of a Guardian to act on behalf of the registered contact of a Junior ISA or Child Trust Fund as typically this is not allowed for a Deputy.

In relation to ISA subscriptions on behalf of a missing person, clarification will be required from HMRC as to whether this will be permitted as a declaration over residency of the missing person cannot be made and an individual must be resident and ordinarily resident in the UK in the tax year in which they subscribe to an ISA.

### *Return of the Missing Person*

We would welcome further guidance and clarification on expectations of the Guardian and financial services firms where the missing person returns and makes direct instruction. We understand the Guardianship Order is automatically revoked in such cases without a Court process and firms should cease to take instructions from the Guardian however there may be cases where the missing person has lost mental capacity and is unable to act. A Deputy Order would be required to provide authority on the account however there will be a period of uncertainty while the Deputy Order is being obtained where there will be no person with authority to act. Guidelines in relation to this potential event would be welcome along with details of how financial services firms could seek confirmation of valid authority should they receive instructions in this period.

### *Mental Capacity of the Guardian*

Guidance on action to be taken in the event the Guardian loses mental capacity would be welcome.

### Part 2 – Consultation Questions Response

*Question 1 - Are the extent, appropriateness and usefulness of the content of the provisions in the draft code of practice satisfactory and does the guidance provided meet the needs of the users.*

From a consumer's perspective, we feel the Code of Practice wording would benefit from additional review to ensure it is jargon free and easily understandable by the consumer as many will have little or no financial or legal experience and will be reading this document at a time when they are particularly vulnerable. The current wording appears overly complex in areas, often needing to be re-read to understand.

A timeline of events would be useful for consumers to show key stages and approximate timescales, including reference to where the 90 day requirement is applicable or an early application may be made.

We feel that further guidance should be available for firms who will be receiving and acting on the Guardianship Orders and we would be keen to work with The Ministry of Justice and the Public Guardian to develop this.

In relation to the services to be provided by the Public Guardian it would be useful to understand the scope of the provision of general guidance with examples of the 'others' referred to and also whether financial services firms will have access to a non-chargeable help line should they have queries following receipt of a Guardianship Order.

*Question 2 -Do you wish to suggest any additional persons or organisations that the Lord Chancellor should consult in the preparation of the code of practice:*

We believe that relevant trade bodies to financial services firms will be aware of the consultation and as such preparing individual responses should they wish.

As noted in our Part 1 response in relation to proof of identify, we recommend further discussions with the Joint Money Laundering Steering Group (JMLSG) on whether a legal statement could be provided in the Guardianship Order to the effect that for identification and verification purposes, the address of the missing person is considered to be [last known address]. Clarification is also required from HMRC in relation to the action that can be taken in relation to Junior ISAs, Child Trust Funds and ISAs by the Guardian.

*Question 7 -Do you agree with the information to be included in the court order appointing a guardian.*

As noted in our Part 1 response in relation to gifting, any additional clarity that can be included in relation to this in the Guardianship Order would be beneficial to firms as this aids understanding due to consistency.

*Question 8 -Do you agree that the standard wording should be developed to assist in the drafting of guardianship orders?*

Yes, we do agree that a standard wording and format should be used, with example copies and explanatory notes available in guidance to assist financial services firms in their understanding and use of Guardianship Orders.



## **TISA Response to Guardianship (Missing Persons) Act 2017: Implementing the Act**

*Question 10 -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?*

Yes, as noted in our Part 1 response we support the aim to, wherever possible, reflect existing processes and structure of Powers of Attorney and Deputy Orders in the implementation of the Guardianship (Missing Persons) Act 2017. This will provide a more familiar platform for financial services firms and administration staff who in practice may see at most one or two Guardianship orders per year.