

EXECUTIVE NOTE

The Adults with Incapacity (Recall of Guardians' Powers) (Scotland) Amendment Regulations 2008 S.S.I. 2008/53

The above statutory instrument was made in exercise of the power conferred by section 73(5) of the Adults with Incapacity (Scotland) Act 2000⁽¹⁾ (the 2000 Act) and of all other powers enabling them to do so. The instrument is subject to negative resolution procedure and comes into force on 1st April 2008.

Policy Objective

These Regulations amend existing forms in The Adults with Incapacity (Recall of Guardians' Powers) (Scotland) Regulations 2002 (<http://www.opsi.gov.uk/legislation/scotland/ssi2002/20020097.htm>) to take account of changes made to the 2000 Act by the Adult Support and Protection (Scotland) Act 2007 to:

- take account of the restriction on the Mental Welfare Commission for Scotland to recall only welfare guardianships where incapacity is the result of mental disorder;
- take account of the forthcoming removal of the restriction on local authorities which prevents them from recalling welfare guardianships where the Chief Social Work Officer is the guardian; and
- make express provision in the forms to take account of the views of the adult's named person², if any.

Background

Part 6 of the 2000 Act provides for the granting and termination, including recall, of guardianship orders to provide authority to safeguard the welfare and/or manage the financial affairs of an adult who lacks the capacity to do so for him/herself. The Adult Support and Protection (Scotland) Act 2007 made a number of changes in relation to the recall of guardianships which require changes to the forms relating to recall in the 2002 Regulations.

The changes take account of sections 60(11) (which clarifies that the Mental Welfare Commission can only recall welfare guardianships where incapacity is by reason of mental disorder) and 60(12) (which allows local authorities to recall welfare guardianships where the Chief Social Work Officer is the guardian) of the 2007 Act.

(1) 2000 asp 4 as amended by the Adult Support and Protection (Scotland) Act 2007 (asp 10). See section 87(1) and (1A) for the definition of "prescribed" and section 86(1) as to the power to make regulations.

² Sections 250 to 257 of the Mental Health (Care and Treatment) (Scotland) Act 2003 provide for the appointment or identification of a 'named person' to represent the interests of and support a patient subject to proceedings under the 2003 Act - <http://www.opsi.gov.uk/legislation/scotland/acts2003/20030013.htm>

Changes are also made in a number of the recall forms to take account of ‘named persons’. The concept of ‘named person’ was introduced by the Mental Health (Care and Treatment) (Scotland) Act 2003. The Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Enactments) Order 2005 inserted ‘named person’ in sections 1(4) (those whose views must be taken into account in determining whether an intervention is to be made) and 73(5) (those to whom intimation of an application for recall should be given) of the 2000 Act.

Consultation

Key stakeholders were invited to comment on the draft Regulations. A list is attached at **Annex A**. The consultation was also available on the Scottish Government website. The consultation was launched on 16 August and closed on 8 November 2007. There were 14 responses – 2 from solicitors, 2 from the voluntary sector, 7 from local authorities and 3 from professional bodies. The responses were positive.

It was suggested that ‘if any’ should be added after the words ‘named person’. We rejected this change because the words are not attached to any of the other categories of persons whose views are to be sought. It is implicit that there may not be anyone in these categories.

Financial Effects

Recall of their own guardianships will possibly be more onerous for local authorities but it should allow these guardianships to be recalled more quickly thus benefiting the adult. Local Authorities requested this change which may lessen the burden on the Mental Welfare Commission and the courts, the bodies which recall these guardianships at present.

Regulatory Impact Assessment

None required as there is no impact on business.

Consultation Recipient List

Local Authority Chief Executives
Local Authority Directors of Social Work
Local Authority Adults with Incapacity Coordinators
CoSLA
ADSW
Office Of the Public Guardian
Mental Welfare Commission for Scotland
Carers Scotland
Scottish Carers Alliance
Princess Royal Trust for Carers
Coalition of Carers
Crossroads Scotland
Shared Care Scotland
Advocates Library
Commission For Racial Equality- Scotland
Equal Opportunities Commission
Citizens Advice Scotland
Scottish Council for Voluntary Organisations
NSF Scotland
FAIR (Family Advice & Information Resource)
Advocard
Advocacy Information and Management Services Ltd.
Advocacy Safeguards Agency
Drumchapel Law & Money Advice Centre
Mental Health Advocacy Project
Scottish Independent Advocacy Alliance
VOCAL Carers Advocacy and Counselling Service
The Building Societies Association
Post Office Ltd
The Committee of Scottish Clearing Bankers
Co-operative Bank plc
Scottish Association Of Care Homes
Scottish Federation of Housing Associations
Dundee North Law Centre
Paisley Law Centre
Castlemilk Law Centre
East End Community Law Centre
Legal Services Agency Ltd
Ethnic Minorities Law Centre
SALC
West Dumbarton Law Centre
Govan Law Centre
Law Society of Scotland
Sheriff's Association

Scottish Law Commission
Scottish Legal Aid Board
Scottish Law Agents Society
Help the Aged
Age Concern Scotland
Scottish Pensioners' Forum
Scottish Pensions Association
Scottish Older People's Advisory Group
ENABLE
Scottish Society for Autism
Down's Syndrome Scotland
National Autistic Society
PAMIS
Garvald Centre (Edinburgh)
Quarriers
ELCAP
Scottish Consortium for Learning Disability
Disability Centre for Independent Living
Scottish Disability Equality Forum
Headway Scotland
Chest, Heart, Stroke Scotland
Disability Rights Commission Office for Scotland
Scottish Head Injuries Forum
Capability Scotland
Scottish Association of Mental Health
Turning Point Scotland
The Richmond Fellowship Scotland
Mental Health Foundation
Manic Depression Fellowship Scotland
Alzheimer Scotland-Action on Dementia
Dementia Services Development Centre
Vulnerable Adults Alliance Scotland
Scottish Development Centre for Mental Health
Penumbra
Scottish Huntington's Association
SACRO
Depression Alliance Scotland
Scottish Dementia Working Group
Neurological Alliance Scotland
Royal College of Physicians and Surgeons Glasgow
Royal College of Psychiatrists
British Geriatrics Society
General Medical Council
Royal College of Physicians of Edinburgh
British Medical Association
Scottish General Practitioners Committee
Royal College of General Practitioners
BASW
Scottish Consumer Council
Society of Will Writers

Justice Committee of the Scottish Parliament
Health Committee of the Scottish Parliament
Adrian Ward