

Consultation Response

Early Intervention – Guardian Declaration Form

March 2019



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 consider and respond to the Office of the Public Guardian (Scotland) consultation on Early Intervention – Guardian Declaration Form. We have the following comments to put forward for consideration.

General comments

We thank the Office of the Public Guardian (OPG) for providing a paper on its early intervention approach, and a copy of the revised Guardian's Declaration Form. It would also be helpful to see a copy of the covering letter that will be sent to applicants together with the form. We would decline, at this stage, to offer our own draft of what that letter should contain, in particular as we do not agree that the OPG should be contacting applicants directly in situations where they are represented by a solicitor.

We are disappointed that these forms were originally introduced without consultation, resulting in serious concerns being raised on a number of issues. We are grateful to the OPG for listening to our initial representations on this issue, and for agreeing to suspend use of the forms pending consultation and further consideration.

However, we continue to have concerns around fundamental issues with the Guardian Declaration Form which must be considered and addressed before consultation can properly proceed.

Role of the OPG

The application for guardianship is an issue for determination by a sheriff. The OPG has an important role in assisting the sheriff, but it must also be acknowledged that the OPG is an interested party in the case and that this will have an impact on their relationship and dynamic with the applicant.

The text of the consultation document declares that “the ability, capability and/or willingness of lay guardians appointed sometimes leaves something to be desired”; and that “many” of the “relatively high proportion of new financial guardians” who are removed shortly after appointment indicate that they didn’t realise what was involved in the role. We are grateful to the OPG for subsequently providing figures for current cases where there have been delays by some guardians. However, those figures by themselves disclose no proper evidence base for suggesting that additional measures are required, nor for suggesting that the proposal in the consultation document is appropriate. They could be read as the inevitable consequence of the clear legislative policy of encouraging appointment of lay guardians, with consequential needs for advice and support (albeit at times firmly expressed) which it is the function of OPG to provide.

The OPG has in correspondence helpfully confirmed that there is no evidence of geographical variation in the suitability of appointed guardians. We would be interested in further information about any patterns in the appointment of such allegedly unsuitable guardians. For example, whether there are differences between applications made by solicitors and those made by non-solicitors. In addition, it would be interesting to know how the Scottish figures for these issues compare to figures in other jurisdictions, and whether there are examples from other jurisdictions of measures that can be demonstrated to be effective in reducing ‘problem appointments’. Is there evidence from other jurisdictions that measures such as those now proposed by the OPG are effective in reducing problem appointments and, if so, what are the available statistics for such reductions?

It would also be helpful to know the collective (rather than sampled) views of sheriffs and Sheriffs Principal, who play a key part in the process of appointment of guardians. As the responsibility for ensuring the suitability of appointments rests with the sheriff who makes the appointments, their views on both the current and proposed steps taken by the OPG are or would be helpful to them in discharging their responsibilities, and specifically in avoiding or reducing the incidence of unsuitable appointments.

Duplication

One of the key concerns around the use of the Guardian’s Declaration Form is the duplication of questions that will have been answered as part of the process of preparing for the application. This duplication may cause frustration and confusion to clients as well as requiring unnecessary work.

Contacting represented applicants

Given the role of the OPG in an application for guardianship, we strongly believe that it is not appropriate for the OPG to be contacting individuals directly where it is known that they are represented by a solicitor for the purposes of the application. Directing any contact through the solicitor ensures that solicitors are able to assist their clients in understanding the nature and detail of the requested information, and that the

applicant does not feel unnecessary pressure or distress at being contacted by the OPG before they have been appointed as guardian.

We understand that there are legitimate reasons for the OPG to seek information at this early stage. However, we would strongly recommend that contact be made through the solicitor and not direct to a represented applicant.

Timing

A number of issues have been noted in relation to the timing of the issuing of these forms.

To the extent that some questionnaires were issued before the proposal was withdrawn, that does provide evidence of experience in practice which strongly demonstrates the timing issues as well as the difficulties caused by contacting applicants directly, and not through their solicitor. Applicants were confused by being asked for information that they knew they had already provided. At this most critical time, they were stressed in particular by such short time-limits for responding. They almost always – and absolutely properly – reported this to their solicitors and sought guidance, yet no steps had been taken to ensure in advance that Scottish Legal Aid Board would raise no difficulty in funding such requests for guidance.

We understand that the forms are issued when OPG receives intimation. At this stage, the questions on the form are likely to have been covered in discussions with a solicitor as well as in the averments (as is required in many sheriffdoms). As mentioned above, this duplication may result in frustration and confusion. In cases where the relevant information is contained in the averments, the OPG will already have sight of the information being requested. However, we appreciate the desire for consistency in having the same form completed by all applicants.

On the point of legal aid, we note that the OPG suggests that this could fall under the application process. However, as a full legal aid certificate has generally been granted by the stage that the form has been issued, it would be helpful to know that SLAB will pay for advising clients on the form at this later stage in the process.

Finally, as acknowledged by the OPG, the form is often issued on short notice. Though we accept that the OPG will attempt to give the applicant as much time as possible to complete the form, in practice, this can be quite a short period creating significant time pressure on the applicant during what may already be a stressful time.

Recommendations

A suggestion to address these issues would be for solicitors to be asked to give the Guardian's Declaration Form to their clients as part of the preparations for the application. This would minimise the risk of duplication, as the questions can be answered as part of the early process of applying to be appointed and

would also ensure that applicants have access to support and advice in understanding and completing the form, as well as ameliorate the timing issues discussed above.

We appreciate the need for this form to be completed by the applicant and not by the solicitor but suggest that a declaration could be made to this effect. Solicitors should be able to support and assist their clients to do so. Many solicitors will already have their own forms of questionnaire for the purpose of gathering information at an early stage of instructions. Gathering further information as required by the OPG could be integrated with that process. However, in order to facilitate that integration, the details, including the terms of questions to be asked and the stage of process at which they should be asked, should be agreed in consultation with the profession.

Previously and separately, we have suggested the possibility that training modules could be offered for potential guardians. It might be of assistance to the courts if the courts could be provided with information upon such training modules, and that where appropriate applications should disclose whether a proposed guardian has successfully completed the module (perhaps with production of the relevant certificate).

The Guardian's Declaration Form

In addition to our general comments, we have concerns around the specific statements made in section 5 of the Guardian's Declaration Form.

Statement 1 includes the wording "I will only make those decisions that the person cannot make themselves, respecting what their wishes would have been." This statement is wrong in law in relation to the provisions of section 1 of the Adults with Incapacity (Scotland) Act 2000. If a person lacks capacity, even with appropriate support, to make a decision it is not for the guardian or any other decision-maker to "respect what their wishes would have been". The obligation, in the words of section 1(4)(a), is to take account of "the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication".

Statement 4 says that "I will ensure that my personal interests do not conflict with my duties as guardian". The potential for conflict of interest will often exist in relation to what is otherwise the person closest to the adult, who understands the adult best, and is in general terms best placed to perform many of the functions of a guardian. However, it is not appropriate to say that a guardian must have no conflicts of interest. Instead, the focus should be on recognising and managing any conflicts as they arise to ensure that they do not interfere with their duties. That is a separate issue from any question of using the position for personal benefit or gain.

We are concerned that the wording of these two statements is incorrect and potentially misleading for applicants and should be amended.

Conclusion

We are grateful for the opportunity to consider and comment on the OPG's approach to early intervention and the use of Guardian's Declaration Forms. Although we appreciate the aims of the OPG in taking this approach, we feel that there are aspects that are unhelpful and likely to cause issues for applicants as well as for their solicitors. We hope that our recommendations for a different approach and for changes to the wording of the form are helpful.

We welcome the offer by the OPG to continue the discussion of these issues, and would welcome further exploration and discussion of these points.

This response has necessarily been prepared under a short time frame, and therefore further dialogue would be helpful to progress the initial issues being raised in this response.

For further information, please contact:

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