



Comments

Guardian Declaration Form

October 2019



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 reviewed the revised draft form and cover letter, we have the following comments to put forward for consideration.

General comments

In the development of an early intervention scheme, including the introduction of a guardian declaration form, the goal should be evidence-based and proportionate intervention that addresses specific concerns and supports applicants to understand their duties, and that complements the existing legal process. Further information would be helpful on the anticipated timelines for this process, including when the form would be issued, and how it will fit into the application process. It will be important to ensure that the applicant is given adequate time to consider and complete the form.

We would also highlight issues around the timing of the sending of the form. We are aware of feedback that OPG observations were often being received just before the hearing or even after the hearing. The concern would be that if the OPG's comments were not received timeously there would be a delay in the court proceedings. On that basis, we would suggest that it is sent at the time of lodging the application with the court and prior to obtaining a warrant as then, if there are issues, this would allow time for those to be addressed.

Represented applicants

Recognition should be given to the fact that many applicants will be represented by a solicitor who will be advising and supporting them through the application process. Solicitors should be expected to engage with their client in relation to the form, including discussing the form with their clients, providing advice, and

considering the terms of the completed form prior to submission. We do not believe that this conflicts with the requirement that the applicant completes the form themselves. This raises two key points.

Firstly, it is essential that appropriate legal aid cover is provided to allow solicitors undertake all of these steps. Legal aid will be required at the full legal aid certificate stage, not as a part of advice and assistance.

Secondly, we would strongly encourage an approach that expects and enables solicitors to manage the process by providing the form to their clients and returning it to the OPG, and for the OPG to only contact applicants directly where they are unrepresented, or where no response has been received within a reasonable timeframe. This approach would respect the solicitor/client relationship and minimise confusion and duplication. We would suggest that solicitors would be expected to forward the form to the OPG at the point the application is served on them. This would allow time for the OPG to consider the form and forward it to the court ahead of a hearing.

Proportionality

Any new process should aim to be clear, simple, and proportionate. In the case of a guardian declaration form, we would suggest that it would be preferable for a tailored approach to be taken, with the form only being sent to those who will require to complete it, and for only relevant questions being asked, as opposed to a generic form sent to all applicants, which may cause unnecessary confusion and concern, as well as ultimately increasing the administrative burden on all parties.

We also suggest that the form should only be required in applications for financial guardianships where a lay guardian is to be appointed.

Cover letter

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.

The draft cover letter states that certain applicants can disregard the form, but does not provide a means of confirming whether an applicant falls within that category, and no assurance that if the form is disregarded in good faith, it will not result in adverse observations being made to the court. Ideally, the form would not be provided to applicants who are not required to complete it. If this more tailored approach is not taken, the cover letter should be clearer on this point, and consideration should be given to providing a confirmation slip, or similar, to allow applicants to notify the OPG that they are not submitting the form for the given reasons. This would ensure that applicants do not mistakenly fail to complete the form if it is required, and encourages a proactive engagement with the OPG, which supports the aims of early intervention.

Given the potential for adverse observations to be made on failure to complete the form, it would be helpful for the OPG to confirm receipt of completed forms, and for the cover letter to let applicants know to expect this.

Guardian declaration form

As a general principle, many of the issues being covered by the form are properly for the sheriff to assess. It may be more appropriate for the OPG to consider working with the judiciary to prepare a checklist of issues for sheriffs to consider.

We continue to have concerns around duplication of information that will be available through other means. For example, issues around family disputes will be covered by reports, and it is likely that such reports will be a more detailed and meaningful evaluation of the impact of any such disputes than would be expected through the declaration form.

In relation to specific sections of the form, we have the following observations:

- 3.6 – this is framed too widely. It is likely to prompt either too much information or not enough.
- 3.8 – this is misleading, as it implies that there is an alternative waiting to step in. Often this is unlikely.
- 4.1 – this does not seem relevant. It is often prudent to switch accounts regularly.
- 4.4 – this is too simplistic and does not explain the possibility of managing conflicts.
- Section 5 – we query the purpose of these declarations. The ability and likeliness of an applicant to fulfil their responsibilities as guardians is for the sheriff to determine. It seems unlikely that people will declare they will not fulfil these responsibilities, and it is unclear what the OPG would do in such a situation.
- Section 7 – the caution declaration is difficult to understand, and it is not clear why this is included at this stage.

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