Legal Aid Review

RESPONSE SHEET

Please use this response sheet when submitting evidence to the review. It will help us both to organise the many responses received, and to reflect your wishes for how the material is used. It can be completed and returned either electronically or posted back in hard copy.

Please send this coversheet and your submission to the following address: LegalAidReview@gov.scot

Or in hard copy to:

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Access to Justice Unit
GW.15
St Andrew's House
Regent Rd
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Information required:

Name of organisation or person responding:

Mental Welfare Commission for Scotland

Contact name (if responding on behalf of an organisation):

Colin McKay

Address and telephone number. Email address: enquiries@mwcscot.org.uk

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Disclosure

Have you submitted any confidential evidence? N

If any of the evidence or views submitted are deemed confidential, please clearly mark these sections of the evidence.

Are you content for this submission to be published on our website? Y

Are you content for your name to be supplied with the response on our website or do you wish the response to be anonymous on the website? Y

Would you be content to be approached by the review for further discussion on your submission? Y

Are you or have you at any time in the past been a recipient of legal aid? N

N.B. The Scottish Government is a data controller under the Data Protection Act 1998. Information collected by the Review will be subject to the Act which balances the legitimate needs of organisations to collect and use personal data against the right of individuals to respect for the privacy of their personal details.

Thank you for your submission.

Legal Aid Review call for evidence
Response of Mental Welfare Commission for Scotland

Introduction

1. The Mental Welfare Commission for Scotland (MWC) is a statutory body with responsibilities under the **Mental Health (Scotland) Act 2003** and the **Adults with Incapacity (Scotland) Act 2000**. Our overall purpose is to protect the human rights of people with mental illness, dementia, learning disability and associated conditions. We monitor the operation of mental health and incapacity legislation, provide advice, and investigate cases of potential ill-treatment or deficiency in care.

2. We note that the review seeks to address broad questions of system design for legal aid. In this context, mental health and incapacity law is an important area to consider because:
   - The use of mental health and incapacity law and the consequent expenditure on various forms of civil legal aid has **significantly increased** in recent years, and is likely to continue to grow.
   - The nature of the cases raises a **distinct set of issues** which do not fall neatly into the traditional model of a civil legal dispute, including
     - The issues at stake are of profound importance in human rights terms, including Article 5 and 8 issues of liberty, privacy and autonomy
     - The person concerned may have an impaired capacity to instruct representation and in most cases has no choice about being involved
     - The State is intimately involved
     - Hearings are intended to be non-adversarial, so far as possible
     - Various third parties (Named Persons and in some cases nearest relatives) have rights to participate in hearings
     - The cases are specialist in nature, and hearings are expected to give effect to distinct statutory principles
     - The implications of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).
   - Partly because of these issues, the normal rules on civil legal aid have been adapted in both mental health and incapacity cases. For example, there is no means test in applications for welfare guardianship (whether or not combined with financial guardianship), and in most legal aid hearings under ABWOR there is neither a means nor merits test. However, it is arguable that what is needed is a **system which starts from first principles** about the kind of support which is appropriate for mental health and incapacity cases, rather than a patchwork of 'fixes' to the normal civil legal aid rules.

3. We set out below more detail on some of the specific issues which we believe warrant further attention. At this stage, we have simply highlighted the nature of our concerns. We would be happy to discuss these further or to provide more detailed information.

Adults with Incapacity

Guardianship versus powers of attorney

4. As we state above, an application for welfare guardianship under Part 6 of the AWI Act attracts legal aid without any means test. In contrast, a person seeking to appoint a welfare power of attorney under Part 2 of the Act will only be entitled to support if they meet the financial criteria for legal advice and assistance, and the amount of support they will receive is very limited.

5. If more people took out welfare powers of attorney, there would be significant benefits to them and the public purse, through avoiding the expense and delay of guardianship applications upon subsequent incapacity. This would be consistent with a wider approach to legal aid which sought to reduce the need for costly legal interventions rather than simply pay for them when they arise.

Involvement of the adult

6. Currently, the adult concerned often has very limited involvement in or even awareness of the proceedings. There is increasing concern that this is not consistent with the expectations of ECHR and the UNCRPD, and pressure for change. This is a wider issue than legal aid but, at the very least, this is likely to add to the costs of the system, and it also raises the question of how best to ensure the adult has appropriate support and representation in AWI cases, separately from those seeking powers over them.

The quality of applications

7. We see huge variations in the quality of applications put forward by solicitors on behalf of private applicants for guardianship. Often powers sought are a ‘cut and paste’ list with little thought given to the need for the powers in the particular case or the principles of the Act. Family members have told us that they did not feel well informed about powers being sought on their behalf. The medical evidence of incapacity can also be highly variable in specificity and detail.

8. We have heard reports of families being asked for ‘up front’ fees of several hundred pounds to progress applications for guardianship before legal aid has been granted.

9. In these cases, the adult involved is clearly not an informed purchaser of legal services. Even the prospective guardian is often acting because they have been encouraged to do so by the NHS or local authority, and is not well placed to ensure that the solicitor involved has the necessary expertise.

10. We therefore believe consideration should be given to how quality can be ensured in AWI cases.

Supported decision making and advocacy

11. Legal representation is at the apex of support which may be needed in an AWI case, alongside support for the person to maximise their own decision making ability, and advocacy to ensure that their needs are being fully considered. All three of these elements must be provided for.

Alternative dispute resolution

12. Sheriff courts may be expected to resolve disputes within families, or between families and public bodies. In some cases, these disputes can be in court for months, costing large amounts of public money (and sometimes using the funds of the incapable adult). The way in which such disputes are litigated is likely to exacerbate differences between the parties, all of whom are likely to continue to be involved in the life of the adult. There is no funding of other forms of dispute resolution such as mediation, which might reduce the need for guardianship or the costs of guardianship when it is needed.

Potential law reform

13. The AWI Act is under review by the Scottish Government, and is likely to change substantially. Being considered is a form of 'graded guardianship', under which powers might be granted to individuals in simple or non-contentious cases without prior judicial authorisation.

14. Consideration will need to be given to how to ensure that rights are properly protected in these cases, including through the provision of support to the adult or concerned family members or third parties.

<u>Mental health law</u>

Quality of representation

15. Obtaining legal aid is straightforward in relation to compulsory measures under the Mental Health (Care and Treatment) Act. We welcome this, but we are not sure that enough is being done to ensure that anyone facing or wishing to challenge compulsory measures under the Act receive appropriate and high quality support.

16. There are a few firms who practice regularly and offer a high quality service. However, we also hear of poor quality representation and occasionally even of dubious practice, such as
    - Solicitors in effect touting for business by visiting psychiatric wards and encouraging patients to appeal when they would not otherwise have sought to do so
    - Raising unrealistic expectations in patients of the likelihood of a successful appeal, which can be potentially detrimental to the patient's mental health

- Solicitors taking an adversarial and even confrontational approach at hearings, which are intended to be inquisitorial and focused on the welfare of the patient.

17. It is not difficult for a solicitor who wishes to obtain an income stream to take on mental health appeals, seek medical second opinions, and do little more to represent the interests of their clients. At the same time, those who do take the role seriously, and may need to do more work to protect their client's human rights, can find that the level of remuneration is simply inadequate to do a proper job.

18. We support the automatic availability of legal aid for cases concerning compulsory treatment under the Mental Health Act. The fact that it is automatic, and the specialist nature of the jurisdiction, suggests that thought should be given to different models of ensuring that such representation is of the highest quality.

Further appeals

19. The Mental Health Act provides for appeals and applications to the sheriff court, the sheriff principal and occasionally the Court of Session. These appeals may raise vital issues of law – for example, the right to apply to the Court of Session under s272 of the Act for performance of statutory duty where the NHS has failed to obey the ruling of a tribunal that a patient must be accommodated at a lower level of security.

20. Unlike tribunal cases, such appeals are not automatic, and the normal means and merits tests apply. Furthermore, because it is possible, at least in theory, for s272 cases to be initiated by the Mental Welfare Commission, there is a risk that the Legal Aid Board may decide that legal aid is not available because the action can be funded through other means. In fact, we have no resources to raise such cases, and it is imperative that legal aid is available for these and other appeals under mental health law.

Colin McKay
Chief Executive
Mental Welfare Commission for Scotland

26 May 2017