



Law Society
of Scotland

Consultation Response

Acquired brain injury call for evidence

June 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Department of Health & Social Care consultation: *Acquired brain injury call for evidence*.¹ The sub-committee has the following comments to put forward for consideration. We do not seek to answer the consultation questions, but have the following general comments.

General Comments

We will begin this brief response by reminding the Department that this exercise will require to be properly co-ordinated with devolved responsibilities. The Scottish Mental Health Law Review (“SMHLR”) is reaching a conclusion, and its recommendations will have a significant impact on the implementation in Scotland of any UK-wide strategy on acquired brain injury (“ABI”).

With that in mind, and in accordance with modern human rights approaches, as fully adopted by the SMHLR, we believe that it is inappropriate to begin this exercise by focusing on individual causes of acquired brain injury. The focus should, instead, be on individual assessment of needs arising from ABI, however it might be caused. Indeed, we should be strongly against the strategy focusing exclusively on acquired brain injury at all, and instead we believe that the strategy should adopt the process of human rights enablement for all, as we hope will be an outcome of SMHLR.

We should also emphasise, from practical experience, the importance of using all modern and still developing techniques of support to enable people with ABI, and conditions creating similar needs, to formulate and express their own will and preferences. See, for example, the articles by Tom McMillan, and by Tom McMillan and C.M. Herbert, from as long ago as the 1990s, and referred to on page 15 of “Adults with Incapacity Legislation”, by Adrian D. Ward. Mr Ward acted in *Britton v Britton’s Curator Bonis*, (1996) SC 178, in which case Ms Britton had sustained a brain injury as a toddler. Her curator bonis (the title of the substitute decision-maker then appointed by the courts in Scotland) thought Ms Britton so incapacitated as not to be worth consulting about any decisions, and he had never attempted to do so. Yet Ms Britton could explain her own thoughts and wishes so well to Mr Ward that her parents succeeded in opposed

¹ [Acquired brain injury call for evidence - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/acquired-brain-injury-call-for-evidence)

proceedings to have the curator bonis removed. In the longer term, when a four-in-a-block flat above her parents became vacant, and with support from all concerned including her social worker, the flat was purchased for Ms Britton, and enabled her to live semi-independently, with appropriate support on hand when needed, but not over-provided. For an account of the remarkable extent to which modern and still developing techniques permit meaningful communication with people who would hitherto have been thought to be completely beyond communication, we recommend “Into the Gray Zone” by the neuroscientist Adrian Owen, Guardian Books, 2017.

Both the Adults with Incapacity (Scotland) Act 2000, and the United Nations Convention on the Rights of Persons with Disabilities, demand that, where appropriate techniques to facilitate the communication of a person’s views are available, they must be used, and the will and preferences of the person in question should be central. Those views should be decisive, rather than the difficulties which require to be overcome to hear them.



For further information, please contact:

Jennifer Paton

Policy Team

Law Society of Scotland

DD: 0131 476 8136

jenniferpaton@lawscot.org.uk