

# **Consultation on the Scottish Civil Courts Review Joint response from Alzheimer Scotland and the Mental Welfare Commission for Scotland.**

## **Introduction**

1 Alzheimer Scotland and the Mental Welfare Commission welcome the opportunity to comment on the above consultation. We are presenting a joint submission because we share mutual concerns, particularly around two key areas affecting access to justice and quality of justice for adults who are unable to represent their own interests due to mental impairment caused by a mental disorder and may become subject to guardianship under the Adults with Incapacity (Scotland) Act 2000 (the 2000 Act). To this end our response focuses on questions and discussion in chapters 2, 3 and 4 that are relevant to the interests of people with incapacity and their families.

2 Mental Welfare Commission for Scotland is an independent organisation working to safeguard the rights and welfare of everyone with a mental illness, learning disability or other mental disorder. Our duties are set out in mental health law. In addition to monitoring the use of legislation, carrying out visits to individuals in receipt of services, and conducting investigations, the Commission produces good practice guidelines in collaboration with key stakeholders, supports service user networks and provides a free-phone advice line (between October - December 2006 just short of 4,000 calls were recorded).

3 Alzheimer Scotland is Scotland's leading charity supporting people with dementia in a variety of ways, through the provision of direct care services, campaigning, information and support. The organisation has a 24hr freephone Helpline which receives approximately 6,000 calls a year, of which about 20% relate to financial and legal matters; employs a Welfare Rights Manager (a non-lawyer) who provides information to carers who present with complex cases in relation to guardianship and provides training to a range of agencies on issues relating to dementia, incapacity and the law.

## **Background**

4 The 2000 Act was introduced to protect individuals with incapacity and to support their families and carers in managing and safeguarding the welfare and finances of individuals. The main groups to benefit are people with dementia, people with a learning disability, people with head injury, and those with severe mental illness, composing an estimated 100,000 people in Scotland.

5 The 2000 Act abolished guardianship under the 1986 Mental Health (Scotland) Act and introduced a new form of guardianship which enables powers to be tailored to the assessed needs of the individual. It allows applications for welfare and /or financial guardianship and intervention orders to be made by private individuals and local authorities and by the adult him or herself. Guardianship cases are heard in the sheriff court. During the developmental phase of the legislation the

Commission and Alzheimer Scotland, with other key stakeholders, supported the recommendation of the Law Commission for Scotland that specialist sheriffs should be responsible for cases under the 2000 Act.

6 It is therefore timely to have the opportunity to look again at how the court system might operate to the full benefit of adults with incapacity. The operation of the 2000 Act has been subject to scrutiny by the then Scottish Executive and by the Mental Welfare Commission. In 2002 the Executive commissioned Alzheimer Scotland and the Scottish Mental Health Development Centre to conduct a two year study into the implementation of the 2000 Act and published a report<sup>1</sup> which identified the need to streamline implementation and improve access. In response, an action programme was put in place and an AWI Co-ordinator appointed to advance progress. Over this (nearly three year) period further practice issues emerged, some of which related to the use of guardianship and court practice. Jan Killeen, Policy Director, Alzheimer Scotland, was seconded to the position of co-ordinator and has since returned to her permanent post with a remit for rights and legal protection. The contribution from Alzheimer Scotland to this submission has been informed, in addition to other sources, by the organisation's multi-disciplinary Rights and Legal Protection Committee.

7 The Mental Welfare Commission has monitored the use of welfare guardianship and intervention orders since the inception of the 2000 Act and identified trends which reveal concerns in relation to how the rights of individuals under the Act are being interpreted. The Commission has regularly reported on these to government in its annual reports.

8 This submission draws upon evidence provided from the above sources in supporting the following recommendations summarised below. In our submission the term 'carer' refers to an unpaid family member or friends who supports an individual with mental impairment.

### **Summary of recommendations**

- **Public legal education** - the provision of accurate and appropriately communicated information is fundamental to facilitating access to justice for adults with incapacity and their families. However evidence suggests that the quality and availability of information is patchy across Scotland. We recommend the development of a comprehensive strategy, in consultation with key agencies, to address this issue.
- **Advice and Assistance** - we support the need for the provision of advice and assistance by non-solicitor advisors, employed in a range of settings including voluntary organisations such as Alzheimer Scotland and the extension of SLAB powers to employ solicitors directly for the purpose of providing civil legal assistance – particularly to support carers in rural areas who are considering the need for welfare and/or financial guardianship for the person they care for.

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1. Scottish Executive, 'Adults with Incapacity (Scotland) Act, Learning from Experience' October 2004.

- **Specialisation within the civil courts** - we strongly support the need for specialist family courts to include cases of incapacity under the 2000 Act.
- **Arrangements/location** – we support arrangements that will maximise ease of access to specialist sheriffs across Scotland.

## Chapter 2: Access to Justice

### 1 What contribution can public legal education make to improving access to justice.

In relation to adults with incapacity, the provision of accurate and appropriately communicated information is fundamental to facilitating access to justice. The ‘Learning from Experience’ report found that the lack of publicity about the Act and how it might benefit adults and carers was one of the main barriers to access. Whilst this has been addressed to some extent (for example, the Office of the Public Guardian has a programme to promote powers of attorney), there remains a worrying lack of knowledge amongst professionals who are in a position to advise the carers who are supporting an adult with a mental disorder.

Examples of where public legal education would improve access to justice

- Wider public education about the benefits of appointing a power of attorney would help to avoid the need to apply for guardianship orders which are costly to the public purse as well as to individuals where a financial order only is applied for. This is especially the case given the rising number of people with dementia. The number of guardianship orders granted has been rising steadily since 2002 and a steady 60% of these are for people with dementia. The potential for early diagnosis means that health care professionals are well placed to alert patients to ways in which they can make arrangements to plan for their future.

<p>Prevalence of dementia in Scotland          2008: between 58,700 - 65,831          2020: between 80,000 - 99,000</p>
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- the uptake of the non-court based authority to access funds for an adult under Part 3 of the 2000 Act has been extremely poor (about 200 a year as opposed to the several thousand predicted). Access to Funds provides a mechanism for the management of funds where the resources of the adult are modest and uncomplicated. A key reason for low take-up is that carers have not been made aware of the scheme and have sometimes been given the wrong advice to apply for financial guardianship, which has proved to be costly, disproportionate to the financial management needs of the individual, and against the ‘least restrictive’ intervention principle of the 2000 Act.
- The Act has been variably interpreted over a number of years in relation to the use of guardianship orders where the adult has been unable to consent to care services and there has been no attorney in place. This was clarified by an

amendment to the Social Work (Scotland) Act 1968 in March 2007, i.e. that local authorities have the power to provide services to adults with mental disorder without consent in certain circumstances. Whilst guidance is available from the Scottish Government we are not confident that relevant professionals will be aware of this change and its implications for service users and carers.

- We are also concerned about the poor information provided to carers by relevant professionals about legal aid provisions for applications under the 2000 Act. The Scottish Government has recently placed an AWI Legal Aid Fact Sheet on its website and this should help, although wider dissemination by SLAB would reach the key target groups.

**2 Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?**

In our experience, many carers, particularly in rural areas are struggling to find the legal advice and representation they need for applications under the 2000 Act. This has been drawn to our attention by carers in the Highlands, Elgin, Moray, Western Isles, Orkney and the Scottish Borders. It is often difficult to find solicitors who are willing to act in guardianship cases, despite changes to legal aid regulations in 2006. For example, the type of anomaly that can arise: a solicitor in Fife is prepared to act for an adult with a learning disability but not for someone with dementia on the assumption that the latter will have funds and should pay privately. In addition, some solicitors have not realised that different legal aid rules apply under the 2000 Act in that it is not capped.

**3 To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?**

The 2000 Act explicitly allows private individuals to make Summary Application for an intervention or guardianship order without legal representation. This is because it was assumed that in most cases, private applications would not be opposed (as has proved to be the case), and that the process should therefore be relatively quick and inexpensive. However the law is not always well understood and we know of several cases where clerks of court have inadvertently misinformed private applicants on this point and put up barriers to self-representation. Although there has been no research to substantiate the claim, it is possible that the court proceedings are regarded as so daunting, and representation so expensive, that applications are not taken forward, with benefit lost to the adult. The Scottish Government has produced a step by step guide for carers on how to make an application for an intervention order or guardianship.<sup>2</sup> Court based advice services could make an important contribution to supporting carers through the process, whether or not they are acting for themselves.

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<sup>2</sup> Scottish Government 'Guardianship and Intervention orders – making an application. A guide for carers. November 2006.

## Chapter 3: The cost and funding of litigation

### 6. To what extent does the cost of litigation deter people from pursuing or defending cases in court?

We have three separate points here:

i) An amendment to Civil Legal Aid regulations for intervention or guardianship applications under the 2000 Act has made an important contribution to access to justice. However the problem for many people is getting over the first hurdle of paying for Advice and Assistance. Eligibility for advice and assistance is based on the adult's income and not the applicant's, but because of the very low financial threshold few adults are eligible. This means that where an application is being considered for a welfare guardianship application (for which there is an entitlement to free Civil Legal Aid), the private client fee for Advice and Assistance can be between £1000-2000. This is considered to be unfair as under previous Mental Health legislation, which covered guardianship, there was a free entitlement to advice and assistance under ABWOR. ABWOR remains the way cover is provided for Mental Health Tribunals and is fast and efficient compared with full legal aid. We recommend that regulations for entitlement to legal aid under the 2000 Act are subject to further consideration in terms of equality of provision for adults considered under the 2000 Act and under the Mental Health Act 2003. It is relevant to note that some adults will be subject to the provisions of both Acts and that an integrated system would be helpful.

iii) A related issue is the confusion that exists around the payment of legal fees for a safeguarder. The sheriff may decide to appoint a safeguarder, and this is nearly always solicitor (although the Act allows non-solicitors to be appointed). The role of the safeguarder is to ensure that the best interests of the adult are being taken fully into account. It is a court appointment and the safeguarder does not represent the adult. The sheriff can allocate costs to the applicant, who may be a local authority or a private individual. The fee can be in the region of £1,000-£2000, a huge burden for the individual, and not eligible for legal aid (except in the unusual situation where it has been anticipated and requested in advance). We know of non-contentious cases where carers have found themselves facing a large unexpected bill. This seems at odds with the appointment of curators *ad litem* for which there is an entitlement to free legal aid. Although there has been no research into the use of safeguarders, as opposed to the curators *ad litem* system, the appointment of such appears to be very variable throughout the country.

iii) We have identified a particular problem in relation to legal aid where we believe that there is a danger of breach of article 6 of the European Convention for Human Rights. Scottish Ministers may appeal a decision of the Mental Health Tribunal for Scotland to the Court of Session. ABWOR was available to the patient with no means test during the process of review by the Tribunal. When the Ministers appealed the decision, any representation for the patient fell under the auspices of civil legal aid and was subject to a means test. The patient's funds were slightly above the legal aid limit and the patient was therefore not entitled to free legal aid. The Mental Welfare Commission considers that legal aid should be provided free in the interests of justice as required by article 6 of ECHR.

## **Chapter 4 The Structure and jurisdiction of the civil courts**

### **1 Do you agree that the conduct of civil business of the courts is adversely affected by the pressure of criminal business?**

There are often delays before a first hearing due to pressure of both criminal and other civil business on court time (even though the hearing should be held within 30 days of receipt of the summary application). Pressure may also mean that the first hearing is very short and business cannot be concluded in one session, thus leading to delays. Court delays can be detrimental to the adult, in that, for example, a care home place may have been identified but lost because it cannot be taken up for some weeks.

### **3 Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?**

We consider that a separation into civil and criminal divisions would be highly desirable. Guardianship cases are sensitive and deal with the futures of people who have vulnerabilities due to their mental disorder – cases are not adversarial. Evidence from the original study and from a follow-up survey of all welfare guardians in 2006 found:

‘most guardians volunteered their views on the court process, describing it as being extremely stressful and in many instances a ‘nightmare’. The majority of carers were pleased with the outcome, but strongly objected to the court environment with its associations of criminality. In several instances it was also reported that the adult felt they were being taken to court because they had ‘done something wrong’ and it was hard to explain why they needed to go there.’

It is interesting to note that in England, hearings before the Court of Protection take place in a normal meeting room in a place of mutual convenience and in Belfast, to reduce the stresses induced by the environment, hearings take place in a less formal setting within the court service. The family court model would be more conducive to guardianship hearings.

### **4 Should there be a greater degree of specialisation within the civil courts of Scotland. If so, in what types of cases and in which courts?**

We are strongly of the view that there should be a greater degree of specialization within the civil courts of Scotland. Family courts would be the most appropriate to deal with guardianship cases and that there should be ready access to family courts across the country.

#### **Why a specialist court?**

The 2000 Act provides a range of provisions which enable families to seek appropriate solutions to the community care, health and financial issues they face

when the person they care for is unable to make some or all decisions for themselves. Guardianship cases involve people with dementia, acquired brain injury, learning disability and severe and chronic mental illness in sensitive and sometimes complex issues for decision-making on behalf of the adult. These are emotionally laden situations for carers requesting powers over the adult and for adults themselves, especially if they are unhappy about proposed arrangements. The family court environment would be the most appropriate place to deal with such cases and may have the effect of increasing access to justice, in that some families may fail to act because they are frightened away by the current court system. Despite advice to the contrary, some cases are still held in open court, thus denying the adult's right to confidentiality and exposing his/her vulnerabilities.

### **Why specialist sheriffs?**

We believe that there would be a better outcome in terms of quality of justice for adults with incapacity. Sheriffs would be able to work flexibly, develop expertise, share knowledge and develop a consistency of approach. Making a judgement in cases involving adults with complex mental disorders and severe communication issues requires a degree of specialist knowledge and training about issues of consent, communication and an ability to assess the evidence presented. The guide produced by the Scottish Government could be adapted for training purposes.<sup>3</sup> Sheriffs need to have a close understanding of the principles of the Act and be able to apply them, particularly in contentious cases. The legislation aims to achieve a balance between supporting the rights of the individual to autonomy and providing protection. This can be a complex and complicated process. The 2000 Act recognised the gravity of intervening in the autonomy of a person's life and provided that only recognised specialist social workers i.e. mental health officers should have authority to assess the suitability of a proposed guardianship application and the suitability of the applicant; and that evidence of capacity in relation to powers sought must be assessed by a consultant approved under section 22 of the Mental Health Act as well as by a general medical practitioner. The MWC monitoring of guardianship orders has observed three issues of concern:

- Cases where excessive powers have been granted in relation to assessed need of the individual. It appears that some solicitors advise applicants to apply for general powers and that sheriffs are not always applying the principles of the Act with sufficient rigour.
- An increasing number of orders granted for an indefinite period. At s58 (4) the Act states that 'where the sheriff grants the application... he shall make an order... for a period of 3 years or such other period (including an indefinite period) as, on cause shown, he may determine. Whilst an indefinite order may be appropriate in certain cases where the adult is likely to deteriorate, 'cause shown' is not always evident.

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<sup>3</sup> Scottish Government, 'Adults with Incapacity (Scotland) Act 2000, Communication and Assessing Capacity, a guide for social work and health care professionals. November 2007.

The following quote from the Commission's annual report 2006-07 raises issues regarding the use of both excessive powers and orders granted for indefinite periods.

'One concerning trend, which we have commented upon in past reports, is the increasing tendency to see guardianship orders for indefinite periods. In the past year 68% of all welfare guardianship orders were granted. In 2003-04 only 27% of orders were granted on an indefinite basis...The Commission expressed concern in individual cases, such as young people with learning disability where a wide range of powers are sought on an indefinite basis. It could be that the case, that even if ... the adult's clinical status is unlikely to improve, the social circumstances of the adult can change over time, enabling the adult to be supported to make certain decisions they would not previously have been able to make without support.'

- There appear to be a larger number of adjournments and interim orders, than would have been anticipated and this has meant delays in meeting the assessed care needs of individuals e.g. delayed discharge of patients with incapacity from NHS hospitals due to lengthy court processes has caused distress to the adult, their family and impacted adversely on the use of NHS beds.

We consider that specialist sheriffs, because of their familiarity with the legislation and local MHOs and solicitors, would be able to expedite cases more swiftly and effectively. This will be essential as the number of guardianship applications increase in line with our aging population, and with complexity.

The Commission's statistics for 2007 show that welfare guardianship has increased again, at its fifth year by a little over 20% per year, to over 1000 orders approved during 2007, with approaching 50% being for both welfare and financial guardianship. It is also possible that the streamlining of regulations for renewal and recall (to improve access to justice), will increase the level of court business.

Because most cases of guardianship are not contentious, it would be possible for specialist sheriffs to conduct hearings remotely by telephone or video link, which would be beneficial to both the adult and his/her carer as well as to the management of court business.

With the appointment of specialist sheriffs to this area of law it is anticipated that solicitors, in parallel would be encouraged to specialise.

### **Future developments**

A related issue is the real concern that the 2000 Act currently puts the onus on the adult or other interested parties to raise a judicial review. We do not feel this is in keeping with accepted standards of justice. The 2003 Mental Health Act has recognised this and made arrangements for a periodic review of compulsory orders which will be initiated by the Mental Health Tribunal. The Commission has drawn attention to this issue in its 2006-07 Annual report. If automatic review of welfare guardianship is introduced there would be a significant impact on the level of court

business. However, specialist sheriffs would be familiar with cases and be in position to deal with them quickly.

## Conclusion

The development of a coherent family court system with specialist sheriffs would make it easier to explain the process to public, less threatening for families and the adult and has the potential to streamline management. Specialist sheriffs, sheriff clerks and solicitors with specific training in the Act and related legislation, on mental disorders, communication with carers and adults, would have a major impact on improving both access to justice and quality of justice for Scotland's most vulnerable people.

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