Law Society of Scotland

Consultation Response

Adults with Incapacity Amendment Act

October 2024

Photo: The West Highland Way

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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 Scottish Government consultation: *Adults with Incapacity Amendment Act*.[1] The sub-committee has the following comments to put forward for consideration.

General Comments

As a broad proposition, we suggest that those charged with drafting of any revised principles could very usefully take note of the principles in section 8 of the Assisted Decision-Making (Capacity) Act 2015. Those contained at sections 8(6) and (7) in particular provide a very useful example of how to "domesticate" the requirements of Article 12 of the CRPD. The specific points that we make below in relation to the consultation questions regarding principles should be read in light of this overarching observation.

Whilst we have sought to comment constructively on the various proposals set out in the consultation, there are some aspects of the proposals which we would like to consider further before expressing a final view. We have therefore not answered those questions in this response.

Consultation Questions

Part 1- Principles of the legislation

1. Do you agree that the principles of the AWI Act should be updated to require all practicable steps to be taken to ascertain the will and preferences of the adult before any action is taken under the AWI Act?
   ☒ Yes
   ☐ No

   Please give the reason(s) for your answer

[1] https://consult.gov.scot/mental-health-law/adults-with-incapacity/

We agree that the principles should be updated to impose an active duty on those acting under the AWI Act to ascertain the information required to construct the decision or action which best respects the adult's rights, will and preferences. This is required to comply with Article 12 of the UN Convention on the Rights of Persons with Disabilities. However, to talk of "will and preferences" alone risks being too simplistic. More statutory guidance is required as to what this includes. We suggest that it includes:

(1) The person's past wishes and feelings
(2) The person's present wishes and feelings
(3) The person's beliefs and values

We consider that the AWI Act also needs to provide expressly for the situation where it is not possible after taking all practicable steps to ascertain these matters. See further the answer to question (3) below.

2. Do you agree that in the AWI Act we should talk about finding out what that adult's will and preferences are instead of their wishes and feelings?
☐ Yes
☒ No

Please give the reason(s) for your answer

See the answer to question (1) above.

3. Do you agree that any intervention under the AWI Act should be in accordance with the adult's rights, will and preferences unless not to do so would be impossible in reality?
☐ Yes
☒ No
Please give the reason(s) for your answer

This is a laudable goal but as set out is logically impossible, as it suggests that steps can be taken which knowingly breach the adult's rights. Article 12 of the CRPD requires respect for the adult's rights, will and preferences. What is required to translate that into Scottish law is drafting which recognises that there will be a balancing act between different rights, including most obviously the adult's rights under Article 2, 3, 8, 9 and 14 ECHR, and that the starting point in determining that balance is the adult's known will and preferences (as amplified by reference to the answer to question (1) above). Where it is not possible to identify the person's will and preferences, the action taken should be that which best upholds the person's rights.

It is not clear whether this proposed principle is intended to be in substitution for the principle currently contained in s.1(3). We suggest it should be. In any

event, if it is not, “freedom” is now too limited, because it does not recognise the full spectrum of matters that might be in play.

4. Do you agree that the principles should be amended to provide that all support to enable a person to make their own decisions should be given, and shown to have been unsuccessful, before interventions can be made under the AWI Act?
☐ Yes
☒ No
Please give the reason(s) for your answer

“All support” leads to potentially impossible situations. By way of example, there is some suggestion that it may be possible to identify ‘yes’ / ‘no’ responses from people in prolonged disorders of consciousness using fMRI scanning. Should such steps be taken before decisions are made about cessation of life-sustaining treatment (and does it make a difference if there are only very few research centres, predominantly in North America) where this is being tried?

We suggest that this should be “all practicable support”. We also suggest that this also includes “help” alongside support, to capture as wide a spectrum as possible of actions.

Using the language of all practicable help and support allows for the necessary calibration between: (1) the gravity of the step contemplated and (2) the urgency of the step. This should also not be limited solely to decisions, given that the AWI Act is also concerned with capacity to act.

5. Do you agree that these principles should have precedence over the rest of the principles in the AWI Act?
☒ Yes
☐ No
Please give the reason(s) for your answer

Yes, but it is now unclear whether and how the other principles are supposed to interact. By way of example, see the discussion of s.1(3) under question 3 above.

6. Do you have any suggestions for additional steps that could be put in place to ensure the principles of the AWI Act are followed in relation to any intervention under the Act?
☒ Yes
☐ No
Please give the reason(s) for your answer

We suggest that the equivalent of section 5 of the Mental Capacity (Northern Ireland) Act 2016 be included, with appropriate modifications, to set out what practicable help and support looks like.

7. Do you agree with the change of name for attorneys with financial authority only?
☒ Yes
☐ No

Please give the reason(s) for your answer

We consider that this will reduce confusion.

8. Do you agree with our proposals to extend the power of direction of the sheriff?

☒ Yes

☐ No

Please give the reason(s) for your answer

This is sensible and will help avoid unnecessary delays

9. Do you agree with our proposal to amend the powers of investigation of the OPG to enable, where appropriate , an investigation to be continued after the death of the adult?

☒ Yes

☐ No

Please give the reason(s) for your answer

This will address a current gap.

10. Do you agree that the investigatory responsibility between OPG and local authority should be split in the manner outlined above?
☐ Yes
☐ No
Please give the reason(s) for your answer

11. Will these changes provide greater clarity on the investigatory functions of OPG and local authority?
☐ Yes
☐ No

Please give the reason(s) for your answer

12. Will this new structure improve the reporting of concerns?
☐ Yes
☐ No
Please give the reason(s) for your answer

Part 2- Powers of attorney

13. Do you agree with the proposals for training for attorneys ?
☒ Yes
☐ No
Please give the reason(s) for your answer

In principle, we welcome training for attorneys as a means of raising awareness of correct operation and encouraging greater use of power of attorney.

14. Do you agree that OPG should be given power to call for capacity evidence and defer registration of a power of attorney where there is dispute about the possible competency of a power of attorney document?
☒ Yes
☐ No
Please give the reason(s) for your answer

We consider that this would strengthen safeguards against misuse of power of attorney.

15. Do you agree that OPG should be able to request further information on capacity evidence to satisfy themselves that the revocation process has been properly met?
☒ Yes
☐ No
Please give the reason(s) for your answer

We consider that this would strengthen safeguards against misuse of power of attorney.

16. Do you agree that OPG should be given the power to determine whether they need to supervise an attorney, give directions or suspend an attorney on cause shown after an investigation rather than needing a court order?
☒ Yes
☐ No
Please give the reason(s) for your answer

This will allow safeguards to be put in place at an earlier stages.

17. Should we extend the class of persons that can certify a granter's capacity in a power of attorney?
☐ Yes
☐ No
Please give the reason(s) for your answer

18. Do you agree that paralegal should be able to certify a granter's capacity in a power of attorney?
☐ Yes
☐ No
Please give the reason(s) for your answer

19. Do you agree that a clinical psychologist should be able to certify a granter's capacity in a power of attorney?
☐ Yes
☐ No
Please give the reason(s) for your answer

20. Which other professionals can certify a granter's capacity in a power of attorney?

Please give the reason(s) for your answer

We have no further comments.

21. Do you agree that attorneys, interveners and withdrawers (under Part 3) should have to comply with an order or demand made by OPG in relation to property and financial affairs in the same way as guardians ?
☒ Yes
☐ No
Please give the reason(s) for your answer

This appears to be a sensible proposal to strengthen existing safeguards.

22. Do you agree that the Public Guardian should have broader powers to suspend powers granted to a proxy under the AWI Act whilst they undertake an investigation into property and financial affairs?

☒ Yes

☐ No

Please give the reason(s) for your answer

This appears to be a sensible proposal to strengthen existing safeguards.

23. Do you agree that the MWC and local authority should have broader powers to suspend powers granted to a proxy under the AWI Act whilst they undertake an investigation into welfare affairs?

☒ Yes

☐ No

Please give the reason(s) for your answer

This appears to be a sensible proposal to strengthen existing safeguards.

Part 3- access to funds

24. Do you agree that the powers and specific amounts should be decoupled?

☐ Yes

☐ No

Please give the reason(s) for your answer

We require further detail in order to answer this question. We do not understand what the difference is between estimating "specific sums", and "giving an indication of each (*estimated*) amount", or why the indication of each estimated amount may not be included on the ATF certificate. A proposed change which reduces clarity, and increases confusion, will not be of assistance.

We ask if it is proposed that there will be an equivalent of the Guardianship Management Plan for ATF? If so, we would suggest that increasing the amount of paperwork required for ATF will not increase its uptake.

Indicating the estimated amounts on the certificate will both remove the requirement of separate information being held by the OPG, and allow financial institutions to better assess whether excessive funds might be being withdrawn. Any increase in access to an adult's funds will require robust monitoring, by both the OPG and financial institutions, to prevent abuse. That monitoring will require increased resources. We point out that in the case of financial guardianship, where unfettered access is possible to an adult's funds between accounting periods, Caution is required to protect the estate of the adult. If such unfettered access is permitted to withdrawers, what protection will there be for the adult's estate, between accounting periods?

The proposals of the consultation paper give rise to concern that the proposals for ATF create a form of "guardianship-lite", without the judicial scrutiny, or system of safeguards, which protect adult subject to guardianship. Repeated reference to "powers" in the consultation paper increases that concern.

25. Do you agree that the withdrawal certificate should contain standard, proforma powers for the withdrawer to use?

☐ Yes

☒ No

Please give the reason(s) for your answer

No. To prescribe powers, or to provide a list of standard, pro forma powers, is contrary to the existing principles of the Act, and to the United Nations Convention on the Rights of Persons with Disabilities. It fails to reflect the individuality of each adult, their needs, or whether they might be supported to make certain decisions. Creating a tick-box exercise has the potential to result in applicants seeking all powers, regardless of whether those powers are to the benefit of the adult, the least restrictive option in relation to the adult's freedom, necessary, or proportionate. Suggestion of the most frequently used powers, as examples, could be coupled with a caution to consider the actual needs of the adult, and a reminder of the principles- we consider that this could provide required clarity whilst avoiding a tick-box approach.

A list of standard, pro forma powers is likely to be viewed as exclusionary, and officially sanctioned. It may also possibly be viewed as the provision of legal advice.

The means of managing funds paid by way of Self-Directed Support is not prescribed by the Social Care (Self-Directed Support) (Scotland) Act 2013. It is the guidance of the Scottish Government that where, Self-Directed Support is paid to an adult without capacity to manage those funds, financial guardianship is required to administer and disburse those funds. That guidance will require amendment.

26. Do you agree that access should be given to the adult's current account, rather than setting up a 'designated account'?

☒ Yes

☐ No

Please give the reason(s) for your answer

Yes. When the Scottish Law Commission proposed the ATF scheme in its Report on incapable adults (SLC 151, Part 4), the Commission envisaged direct access to the bank account of the adult. The existing system is cumbersome and unwieldy with different institutions taking difference approaches, it is not suited to an age of internet banking, and anecdotally, it is off-putting to potential applicants.

Direct access to an adult's account increases, however, the opportunity for abuse, and requires enhanced monitoring of intromissions, including potentially by financial institutions themselves. Indication of the estimated

amounts to be withdrawn on the ATF certificate will be of assistance in that monitoring. There are, however, increased resourcing issues.

27. Do you agree that in certain circumstances, applications where there is a guardian, or intervener with powers relating to the funds in question should be allowed?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes. It is a major defect of Part 3 that equivalent transfer from an intervention order (to that provided for guardianship in terms of section 31E) is not permitted. This can result in an unnecessary guardianship, rather than the lesser intervention of an intervention order, where the expectation is that funds released can ultimately be administered under Part 3. A process should be provided for intervention orders which will allow for a seamless continuation of authority to manage the Adult's funds, in terms of ATF.

We agree that enactment of section 31E of the Act, without amendment of section 24B(2) is both confusing and unhelpful. We would support amendment of section 24B to exclude applications made under section 31E, and any equivalent provision to section 31E in relation to intervention orders.

28. Do you agree that we should clarify that a bar to applying under this section only applies if someone is already authorised under Part 3 of the Act to intromit with the same funds?

☒ Yes

☐ No

Please give the reason(s) for your answer

Yes. We agree that it is unclear whether "already authorised to intromit" means authorised under Part 3, or authorised under any other provisions as well. The latter interpretation can inhibit appropriate use of Part 3 where there is already some other source of authority, such as a DWP appointment. That can cause disadvantageous inflexibility. We would welcome clarity.

29. Does having an account in the adult's sole name limit organisational use of the scheme?

☒ Yes

☐ No

Please give the reason(s) for your answer

Yes. The requirement for the account to be "in the adult's sole name" can be cumbersome, where proper organisational use of a single account, coupled with appropriate technology, can still be operated with adequate protection for each individual adult.

30. Should we add the same transition provisions to intervention orders as there are for guardianships?
☒ Yes
☐ No

Please give the reason(s) for your answer

Yes. Please see above at question 28. We add a note of caution, however, as to whether an intervention order is appropriate for management and investment of large sums of money, in circumstances where these powers might properly be described as "continuing". In those circumstances, guardianship, with its attendant safeguards for the adult, may well be the more appropriate tool.

We are not certain in what way a guardianship application to the court requires "less paperwork" than ATF, although we appreciate that applicants for guardianship are likely to have the benefit of both the assistance of a solicitor to manage that paperwork, and Civil Legal Aid. No evidence has been produced to show that "people are encouraged" to apply for guardianship on the basis suggested, and anecdotal evidence would suggest the opposite. Guardianship orders should not be granted, where there are other means by or under the 2000 Act which would be sufficient to enable the adult's interests in their property and financial affairs to be safeguarded or promoted (section 58(1)(b))

31. Do you agree that sheriffs, under certain circumstances, should be able to grant powers to access funds under our new proposal?
☒ Yes
☐ No

Please give the reason(s) for your answer

Yes. The sheriff already has authority under section 58(3) of the Act to grant an intervention order where that is the best means of enabling the adult's interests in their property or financial affairs to be safeguarded or promoted. Given the amount of detailed information provided to the court in terms of sections 53 and 57 of the Act, and the wide discretion already afforded to the sheriff by the Act, the sheriff should be able to grant powers to access funds, in relation to an application for guardianship or an intervention order, with financial powers. These powers may expediate the process.

32. Do you agree that authorised establishments should be able to apply under the ATF scheme?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, if such an opportunity will be utilised by authorised establishments, is subject to the same safeguards as other organisations, and lay people, and is monitored and enforced. As referred to below, there is no evidence in the consultation paper as to by what lawful authority adult's funds are currently being managed, particularly in a hospital setting. It will be interesting to see if authorised establishments avail themselves of an opportunity to apply for ATF, and whether greater scrutiny will be applied to the future management of patients' and residents' funds than is presently the case.

33. Do you agree we should split intimation of the application between organisations and lay people (OPG)?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, if such a course of action reduces the administrative burden on the OPG.

Part 4- management of residents' finances

34. Do you support the proposal to remove Part 4 from the AWI Act?

☒ Yes

☐ No

Please give the reason(s) for your answer

Yes, but only if there are adequate, monitored safeguards in place, to replace Part 4. We recognise that there is currently very limited uptake of this part of the Act.

35. Do you think alternative mechanisms like the ATF scheme, guardianships and intervention orders adequately address the financial needs of adults with incapacity living in residential care settings and hospitals?

☐ Yes

☒ No

Please give the reason(s) for your answer

No, not at present. According to the information in the consultation paper, at present there is no evidence as to how, in particular, patients' funds are being lawfully managed in a hospital setting, where other interventions are less likely to be in place. This raises significant concerns about what scrutiny, if any, there has been, or is, in relation to the management of patients' and residents' funds. Given the safeguards provided for in the Act, this is a significant failing.

We have commented frequently on the absence of safeguards associated with DWP appointeeship, and the non-compliance of the system with either the European Convention on Human Rights, or the United Nations Convention on the Rights of Persons with Disabilities.

Part 5- changes to s47 certificates and associated matters

36. Do you agree that the existing section 47 certificate should be adapted to allow for the removal of an adult to hospital for the treatment of a physical illness or diagnostic test where they appear to be unable to consent to admission?

☒ Yes

☐ No

Please give the reason(s) for your answer

This approach could provide greater clarity but must be subject to appropriate safeguards.

37. Do you consider anyone other than GPs, community nurses and paramedics being able to authorise a person to be conveyed to hospital? If so, who?

☐ Yes

☒ No

Please give the reason(s) for your answer

We have no specific comments

38. Do you agree that if the adult contests their stay after arriving in hospital that they should be assisted to appeal this?

☒ Yes

☐ No

Please give the reason(s) for your answer

We have no specific comments.

39. Who could be responsible for assisting the adult in appealing this in hospital?

Please give the reason(s) for your answer

Solicitor or advocacy worker.

40. Do you agree that the lead medical practitioner responsible for authorising the section 47 certificate can also then authorise measures to prevent the adult from leaving the hospital?

☒ Yes

☐ No

Please give the reason(s) for your answer

41. Do you think the certificate should provide for an end date which allows an adult to leave the hospital after treatment for a physical illness has ended?

☒ Yes

☐ No

Please give the reason(s) for your answer

42. Do you think that there should be a second medical practitioner (i.e. one that has not certified the section 47 certificate treatment) authorising the measures to prevent an adult from leaving the hospital?

☐ Yes

☒ No

Please give the reason(s) for your answer

This proposal may lead to unnecessary delays.

43. If yes, should they only be involved if relevant others such as family, guardian or attorney dispute the placement in hospital?

☐ Yes

☐ No

Please give the reason(s) for your answer

44. Do you agree that there should be a review process after 28 days to ensure that the patient still needs to be made subject to the restriction measures under the new provisions?

☒ Yes

☐ No

Please give the reason(s) for your answer

Yes, however provision should be made for an earlier review if applicable in the circumstances. Perhaps add in “no later than 28 days “ or similar wording.

45. Do you agree that the lead clinician can only authorise renewal after review up to maximum of 3 months before Sheriff Court needs to be involved in review of the detention?

☒ Yes

☐ No

Please give the reason(s) for your answer

Yes. This would provide a safeguard for the Adult.

46. What sort of support should be provided to enable the adult to appeal treatment and restriction measures?

Please give the reason(s) for your answer

Access to a solicitor and legal aid to be provided and or access to independent advocacy if appropriate.

47. Do you agree that section 50(7) should be amended to allow treatment to alleviate serious suffering on the part of the patient?

☒ Yes

☐ No

Please give the reason(s) for your answer

48. Would this provide clarity in the legislation for medical practitioners?

☒ Yes

☐ No

Please give the reason(s) for your answer

Part 6- changes to guardianship, interim guardianship and intervention orders

49. Do you think the requirement for medical reports for guardianship order should change to a single medical report?

☒ Yes
☐ No

Please give the reason(s) for your answer

We do believe that the requirement for medical reports should change to a single report. The requirement for two reports can cause delays in applications being finalised and lodged. There can also be difficulties in terms of co-ordinating the timeframes for both medical reports, and the Mental Health Officer Reports. The requirement for two reports also increases the cost of applications, whether that is being funded by Adults, family members, or the public purse.

It is often the case, particularly where GP reports are concerned, that the second report simply mirrors the information contained within the primary report.

In contested applications, it is often the case that the Adult, or any other party challenging the application, may request their own independent medical report. If a Safeguarder is appointed, they may also instruct an independent medical report.

If the requirement for medical reports is reduced to one report, the report should be prepared by a suitably skilled medical professional, such as a psychiatrist or a clinical psychologist. It is of note that when an application is made for a Compulsory Treatment Order under the Mental Health (Care and Treatment) Scotland Act 2003 there is a requirement for one of the reports to be prepared by an Approved Medical Practitioner who is Section 22 approved. A CTO lasts only for a period of 6 months and is subject to more regular reviews, and readier appeal rights, than a Guardianship Order. To remove the requirement for a psychiatrist to prepare a medical report when making an application for a Guardianship Order would be to remove some of the procedural safeguards. It is our view that GPs are not suitably qualified to prepare such reports in isolation. They are often not required by contract to do so.

There should be specific provision within the legislation for the Sheriff to request an additional medical report, from a GP, psychiatrist or clinical psychologist if so required. We would suggest that professional guidance is given to the effect that if the assessment suggests borderline or fluctuating incapacity, the applicant ought to obtain a second report (and that this should be funded by Legal Aid on a template basis).

50. Do you agree with our suggestion that clinical psychologists should be added to the category of professional who can provide these reports (where the incapacity arises by reason of mental disorder)?

☒ Yes
☐ No

Please give the reason(s) for your answer

Clinical psychologists are often involved in the care and treatment of Adults with incapacity. They are involved in formulating psychological interventions to enhance individuals skills and to risk assess. The training and experience of clinical psychologists qualifies them to provide evidence of incapacity which will assist the court, and widening the category of practitioners will assist in accessing reports particularly where there are fewer available GPs and/or psychiatrists. It is accordingly our view that they should be added to the category of professionals who can provide these reports.

51. Do you think the Mental Health Officer form for guardianships can be improved, to make it more concise whilst retaining the same information?

☒ Yes

☐ No

Please give the reason(s) for your answer

The MHO report is important because it is usually the only information before the court about the Adult, his or her life and experiences, and past and present views, needs and wishes. It also assesses the suitability of the proposed guardians. As such it respects the adult's life history and provides an essential check on suitability. Our understanding is that Sheriffs find these reports very helpful.

However, we are of the view that the quality of the information provided on the Schedule 2 report is more important than the quantity. MHO reports should focus on the Principles of the Act, the Adult's views, the proportionality of the Powers sought and the suitability of the applicant. The current format can create repetition. There is unprecedented pressure on MHOs which has caused delays to applications. This has a negative impact on adults. A more concise form will hopefully alleviate some of these pressures and reduce delays, while care must be taken not to reduce this to a tick-box exercise for MHOs.

It has not been our experience that these reports are delayed by MHOs' efforts to track down people who have no real interest in the Adult's affairs, as suggested in the consultation document. If any MHOs are not sure how wide to cast the net of interested parties this could be better addressed through training rather than amending the procedure or form.

If MHO reports were to become less useful, we would expect more Sheriffs to appoint safeguarders. This would increase the overall cost to legal aid and

private parties and potentially lead to more delays than it would resolve. It would also result in further investigation and intrusion into the family life of that particular Adult even if there is otherwise no particular requirement for a safeguarder.

52. Do you think the 'person with sufficient knowledge' form can be improved, making it more concise whilst retaining the same information?
☒ Yes
☐ No
Please give the reason(s) for your answer

We refer to our comments at question 51. We are of the view that a more concise form is appropriate. In addition, consideration should be given to revising the Schedule 8 form to cover particulars related to financial guardianship, for example specific reference to caution and the relevant financial skills and qualifications of the applicant.

53. Should the person with sufficient interest continue to be the person who prepares the report for financial and property guardianship?
☒ Yes
☐ No
Please give the reason(s) for your answer

There should continue to be provision for a person with sufficient interest to prepare reports for financial and property guardianship. The legislation should stipulate who should be considered a person with sufficient interest. It is suggested that this should stipulate be a person with sufficient knowledge of Adults with Incapacity legislation. There should be formal categories of individuals who can provide such reports, such as social workers, MHOs and qualified solicitors. At present there is a lack of clarity and understanding around the choice of an appropriate reporter. We consider it should be carried out by an independent professional and not a family member or friend.

These reports should always be required in more complex cases, where the Adult has a higher level of assets and/or owns property, or if it is known that the Adult is opposed to the application being granted.

54. Do you agree with our proposal to replace the second part of the 'person with sufficient knowledge' report with a statutory requirement to complete the OPG guardian declaration form?
☐ Yes
☒ No
Please give the reason(s) for your answer

The OPG currently have applications intimated upon them. This should continue to be the case. The OPG should provide reports for simple or low value estates

where financial guardianship orders are sought and where the Adult is not known to be opposed to the application.

Part of the Schedule 8 report requires taking the Adult's views and meeting with individuals involved in the Adult's estate. If the OPG completed all such reports, this would be at risk of becoming an administrative exercise. The OPG is unlikely to interview the Adult or meet the individuals involved in the Adult's life. We consider it important that the reporter should interview the Applicant and assess suitability, and that the Adult's views should be sought.

The Sheriff should continue to have the power to order a report from a qualified person with sufficient knowledge if they feel that the OPG form is not sufficient in a particular case.

55. Should sheriffs be afforded the same discretion with mental health officer report timings as they are with medical reports?

☒ Yes

☐ No

Please give the reason(s) for your answer

The consultation paper refers to a MHO preparing a full new report if their report is out of time. In our experience they will not do this but will visit the adult again and update their report as required. Equally, this is not ideal given the pressure on MHO resources and the intrusion for the adult. We therefore support this proposal to avoid delays and unnecessary resource pressures.

We note that section 57(3B) enables Sheriffs to accept late medical reports "*if satisfied that there has been no change in circumstances since the examination and assessment was carried out which may be relevant to matters set out in the report*" and suggest it is important for similar wording to be retained in respect of late MHO reports. The purpose is to avoid an application being rejected simply because of a short delay where there has been no material change to the situation – it does not mean time limits can be abandoned entirely, because capacity and needs can change, so reports need to be current.

We would note that the Adult's incapacity is often reasonably stable but their wishes, circumstances and the appropriateness of the orders sought are more subject to change. We expect Sheriffs would have concerns about MHO reports that were several weeks out of date with no updated information on the Adult's care and circumstances, especially when he or she is in hospital. Subject to these considerations, we are in favour of aligning the position with medical reports.

56. Do you agree that the best approach to cater for urgent situations is to amend the existing interim guardianship orders?

☒ Yes
☐ No

Please give the reason(s) for your answer

We agree in principle that there should be a mechanism for seeking urgent orders which does not require obtaining all three statutory reports, and that amending interim guardianship rather than creating a new procedure is sensible. This is on the proviso that there is no requirement for separate and distinct legislation in this area and instead the use of interim powers can be amended and maximised within the current legislative framework.

We are however concerned by the comment "***If*** *a full guardianship order is considered necessary, the full report can be submitted to court in the usual timescale, with a hearing be scheduled on receipt of the full report*" (our emphasis). The purpose of an interim order is to enable the adult to derive a benefit which cannot otherwise reasonably be obtained before the court is able to consider the full application. The interim order will rely on abbreviated reports and treating it as a full consideration of the matters set out in sections 57-59 of the Act potentially places the adult's article 5, 6 and possibly 8 rights at risk. All interim guardianships should be followed by a full application which is scrutinised by the court.

It would be essential for there to be a requirement to intimate the interim order application on the Adult. Given the timescales this may require to be done via Sheriff Officers so it would be important to ensure Legal Aid covered this outlay. At present an adult living in an 'authorised establishment' will be shown the papers by an appropriate member of staff and it would be helpful for guidance to be produced which assists these staff in performing their duties properly and within the timescale.

If this approach is to be adopted, clarification will also be needed of the application of section 57(6) of the Act whereby no interim guardianship order can extend beyond the 'effective period'. The practice of Sheriffs varies. Some take the view that a subsequent interim order 'resets the clock' and so the overall interim position can run beyond six months. Some take the first interim order to be inviolably the start of the six-month period and will refuse any motion to continue such interim orders beyond that. Where possible, interim powers are often renewed afresh for further periods and often remain in place for months or years in opposed cases where a proof is required. The amended statute should be clear in its intention if there is a maximum period for interim powers to be in place and guidance on the interpretation of this provision should be clear.

57. Do you agree that an abbreviated mental health officer report together with a single medical report should suffice for a guardianship order to be accepted by the court in the first instance?

☒ Yes
☐ No

Please give the reason(s) for your answer

We agree an abbreviated MHO report together with a single medical report, form a psychiatrist or clinical psychologist, should suffice for an interim guardianship order to be made by the court in the first instance. This would avoid unnecessary duplication of work by the MHO. The Sheriff must be satisfied that the information provided is comprehensive enough to ensure that the legal tests for an interim order are met, taking into account the views of the Adult and the Principles of the legislation. There should be provision for the Sheriff to request more information at this stage if required. The legal test for the granting of an interim order should be clear and specific. The interim Order should only be granted where there is a discernible benefit to the Adult. We also consider it essential that even an abbreviated report contains information on the adult's views (or any attempt to seek these) and an assessment of the suitability of the applicant, as otherwise there may be no information before the court about these essential points.

58. Do you agree that there should be a short statutory timescale for the court to consider urgent interim applications of this sort?

☐ Yes
☒ No

Please give the reason(s) for your answer

We agree that there does require to be a short timeframe for dealing with these applications, as this would help address the current position where there may be delays even in urgent cases. However this must also be balanced with the Adult's right to participation. It is essential that the Adult must have the interim application intimated upon them and be given an opportunity to have their views heard if they so wish. It may be difficult for an Adult to make representations themselves, or to arrange representation by an advocacy worker or solicitor within those timeframes. Fewer solicitors are specialising in this area of law, and fewer still are undertaking legal aid work due to the poor rates of renumeration. We are of the view that, if it is known that an Adult is opposed to the granting of interim powers, particularly where a deprivation of liberty is sought, that a Safeguarder or Curator ad Litem should be appointed to safeguard the Adults interest. This is in line with the procedure under the Mental Health Act where an application to detain a person in hospital under a CTO is made.

It is reasonable to expect any form of interim orders application to be heard by the court as soon as practicable. Urgent interim orders applications are regularly considered in the Sheriff Court in family actions, for example, and there is no reason in principle why an interim AWI application should be considered

differently. However, there are no statutory timescales for fixing interim order hearings in, for example, child contact hearings and we would be concerned that any statutory timescale could not be adhered to in practice. An alternative approach would be to amend the Summary Cause Rules.

59. Do you agree that further medical reports are not required when varying a guardianship to add either welfare or financial powers?
Please give the reason(s) for your answer
☐ Yes

☒ No

Applications to add welfare/financial powers where none had been originally sought are usually made some time after the original order, because the Adult's circumstances have changed (e.g. there is a need to manage funds which have become available). This may take place years since the original assessment because otherwise the need for the powers would have been anticipated in the original Application. We do not think the court can properly assume that the Adult's capacity is unchanged from the original application. Furthermore, the assessment of capacity is task specific. A medical report stating that an Adult lacks capacity in relation to certain elements of their welfare, cannot be relied upon when deciding whether an Adult lacks financial capacity, and vice versa.

We *would* support a change to requiring only one medical report rather than two, and/or an abbreviated suitability report, but not the removal of the requirement for medical evidence entirely.

60. Does the current approach to length of guardianship orders provide sufficient safeguards for the adult?
☐ Yes
☒ No

In our view any guardianship order, whether or not it specifically authorises decisions which deprive the person of their liberty, is a significant restriction on autonomy and as such requires regular judicial review and scrutiny. We disagree in principle with the distinction drawn in the consultation document.

It is not entirely clear what is being asked here, but we consider there should be more regular and frequent reviews to ensure the legislation is ECHR compliant and in line with practice in other jurisdictions. Each first guardianship order should be granted for a period of 12 months, unless there is a compelling reason for it to be granted for a longer period, such as the Court process causing the Adult undue distress. Longer periods of renewal should be considered only in cases where it can be evidenced that the Adults condition has deteriorated, or has no prospect of improving.

We agree that it is important to consider the benefit to the adult in requiring a renewal procedure but point out that the benefit here is respect for their rights through appropriate scrutiny of the continuing need for the order, the appropriateness of the powers, and the continued suitability of the guardian. Renewals can sometimes be seen as an 'intrusion' for the adult rather than a form of benefit and we disagree with that implication.

61. Do changes require to be made to ensure an appropriate level of scrutiny for each guardianship order?
☒ Yes
☐ No

See our comments above.

62. Is there a need to remove discretion from the sheriff to grant indefinite guardianships?
☒ Yes
☐ No
Please give the reason(s) for your answer

Indefinite orders are not in line with ECHR and Article 5 rights. This was recently confirmed in *Aberdeenshire Council v SF & Ors* (No. 2) [2024] EWCOP 10.

63. If you consider changes are necessary, what do you suggest they would be?
Please give the reason(s) for your answer

See above- we would also suggest that additional detail should be included in the interlocutor, including on deprivation of liberty where applicable, and the interlocutor should also address why the length of order is considered appropriate.

64. We propose that the following powers should be added to the list of actions that guardians, attorneys and interveners should be expressly excluded from. Do you agree with this proposal?

1. consenting to marriage or a civil partnership
☐ Yes exclude
☒ No

2. consenting to have sexual relations
☒ Yes exclude
☐ No

3. consenting to a decree of divorce
   ☐ Yes exclude
   ☒ No

4. consenting to a dissolution order being made in relation to a civil partnership
   ☐ Yes exclude
   ☒ No

5. consenting to a child being placed for adoption by an adoption agency
   ☒ Yes exclude
   ☐ No

6. consenting to the making of an adoption order
   ☒ Yes exclude
   ☐ No

7. voting at an election for any public office, or at a referendum
   ☒ Yes exclude
   ☐ No

8. making a will
   ☐ Yes exclude
   ☒ No

9. if the adult is a trustee, executor or company director, carrying discretionary functions on behalf of them
   ☐ Yes exclude
   ☐ No

10. giving evidence in the form of a sworn affidavit
    ☐ Yes exclude
    ☐ No

65. Are there any other powers you think should be added to a list of exclusion?

Please give the reason(s) for your any of your answers to questions 64 and 65 above

In relation to marital status: A guardian currently requires an express power to be able to "pursue or defend an action of declarator of nullity or divorce or separation in the name of the adult" (s64(1)(b). It is not consistent with this to import a general prohibition on consenting to marriage, divorce, or dissolution in any circumstances.

It is also not practical to do so, as situations arise where a person who has resolved financial and property matters from a separation and has expressed a wish to be divorced but loses capacity before the divorce is granted. Under

s64(1)(b) the guardian can raise or defend divorce but cannot consent on behalf of the adult to divorce proceedings raised by the other party. Rather than prohibit this it would be helpful to confer this power, but only by express authority of the court as per s64(1)(b).

This presents an opportunity to align the 2000 Act with the family court rules. In a family action "where it appears to the court that the defender is suffering from a mental disorder" (OCR 33.13(1)) the court is obliged to appoint a curator ad litem to the defender and, where consent to divorce is sought, to intimate on the MWC and seek a report on whether the defender can consent to divorce. This causes confusion where the person has an attorney or guardian. While of course not every person with mental disorder is an adult with incapacity it would be helpful for guardians on whom a specific power to consent to or otherwise cooperate with actions for divorce where this is the past and present wish of the adult to be able to enact this wish.

In relation to sexual relations: We agree this should be excluded. The consideration of whether an adult with incapacity can engage in sexual activity is decision specific and potentially complex. The Mental Capacity Act 2005 (s27(1)(b)) provides that no person can consent to sexual relations on behalf of another person. We agree it would be appropriate to align the 2000 Act with this provision. Enabling a guardian to consent to sexual activity where such activity constitutes a criminal offence would also be problematic and the proposed exclusion avoids this scenario.

In relation to adoption: We agree this should be excluded. The court can make an adoption order without the consent of persons with parental responsibilities if they are incapable of giving consent/ are unable to discharge those responsibilities and are likely to continue to be able to do so. In situations where a parent does not have capacity it is appropriate for their Article 8 rights (and those of the child) to be recognised and addressed in the process of the court considering dispensation with their consent, rather than such consent being provided by their representative.

In relation to Wills: This needs to be more precise. Making a Will without any indication of the person's wishes and preferences should not be done and would not be sanctioned by a court, but it ought to still be possible for a guardian or intervenor to seek to rectify errors of expression or execution in a Will provided this is sanctioned by the court, as is currently the case.

In relation to sworn evidence: This comment lacks specification – it is not clear whether it means swearing an Affidavit on behalf of the Adult, or the guardian giving evidence in their own capacity. If the former, we agree this should be excluded as if the Adult has the capacity to understand questions and the giving of evidence, they should be able to do so in their own right.

Part 7- deprivation of liberty proposals, stand-alone right of appeal, limitation of liability, appointment of safeguarders

66. Do you agree with the overall approach we are proposing to address DOL?

☐ Yes
☒ No
Please give the reason(s) for your answer

Whilst we welcome in principle an approach which gives greater weight to the views of the adult, there is a real risk of confusion if a situation is identified as being a DOL but one to which it is understood that the person is consenting. A DOL for purposes of Article 5 ECHR is a confinement to which the person does not / cannot consent, and which is imputable to the state. It would be much clearer to proceed on the basis that a confinement to which the person can consent is not a DOL.

It is also unclear whether, given the use of the term 'consent', the consultation is proceeding on the basis that 'consent' has to be capacitous for purposes of the AWI, or whether the consultation is proceeding on the basis of a wider conception of the term.

Clarity on both of these matters is extremely important. This then feeds into the safeguards required.

We suggest that the way to approach safeguards is to ensure that they are tailored to:

(1) Identification of whether the situation amounts to confinement (i.e. that the person is not free to leave, and whether they are subject to continuous supervision and control).
(2) Identification of whether the person is able to consent (with appropriate support, but that support not amounting to coercion) to that confinement.
(3) Identification of whether that consent is continuing.

If at any point there is a confinement to which the person is not consenting, that must be recognised as a deprivation of liberty, and the safeguards required by Article 5 ECHR provided.

67. Is there a need to consider additional safeguards for restrictions of liberty that fall short of DOL?

☒ Yes
☐ No
Please give the reason(s) for your answer

Yes. These are particularly important when they relate to restrictions which shade between Article 5 and Article 8 ECHR. There are many restrictions which give rise to interferences with the person's autonomy, for instance on contact, the internet or social media. Unless they give rise to restrictions on

the person's physical liberty, they do not fall within the scope of Article 5 ECHR (see *Manchester City Council v P (Refusal of Restrictions on Mobile Phone)* [2023] EWHC 133 (Fam); although decided in England and Wales, the analysis is of ECHR case-law, so is applicable in Scotland as well). There need to be safeguards to ensure that these interferences with the rights of the person under Article 8 ECHR are necessary and proportionate.

68. Do you agree with the proposal to have prescribed wording to enable a power of attorney to grant advance consent to a DOL ?

☐ Yes
☐ No

Please give the reason(s) for your answer

If the proposal is that deprivation of liberty will be authorised by the granter's own consent contained in the power of attorney document, then this is not in fact a power of attorney- All relevant definitions, of which the most widely used is the definition in Council of Europe Recommendation (2009)11, are clear as to the distinction between a power of attorney and an advance directive (increasingly and widely referred to as an advance choice). If the document purports itself to grant consent to a deprivation of liberty, without doing so through the mediation of an attorney, then it is an advance directive/advance choice, not a power of attorney. We have commented further on advance choices below.

If the proposal is that the power of attorney document will empower the attorney to make decisions in relation to deprivation of liberty, there seems to be inadequate clarity about the distinction between empowering someone to authorise a deprivation of liberty, and the requirement for Article 5 compliance whenever that power is exercised and a particular deprivation of liberty is authorised. There is further, a lack of clarity as to whether the policy:

(1) For the adult to empower the attorney to consent on their behalf to confinement, so as to take that confinement out of the scope of Article 5 ECHR altogether?

(2) For the adult to empower the attorney to authorise confinement on their behalf, so that the confinement is still recognised to be a deprivation of liberty for purposes of Article 5 ECHR, but one which for which there is the necessary authority contained within the instrument itself, thereby obviating the need for further safeguards to be applied?

As well as the need for absolute clarity about this in the proposed legislation and in ensuing implementation, there is the immediate danger of this lack of clarity within the proposals being seen as endorsing existing malpractices in which someone is granted very generalised powers amounting to authorising deprivations of liberty, with no related requirements to ensure Article 5 compliance if the power is exercised, indeed sometimes with no

acknowledgement or readily accessible record that such has happened, and even with no requirement to ensure appropriate consultation with, and involvement of, the adult, nor ensuring that the adult has a real, effective and accessible right to challenge the deprivation.

We note that there is no Strasbourg case-law which expressly recognises the ability of a proxy (even one appointed by the adult) to consent on their behalf to be opted out of the protections of Article 5 ECHR.

It would be far preferable for the model to be based on the second approach set out above, namely that the attorney is authorising a deprivation of liberty, because this means that the situation is clearly recognised as falling within the scope of Article 5. This, in turns, means that it is entirely clear the attorney can / should only take steps to authorise any particular set of circumstances where (1) there is the necessary medical evidence; and (2) the deprivation of liberty is clearly necessary and proportionate (and this is kept under review).

To the extent that it is considered important to support the exercise of legal capacity by individuals in this area, Scottish Government may wish to consider the potential for advance consent to be given to confinement on a unilateral basis by the adult. Such an advance consent is not then mediated by another (the attorney), and is therefore clearly linked to the person's will and preferences. There would need to be clear safeguards to ensure that this consent is not relied upon inappropriately so as exclude the person from the protections required by Article 5 ECHR.

Any prescribed wording must clearly reflect what a deprivation of liberty may entail in practice, for the benefit of both the granter and the attorney.

69. What are your views on the issues we consider need to be included in the advance consent?

Please give the reason(s) for your answer

See above. It is better not to talk of 'advance consent,' but rather 'prior authority to confine.' That, in turn, also means that the attorney must only be able to exercise that authority in compliance with Article 5 ECHR.

70. What else could be done to improve the accessibility of appeals?

Please give the reason(s) for your answer

There is a concern that a statutory requirement for an interim hearing to be held within 5 days may restrict an Adult's ability to make representations and be heard in opposition to Orders sought. If there is to be an automatic right to appeal the Adult must require sufficient support to access this. The Mental

Health (Care and Treatment) Scotland Act 2003 (MHCTA) has a statutory provision for independent advocacy. We suggest that there is a statutory provision for access to suitable training independent advocacy workers when applications are made under the AWI Act.

Where an Adult has been deemed as lacking capacity to instruct a solicitor, a Safeguarder or Curator should be appointed to the Adult from a list of Safeguarder and Curators held within the Jurisdiction of the Court. This is in line with the MHCTA whereby a Curator ad litem is appointed to a person deemed as lacking in capacity to instruct a solicitor, when an application for a CTO is made. It is of note that such a provision exists, despite CTOs lasting for short periods than guardianship Orders, and having more accessible rights of appeal. Where a deprivation of Liberty is proposed, and it is known that it is the Adults past or present wish that they do not agree with the proposed DOL, a Safeguarder or CAL should again be appointed to safeguard the interest of the Adult.

There is a lack of solicitors in Scotland who specialise in this particular area. It may be difficult for Adults to access independent legal representation timeously. There should be provision within the Act to ensure that the appeal timeframes are not so stringent that Adults will have time to fully identify and instruct a solicitor. It is essential that legal aid is made available to properly renumerate such appeals. In the absence of proper renumeration it is unlikely that there will be enough solicitors willing to undertake this type of work. Adults with incapacity often do not have access to their finances. Non means tested legal aid should be made available for such appeals. This is in keeping with provisions for those applying for legal aid when detained under the MHCTA.

71. What support should be given to the adult to raise an appeal?

Please give the reason(s) for your answer

The MHO should have a statutory obligation to advise them of their right to appeal and to refer to them to advocacy. The Adult should be advised of their right to access independent legal advice. Non means tested legal aid should be made available.

72. What other views do you have on rights of appeal?

Please give the reason(s) for your answer

Nearest relatives, or a person with sufficient interest should have the right to raise an appeal. Legal aid should also be made available for this.

73. How can DOLs authorised by a power of attorney be appropriately reviewed?

Please give the reason(s) for your answer

If, as the question suggests (and we propose should be identified as being the case) this is a situation in which a deprivation of liberty has been authorised by the attorney, then this is, and needs to be identified, as a situation falling squarely within Article 5(1)(e) ECHR. This means that the appeal and review procedure needs to comply with Article 5(4) ECHR because, logically, the adult is subject to exactly the same set of circumstances as if their deprivation of liberty was being authorised by way of guardianship.

There may also be a role for the Mental Welfare Commission.

74. Do you agree with the proposal to set out the position on DOL and guardianships in the AWI Act?
☐ Yes
☐ No

Please give the reason(s) for your answer

It is unclear whether the consultation is proceeding on the basis that (in the absence of a power of attorney being in play), the only mechanism by which deprivation of liberty can be authorised is by way of guardianship. It is suggested that serious thought needs to be given to whether this is appropriate, or whether (a) there should be a power for the court, itself, to authorise deprivation of liberty by way of an intervention order; or (b) an administrative framework is required to enable authorisation of deprivation of liberty without recourse in the first instance to the courts. There are two reasons for this:

(1) Judicial authorisation of deprivation of liberty means that it is very clear that there has been express consideration of the matters required by Article 5(1)(e) ECHR in the context of the particular confinement for which authorisation is sought. The more 'delinked' the judicial scrutiny of the powers being granted by the welfare guardian and the exercise of those powers, the more possibility there is for the welfare guardian to exercise those powers in a way which is not compatible with Article 5 ECHR. See in this regard the concerns expressed by the Court of Protection in *Aberdeenshire Council v SF & Ors* (No. 2) [2024] EWCOP 10. At present, it is not clear from the consultation paper what guarantees there are, or can be, that at the point in time when the guardian exercises the power, they will comply with the strict requirements of Article 5(1)(e).

(2) There will be very significant numbers of people who cannot (even with support, and even taking the wider view of 'consent' potentially proposed in the consultation) consent to their confinement. Is it the intention that all such individuals are to be subject to welfare guardianship if the sole reason for that is for purposes of authorising the deprivation of liberty?

75. In particular what are your views on the proposed timescales?

Please give the reason(s) for your answer

See above. The longer the potential gap between the grant of authority and the exercise of that authority, the more problematic the position. Note also that, if the order can only be made for a maximum of a year in the first instance, and then 2 years, it is not immediately obvious what is being gained by giving the power to the guardian within those timeframes to authorise deprivation of liberty as opposed to having the court authorising the deprivation of liberty itself.

76. What are your views on the proposed right of appeal?

Please give the reason(s) for your answer

An accessible, effective, and speedy mechanism of review by a court is required by Article 5(4) ECHR. It may be useful to have regard to the decision of the Court of Protection in *RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAS)* [2016] EWCOP 49 for a comprehensive overview of the obligations of Article 5(4) in this context, and also for an (English) judicial consideration of how those deprived of their liberty can be supported to access the right to appeal.

77. What else could be done to improve the accessibility of appeals?

Please give the reason(s) for your answer

See above in response to question 70.

78. Do you agree with the proposal to have 6 monthly reviews of the placement carried out by local authorities?

☐ Yes
☒ No

Please give the reason(s) for your answer

Local authorities are often the state body who make the decision to place the individual in an institution, where ultimately they are deprived of their liberty. There is nothing to suggest that more frequent reviews from the decision maker would increase safeguards or change the decision making process of the local authority. This would not constitute a independent review or oversight. However, review on a 6-monthly basis seems reasonable.

79. Is there anything else that we should consider by way of review?

Please give the reason(s) for your answer

Local authorities are often the state body who make the decision to place the individual in an institution, where ultimately they are deprived of their liberty. There is nothing to suggest that more frequent reviews from the decision maker would increase safeguards or change the decision making process of the local authority. This would not constitute a independent review or oversight. Any review should include involvement form the Adult and their family.

80. Do you agree with our proposal for a stand - alone right of appeal against a deprivation of liberty?

Please give the reason(s) for your answer

Yes, because such is required by Article 5(4) ECHR.

81. Do you agree with our proposal to give the MWC a right to investigate DOL placements when concern is raised with them?

Please give the reason(s) for your answer

Yes, because this provides an important safeguard for the situation where those who should be taking action to bring the adult's circumstances to the attention of the courts have not (for whatever reason). It should be made clear that the MWC has the power to take whatever steps are required to secure:

(1) that (if the deprivation of liberty is substantively justified but there is a technical default in authorisation), the appropriate authorisation is secured.
(2) that (if the deprivation of liberty is not substantively justified), the deprivation of liberty is brought to an end.

82. Do you agree with the proposals to regulate the appointment, training and remuneration of safeguarders in AWI cases?

☐ Yes
☒ No

Please give the reason(s) for your answer

Safeguarders are an essential part of the AWI system. Appointment is already regulated insofar as Safeguarders are selected in most Jurisdictions and placed on a list by the Sheriff Principal, based on their knowledge and experience. Renumeration is generally regulated by the Scottish Legal Aid Board, where cases are legally aided. In civil legal aid cases, where Safeguarders (in relation to the preparation of a Guardianship report),or Curators are appointed as Officers of the Court, their reasonable costs are

chargeable in terms of regulation 4 of the Civil Legal Aid (Scotland)(Fees) Regulations 1989, as an outlay in the nominated solicitors legal aid account.

This was confirmed by a recent taxation decision at Edinburgh Sheriff Court of November 2023. Privately funded applicants can seek to have the Safeguarder/curator's account taxed if required, in line with any other litigation expense.

However, there may be benefit in adopting a more consistent approach. A centrally held and updated list of Safeguarders and Curators ad litems, with suitable knowledge and experience within the area of AWI legislation, should be held in each Sheriff Court Jurisdiction. It is essential that those appointed by the Court to Safeguard the interests of Adults have the necessary expertise in this particular area of law, and not just of civil litigation generally. Training should be provided in terms of best practice, to ensure reports, and representations, are of sufficient quality across the board. It will be important to ensure that appropriate consideration is given to the content and delivery of such training, in consultation with experienced Safeguarders, to ensure that it adds genuine value and has credibility with participants. We would particularly recommend that the training encompass skills-based training in communicating effectively with Adults (including the use of assistive technology) given the diversity of individuals a Safeguarder will encounter.

Given that there is a shortage of safeguarders in some areas, it would not be desirable to pause recruitment until such training is available, as was done with Child Welfare Reporters.

83. Do you agree with the proposals for training and reporting duties for curators?

☐ Yes
☐ No

Please give the reason(s) for your answer

As above, the current system can be inconsistent.

84. What suggestions do you have for additional support for adults with incapacity in AWI cases to improve accessibility?

Please give the reason(s) for your answer

Greater use of mental health advocates who are trained professionals with relevant experience. Sheriffs are not always clear about their roles or take into account their discussions with the Adult.

85. Do you think there should be a specific criminal offence relating to financial abuse of an adult lacking capacity?
☒ Yes
☐ No

Please give the reason(s) for your answer

When a individuals appointment as Guardian or Attorney comes to an end, the OPGs powers to investigate also come to an end. The police do not often investigate or prosecute crimes where the Adult lacks capacity and a proxy has been in place, even when there are large amounts of money involved.

86. If so, should the liability be the same as for the welfare offence?
☒ Yes
☐ No

Please give the reason(s) for your answer

Financial abuse can equally cause distress and harm to the Adult.

87. Do you have experience of adults lacking in capacity being supported in hospital, despite being deemed to be no longer in need of hospital care and treatment? What issues have arisen with this?
☒ Yes
☐ No

Please give the reason(s) for your answer

We understand that this frequently occurs, especially for the elderly were they may have had a fall/experienced another physical injury or illness and it is not deemed safe for them to return home. In addition, the situation may arise for those who have limited contact with health and social care professionals and the extent of their mental health deterioration is only assessed when they are admitted to hospital for another matter. Issues arise where they do not have a Power of Attorney or guardianship in place and there is nowhere immediately suitable for them to be placed. It is not in their best interests to remain within a hospital setting where more restrictions are in place and they are taking up hospital beds which they do not medically require.

88. Do you foresee any difficulties or challenges with using care settings for those who have been determined to no longer need acute hospital care and treatment?
☒ Yes
☐ No

Please give the reason(s) for your answer

We understand that there is a lot of pressure on private care homes and due to funding some are no longer able to remain open. Funding is an issue that needs to be addressed, otherwise there will be fewer care home spaces available with an increasing elderly population.

89. What safeguards should we consider to ensure that the interests and rights of the patients are protected?

Please give the reason(s) for your answer

Provision for the patient's past and current views to be taken into account as currently and look at ways this can be enhanced.

90. What issues should we consider when contemplating moving patients from an NHS acute to a community-based care settings, such as a care home?

Availability of places and importance of keeping ongoing links with family and friends.

Full discussions as currently with all professionals involved in the patient's /Adult's care about what type of care setting would best meet their needs.

Part 8- Authority for Research

91. Should the AWI Act be amended to allow the creation of more than one ethics committee capable of reviewing research proposals involving adults lacking capacity in Scotland?
☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, this seems reasonable given that the objective of the proposed amendments is to potentially, but ethically, increase research involving adults with incapacity.

92. In research studies for which consent is not required for adults with capacity to be included as participants, should adults with incapacity also be permitted to be included as participants without an appropriate person providing consent for them?
☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, provided safeguards are in place to ensure that adults with incapacity are not disproportionately targeted for recruitment for such research.

It is vital that the adult's rights to autonomy (including the exercise of legal capacity), bodily integrity, dignity and non-discrimination (Articles 3, 8 and 14 ECHR; Articles 5, 12, 15 and 17 UNCRPD) are carefully considered.*[Assuming that the nature of these rights (including the different equality comparator used by the UNCRPD) will have already been mentioned earlier in the response so only needs to be referred here?]* It is also important to be clear that non-discrimination includes not excluding persons with cognitive impairments from research either because of (1) a failure to provide proper support to enable them to give consent; or (2) a failure to have mechanisms which appropriately allow for research to take place where they do not have capacity to consent but where it does not conflict with their known will and preferences.

It would also be useful to consider whether to provide for advance consent to be given by the person to participation in research (subject to safeguards). This would have two benefits: (1) supporting the exercise of legal capacity; and (2) providing greater clarity in what is an increasing and considerable practical problem in longitudinal research studies both (a) in terms of identifying that the person may have lost capacity to maintain their consent to remain; and (b) transferring the person onto the incapacity-based track and obtaining proxy consent. Providing for advance consent would alleviate these issues.

It is also important to note that the Helsinki Declaration (of ethical principles for medical research involving humans) is currently under review. Any legislation therefore needs to be reviewed against the final version of the declaration to ensure that any non-alignment is conscious and reasoned.

The above comments should be read into all our other responses to this section of the consultation.

93. Should Scotland A REC (or any other ethics committee constituted under Regulations made by the Scottish Ministers in the future) have the ability to determine that consent would not be required for adults with incapacity to be included as research participants, when reviewing studies for which consent would also not be required to include adults with capacity as research participants?

☐ Yes
☐ No

Please give the reason(s) for your answer

As in 92 above.

94. Should the AWI Act be amended to allow researchers to consult with a registered medical practitioner not associated with the study and, where both agree, to authorise the participation of adults with incapacity in research studies in emergency situations where an urgent decision is required and researchers cannot reasonably obtain consent from a guardian, welfare attorney or nearest relative in time?
☐ Yes
☐ No

Please give the reason(s) for your answer

If this is permitted then this approach should be used sparingly and only for clearly specified emergencies.

95. Should the AWI Act be amended to allow researchers to enrol adults with incapacity in research studies without the consent of an appropriate representative of the adult, in emergency situations where a decision to participate in research must be made as a matter of urgency, where researchers cannot reasonably obtain consent from an appropriate representative of the adult, and where researchers act in accordance with procedures that have been approved by Scotland A REC (or any other ethics committee constituted by regulations made by the Scottish Ministers)?
☐ Yes
☐ No

Please give the reason(s) for your answer

If this is permitted then this approach should be used sparingly and only for clearly specified emergencies.

96. Should the AWI Act be amended to permit researchers to nominate a professional consultee to provide consent for adults with incapacity to participate in research, in instances where researchers cannot reasonably obtain consent from a guardian, welfare attorney or nearest relative?
☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, but the professional consultee must have satisfied themselves that (1) it would be disproportionate in the particular circumstances to obtain the consent of a guardian, welfare attorney or nearest relative's consent; and (2),

that all reasonable endeavours have been used to ascertain that consent or refusal to consent aligns with the adult's will and preferences?

97. In addition to being permitted to participate in research that investigates the cause, diagnosis, treatment or care of their incapacity, should the AWI Act be amended to allow adults lacking capacity to participate in research that investigates conditions that may arise as a consequence of their incapacity?
☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, subject to rights safeguards. Please see our comments in response to question 92 above.

98. In addition to being permitted to participate in research that investigates the cause, diagnosis, treatment or care of their incapacity, should the AWI Act be amended to allow adults lacking capacity to partake in research that investigates conditions they experience that do not relate to their incapacity?
☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, subject to rights safeguards, and provided that adults with incapacity are not disproportionally targeted for research studies. Please see our comments in response to question 92 above.

99. Should the AWI Act be amended to allow adults with incapacity the opportunity to participate in any research; regardless of whether the research explores conditions that relate to their incapacity or investigates conditions that they experience themselves?
☒ Yes
☐ No

Please give the reason(s) for your answer
Yes, subject to rights safeguards, and provided that adults with incapacity are not disproportionally targeted for research studies. Please see our comments in response to question 92 above.

For further information, please contact:

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