



Law Society
of Scotland

Consultation Response

Guardian Declaration Form: Further Comments

April 2020



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Mental Health and Disability sub-committee welcomes the opportunity to further engage with the Office of the Public Guardian on the development of a Guardian Declaration Form. Having had an opportunity to consider the Public Guardian's letter of 24 December 2019 together with the revised Guardian Declaration Form (v6 July 2019) and covering letter (v1 July 2018), the sub-committee has the following comments to put forward for consideration.

General Comments

We are grateful to the Public Guardian for providing further clarity around the proposed timelines and processes for the Guardian Declaration Form.

We are also grateful to the Public Guardian for clarifying that in the case of represented applicants, it is proposed that the Guardian Declaration Form ("the form") will be provided to the applicant by their Solicitor and returned to the OPG by the Solicitor.

We note that it is anticipated that the completed form will be returned to the OPG by the Solicitor at the point at which the guardianship application is intimated on the OPG. We would suggest that in many cases, it will be both possible and desirable for the form to be returned at an earlier stage. Much of the information sought in the form is information that a Solicitor will obtain at a very early stage of taking instructions from a potential guardian. Early submission may also assist OPG staff in carrying out the normal court observation process expeditiously when the guardianship application is intimated on the OPG, avoiding any delay in the court proceedings.

Should the above suggestion regarding earlier return of the completed form be approved, we would also suggest that a dedicated email address be established for submission of completed forms, or that consideration is given to an alternative system for ensuring safe receipt and swift processing for completed forms by the OPG. Consideration should also be given to a mechanism for ensuring that completed forms are matched to the corresponding guardianship applications when these are intimated, by way of the allocation of a provisional reference number or otherwise. If applicants' solicitors were instructed

to include such reference number on the intimation, or otherwise at an agreed place on the papers to be intimated, that could help minimise OPG staff time in matching the application (once intimated) to the declaration form already received.

Cover Letter

We note that the OPG will only issue a copy of the form directly to a proposed lay financial guardian in cases where a completed form has not been received by the time the application is intimated on the OPG.

We would suggest that in such cases, the cover letter accompanying the form should include a statement to the effect that the form is being sent directly to the applicant because no completed form has been submitted by any Solicitor acting on the applicant's behalf. We would also suggest that the cover letter direct the applicant to contact any Solicitor acting on their behalf, if they have one. We consider that statements along these lines would address situations where a Solicitor is acting but has not submitted the completed form; cases where the applicant is not represented; and the small number of possible cases where there may have been some malfunction in intended arrangements. In cases where an applicant is unrepresented, such a statement may encourage them to seek representation.

In cases where no completed form has been returned at the point the application is intimated on the OPG, and the OPG are aware that the applicant is represented, we would suggest that it would be appropriate for the OPG to copy the letter to the applicant enclosing the form to the Solicitor acting on the applicant's behalf. This would be similar to the process used by the Scottish Legal Aid Board to confirm grants of legal aid, and may prompt both the applicant and their solicitor to make further enquiries to ascertain the position.

We would also suggest that the cover letter should contain a statement in respect of data protection requirements, clarifying the extent to which personal information provided will be retained and destroyed, particularly in cases where the applicant may not ultimately be appointed as a guardian.

Finally, we would reiterate our previous comments that the cover letter should make clear the purpose of the form, how it will be used (for example, whether it will inform the OPGs observations to the court), and what the consequences of disregarding the form are.

Guardian Declaration Form

We note that it is not possible to tailor the form to each case. Accordingly, we have suggested below certain amendments to the form itself to better reflect the broad range of circumstances which may apply to potential guardians. We consider that these amendments may better enable applicants to focus their answers on relevant matters, whilst setting the basis for appropriate co-operation with the OPG in the future.

The headings below refer to those in the Guardian Declaration Form v6 July 2019.

Section 2

As above, we would suggest that this section of the form should make reference to data protection process in relation to the retention and destruction of personal details.

Section 3

We would suggest the following alternative wording for certain questions within this section:

- 3.6 "Are there any relatives of the Adult or of yours, or any others, who might take issue with your application? If so, do you know why?"
- 3.7 We would suggest including a reference to confidentiality considerations eg: "If yes, please provide executors and beneficiaries details, if known **and if you feel able to disclose this information without breaching confidentiality.**" [our addition in bold]. We also consider that this question should reiterate that extent to which information included in the form will remain confidential and will be destroyed and entirely removed if the applicant is not appointed guardian.
- 3.8 "Are you aware that no-one is obliged to take on the appointment of guardian, and that if you do not wish to, or do not think you are able to, you do not have to become guardian?"
- "Have you been advised that a professional guardian can be appointed, at cost to the estate of the guardian's proper professional charges as approved by the Public Guardian?"

We consider that the above questions could be answered by way of a yes/no tick box, as per the current version of the form.

Section 4

- 4.4 "Have you or any family members received a payment, gift, or other benefit from the Adult since the Adult's diagnosis? If so, please explain the details."
- "Are you aware that the Adult's finances must be kept separate from your own?"
- "Do you or any family members draw any benefit from anything belonging to the Adult, e.g. do you live in a house owned by the Adult or use a car owned by the Adult?"

Section 5

- 5.1 Remove the final two sentences of 5.1 and replaced with "I will provide support to the person to assist them in all aspects of acting and deciding within the scope of my appointment. In each matter, I will only act or decide if the person cannot, if necessary with appropriate support, do that themselves. Where I act or decide, I shall do so in accordance with the person's known wishes and

feelings, or my best interpretation (from all of the knowledge and information available to me) as to what their wishes and feelings would have been, if it had been possible to ascertain them."

- 5.4 "Where there may be a conflict of interest, I will disclose it to the Office of the Public Guardian, and I shall seek professional advice where appropriate from them or my solicitor to ensure that any conflict of interest does not interfere with my responsibilities as guardian. I am aware that the Office of the Public Guardian can assist and advise me in carrying out my appointment."
- 5.7. "In keeping with the general principles of the Act, I will always take into account the past and present wishes and feelings of the Adult; and, insofar as reasonably practicable, I will take into account the views of the nearest relative, named person, primary carer or any other involved person."

We consider that the terms of this section in the current draft form to not accurately reflect the terms of the Adults with Incapacity (Scotland) Act 2000.

- 5.11. "I am aware that my appointment depends on the Adult's lack of capacity to safeguard and promote his/her interest in his/her property and/or financial affairs. If the Adult is capable of regaining or developing capacity, I am aware that I have a duty to monitor the Adult's capability, and if at any point it appears that the Adult may have capacity in relation to their financial affairs as a whole or any of the powers that I hold, other than for a temporary period only, I undertake promptly to seek the advice of the Office of the Public Guardian and/or a solicitor, and to proceed in accordance with such advice, including (if so advised) to have the Adult's capacity assessed by an appropriate professional person."

For further information, please contact:

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