

ENABLE Scotland

Response to Consultation on the Scottish Civil Courts Review

March 2008

ENABLE Scotland is the largest voluntary organisation in Scotland of and for people with learning disabilities. We have a strong voluntary network with around 4000 members in 68 local branches as well as 500 national members throughout Scotland. Around a third of our members have a learning disability.

ENABLE Scotland campaigns to improve the lives of people with learning disabilities and their families and carers. We also provide a range of services for children, young people and adults including a number of employment and training initiatives that support in excess of 100 people with learning disabilities each year to gain jobs. Altogether in our direct care and other services, we employ around 1200 staff across Scotland.

We know that people with learning disabilities can have difficulties accessing justice even with positive measures such as the Vulnerable Witnesses (Scotland) Act 2007. We also know that parents and carers sometimes find themselves in situations where they need to take court action to achieve an outcome yet have difficulties finding solicitors, understanding the process and obtaining legal aid. As a result we are pleased to have the opportunity to respond to this consultation. Our comments are detailed below and are made with reference to the questions of particular relevance to us listed at the end of each chapter.

Chapter 2

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

Good quality accessible information is highly important in facilitating access to justice. It helps ensure people are aware of their rights and responsibilities as well as the various legal mechanisms available.

We also think that public legal education can help reduce the need for stressful and expensive court hearings. For example, we come across a lot of misconceptions about powers of attorney. People believe that these are document that you “take out” on other person. They are still not understood as a useful planning tool for the future. More widespread use would reduce the need for guardianship applications, particularly in the older client group.

We also support more public education about guardianship. Many parents and carers believe an order gives the authority to control the provision of care. In addition, parents of younger children often feel that guardianship is something they must have in place by their child's 16th birthday. Better information may lead to a reduction in the number of applications. It would also allow people to plan ahead more effectively and reduce the need for interim orders.

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

In our experience, many parents find it difficult to get representation for applications under the Adults with Incapacity (Scotland) Act 2000. This is despite the fact that the legal aid regulations were changed in 2006 in an attempt to facilitate this. The problem is particularly prevalent in rural areas. For example, we are aware of parents in Morayshire who have been unable to secure local representation.

We also find that people with learning disabilities can have problems finding solicitors willing to act. They often face assumptions about their level of capacity and ability to instruct. In addition, it can take more time to get clear instructions. For example, home visits might be needed or several short meetings. In some cases, the individual may use alternative forms of communication or need support of another person. We find that solicitors are not always willing to take on such clients despite their obligations under the Disability Discrimination legislation.

We are also aware that there can be difficulties in persuading the Scottish Legal Aid Board that increases are necessary because someone has additional needs. This does not encourage solicitors to take on work and can lead to delays in clients getting the legal help and support they need.

- 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?**
- 4. What contribution, if any, can (a) “self-help” services for party litigants and (b) court based advice services make to improving access to justice?**

We will deal with these questions together.

A large number of cases under the Adults with Incapacity (Scotland) Act 2000 are unopposed. In many instances, parents need to apply because their child lacks capacity and they need to do something quite

straightforward like sign a tenancy agreement. Given that applications can take 3-6 months this obviously causes unnecessary delays in a person moving forward with their life. We wonder if a procedure could be designed to facilitate this type of case. It seems excessive to parents and carers that a lengthy and expensive court process is necessary in such circumstances. While we obviously appreciate that safeguards for the adults welfare must be in place we question whether such applications are an effective and efficient use of court time.

The Ordinary Cause and Summary Application rules are complex and it is unlikely parents could make applications without the support of a solicitor. We would welcome a discussion on whether or not some types of decision could follow a streamlined procedure or even be taken out the formal court system.

Chapter 3

2. To what extent does the cost of litigating deter people from pursuing or defending cases in court?

We know that the cost of applying for a guardianship order can deter people from applying. Although legal aid should be available for all in some areas people have difficulty finding a solicitor prepared to carry out the work under the scheme. We find that parents need to pay around £3000 for an order and in some cases substantially more. Given that some parents might find themselves with no option but to apply, for example where a legal rights claim needs discharged or a person is moving house, we find it unfair that they are required to pay. It is particularly unfair in uncontested cases where the application is really a formality to allow something straightforward and in the persons best interests to happen.

6. To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

As mentioned above some parents find it difficult to locate a solicitor prepared to carry out work under the various legal aid schemes. This leaves them unable to make an application unless they have additional resources.

In addition, we find that solicitors are not keen to take on cases involving people with learning disabilities who might need additional support to build their capacity to instruct. It can be difficult to persuade the Scottish Legal Aid Board that in such cases additional time, and therefore funding, is required. For example, taking instructions for a will might often involved 2 or 3 visits.

7. Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?

As identified above in our experience there are difficulties in general with cases involving people with learning disabilities.

There are also difficulties in accessing legal aid for cases under the Adults with Incapacity (Scotland) Act 2000.

Chapter 4

5. Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?

Given our comments above we wonder if some applications under the Adults with Incapacity (Scotland) Act 2000 could be looked at in a different forum.

We are also aware that in many cases guardianship orders are granted with very wide powers and that these powers are not always merited. We think that if specific people were allocated to take decisions they could build up a level of expertise in making decisions and assessing capacity. This would lead to greater consistency.

Guardianship orders effectively deprive people of their legal capacity. As a result it is very important they are considered carefully and that necessary powers can be obtained quickly but there is an effective check on excessive powers.

14. Are current arrangements for dealing with undefended actions satisfactory?

16. Are there types of business in the sheriff court which could more efficiently or appropriately be dealt with by administrative rather than judicial process? For example, are current arrangements for the disposal of commissary business satisfactory?

We will deal with these questions together.

As mentioned above some applications are unopposed and made for practical reasons such as to allow a person to move house. We wonder if these need to follow a sheriff court procedure that requires parents and carers to instruct solicitors

Clearly we would need to make sure there were sufficient safeguards but we wonder if it is worth exploring further whether or not the sheriff court is the right forum for these cases.

Chapter 5

2. Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

Where applications arise because of disputes between parents and carers and the local authority or another service providers we think that mediation can be a very useful tool. Formal court hearings do not often improve the relationship and are stressful for all involved. In addition, they often do not produce the desired result for parents. Consideration of alternative methods of resolving such disputes at an early stage could be productive.

Chapter 6

7. Should there be a single initiating document for (a) all types of action and/or (b) at all levels of the court structure? If so, what format should that document take?

8. To what extent should a system of abbreviated pleadings be introduced?

We will deal with these questions together.

We think the methods of applying for orders under the Adults with Incapacity (Scotland) Act 2000 could be made clearer. Where actions are likely to be unopposed consideration could be given to the use of standard forms that would allow individuals to apply without needing to instruct a solicitor.