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ADVICE NOTES

## **Complaints about Solicitors and Tribunal Hearings**

**August 2015**

## **COMPLAINTS ABOUT SOLICITORS AND TRIBUNAL HEARINGS**

**Q** – What should I do (in respect of Mental Health Tribunal Service (MHTS) hearings) if I believe a solicitor was claiming to be taking instruction from an individual that in my opinion lacked capacity at the time, to instruct the solicitor, or was under the undue influence of the solicitor?

**A** – Firstly, it is worth remembering that capacity may vary, and that although the individual may not have sufficient capacity to make many decisions, they may still have had sufficient capacity to instruct a solicitor. We believe the MHTS take a broad view of capacity to ensure that individuals subject to the Mental Health Act do receive legal representation where this is the wish of the individual (or their power of attorney/guardian). The solicitor may have formed the view at the time of their meeting that sufficient capacity was present for the individual to make the decision to instruct a solicitor, and be able to retain the memory of this decision.

The question arises of whether there is anything which can now be done now in circumstances where an appeal has been made by the solicitor to the MHTS, where you believe a curator ad litem would have been more appropriate, or where you believe the individual, when not under the influence of the solicitor, does not wish to appeal. Some thoughts:

- Where it is felt that the person lacks capacity to instruct an appeal, the situation can be brought to the attention of the Mental Health Tribunal Service by the mental health officer or responsible medical officer (RMO). The Convenor may decide to appoint a curator in spite of the involvement of the solicitor, and may ask the solicitor to withdraw, or ask the solicitor and the curator to decide who is most appropriate to continue. Solicitors are held to a high standard of conduct and it may still be beneficial for all concerned if the solicitor is able to share their point of view. What may seem like undue influence to one party may in fact be the solicitor behaving appropriately and may be in accordance with their professional obligations to act in the best interests of their client.
- Where the person may have capacity to make a decision about the appeal, the individual can be assisted by advocacy to make an independent decision, without the influence of the solicitor. This may lead to their contacting the solicitor and/or the Mental Health Tribunal Service to withdraw their appeal, if that is what they wish to do.

If the problem persists or if you believe the solicitor's behaviour has fallen below the standards as required by the Law Society of Scotland then reference to the Law

Society of Scotland for advice or the Scottish Legal Complaints Commission may be appropriate. In some cases, the Scottish Legal Aid Board may also be contacted.

The Law Society of Scotland has produced guidance for solicitors where there is the risk of vulnerability, undue influence, or where there may be a lack of capacity to make decisions. (<https://www.lawscot.org.uk/rules-and-guidance/section-b/rule-b1-standards-of-conduct/guidance/b15-vulnerable-clients-guidance> ).

This guidance for instance says at paras 8 and 9:

“A solicitor may, and in some circumstances should, seek and carefully consider expert guidance. However the solicitor retains responsibility for compliance with all relevant Rules and should not abdicate responsibility to the expert. Solicitors should not simply rely upon the legal presumption of capacity. On the contrary, they "must .... be satisfied when taking instructions, that his or her client has the capacity to give instructions in relation to that matter" (guidance related to Rule B 1.5).

In cases of doubt as to the extent to which, and circumstances in which, capacity can be exercised, or conversely as to the extent to which incapacity prevents a contemplated act or transaction, the advice of a medical practitioner or clinical psychologist should be sought”.

You could write formally to the solicitor setting out your concerns and suggesting that the solicitor seeks advice from the Law Society Professional Practice department on his or her actions and the application of its “vulnerable clients” guidance. The Law Society of Scotland does not receive complaints but the Professional Practice department assist solicitors on a confidential basis in respect of matters of conduct, ethics and practice and may be able to give guidance and support in challenging cases.

If you believe the solicitor was not acting in good faith, it may be appropriate to complain to the Scottish Legal Complaints Commission who can hear complaints from third parties. Their website says:

“The introduction of the Legal Profession and Legal Aid (Scotland) Act 2007 created the Scottish Legal Complaints Commission or SLCC and we opened for business on 1 October 2008. We provide a single gateway for complaints against legal practitioners operating in Scotland and aim to resolve complaints quickly and effectively”.

“The Scottish Legal Complaints Commission investigates complaints made against legal practitioners in Scotland. We operate wholly independently of the legal profession and government, and are impartial, accessible and independent”. They can be contacted at:

<http://www.scottishlegalcomplaints.com/>

Scottish Legal Complaints Commission  
The Stamp Office  
10 - 14 Waterloo Place  
EDINBURGH  
EH1 3EG

Telephone: 0131 528 5111

Website: [www.scottishlegalcomplaints.com](http://www.scottishlegalcomplaints.com)

Email: [enquiries@scottishlegalcomplaints.org.uk](mailto:enquiries@scottishlegalcomplaints.org.uk)

Solicitors acting in a manner you consider inappropriate may be funded, or part funded, by the Scottish Legal Aid Board, and they have expressed an interest in hearing about issues of concern.

They may be contacted at:

Applicant Investigations  
SLAB  
Thistle House  
91 Haymarket Terrace  
Edinburgh  
EH12 5HE

They also have a very simple online complaints form at [www.slab.org.uk/public/](http://www.slab.org.uk/public/)

NOTE: Please read their website information about the eligibility for criminal or civil legal assistance before filling in their online complaints form.

If you do take this situation to one or other of these bodies, please consider copying any correspondence you write to them, to the Mental Welfare Commission.



Thistle House  
91 Haymarket Terrace  
Edinburgh  
EH12 5HE

Tel: 0131 313 8777

Fax: 0131 313 8778

Service user and carer

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