

# **JUSTICE 2 COMMITTEE**

Tuesday 13 December 2005

Session 2

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## **JUSTICE 2 COMMITTEE** **35<sup>th</sup> Meeting 2005, Session 2**

### **CONVENER**

\*Miss Annabel Goldie (West of Scotland) (Con)

### **DEPUTY CONVENER**

\*Bill Butler (Glasgow Anniesland) (Lab)

### **COMMITTEE MEMBERS**

\*Jackie Baillie (Dumbarton) (Lab)

Colin Fox (Lothians) (SSP)

\*Maureen Macmillan (Highlands and Islands) (Lab)

\*Mr Stewart Maxwell (West of Scotland) (SNP)

\*Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

### **COMMITTEE SUBSTITUTES**

Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

\*Carolyn Leckie (Central Scotland) (SSP)

Mr Kenny MacAskill (Lothians) (SNP)

Margaret Mitchell (Central Scotland) (Con)

Mike Pringle (Edinburgh South) (LD)

\*attended

### **THE FOLLOWING GAVE EVIDENCE:**

Hugh Henry (Deputy Minister for Justice)

Jan Killeen (Scottish Executive Justice Department)

### **CLERKS TO THE COMMITTEE**

Gillian Baxendine

Tracey Hawe

### **SENIOR ASSISTANT CLERK**

Anne Peat

### **ASSISTANT CLERK**

Steven Tallach

### **LOCATION**

Committee Room 5



# Scottish Parliament

## Justice 2 Committee

*Tuesday 13 December 2005*

[THE CONVENER *opened the meeting at 14:01*]

### Adults with Incapacity (Scotland) Act 2000

**The Convener (Miss Annabel Goldie):** I welcome colleagues to the 35<sup>th</sup> meeting in 2005 of the Justice 2 Committee. Members will have received the agenda and the other committee papers as usual. I have apologies from Colin Fox; Carolyn Leckie may attend in his absence. I understand that Maureen Macmillan will join us later, too.

The first item on the agenda concerns the Adults with Incapacity (Scotland) Act 2000, which is now in force. The committee made preliminary inquiries previously to see whether issues have arisen from the implementation of the act. When we considered the matter in June, we thought it appropriate to ask the Deputy Minister for Justice and the adults with incapacity national practice co-ordinator to come along to a committee meeting so that we could explore those issues.

I am pleased to welcome to our meeting Hugh Henry, the Deputy Minister for Justice, and Jan Killeen, the adults with incapacity national practice co-ordinator. I appreciate your both coming. I hope that this will not be less than a good use of time. When the committee came up with the brilliant wheeze of inviting you, we felt that it would be helpful to see you both, but that is not to say that we are brimming with questions. Would either of you like to make an introductory comment?

**The Deputy Minister for Justice (Hugh Henry):** Thank you. The Justice 2 Committee is having its 35<sup>th</sup> meeting—how time flies when you are enjoying yourself.

We have a good-news story. The issue with which the act deals is complicated and has impacted on people in a heartbreaking way in many circumstances. Jan Killeen in particular is to be commended for the comprehensive work that she has done; she has worked in a diligent manner, supported by a number of people.

We have tried to introduce practical measures that can help and, where necessary, to underpin those measures with legislative change. I hope that the letter that was sent to the convener gives the committee sufficient detail about what we intend to do. Suffice it to say that we are still committed to making legislative changes on a

number of issues. We are waiting on a suitable legislative slot, sooner rather than later, we hope, but negotiations are continuing. We have also identified a number of legal aid changes that need to be made. Subject to further discussion, we will try to bring back the draft regulations as soon as we can.

The work to date—never mind whatever further work we intend to do—has been well received by families and individuals right across Scotland. It is making a difference. A number of problems have been pointed out to us—for example, people have had difficulty in getting access and there have been problems of cost—but we have responded to all those problems. The feedback that I have received from people who have been directly affected is that they appreciate our further efforts to simplify the system. We do not want the arrangements to be complicated; they have to work in the best interests of the people concerned. However, we also have to ensure that legal safeguards and protection are in place for people who are exceptionally vulnerable.

Having made that general opening statement, convener, I am happy to answer any specific questions that have not been covered in the letter—or, if I am more truthful, Jan Killeen will be happy to answer them.

**The Convener:** Thank you for that extremely helpful letter. Coming as it did after the end of the consultation period, it has given us information that we did not have when we thought of asking you to come to a meeting.

**Bill Butler (Glasgow Anniesland) (Lab):** The letter is detailed and helpful; it shows that good progress has been made in a number of areas. In the letter, minister, you mention “intrusion with funds” and I want to ask about the extension of that to local authorities and other organisations. On page 5, you say:

“More work is required to identify the criteria organisations would need to meet before authority to intrude with funds could be granted and we are currently giving this aspect further consideration.”

What work needs to be done so that the extension can be made and when will that work be completed?

**Hugh Henry:** I will ask Jan Killeen to answer that.

**Jan Killeen (Scottish Executive Justice Department):** We held a consultation meeting in October at which it was acknowledged that considerable thought would have to be given to the management of conflicts of interests among organisations. For example, an organisation might be a direct care provider but might also, because it knows the person, help that person to manage their funds.

We want to consult further on a number of criteria that we have begun to develop. We will want to consider key features of organisations that might apply to intromit with funds for a person who has no family member or friend to do so. For example, organisations will have to demonstrate that they are liable for acts or omissions by employees or volunteers who are managing the person's funds. They will have to have indemnity to cover for negligence, fraud and other breaches of the duty of care. They will also have to demonstrate that they have satisfactory and transparent internal systems, so that there can be audit trails and accountable financial procedures that will safeguard the person's funds.

Local authorities and other organisations may want to set up arm's-length arrangements, as they have done for direct payments. They may also want to have procedures in place for the supervision and assessment of members of staff, to ensure that they are suitable. The question arises whether members of staff might require disclosure certificates, but that question requires a lot more consideration. The Office of the Public Guardian would have to be convinced that organisations were viable for the period for which intromission with funds was being requested and satisfactory testimony would be required that members of staff were competent and suitable.

We are therefore considering a number of criteria that organisations would need to meet when taking on that responsibility, but we feel that it will be the Office of the Public Guardian that will decide whether a particular organisation meets those criteria.

**Bill Butler:** I am grateful for that answer. The criteria are eminently sensible, but when will they be agreed and be ready to be implemented?

**Jan Killeen:** Work continues on them as we speak. The aim is to have them in place in advance of the amendments coming into force.

**The Convener:** Will you clarify a technical point? Does that require further legislative procedure?

**Jan Killeen:** Yes, it does. At the moment, the 2000 act allows only individuals to intromit with funds. Even though many adults who lack capacity have only fairly modest assets, they may have more than their Department for Work and Pensions payments. The only way of managing their finances at the moment is through the top-heavy procedure of guardianship. The changes to the 2000 act would allow organisations to manage funds on behalf of individuals who do not need guardianship but need a simple way in which someone can manage their funds.

**The Convener:** A subsequent legislative measure is proposed to address that.

**Hugh Henry:** That is correct.

**Jan Killeen:** That was outlined in our consultation paper.

**Bill Butler:** Will you be more specific about when legislation will be introduced? You do not have to give an answer today. You said that it would happen when a suitable legislative slot was found. Are you confident that such a slot could be found in this diet of the Parliament or would it be later than that?

**Hugh Henry:** We hope to find a slot in this session. We are in discussions with colleagues about a bill that might be suitable, although other considerations have to be taken into account in doing that. If it is at all possible, we intend to legislate next year, but that will depend on our being able to get approval for a suitable bill.

**The Convener:** Bill Butler asked about the criteria that organisations need to satisfy. I am concerned about the obvious conflict of interests. Take the example of an elderly, vulnerable person of modest means living in a local authority home. Most of us would think that there could be a conflict of interest in giving the home that is directly concerned for providing for that person control over their resources.

**Jan Killeen:** The management of care home residents' funds is covered by part 4 of the 2000 act. The scenario that you describe should not arise. However, I can see that there might be a conflict of interests in the case of someone who was receiving community care services in their own home. We would have to look at how matters were managed.

**Hugh Henry:** That would concern us and we will look at the matter closely. We want to ensure that the local authority acts with the best interests of the adult in mind and does not make its financial interests paramount.

**Jan Killeen:** For many of the individuals whom we are talking about, a local authority may contract out the provision of services to a specialist voluntary organisation provider. There is an indirect relationship. The care provider does not receive direct payment for the service; it delivers a support service to an individual, the cost of which is met either by the individual or by the local authority. There would be a concern if the private sector provided a service and charged the individual directly without the involvement of a local authority. How would that be managed? We need to tease out those issues.

**The Convener:** I am not imputing malign intent to any organisation. However, there is a genuine capacity for confusion if clearly defined lines have not been drawn.

**Hugh Henry:** That is correct. Even with the best will in the world, conflicts of interest can lead to dilemmas and sometimes to wrong interpretation. We need to proceed cautiously and carefully.

14:15

**Maureen Macmillan (Highlands and Islands) (Lab):** I apologise for not being here for the minister's opening remarks. I want to discuss the proposal to dispense with caution. I was recently made aware of a man who was asked for £1,500 caution to deal with the affairs of his brother, who had had a stroke. He was taken aback at the prospect of having to find that amount of money. I notice that the minister now plans to give sheriffs the discretion to dispense with those bonds. What sort of criteria will the sheriffs use? Will they have guidance? Will the proposal be purely about the financial means of the person who is applying to look after their relative's affairs? Will it be connected with their character?

**Jan Killeen:** There will be a type of risk assessment process, which will need to be worked out in collaboration with the OPG and perhaps with the sheriffs. We have not yet reached that stage, but there would certainly need to be guidelines about the risk that is posed. That is the key. It is unfortunate that only two insurance companies provide caution. They have the market and it is not cost effective for them to offer caution below a certain level, so it is often disproportionate.

**Maureen Macmillan:** Recent conversations that I have had have made me aware of that. What timescale do you envisage to make any changes?

**Hugh Henry:** Anything that requires legislative change will depend on our getting a suitable hook. If anything else can be done beyond that, such as training and guidance, we will move as soon as we have clarity on the legislative proposals.

**Maureen Macmillan:** Thank you, minister. We will wait to hear further news.

**Jackie Baillie (Dumbarton) (Lab):** I have more of a comment than a question. It is interesting that the Executive and the committee are engaging in robust post-legislative scrutiny. Could we not spread that model across the Executive? Consideration of the effectiveness of a piece of legislation has reaped positive benefits. I crave the convener's indulgence to allow me to thank the minister and Jan Killeen for the changes that have been made to legal aid in relation to advice and assistance. The cross-party group on learning disability, Enable and PAMIS—the Profound and Multiple Impairment Service—were keen for that to happen. I am grateful to the Executive for having listened. The measure was implemented in June, so we do not need to wait.

**The Convener:** Your plaudit has been noted and received with pleasure in the appropriate quarters.

**Hugh Henry:** Jackie Baillie mentioned post-legislative scrutiny. I am sure that the committee would want the parliamentary authorities to hear its comments on how legislation can best be scrutinised once it has been passed. We in the Justice Department can certainly learn from the work that we have done; indeed, we are seeking to review other pieces of legislation. However, because other things were required and because we are still working on the issue, we have done a lot more work on the 2000 act than on anything else that required legislation. In a sense, there was unfinished business. Jan Killeen and others have made a huge effort. The response that that work is getting across the country is heartening. People can already see the benefits of what we have done. They were able to tell us their concerns and we listened and responded. We might not agree on everything, but people generally welcomed the opportunity to continue the dialogue.

**The Convener:** Does the Executive intend to communicate with the Association of British Insurers, for example, to see whether the sector has any comments about the availability of caution cover?

**Hugh Henry:** That is certainly a useful idea. If the association has anything to say, we will listen with interest.

**The Convener:** It used to be the case that intestate estates were administered and the court had to be petitioned to appoint an executor. In such circumstances, caution was essential before the court would make the appointment. As far as I am aware, that requirement continues, so I do not know from where that caution is being obtained. That might be an issue to take up with the Law Society of Scotland, which might have practitioners' information about it.

**Hugh Henry:** We can do that. We have been heavily engaged with the Law Society of Scotland on this and several other issues, so anything that it can say on the matter would be useful.

**The Convener:** As there are no further questions, I thank the minister and Jan Killeen for coming this afternoon. We now move into private session.

14:21

*Meeting continued in private until 16:39.*





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