



**THE LAW SOCIETY
of SCOTLAND**

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**Court of Session
Scottish Civil Courts Review**

**The Response of the Mental Health and Disability Sub-Committee of the Law Society of
Scotland**

April 2008

INTRODUCTION

The Mental Health and Disability Sub-Committee of the Law Society of Scotland (“the Committee”) welcomes the Scottish Civil Courts Review. This response should be read as a supplement to the Society’s main response, submitted separately.

This response, concentrates on issues of access to justice of particular relevance to people with mental impairments, such as mental illness, dementia or learning disability.

The Committee has long and wide-ranging experience of such issues, being comprised of practising solicitors, academics and legal advisers to voluntary agencies working in these areas.

The Committee warmly welcomes the Scottish Civil Courts Review and in particular its stress on improving access to justice for all the people of Scotland. The Committee welcomes the stress placed by the Review on the importance of high quality advice, information and assistance and on creating an accessible system with procedures and language accessible to the public.

The Committee would urge that this accessibility is also extended to those whose impairments may mean that they have additional needs, whether of access, for support or for accessible language.

Chapter 1, question 3: other matters of concern not dealt with in paper

Are there any matters within the Review’s remit about which you have concerns but which are not dealt with in this paper?

There are three other matters which the Committee would ask the Review to consider. These are the accessibility of the judicial system, the reporting of cases and the curators *ad litem* system.

Accessibility of the judicial system

A major concern for the Committee is that the Review considers ways of making the civil justice system accessible to all who come before the courts, including those with mental vulnerabilities. The Committee is pleased that the Review is considering these important issues, but notes that the consultation document does not appear to ask this question specifically.

Although there has been very little formal research in Scotland about the issues facing people with mental vulnerabilities involved in the civil justice process, the Review will be aware that recent research into the family court service indicated unhappiness about the cost of proceedings, the adversarial nature of the legal system and the length of the court process. Interviewees complained that the courts were old fashioned and not user friendly. Court dress, style and language were also seen as unhelpful in this setting. (*Improving family law in Scotland* Scottish Executive (2004)).

Research into the implementation of the Adults with Incapacity (Scotland) Act 2000 identified some unhappiness with the formality of the court setting. Carers who attended court found the process perplexing and inhibiting. Where the adult with incapacities attended court, the experience was confusing and stressful. The association of the sheriff court with criminal justice matters was particularly unhelpful. (*Learning from experience* Scottish Executive Social Research, (2004) paras 5.90-95)

Researchers estimate that 1-2% of the population have communication support needs, including needs from mental vulnerability. While the researchers did not consider how this might affect people's ability to participate in the civil justice process, they recommended that legal professionals working in the criminal courts should receive specialised training in recognising and meeting people's communication support needs to enable them to communicate appropriately and avoid underestimating or overestimating people's capabilities. Similar advice might be appropriate for the civil courts. (*Communication support needs: a review of the*

literature Scottish Executive (2007))

The Review will be aware that both human rights and discrimination law impose legal duties on public authorities to meet the needs of people with disabilities, including mental disabilities. Public bodies are obliged to publish disability equality schemes to show how they will achieve this. It is unfortunate that the current disability equality scheme of the Scottish Court Service still concentrates on physical disability. **The Review should ask the Scottish Court Service to consult further to consider the needs of those with mental impairments.**

The Committee welcomes the important reforms in the Vulnerable Witnesses legislation, for which it has long argued, but believes that there remains a need for further reform.

It could be argued that to make the court system accessible to people with mental vulnerability will also improve its accessibility to other members of the public. For example, reducing the stress of attending court, or ensuring that court processes and the language used in court are comprehensible, is likely to benefit all who attend court.

In addition, judges, advocates and solicitors should have some understanding of the possible impact of the disability on a witness's individual needs.

(For example, flexibility on timetabling might help a person with mental health challenges, whose condition might fluctuate. A person with a learning disability may need reassurance that it is acceptable to tell the truth, even if the answer is not what he or she thinks the questioner wants to hear.) Adults with Incapacity Act guidance on maximising capacity could be suitably adapted.

For people with mental impairments are concerned, many of the possible changes require a change in culture rather than expensive technology. They could include:

Information giving

- (i) Ensuring that written and oral information is in plain English with a reduction in the unnecessary use of jargon. Examples would be the helpful *Being a Witness* guide for people with learning disabilities, written for the Scottish Executive by Enable and the website of the Crown Office and Procurator Fiscal service, which now includes a 'jargon buster'.

Easy Read versions of documents should also be available for people with learning disabilities.

- (ii) Giving witnesses clear explanations at the start of the process about the various people in the court and their roles.
- (iii) Making it clear that witnesses can ask questions if something is not clear.

Communication

- (i) Providing training for legal professionals, including judges and sheriffs, in communication skills, such as asking simple questions which require a yes/no answer, and, where appropriate, reducing the use of abstract terms. For example, in a criminal trial brought to the attention of the Committee, the judge asked a man with learning disabilities if he '*felt any remorse*'. As he did not know what this was, he said he did not.
- (ii) Involving speech or language therapists, interpreters and/or the use of visual or other aids, if necessary.
- (iii) Pre-trial meetings to ascertain the level of an individual's ability to understand and engage in the legal process.

Support

- (i) Allowing supporters to attend court with the person.
- (ii) Reducing stressful delays.
- (iii) Giving witnesses a chance to take breaks whilst giving evidence.
- (iv) Reducing unnecessary and intimidating formality, such as the use of wigs.
- (v) Consideration of courtroom design, with facilities for people to give evidence sitting down.
- (vi) Use of less formal settings, such as judges' chambers, where appropriate.

The Committee urges the Review to take further advice about how to make the judicial system more accessible to those with special needs, in the knowledge that such changes may help a wider body of people attending court.

Reporting of cases

The reporting of court judgements has caused the Committee some concerns, as the Scottish Court Service appears to have an inconsistent policy on protecting the anonymity of people involved in mental health and incapacity cases.

It appears that since May 2005 the reports of adult incapacity cases have been anonymised, but reports of appeals to the sheriff principal against decisions of the mental health tribunal, which raise equally sensitive issues, are not always so anonymised. These judgements are public documents, published on the Scottish Court Service's website.

It must be questionable whether there is any public interest in having patients' details published on the Internet in this way, easily accessible by a simple web search. **It would be helpful if the Scottish Courts Service could develop a consistent policy on protecting anonymity in these types of sensitive cases.**

Curators ad litem

When mental disorder means an adult does not have the legal capacity to instruct a solicitor or participate in legal proceedings, the court can appoint a curator *ad litem* or use the procedures available under the Adults with Incapacity (Scotland) Act.

The common law power to appoint a curator *ad litem* applies whenever an adult or child is unable to participate in litigation and has no guardian to represent his or her interests. The curator's function is to protect and safeguard the person's interests in the litigation.

Under the Adults with Incapacity Act, where an adult lacks the capacity to instruct or defend legal proceedings, the court may make a one-off 'intervention order' authorising the intervener to act on the adult's behalf, or grant a guardianship order

including this power.

In any proceedings under the Adults with Incapacity Act, the court may, in addition to appointing a curator, appoint a person to safeguard the interests of the adult, including representing his or her views to the court. If it is inappropriate for the safeguarder to represent an adult's views, the court may appoint yet another person for that function.

These various legal powers could be streamlined. In particular:

- (i) The common law does not appear to contain any clear **procedures** for the appointment of a curator *ad litem*, and although there may be a court hearing, the common law does not appear to require this, although it may be required under Article 6 ECHR.

Use of the Adults with Incapacity Act in this situation would ensure a court hearing, appropriate medical reports and the involvement of the principles set out in that Act, including respect for the wishes and feelings of the adult, past and present. (The requirement that a curator act in the 'best interests' of the adult, is now considered paternalistic, and is not in accordance with the principles set out in the Incapacity Act). **The Scottish Civil Courts Review might wish to make recommendations in this area.**

- (ii) There remains uncertainty about the **payment** of safeguarders and curators in applications under the Adults with Incapacity Act. The Act did not make provision for their payment and there is no provision in the Rules of Court.

Although the courts invariably appoint solicitors to this role, the solicitor is acting as an officer of court, not a solicitor. The Scottish Legal Aid Board takes the view that it is not appropriate for the legal aid fund to pay these costs, as the curator is not providing legal services to clients.

The common law requirement that the party seeking the appointment should pay would mean that in guardianship cases, this will be the local authority, but if a private

individual applies, he or she may have to finance the curator.

It would be helpful if the Review could clarify this situation.

Curators in divorce or separation

Rules of court make special provision for the appointment of a curator *ad litem* in an action of divorce or separation where the court considers that the defender is suffering from a mental disorder. (RSC, rule 49.17; OCR, rule 33.16) The curator may defend the action on the person's behalf and may appear in court to protect the person's interests (RSC 49.17(7)). The grounds for the appointment of a curator are not linked to the capacity of the defender, who, if he or she has legal capacity, may instruct his or her own solicitor.

The Mental Welfare Commission is involved in all cases of divorce based on one year's separation and consent. If it establishes that a defender is unable to consent, it must notify the court. The Committee suggests that it is no longer appropriate to appoint a curator *ad litem* in divorce or separation on the grounds of 'mental disorder' alone. A person with, for example, depression, anxiety or some forms of learning disability may well retain the capacity to take his or her own decisions and arrange his or her own representation in the divorce action. If mental disorder means someone is unable to take action in relation to divorce, the person will need someone to represent his or her interests in court, but in other cases the benefits of special court protection appear less clear. Indeed, it could be said that such an intervention runs contrary to Adults with Incapacity Act principles of minimum necessary intervention and respect for the wishes of the adult.

An additional issue is that these rules of court overlap with provisions in the Adults with Incapacity Act, which provides that guardianship orders may include the power to defend or initiate an action of divorce or separation. It is not clear which procedure is to be preferred.

The Committee suggests that this area of court practice requires clarification.

Chapter 2, question 1: Importance of public education

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

The Committee welcomes the findings of *Modern laws for a modern Scotland*. The Committee agrees that high quality advice and information can not only improve access to justice but can also reduce the use of the courts, as complainants are pointed to alternative remedies, such as mediation, the use of ombudsmen or complaints procedures. Advisers can direct complainants to other organisations which may be able to resolve the problem, for example, the Mental Welfare Commission, the Office of the Public Guardian and the Commission for Equality and Human Rights.

Good quality public information may also provide a service for lawyers operating in these areas, increasing familiarity with the issues and thus enabling a more streamlined service to be provided.

Initial legal information and advice on mental health matters is available from the Law Society (members of the Committee have written widely on these matters for various audiences), and from a variety of lay providers, including three main voluntary organisations, (the Scottish Association for Mental Health, Enable and Alzheimer's Scotland), and citizens' advice bureaux.

The three major voluntary organisations have access to legal advice, through lawyers on their staff or boards of directors. This enhances the quality of the advice they can provide to the public (including professionals and other lawyers), but additional funding would mean that this service could be significantly improved.

There has been little research about access to advice and information in mental health and incapacity law in Scotland but there is anecdotal evidence that good quality information remains patchy. In a recent Fatal Accident Inquiry, for example, the sheriff

found disturbing ignorance of incapacity law among health and social work professionals. He believed there had been a failure by the Scottish Executive to provide adequate training in the legislation and saw a clear need to improve this.

A research project carried out before full implementation of Adults with Incapacity Act looked at people with dementia and their use of the legal system. The researchers found evidence of poor information from health and social care professionals and recommended that more accessible information on legal needs and opportunities should be circulated through a variety of sources, including health and social care professionals and voluntary organisations such as Alzheimer Scotland. (*The characteristics of people with dementia who are users and non-users of the legal system in Scotland* Scottish Executive (2002))

The Committee considers that improvements in public mental health and incapacity law education would contribute significantly to the access to justice of this vulnerable group of people to justice.

Chapter 2, question 2: Gaps of provision in civil legal advice or representation

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?

Access to legal advice and assistance

There has, unfortunately, been very little research into the unmet legal needs of people with mental disabilities in Scotland. People with long-term mental or physical impairments are more likely to have a serious legal problem for which legal advice would be appropriate, (*Community legal service: Assessing need for legal advice in Scotland* (2004) Scottish Executive).

However research from England and Wales indicates that people facing legal issues relating to their mental health are among the least likely groups to take legal action, or even to seek advice. (*Causes of action: civil law and social justice* (2004) LSRC Research Paper No. 11) Research from Australia confirms the barriers people face and makes some suggestions for overcoming these. (*On the Edge of Justice: the Legal Needs of People with a*

Mental Illness in NSW, Law and Justice Foundation of NSW, (2006)).

There is anecdotal evidence of the difficulties people in Scotland face in obtaining good quality legal advice and representation in mental health and incapacity matters. The Committee understands that clients can face serious difficulties in finding a solicitor with the appropriate expertise outside the Central Belt.

The Law Society maintains a list of solicitors willing to deal with mental health matters, but a recent report highlighted the difficulties in obtaining legal representation at the Mental Health Tribunals. (*Mental Health Tribunal for Scotland: experiences of independent advocates and service users* Scottish Independent Advocacy Alliance (2006)). There is anecdotal evidence of similar difficulties in other areas of mental health and incapacity law.

The Law Society has only two accredited specialists in incapacity law and none in mental health law, although these figures do not, of course, represent the true numbers of people working in these fields. The Committee understands that Alzheimer's Scotland maintains a list of solicitors, but the organisation can give no guarantees as to quality or availability. The Review will be aware that research into general unmet legal need has found significant gaps in provision (as found in *Paths to Justice Scotland* by Glenn and Paterson) and currently social welfare law remains outside the core syllabus for qualification. One study found that only 25% of Scottish solicitors could advise on welfare benefits and social security benefits. (*Specialism in Private Legal Practice* Scottish Executive (1999)) Research carried out for the Scottish Executive confirms the lack of availability of such legal advice generally. (*Review of Legal Advice and Information provision in Scotland* (2001) Scottish Executive).

An important project in Fife financed by the Scottish Legal Aid Board (under Part V of the Legal Aid (Scotland) Act 1986) aimed (among other things) to identify the unmet legal needs of people with mental health problems, their carers and families, as well as related social policy issues. This followed reports from a number of advice agencies that the lack

of access to specialised legal advice was a serious barrier to providing support to people with mental health issues. **Similar research could usefully be carried out in other pilot areas to establish unmet legal need.**

Legal aid

Many people living with mental health challenges are unemployed and many will be dependent on welfare benefits. (*Mental health and social exclusion* (2004) Social Exclusion Unit) They would, therefore, be eligible for legal aid. The Review will be aware of the shortage of availability in civil legal aid in many areas, and mental health and incapacity law is not immune from this.

A major challenge for the legal profession is the complexity of mental health law work. As well as requiring an understanding of the complex mental health and incapacity legislation, a solicitor may need to be familiar with issues of discrimination law, medical law, community care and administrative law. While this makes the subject of immense interest to the academic, it imposes significant pressure on the busy solicitor.

The solicitor working in this area also requires high quality interpersonal skills. A client may be distressed or vulnerable, and may have special communication needs, all of which may make the work both time-consuming and challenging. Unless legal aid fees can adequately cover the increased costs, solicitors may be disinclined to take on such work.

There is a need for further consideration of the options in providing adequate access to justice for clients with mental health or learning difficulties.

One long-standing model of legal provision has been the dedicated legal services provided by the Legal Services Agency law centre in Glasgow and Edinburgh. Their Mental Health Representation Projects, funded through the Mental Health Specific Grant and legal aid, provide legal advice and representation to people living with mental health challenges, including dementia. The projects' expertise covers community care, mental health tribunals and incapacity matters and they carry a large caseload.

It may be necessary for the Legal Aid Board, together with local authorities and central government, to consider supplementing the advice and representation services provided by solicitors in private practice with solicitors directly employed by the Legal Aid Board in community mental health legal projects. Use could be made of the Board's powers under section 6(1) of the Legal Profession and Legal Aid (Scotland) Act 2007.

In addition, generic community legal projects could make mental health service users a priority group for receiving social welfare legal advice, a solution already adopted by the Legal Services Commission in England and Wales through its Community Legal Advice Centres.

In conclusion, the Committee strongly welcome the opportunity given by the Review to ensure that the Scottish civil justice system meets the needs of all citizens, including those with mental vulnerabilities. It urges the Review to recommend further research into the extent of unmet legal need in this group of vulnerable citizens.

Chapter 2, question 4: Should court procedures be designed to enable litigants to take part without legal representation?

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

For human rights reasons, legal representation would generally be essential in, for example, incapacity cases. The Committee would find it hard to envisage situations where it would be appropriate for an adult to represent his or herself in such a case.

Chapter 3 question 6: availability of legal aid and advice and assistance

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

(See also the Committee's answer to question 2 in Chapter 2.) The Review will be aware that the late 20th and early 21st centuries have witnessed a considerable amount of

reforming social legislation in Scotland, and the Westminster and Holyrood Parliaments have shown particular concern for people with mental vulnerabilities. Reforms to mental health and incapacity legislation have made Scottish law a world leader and there has been significant reform in community care and adult protection law.

However the Committee believes that without accessible and high quality information, advice and (where appropriate) legal representation, legal rights are ineffective, confusing and ultimately meaningless.

The Committee would argue that access to justice does not necessarily mean a right of access to the courts in every case, but that people need advice and information about their rights, that knowledge of new legislation is adequately disseminated through public education, and that legal assistance is available where other remedies have been found wanting. The Committee does not believe that such a coherent system is currently available for people with mental vulnerabilities in Scotland.

Chapter 4, question 4: Specialisation in civil courts

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?

The Law Society has supported the recommendation of the Scottish Law Commission that specialist sheriffs become responsible for incapacity cases. Such sheriffs could perhaps be part of a specialist family court.

Specialised sheriffs would receive special training about the needs of people with mental incapacity and would be able to develop expertise both in the law and in communication and other skills.

The reported cases show that certain sheriffs are now specialising in this area, and the Committee would welcome its further development.

The Committee agrees with the consultation paper that such a court might be able to

develop a more 'user friendly' tone and this would be additionally helpful for people living with mental impairments.

Chapter 5, question 4: mediation

Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.

Because of the human rights concerns and the apparent inequality between the parties, the Committee does not immediately see a role for mediation in incapacity cases.

Chapter 6, question 22 Rights of audience for representatives of party litigants

Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?

The Review might want to encourage the development of schemes allowing lay people to be encouraged to take their own applications to court. For example, the Committee does not believe that it should always be necessary for a person making an application for guardianship under the Adults with Incapacity Act to have legal representation in court. The Committee understands that in some countries, such as Germany, for example, lay applications are the norm.

If a lay representative, for example an advisor from a reputable voluntary organisation, could assist the applicant in court, this might be welcomed by the court as a means of speeding the process.



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