

Adults with Incapacity (Scotland) Act 2000

Proposals for Reform

January 2018

ADULTS WITH INCAPACITY

PROPOSALS FOR REFORM

Ministerial foreword



The Adults with Incapacity (Scotland) Act 2000 was one of the first substantive pieces of legislation passed by the Scottish Parliament after it was re-established in 1999.

For the first time, Scotland had a comprehensive regime to protect the rights of people lacking in capacity. This replaced a myriad of common law, some of which dated back to the middle ages. The principles embedded in the legislation, which must inform and be applied to decisions regarding interventions under the legislation earned Scotland an international reputation for being a leading example of a country that had created good legislative practice.

Nearly 20 years on however much has changed. Significant court decisions have raised concerns about the way residential care for adults is authorised. The Scottish Government's commitment to fully implement the UN Convention on the Rights of Persons with Disabilities means we need to be satisfied the Adults with Incapacity legislation meets the requirements of this convention; the increase in the number of guardianships under the legislation has resulted in significant delays in processing applications, meaning persons in need of help under the legislation are sometimes adversely affected because of these delays.

The time has come therefore to review the way the current legislation is working and to consider proposals for change. This consultation paper is the outcome of informal discussions with a wide range of stakeholders and service users who gave up valuable time to meet with Scottish Government officials to discuss what works well about the law as it stands, and what needs to change. We are grateful for their time and contributions, and grateful to those of you who are taking the time to participate in this consultation.

A handwritten signature in black ink that reads "Maureen Watt". The signature is written in a cursive style.

Maureen Watt
Minister for Mental Health

CONTENTS

CHAPTER ONE – Background, current law and glossary of terms

CHAPTER TWO – Summary of proposals

CHAPTER THREE – Restrictions on liberty

CHAPTER FOUR – Principles of Adults with Incapacity legislation

CHAPTER FIVE – Powers of attorney and official supporter

CHAPTER SIX – Capacity assessments

CHAPTER SEVEN – Graded guardianship

CHAPTER EIGHT – Forum for guardians

CHAPTER NINE – Supervision and support for guardians

CHAPTER TEN – Order for cessation of residential placement, short term placement order

CHAPTER ELEVEN – Advance directives

CHAPTER TWELVE – Adjustments to authorisation for medical treatment

CHAPTER THIRTEEN – Research

CHAPTER FOURTEEN – Miscellaneous issues

CHAPTER ONE – BACKGROUND, CURRENT LAW AND GLOSSARY

Background

The Adults with Incapacity (Scotland) Act 2000 (AWI) introduced a system for safeguarding the welfare and managing the finances and property of adults who lack capacity to make some or all decisions for themselves.

At that time it was widely acclaimed as ground breaking law. But law is ever evolving. In 2005, the European Court issued its ruling on the Bournemouth case.¹ The ruling in this case made it clear that persons who lack capacity to consent to deprivation of liberty must have the protection of Article 5 European Court of Human Rights (ECHR)² compliant legal and procedural safeguards. This resulted in scrutiny of the existing AWI provisions and their compatibility with Article 5. Concerns were, and continue to be expressed that the current AWI regime is not adequate to meet Article 5 requirements.

In 2009 the UK Government ratified the UN Convention on the Rights of Persons with Disabilities (UNCRPD). The Scottish Government is committed to fully implementing the convention. A number of practitioners, stakeholders and academics have offered the view that the AWI Act as it currently stands is not fully compliant with the UNCRPD.³ In particular it has been suggested that a greater focus on support for exercising legal capacity is needed.

In 2011 the Public Guardian, after operating under the AWI for 10 years proposed a system of graded guardianships, which sought to address the issue of one size of guardianship attempting to fit all, which is not in-keeping with the principle of least restriction required by the Act.

In 2014, the UK Supreme Court issued a judgement in the case of P v Cheshire West⁴ which clarified that there is a deprivation of liberty for the purposes of Article 5 ECHR where ‘the person is under continuous supervision and control and is not free to leave and the person lacks capacity to consent to these arrangements’. The effect of this decision is that the vast majority of adults with cognitive impairment who are presently detained in care homes and hospitals in Scotland (other than those who are subject to compulsory treatment authorised by the Mental Health (Care and Treatment) (Scotland) Act 2003⁵ (the 2003 Act) could be regarded as deprived of their liberty and, unless subject to an underlying legal process, could be seen as causing a breach of rights under Article 5 ECHR.

¹ HLvUK(2005) 40EHRR32

² ECHR Article 5 – right to liberty and security of the person.

³ Essex Autonomy Three Jurisdictions report June 2016,p51 ‘Conclusions and recommendations’.

⁴ [2014]EWCOP 45

⁵ 2003 asp

Scottish Law Commission report

Following the decision on Bournemouth, the Scottish Law Commission, which had prepared the Report on Incapable Adults⁶ which led to the AWI Act, was approached by a number of bodies including the Mental Welfare Commission, ENABLE Scotland and the Mental Health and Disability Subcommittee of the Law Society of Scotland to examine the implications of this decision for the law in Scotland. The matter was included in their eighth programme of Law Reform and resulted in the Report on Adults with Incapacity in 2014.⁷

This report focussed on issues around deprivation of liberty for persons lacking in capacity. In making their recommendations, the Commission assessed recent case law from the European Court of Human Rights, and courts within the UK, including the Cheshire West decision, to identify the circumstances in which a placement in residential care accommodation or restrictions placed on a person in hospital for treatment or assessment would constitute a deprivation of liberty and must be authorised in law to comply with Article 5 ECHR.

The Commission recommended measures to prevent a person from leaving hospital, whether that person is in hospital for treatment or assessment, where the medical practitioner is of the view that the person is incapable of making decisions as to whether to leave hospital or not, and measures to authorise a significant restriction of the liberty of an incapable adult within a community setting by means of a 'statement of significant restriction'.⁸

The Scottish Government consulted on this report at the start of 2016. The main themes emerging from this consultation were:

- There is a compelling need to ensure a lawful process is in place for those persons who may need to be deprived of their liberty in community or hospital settings and lack capacity to agree to such a placement.
- The changes proposed by the Scottish Law Commission would result in a huge workload for an already pressurised system and workforce.
- Any changes to the law should take place within the context of a wider revision of AWI legislation.

In addition, the consultation paper sought views on what changes, if any, should be made to the current legislation. The most popular areas for change were:

- A move to a form of graded guardianship.
- Consideration of a change of jurisdiction for AWI cases from the Sheriff Courts to a tribunal.
- Creation of a short term /emergency placement order that can be used at short notice.
- Consideration of changes needed to implement the UNCRPD.

Scottish Government officials have worked with stakeholders and service users to develop these proposals for change, and this consultation paper sets out a number of detailed

⁶ Scot Law Com No 151, 1995

⁷ Scot Law Com 240, 2014.

⁸ SLC report appendix A

recommendations for reform of the legislation and seeks views on these and further areas for change.

Context

Adults are presumed to have capacity to make decisions about their own lives. But sometimes a lack of capacity to make decisions about one's life can occur, due to any number of factors, such as an acquired brain injury, neurological condition, mental illness or learning disability. At present, the largest group of people in Scotland who lose capacity do so as a result of dementia.

But a lack of capacity does not mean a person has no understanding of what is going on in their lives. And it certainly does not mean that a person lacking in capacity should not be fully involved in life decisions about them. The Adults with Incapacity (Scotland) Act sought to ensure decisions could be made for people when they were no longer able to take those decisions for themselves, but this should only happen when it will benefit the adult and such benefit cannot be reasonably achieved without the intervention. And in any action under the AWI Act, the present and past wishes and feelings of the adult should be taken account of.

How does the legislation work at present?

The AWI Act aims to help adults over the age of 16 who lack capacity to make some or all decisions for themselves. It covers people whose incapacity is caused by a mental disorder, such as severe dementia, learning disability, acquired brain injury or severe mental illness. It also covers people who are unable to communicate due to a physical condition such as a stroke.

The Act introduced arrangements for making decisions about personal welfare and managing the finances and property of individuals whose capacity to make or carry out specific decisions is impaired. It allows carers and others to have authority to do so on their behalf.

The law in Scotland presumes that persons over the age of 16 are capable of making personal decisions for themselves and of managing their own affairs. That presumption can only be overturned if there is evidence that the person lacks capacity to make a decision.

We must remember however that having a diagnosis of, for example, dementia does not mean that a person is necessarily unable to make decisions for themselves.

What incapacity means under the AWI Act

The AWI Act recognises that a person may be legally capable of some decisions and actions and not capable of others. The Act says that a person lacks capacity to take a particular decision or action when there is evidence they are unable to do so.

For the purpose of the AWI Act incapable means incapable of

- Acting on decisions; or
- Making decisions; or
- Communicating decisions; or
- Understanding decisions; or

- Retaining the memory of decisions

in relation to any particular matter due to mental disorder or inability to communicate because of physical disability.

This means no one should be treated as unable to make or act on decisions unless all practical steps have been taken to assist him or her.

The Act offers the following ways for managing and safeguarding a person's welfare, financial affairs or both:

Power of attorney (Part 2)

This is a means by which individuals, whilst they still have capacity, can grant someone they trust powers to act as their financial (known as continuing) attorney and/or their welfare attorney in case capacity is lost at some future point.

Access to funds scheme (Part 3)

This is an administrative application to The Office of the Public Guardian (OPG) to access the funds of the adult in order to meet his/her living costs.

Welfare and /or financial guardianship order (Part 6)

This can be applied for by one or more individuals acting together or by the local authority and is granted by the Sheriff. This is appropriate where the adult requires someone to make specific decisions on his/her behalf over the long term.

Intervention order (Part 6)

This may be applied for by an individual or a local authority and granted by the Sheriff to carry out a one off action or to deal with a specific issue on behalf of the adult.

Management of care home/ hospital residents' fund (Part 4)

A certificate of authority may be granted to a care home manager or hospital manager by the supervising body (Care Inspectorate or health board) where the resident lacks capacity to manage his/her own funds and there is no other arrangement in place.

Medical treatment decisions (Part 5)

A doctor is authorised to provide medical treatment to someone who is unable to consent subject to certain safeguards and exceptions. In addition, certain other health care practitioners, if accredited to do so, have authority to provide treatments which they are qualified to administer.

Medical research (Part 5)

Medical research involving adults who cannot consent is authorised subject to safeguards and conditions.

Principles to be followed (Part 1, s.1)

The AWI Act is underpinned by principles which anyone taking action under the Act must apply when deciding which measure under the Act will be the most suitable for meeting the needs of the individual. The principles must also be used whenever decisions need to be made on behalf of the adult. The Act aims to protect people who lack capacity to make particular decisions but also to support their involvement in making decisions about their own lives as far as they are able to do so.

Principle 1 – benefit

Any action or decisions taken must benefit the adult and only be taken when that benefit cannot reasonably be achieved without it.

Principle 2 – least restrictive option

Any action or decision taken should be the minimum necessary to achieve the purpose. It should be the option that restricts the person's freedom as little as possible.

Principle 3 – take account of the wishes of the adult

In deciding if an action or decision is to be made, and what that should be, account shall be taken of the present and past wishes and feelings of the adult as far as they can be ascertained. The adult should be offered appropriate assistance to communicate his or her views.

Principle 4 – consultation with relevant others

In deciding if an action or decision is to be made, and what that should be, account shall be taken of the views of the nearest relative and the primary carer of the adult, the adult's named person, any guardian or attorney with powers relating to the proposed intervention, and any person whom the Sheriff has directed should be consulted, in so far as it is reasonable and practicable to do so.

Principle 5 – encouraging the adult

Any guardian, attorney, or manager of an establishment exercising functions under this Act shall in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he or she has concerning property, financial affairs or personal welfare as the case may be and to develop new such skills.

GLOSSARY OF TERMS

“2003 Act” – The Mental Health (Care and Treatment) (Scotland) Act 2003

“Advocacy” - Advocacy means getting support from another person to help the adult express their views and wishes, and to help make sure their voice is heard. Someone who helps an adult in this way is called an advocate

“ATF” – Access to Funds. This is a scheme operated by the Office of the Public Guardian to access an incapacitated adult’s funds

“Article 5 ECHR” – Article 5 of the European Convention on Human Rights relates to the right to liberty and security. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in certain cases and in accordance with a procedure prescribed by law

“AWI” – The Adults with Incapacity (Scotland) Act 2000

“Care Inspectorate” - The Care Inspectorate regulates and inspects care services in Scotland to make sure that they meet the right standards. They jointly inspect with other regulators to check how well different organisations in local areas work to support adults and children

“Court of Session” - The Court of Session is the supreme civil court of Scotland, and constitutes part of the College of Justice; the supreme criminal court of Scotland is the High Court of Justiciary. The Court of Session sits in Parliament House in Edinburgh, and is both a trial court and a court of appeal

“ECHR” – The European Convention on Human Rights

“ECtHR” – The European Court of Human Rights. This is an international court established by the European Convention on Human Rights. It hears applications alleging that a contracting state has breached one or more of the human rights provisions concerning civil and political rights set out in the Convention and its protocols. An application can be lodged by an individual, a group of individuals or one or more of the other contracting states, and, besides judgments, the Court can also issue advisory opinions. The Convention was adopted within the context of the Council of Europe, and all its 47 member states are contracting parties to the Convention. The Court is based in Strasbourg, France

“ENABLE Scotland” - A Scottish charity, working for an equal society for every person who has a learning disability

“Essex Autonomy Project” - The Essex Autonomy Project is a collaborative, interdisciplinary research initiative based at Essex University in the School of Philosophy and Art History. It was founded in 2010 and work with academic researchers, practitioners and policy-makers across the UK. They completed a report in January 2017 titled ‘Three Jurisdictions Report: Towards Compliance with CRPD Art-12 in Capacity/Incapacity Legislation across the UK’

“European Court” – The European Court of Justice, or ECJ. The highest court in the European Union in matters of European Union law. It is tasked with interpreting EU law and ensuring its equal application across all EU member states

“Faculty of Advocates” - The Faculty of Advocates is an independent body of lawyers who have been admitted to practise as advocates before the courts of Scotland, especially the Court of Session and the High Court of Justiciary. The Faculty of Advocates is a constituent part of the College of Justice and is based in Edinburgh

“Law Society of Scotland” - The professional governing body for Scottish solicitors. It promotes the interests of the public in relation to the profession. The Society helps to shape the law for the benefit of both the public and the profession

“Mental Health Officer” - A mental health officer is a social worker who has special training and experience in working with people who have a mental illness, learning disability or related condition

“MHTS” – The Mental Health Tribunal for Scotland

“MWC” – The Mental Welfare Commission

“OPG” – The Office of the Public Guardian

“Section 22 Doctor” - A section 22 doctor is a medical practitioner approved by the local health board, or the State Hospital’s Board for Scotland for the purposes of section 22 of the Mental Health (Care and Treatment) Scotland Act 2003 as having special experience in the diagnosis and treatment of mental disorder

“Sheriff Appeal Court” - The Sheriff Appeal Court hears appeals from summary criminal proceedings in the Sheriff Courts and justice of the peace courts, and hears appeals on bail decisions made in solemn proceedings in the Sheriff Court. The Sheriff Appeal Court also hears appeals in civil cases from the Sheriff Courts, including the Sheriff Personal Injury Court

“The Commission” – The Scottish Law Commission (SLC). The Commission is Scotland's law reform body. It was established under the Law Commissions Act 1965 to make recommendations to Government to simplify, modernise and improve Scots law

“UK Supreme Court” - The Supreme Court of the United Kingdom is the supreme court in all matters under English, Welsh, Northern Irish law and Scottish civil law. It is the court of last resort and the highest appellate court in the United Kingdom, although the High Court of Justiciary remains the court of last resort for criminal law in Scotland

“UNCPRD” – The United Nations Convention on the Rights of Persons with Disabilities

“Upper Tribunal for Scotland” - The Upper Tribunal for Scotland hears appeals on decisions of the chambers of the First-tier Tribunal

References to legislation - all references to sections of legislation are to sections of the AWI act unless otherwise stated

CHAPTER TWO – SUMMARY OF PROPOSALS

WHAT CHANGES TO THE ACT ARE BEING CONSIDERED?

The AWI Act has long been a highly regarded piece of legislation and its approach of ensuring that solutions focus on the needs of the individual reflects the person centred approach that underpins much of Scottish legislation today.

We are proposing a number of changes that will maintain the overall shape of the legislation, but we hope that they will ensure the legislation is fit for the next twenty years and beyond. The proposals are intended to modernise the legislation, improve the extent to which it empowers disabled adults and simplify the complex process of guardianship to provide something more flexible and limited for the significant number of cases where a full court process adds little value.

Summary of proposals

This consultation paper contains detailed proposals for changes in the following areas:

- Enhanced principles within the legislation to reflect the need for an adult to have support for the exercise of legal capacity.
- The use of powers of attorney.
- Creation of graded guardianship.
- Judicial forum for cases under AWI legislation.
- Creation of a short term placement order.
- Creation of a right of appeal against a residential placement, or restrictions within a placement.
- Changes to authorisation for medical treatment.
- Changes to authority for research.

In addition the paper asks for views on the following:

- Supervision and support for guardians.
- Advance directives.

There will also be the opportunity to comment on any other matters within the AWI legislation that consultees may consider would benefit from review.

Other areas for change

But the proposals in this consultation paper contain only part of the story of change around this legislation. The Scottish Government is committed to fully ratifying the UN Convention on the Rights of Persons with Disabilities, and this will mean ensuring that support is given for persons who need it to exercise their legal capacity.

So, in parallel with this consultation paper, a scoping exercise is being carried out to find out what is currently happening across Scotland by way of support for decision making for those who need it.

Using the information from this exercise, working groups with a range of stakeholders will be set up with the aim of establishing a strategy for support for decision making that will underpin the AWI legislation.

What we are seeking to achieve is an over-arching support mechanism which will maximise the autonomy and exercise of legal capacity for persons with impaired capacity so that genuine non-discriminatory respect is afforded for an individual's rights, will and preferences.

In addition, the Scottish Government is committed to carrying out work to improve practice and develop consistent standards across law and medicine on the assessment of capacity.

Further announcements on this work around support for decision making and capacity assessments will be made in the summer of 2018.

Impact assessment

It is important to ensure that any legislation which may result from this consultation, which has the potential to impact on us all, is robust and durable, with no unintended consequences and that it takes account of all relevant perspectives, including equalities considerations and any potential financial and regulatory implications.

As part of the consultation process, we will be gathering information to enable us to assess the impact and costs of implementing any of the proposals, or indeed of not doing so, from the perspective of a range of interests.

CHAPTER THREE – RESTRICTIONS ON A PERSON’S LIBERTY

As mentioned in the last chapter, the Scottish Government consulted on the Scottish Law Commission’s report on Adults with Incapacity in 2016. The findings from this consultation were clear in stating that there is a need to ensure a lawful process is in place for those persons who may need to be deprived of their liberty in community or hospital settings and lack capacity to agree to such a placement. Chapter Twelve of this paper will consider hospital settings. We have sought a flexible approach to the matter for community settings.

Firstly, we are in agreement with the approach taken in the SLC report on AWI, namely that deprivation of liberty is not a particularly helpful term and we consider that using the term ‘significant restrictions on liberty’ can more accurately convey the range of measures which can reduce a person’s freedoms and curtail their liberties.⁹

Much importance has been placed on the Cheshire West case, as mentioned in Chapter One, but analysis of cases since that judgement has suggested further evolution of the jurisprudence in this field.¹⁰

We would suggest that significant restrictions on liberty are as much about how a person lives as where the person lives and it is important to distinguish between decisions as to where a person lives and the conditions that should apply there:

- If a regime looks like detention it does not lose that characteristic just because the person does not display opposition.¹¹
- If a regime does not look like detention but the adult displays opposition to staying there, then that should be considered as placing significant restrictions on that adult’s liberty
- A person may be perfectly content to agree to moving to another place of residence but may not agree with aspects of their care there which amount to significant restrictions on their liberty.
- A person may remain in the same residential setting but become subject to changes in aspects of their care which in themselves mean they become subject to significant restrictions on their liberty.

Our starting point is that we consider that a person may be considered as having significant restrictions placed on their liberty if:

- The adult is under continuous supervision and control and is not free to leave the premises;
- barriers are used to limit the adult to particular areas of premises;
- the adult’s actions are controlled by physical force, the use of restraints, the administration of medication or close observation and surveillance.

⁹ SLC report 240 para 4.48 et seq.

¹⁰ *KC v Poland* app no 31199/12, 25 November 2014, *Cervenka v Czech Republic* [2017] M.H.L.R. 195, *A-MV v Finland* app no 53251/13, 23 March 2017, *r-ferreira-v-hm-senior-coroner-for-inner-south-london*[2015] EWHC 2990 (Admin)

¹¹ See *Bournewood case* –confinement in a secure psychiatric hospital; *Cheshire West* –highly restrictive arrangements

But measures applicable to all adults living at a given place (other than staff) and which are intended to facilitate the proper management of the premises without disadvantaging adults excessively or unreasonably are not to be regarded as giving rise to significant restrictions (for example standard security cameras).

However, if an adult is able to express their valid consent to a placement, and / or any conditions of that placement, then we consider that that is sufficient for the placement, or the change in conditions to proceed. We consider that where it is clear that a person seeks through words or actions to express their wish to be in a given place and to receive care and treatment in a given manner, that may include significant restrictions on their liberty, then in keeping with the aims of Article 12 of UNCRPD, that wish can be considered as giving valid consent for the purposes of Article 5 ECHR.

We therefore consider that in the first instance, where a placement or change in a care regime is being considered for an adult which may result in them being subject to significant restrictions on their liberty, then every effort should be made to support the adult to understand the proposal and express their view on the matter. The work referred to in Chapter Two, on developing a strategy for support for decision making will form a model for such cases.

If no consent is forthcoming but it is clear that there is no apparent objection on the part of the adult to the move, and all other interested parties are in agreement with the move then a grade 2 guardianship order with appropriate powers can be sought. Grade 2 guardianships will be considered by a Sheriff in chambers or a single legal tribunal member, on the basis of documents received. Chapter Seven provides more detail on this proposal.

If however no consent is forthcoming, and there is objection from the adult or other interested parties, then an application for guardianship at grade 3 may be sought, whereby we suggest that a full hearing in front of a Sheriff, or a tribunal will consider the proposal. Again Chapter Seven provides full detail on this proposal.

If a person has prepared a valid power of attorney with the relevant powers, then with the changes proposed in Chapter Five, we consider that this can be relied upon to authorise a move to a setting where there may be significant restrictions on a person's liberty.

Chapter Ten proposes the creation of a short term placement order, which may be used to move a person to accommodation at short notice, where no other authority exists, the person is unable to consent to the move because of lack of capacity and there is a need to move the person quickly for their own safety and wellbeing. In addition Chapter Ten proposes an order for cessation of significant restrictions of liberty, to enable a person to raise proceedings to challenge continuation of a placement or conditions in that placement.

We consider that these options should give a range of lawful processes that can be relied upon to authorise placements which significantly restrict a person's liberty.

QUESTIONS

Do you agree with the overall approach taken to address issues around significant restrictions on a person's liberty?

In particular we are suggesting that significant restrictions on liberty be defined as the following;

- **The adult is under continuous supervision and control and is not free to leave the premises**
- **barriers are used to limit the adult to particular areas of premises;**
- **the adult's actions are controlled by physical force, the use of restraints, the administration of medication or close observation and surveillance**

Do you agree with this approach? Please give reasons for your answers.

Are there any other issues we need to consider here?

Article 12 UNCRPD – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

CHAPTER FOUR

PRINCIPLES OF THE ADULTS WITH INCAPACITY LEGISLATION (Part 1, s.1)

The starting point for any actions under the AWI legislation is that a person is assumed to have capacity to make and understand decisions unless it is shown to be otherwise. Assessments of capacity must be decision specific.

The principles of the AWI legislation are intended to make sure that a person's independence of thought and action is maintained as far as is possible when interventions under the legislation are being considered.

Anyone taking action under the AWI Act, or thinking about taking action under the Act has a legal duty to implement the principles.

When the AWI legislation came into force, the principles of the Act reflected international human rights standards as contained within the European Convention on Human rights, and were widely welcomed. But with the advent of the UNCRPD, we believe that more needs to be done to maximise the autonomy of those persons who may have some form of impairment in their ability to make decisions for themselves. In particular, we believe the requirements of Article 12 of the UNCRPD should be reflected within the principles of the AWI legislation.

Our proposal is that we create a new principle stating:

There shall be no intervention in the affairs of an adult unless it can be demonstrated that all practical help and support to help the adult make a decision about the matter requiring intervention has been given without success.

Amendment to the code of practice will set out what is expected by way of practical help and support. We believe this principle will help ensure that interventions under the AWI legislation are only taken when absolutely necessary and that priority is given to supporting individuals to continue to make decisions for which they retain the capacity to make, and to influence proxies where they lack capacity to intervene in ways which are most aligned to the adult's will and preferences as far as it is safe and practicable to do so.

In addition, it has been recommended by the Essex Autonomy Project that actions which contravene the person's known will and preferences should only be permissible if it is shown to be a proportionate and necessary means of effectively protecting the full range of the person's rights, freedoms and interests.

At present the AWI principles state:

- there shall be no intervention in the affairs of an adult unless the person responsible for authorising the intervention is satisfied that the intervention will benefit the adult and such benefit cannot reasonably be achieved without the intervention

- and such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention
- In determining if an intervention is to be made and, if so, what intervention is to be made account shall be taken of the past and present wishes and feelings of the adult so far as they can be ascertained, the views of the nearest relative and primary carer, and any guardian, continuing attorney or welfare attorney who has powers relating to the to proposed intervention.

However, it is arguable that these principles do not go far enough to reflect the requirements of Article 12 of the UNCRPD in ensuring the the rights, will, and preferences of adults who may be subject to intervention under the AWI legislation are respected.

We therefore would like views on whether a further principle may be required to ensure that an adult's will and preferences are only contravened in actions under the Act if it is shown to be a necessary and proportionate means of protecting the full range of the person's rights and freedoms.

QUESTIONS

Do you agree that we need to amend the principles of the AWI legislation to reflect Article 12 of the UNCRPD? `

Does our proposed new principle achieve that?

Is a further principle required to ensure an adult's will and preferences are not contravened unless it is necessary and proportionate to do so?

Are there any other changes you consider may be required to the principles of the AWI legislation?

Please give reasons for your answers.

CHAPTER FIVE – POWERS OF ATTORNEY AND OFFICIAL SUPPORTER

How does the law work at present?

Part 2 of the Act deals with powers of attorney. Anyone who wants to make plans for the future can make a power of attorney under Part 2 of the AWI Act. The person who makes the power of attorney is known as the granter and the person appointed is known as the attorney. A power of attorney can be useful both for someone anticipating permanent incapacity or to deal with a period of temporary incapacity. Powers of attorney can deal with financial (s.15) and / or welfare (s.16) matters.

A continuing power of attorney, often known as a financial power of attorney, can be used immediately on registration with OPG and may continue to have effect in the event of the granter becoming incapable in relation to decisions about the matter to which the power of attorney relates. A welfare power of attorney relates to decision making in relation to the granter's health or personal welfare and can only come into effect on the onset of incapacity in relation to the powers granted. The same person can be appointed to deal with financial and welfare matters or different people can be appointed.

Most people ask a solicitor to draw up a power of attorney but it can be done without a solicitor. It needs to be expressed in writing, the granter must say how his/her incapacity must be determined if the authority of the attorney starts with the incapacity of the granter, and it must incorporate a certificate from a practising solicitor, member of the Faculty of Advocates or registered and licensed medical practitioner stating the granter has been interviewed immediately before subscribing the document, understands the nature and extent of the power of attorney and is not acting under undue influence.

Continuing or welfare attorneys are obliged to keep records of the exercise of their powers, however there is no direct supervision by the Public Guardian or local authority. Anyone with an interest in the property, financial affairs or personal welfare of the granter of a power of attorney can notify the Public Guardian or the local authority respectively of any concerns they have. The Public Guardian and local authority can investigate any complaints in relation to continuing and welfare attorneys respectively. Interested parties can also make an application to the Sheriff who can ordain a continuing welfare attorney to be subject to the supervision of the Public Guardian or the local authority respectively, as well as giving accounts or reports to each body.

What changes are we proposing?

The Scottish Government believes that a power of attorney continues to be a really useful way of ensuring your autonomous choices are still given effect. But we are aware that sometimes arguments have arisen over whether the power of attorney document is clear about when it comes into force and whether it gives enough authority to make certain decisions about a person's care and welfare.

Welfare attorneys are appointed by a person in the event of their future incapacity, and their powers come into effect when the granter is unable to take welfare decisions, or the attorney reasonably believes this.

Section 16(ba) of the Act states that the welfare power of attorney must state that the granter has considered how a determination as to whether he is incapable in relation to decisions about the matter to which the welfare power of attorney relates. This however does not always translate into clear directions within the power of attorney itself as to what test must be met before the attorney can exercise the powers given by the granter.

Without clarity on this matter there could be perceived a risk that a power of attorney comes into effect in a manner and at a time that the granter did not intend or consent to. We would therefore like views on whether there is a need to require that a power of attorney contains clear instructions on how the granter wishes their incapacity to be determined before a power comes into effect.

There is also concern that powers of attorney do not provide sufficient safeguards to ensure an adult is not subject to unlawful significant restrictions on their liberty if the authority to create such restrictions rests solely in a power of attorney. Welfare powers of attorney are not subject to review and supervision in the way guardianship orders are.

In particular, the Mental Welfare Commission in their 2015 Advice note on deprivations of liberty states:

“Unfortunately the Act is unclear as to the extent to which welfare attorneys may consent to arrangements that amount to deprivation of liberty where the adult appears to resist or oppose them (even where the power of attorney actually permits this), nor where a power of attorney can use or authorise restraint. Under these circumstances it is highly recommended that a welfare attorney does not consent to such measures on behalf of an unwilling granter, and where they are uncertain how to proceed apply to the Sheriff for direction under section 3 of the Adults with Incapacity Act as to their powers”.¹²

We have been made aware of a number of cases where the existence of a welfare power of attorney has been deemed to be insufficient for the decisions required and an application for welfare guardianship has been required which has caused additional delay and distress to the families concerned.

However we consider that in the same way that adults who have the capacity to do so can agree to significant restrictions on their liberty, an adult can consent to these restrictions should they arise in the future, subject to certain safeguards. The ECtHR has confirmed that a person can only be considered to be deprived of their liberty if there is no valid consent to that position.¹³ We consider that this principle can be applied to consent by an adult in advance of losing capacity, as long the consent is valid and relates to specific arrangements.

We are proposing that a set of advance conditions should be put in place if the granter of a power of attorney wishes the attorney to rely on them in the future in the event of the granter needing care in an environment that may result in significant restrictions on their liberty.

¹² MWC Advice note Deprivation of Liberty (update 2015)

¹³ HLvUK (2005) 40 EHRR 32

We would suggest these advance consent conditions would need to follow specific wording and meet criteria to be set out in regulation. These advance consent conditions would enable the adult to consent to specified arrangements enabling his/her care and treatment to be put in place at a later time, which, if the person did not consent to them would give rise to a significant restriction on their liberty. There would require to be regular reviews of the arrangements, and such arrangements would also benefit from the right of appeal proposed in Chapter Ten. A general declaration would not suffice otherwise there might be a danger that a person could forego his/her article 5 protections for an unknown period of time in unforeseen circumstances.

EXAMPLE

Angus had asked his daughter to act as his power of attorney for a number of welfare and financial matters in the event that he was unable to make decisions for himself about those things in the future.

He remembered however that his elderly mother had developed severe dementia which had caused her to wander from her home putting herself at risk. He spoke to his daughter about it and decided that if he was similarly affected by dementia later in life, he would want his daughter to be able to make decisions that could keep him safe, and ease her worry as he remembered how much upset his mother's behaviour has caused him. He therefore spoke to his solicitor and had an extra section added into his power of attorney which clearly stated that if he was putting himself or other people at risk by his actions then his daughter had the authority to choose a place for him to live where he would be kept safe, even if that meant his liberty was restricted. He also added a condition that any placement had to be kept under regular review.

QUESTIONS

Do you agree that there is a need to clarify the use of powers of attorney in situations that might give rise to restrictions on a person's liberty?

If so, do you consider that the proposal for advance consent provisions will address the issue?

Please give reasons for your answers.

Is there a need to clarify how and when a power of attorney should be activated?

If you have answered yes and have views on how this should be done, please comment here.

OFFICIAL SUPPORTER FOR DECISION MAKING

Powers of attorney are well tried and tested models of ensuring that an adult's will and preferences are followed, even if the adult is no longer able to articulate their will or preference themselves. But sometimes a person may need a bit of help and support in making a decision about a certain matter and would like to involve a trusted family member or friend in coming to a decision, or understanding a situation without losing the authority to make that decision for themselves.

We know that Article 12 of the UNCRPD requires States to provide help to people who may need support in making decisions. That help can come in many ways, one of which is support from a family member or friend.

Certain countries already have a system of persons who can provide support for decision making. Canada is a pioneer in this field with a number of examples of supported decision making regimes. In British Columbia, the Representation Agreement Act 1996, allows adults to enter into an agreement to appoint someone to support them in decision making, with that person being given legal recognition.

In the state of Victoria, Australia anyone aged 18 or over can appoint a person to become a supportive attorney for them if they have the capacity to make such an appointment. A person who makes a supportive attorney appointment, known as the principal, gives power to the person they appoint to access or provide information about them to organisations (such as hospitals, banks and utility providers), communicate with organisations, communicate their decisions and, give effect to their decisions.

The intention is that a supportive attorney who supports the principal to make and act on their own decisions can increase the independence and self-reliance of the principal.

We are proposing that a person who has capacity to understand the consequences of that decision can appoint an official supporter, who can help the person understand situations and make decisions but does not have the authority to make decisions on behalf of the adult. The supporter would have access to as much information as the adult would wish but unless a point is reached where the adult no longer has capacity to understand the implications of a decision, **the adult would always make the decision**. The supporter could become an attorney for the adult, if the adult wished that, but equally someone else could be appointed as an attorney.

We would also like views on how a supporter might be appointed. One option would be for a power of attorney to contain an appointment of a supporter, and for the supporter to be registered in the same way as an attorney is as present. Supportive attorneys in Victoria, Australia are appointed by a form signed by the principal in front of witnesses but at present are not registered, which is another model that could be considered.

EXAMPLE

Oliver's partner used to deal with all the financial matters in their household. After his partner's death, Oliver was struggling to understand how to manage his money, as the bank accounts were a mixture of online accounts and more traditional bank accounts. Oliver asked his niece Laura if she would be his official supporter and help him manage his money. Laura was happy to do so. She was copied into correspondence from the banks and helped Oliver amalgamate his accounts so that he was able to manage his money more easily.

Oliver then had to go to hospital to see about having his cataracts done. As his official supporter, Laura was copied into correspondence about his appointments and was able to ensure that Oliver got to all his appointments on time, understood fully what the procedures involved and helped him to reach a decision about his treatment that he was happy with.

QUESTIONS

Do you think there would be value in creating a role of official supporter?

If you have answered yes, please give us your views on how an official supporter might be appointed.

Countries that have created a role of supported decision maker have used different names, such as supportive attorney in Australia, or a 'Godman' in Sweden, meaning custodian. We have suggested 'official supporter' Do you think this is the right term or is another term preferred?

CHAPTER SIX

CAPACITY ASSESSMENTS

As mentioned in the introduction, the Scottish Government is carrying out work over the coming months to find ways of developing consistent standards across law and medicine on the assessment of capacity for the purposes of this legislation.

It has been suggested to us that as part of that work we consider whether it would be appropriate for other professionals to carry out capacity assessments. At present for a continuing or welfare power of attorney to be valid, it needs to incorporate a statement to the effect that a solicitor, advocate or registered medical practitioner has interviewed the granter immediately before the document was signed and was satisfied that the granter of the power of attorney understands its nature and extent and has no reason to believe the granter is acting under undue influence.

For guardianship orders, a registered medical practitioner and a doctor authorised under section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003, are required to examine and assess the adult and report on the adult's incapacity as part of the application for guardianship, or an intervention order, where incapacity by mental disorder has been craved.

Under section 47 of the AWI Act, medical treatment for adults with incapacity can be authorised by any of the following:

- The medical practitioner primarily responsible for the medical treatment of the adult.
- A person who is a dental practitioner; ophthalmic optician; registered nurse or an individual who falls within a description of person as may be prescribed by Scottish Ministers.

Chapter Twelve of this consultation paper contains proposals for change around section 47 of the AWI Act.

However we would like your views on whether we should extend the range of persons who may be able to carry out capacity assessments for the purposes of guardianship orders to include a list of professionals similar to the approach taken for section 47. And if so, which other professionals do you consider might be appropriately placed to assess an individual's capacity?

DEFINITION OF CAPACITY

The AWI Act at s.1(6) currently defines capacity in the following terms:

‘Incapable means incapable of a) acting, b) making decisions, c) communicating decisions, or d) understanding decisions or e) retaining the memory of decisions, as mentioned in any provision of this Act by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack of or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid’.

However, because incapacity in most cases is founded on having a mental disorder, it could be argued that this appears to breach the requirements of the UNCRPD, that measures affecting legal status should be non-discriminatory, particularly given that measures under the AWI Act could give rise to a person having substantive rights removed. The approach behind the UNCRPD is that provisions that govern interventions, or legitimately restrict or deprive a person of liberty should be generic and equally applicable to all persons regardless of the type of diagnosis, mental or physical.

But we consider that in order to make fully informed decisions about the definition of capacity it would be helpful to have the findings of the report on learning disability and autism which is currently underway, therefore this consultation does not consider this issue but it is a matter the Scottish Government will return to when the review of learning disability and autism in the Mental Health (Care and Treatment) (Scotland) Act 2003 has concluded.¹⁴

QUESTIONS

Should we give consideration to extending the range of professionals who can carry out capacity assessments for the purposes of guardianship orders?

If you answered yes, can you please suggest which professionals should be considered for this purpose?

¹⁴ The review was announced by the then Minister for Mental Health in spring 2015 and is expected to conclude in 2019.

CHAPTER SEVEN

GRADED GUARDIANSHIP

Article 12 of the UNCRPD emphasises that every available support must be made to persons with disability in order for them to exercise their legal capacity. But it also requires measures that relate to the exercise of legal capacity must provide safeguards to prevent abuse in accordance with international human rights law. These measures must respect the rights, will and preferences of the person, be free of conflict of interest and undue influence, be proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to review by a competent, independent and impartial authority.

To meet these requirements, there is our proposal for an additional principle for the AWI Act stating that there shall be no intervention in the affairs of an adult unless it can be demonstrated that all practical help and support to make a decision about the matter requiring intervention has been given without success. This will be underpinned by our work on developing a strategy for support for decision making in Scotland.

But we consider that even with increased provision for support for decision making, there will always be a need to provide guardianship orders for those persons who, despite all practical support being given to them, lack the capacity to make decisions on certain matters for themselves.

However guardianship powers should be sought only where the adult is unable to take their own decisions and should take into account the adult's will and preferences as far as they can be ascertained.

Guardianships should, at present, meet most of the requirements of Article 12, but in speaking to people about the way the system works just now, we have been told that sometimes wide ranging powers are being granted unnecessarily to guardians to avoid the need to return to court, and go through another complex process in the event of the adult's needs changing. We have also been told that the process of obtaining a guardianship is generally not inclusive of the adult. The adult very rarely attends court and is often unaware of the process.

So we have suggested a form of graded guardianship that can be more easily tailored to the adult's circumstances, that can apply for only the time necessary and with safeguards that will be proportionate to the degree to which such measures affect the person's rights and interests.

In suggesting the changes that are in this consultation, we are aiming to make the application process simpler and more user friendly, as well as making it easier for an adult to attend a hearing on their case, if they so wish. In addition, in Chapter Eight we consider proposals for changing the forum for AWI cases from the Sheriff Court to the Mental Health Tribunal for Scotland.

Guardianship law as it stands (s.57-79A)

Presently, guardianship cases are decided by the Sheriff Court which is most local to where the adult lives. Guardians are appointed by the Sheriff.

An application to court is generally made by a solicitor and will ask the Sheriff to appoint the guardian(s), listing the welfare and financial powers which are requested. The application will give a brief background of the adult and the reasons for the guardian's appointment. It will also list any interested parties, in order that the Sheriff can instruct that they are sent a copy of the application.

The application has to contain certain reports as follows:

- A report from a doctor, generally the adult's GP, from an examination carried out not more than 30 days before the lodging of the application. This should state that the adult is incapacitated in relation to the powers sought.
- A report from a doctor who has specialist experience in the diagnosis and treatment of mental disorder. Again, the examination has to be carried out not more than 30 days before the lodging of the application and it should state that the adult is incapacitated in relation to the powers sought.
- Where the application relates to welfare, a report from a Mental Health Officer containing their opinion as to the appropriateness of the order sought. This will be based on an interview and assessment of the adult carried out no more than 30 days before the application is lodged. It will also contain their opinion on the suitability of the nominated individual to be guardian. In coming to their views, the Mental Health Officer will consider each of the principles of the Adults with Incapacity (Scotland) Act 2000 (AWI Act) and seek out the views of the adult and interested parties. Where the application relates only to the property and financial affairs of the adult, then a report from a person who has sufficient knowledge to make such a report is required. This will follow the same format and have the same requirements as the Mental Health Officer report.

Once the application is received at court, it will then be sent back to the applicant with a court hearing date and an instruction from the Sheriff to send the application to interested parties, allowing them a reasonable time to respond before the hearing is due.

All interested parties can attend the hearing and have their say on the application. The Sheriff can continue the matter to another hearing for a number of reasons. These include ensuring all interested parties have received the application and had enough time to respond and to receive any further reports.

Once the Sheriff grants the guardianship he/she informs the applicant and the Office of the Public Guardian of the powers granted. If there are financial matters the Sheriff may well have set an amount of caution that the guardian has to find before acting. This is an insurance bond to protect the adult against misuse of their funds. Once the guardian has found caution then the Office of the Public Guardian will issue them with their certificate of appointment. If no caution is required then the Office of the Public Guardian will issue the certificate of appointment on receipt of the order from the Sheriff.

Graded system

To address the concerns people have about the way guardianship works at present, we are proposing a change to a graded system of guardianship. The changes aim to create a system whereby it will be easier to seek only those guardianship powers that are absolutely necessary to safeguard the finance and welfare of an adult, leaving the adult to make many other decisions about their lives.

We are suggesting a move to 3 grades of guardianship covering both financial and welfare matters, with the complexity of the application increasing as the level of powers sought increases.

A Grade 1 guardianship would be used for day to day welfare matters and for managing simpler financial affairs under a threshold to be set by regulations.

A Grade 2 guardianship would be used for managing property and financial affairs above the threshold set by regulations, as well as more complex welfare needs such as a move of accommodation where there might be a significant restriction on a person's liberty.

A Grade 3 guardianship would be used for all the financial and welfare powers of Grade 2 and is used where there is some disagreement between interested parties, including the adult, about the application.

Chapter 8 seeks views on what forum should be used for cases under AWI legislation going forward so in this chapter we refer to either the sheriff or the tribunal considering cases. These options are discussed in more detail in the next chapter.

Grade 1 Guardianship

When speaking to people, we have often heard that in some situations the present guardianship process is too onerous for the powers that are required. We think there is room in the guardianship system for a simple administrative application, which will be quicker to obtain and will be suitable for a significant proportion of guardianship applications.

For example, if a tenancy agreement needs to be signed, or a person needs the intervention of a guardian to manage an estate where there are only state benefits to consider, the current system is very cumbersome. And if a guardianship is required where a child with severe learning disabilities is turning 16, but is still being cared for by parents, again the current process can be complex and burdensome for families.

We are proposing that a wide range of welfare and financial powers can be applied for under a simple grade 1 guardianship application. Only the powers that are absolutely required to address the adult's needs should be applied for, but at grade 1 it will not be possible to apply for authority to change the adult's accommodation, which includes moving the person to a care setting, selling or purchasing housing for the adult, or dealing with financial estates over a threshold to be determined by regulations. We consider in most cases however, the signing of a tenancy agreement would be a matter that could be managed by a grade 1 guardianship.

All interested parties must agree to the application for it to be granted and most importantly, the will and preferences of the adult must as far as is possible, be shown to be in step with the application.

It is proposed that in most cases, a grade 1 guardianship order may be applied for without formal legal advice. We intend that a standard application form, available online and accompanied by certain reports would be submitted by the person applying to be guardian, to the Office of the Public Guardian (OPG). Of course legal advice could be sought if required and we intend that as now, solicitors could also apply to be a guardian at this grade themselves.

For all applications, a certificate of incapacity will be required, stating that the adult is incapable in relation to the powers sought. If only financial powers are required, then an OPG guardian's declaration will be required. If both welfare and financial powers are sought then a local authority social work report will be required as well. We provide more detail on this in the following paragraphs.

Requirements for Grade 1 Applications

Our proposal is that an application for grade 1 guardianship will be made by a standard form which will be available online and can be completed by the applicant without the need for legal advice.

The form will contain a list of the welfare and financial powers available at grade 1 and the applicant will select the powers they seek. The details of the applicant, adult, guardian(s), nearest relative and interested parties would also require to be entered in the form.

As this is an administrative process, there will be no discretion on the part of the OPG to decide if any additional powers should be suitable for grade 1.

In addition to the completed application form, the following documents will also be required:

OPG guardian declaration

This is a questionnaire from OPG that the applicant would have to complete. The purpose of this is to assess the suitability of the applicant to manage the adult's finances. It will consider the applicant's current financial circumstances and their awareness of the duties of a guardian and preparedness to take these duties on.

Local Authority Social Work Report for Guardianships Seeking Welfare Powers

We suggest that a local authority social worker would be able to provide a report commenting on the necessity of the application in relation to the appointment of the welfare guardian and also in relation to the AWI principles. For applications that are only seeking financial powers, then a local authority social work report will not be required.

Incapacity Certificate

Given that the adult should be incapacitated in relation to the powers sought, there needs to be proof of this incapacity at each level. Powers sought would have to be specified at each level and therefore the incapacity certificate should refer to the powers chosen, in order to make the incapacity decision specific. We propose that the class of people able to sign

this certificate could be extended to include a wider range of professionals with appropriate training. We have asked for views on this in Chapter Six.

Duration of the order

We propose that given the simpler nature of the application and the powers requested, an initial grade 1 guardianship application can only be granted for a maximum of 3 years. The applicant will be required to enter the reason for the application and how they have complied with the principles of the Adults with Incapacity legislation, in particular what they have done to ascertain the adult’s will and preferences. This will help the interested parties on receipt of the application, to see if it corresponds with their knowledge of the adult’s circumstances.

Intimation

Once OPG receive the application and they have checked that all reports are in place, then they will return the documents to the applicant for them to send it to interested parties, including the adult. Interested parties are served with a copy of the application and will be the adult, the nearest relative of the adult, the primary carer of the adult (if any), any guardian, continuing attorney or welfare attorney of the adult who has any power relating to the application or proceedings, the Public Guardian, the local authority and the Mental Welfare Commission (where appropriate). Once the applicant has done this, they will have to send proof to OPG.

If for any reason it was considered by the applicant that that the adult should not be sent the application, then the application should automatically be transferred to a Grade 3 application because of the significance of omitting any views of the adult from the process. At grade 3 a certificate from a s.22 doctor stating that receipt of the application would cause a serious risk to the adult’s health will be required in order that the Sheriff or Mental Health Tribunal can consider the matter. This would be made clear within the guidance for Grade 1 applications.

Interested parties will get an opportunity to raise any concerns they have about the application. The local authority, will also be notified of every application, which will add an additional safeguard as they will be able to advise if they are aware of the applicant and whether they have any concerns about him or her. Interested parties would be given 21 days to lodge any objections. If there were any objections then the case would be referred to a full legislative hearing for consideration. Additionally, if the adult or interested parties requested a hearing, then the application should be considered by a full legislative hearing.

If there are no objections then the application may be granted after the 21 day period.

EXAMPLE POWERS FOR GRADE 1

Grade 1 – Administrative

We propose that a list of fixed powers as follows be available in an application form for the applicant to choose from:

Welfare	Financial Powers
To decide what day to day care may be appropriate for the adult.	To enter into a tenancy agreement for the adult, including negotiating, concluding and

<p>To consent to any medical treatment not specifically disallowed by the Act or procedure or therapy of whatever nature and provide access for that, or refuse such consent.</p> <p>To decide, alone or with others, on the level of care which the adult may require.</p> <p>To make such decisions regarding the adult's social and cultural activities.</p> <p>To exercise any rights of access the adult has in relation to personal data and records.</p> <p>To arrange for the adult to undertake work, education or training.</p> <p>To take the adult on holiday or authorise someone else to do so.</p>	<p>implementing such an agreement.</p> <p>To open, close, operate, any account containing the adult's funds including those held in common with other persons to a maximum value to be determined by regulations.</p> <p>To claim and receive on the adult's behalf all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which the adult is entitled.</p> <p>To make an application for self-directed support on the adult's behalf; To claim and receive self-directed support in order to purchase care services appropriate for the adult, to employ a personal assistant or contract with a care provider and pay for services and care utilising self-directed support payments and arrange for employer's liability insurance on the adult's behalf.</p> <p>To sign and endorse any cheques, deposits, receipts or bank drafts issued and to be issued in the adult's name or made payable to the adult.</p> <p>To sign and deliver deeds or documents</p> <p>To make all tax returns and adjust and settle any claim for tax.</p> <p>To be allowed financial information concerning the adult.</p> <p>To require disclosure any document or information regarding the adult, however confidential, including testamentary documents.</p> <p>To pay the adult's household expenses.</p> <p>To effect, pay the premiums on, alter or surrender any insurance policy.</p> <p>To buy, lease, sell and otherwise deal with any interest the adult may have in property of any kind or description (excluding heritable property – houses, flats etc) and wherever situated.</p> <p>To borrow and grant security for any sum</p>
---	---

	<p>and to pay the interest and capital on any loan taken out by the adult on the adult's behalf.</p> <p>To receive or renounce any testamentary or other entitlements; to grant Deeds of Covenant or make other provision for the adult's estate; to set up any form of Trust.</p> <p>To pay for private medical care and residential care costs.</p> <p>To pay any debt or claim owing by or to the adult.</p> <p>To make gifts on behalf of the adult, subject to the authorisation of the public guardian, including any limits on the size of such gifts or the potential recipients.</p> <p>To pay for the adult to go on holiday and for the expenses of any accompanying carer/carers.</p> <p>To purchase out of the adult's income or capital, a vehicle or any other equipment which may be required for the adult's benefit.</p> <p>To employ Bankers, Brokers, Solicitors Counsel, Accountants, Managers, Factors or Agents of any kind for the management of any of the adult's affairs, other than delegating powers to run the guardianship, at the usual professional rate of payment.</p> <p>To implement such tax planning or similar arrangements as may deem suitable.</p> <p>To incur expenditure on others as, in judgement, acting reasonably, the adult would have done if consulted or able to be consulted; including expenditure for any children or other dependants of the adult.</p>
--	---

Grade 2 Guardianship applications

We intend that grade 2 guardianships will be available for people who need help with perhaps a more complex set of needs and in particular, who may need to move accommodation. In addition grade 2 guardianships will be required for the management of larger estates, above the grade 1 threshold.

We are suggesting that all the powers that are available at grade 1 can be sought at grade 2, as well as the ability to ask for any other power that might be deemed necessary. In particular, it will be possible to seek powers that may be needed to manage financial estates of all values at this level, such as powers relating to the sale and purchase of housing. The sale and purchase of housing will be subject to the consent of the Public Guardian. If an adult needs to move accommodation, and that move will result in significant restrictions on a person's liberty, then authority for such a move may be sought under a grade 2 application. An independent medical report will be required in addition, stating the necessity of such a move.

Similarly if changes are being made to a person's care regime, which will result in significant restrictions on a person's liberty then authority for such changes may be sought under a grade 2 application.

As is the case with applications at grade 1, all interested parties would have to agree to the application, with the will and preferences of the adult being sought and needing to be in line with the powers sought. Interested parties are served with a copy of the application and will be the same as in grade 1, with the addition that the Sheriff or legal tribunal member can direct any other person to be served with a copy of the application. If any of the interested parties, or the adult themselves do not agree with the proposals, then the application would have to be made at the higher grade 3 level.

The proposal for grade 2 applications, is that the application would be examined by either a Sheriff in chambers or a legal member of the Mental Health Tribunal. This would be a paper only exercise, with either of the two looking at the documents submitted and coming to a decision, without a hearing.

Unlike at grade 1, where there will be a standard application form to be completed, a grade 2 application will require a summary application to the court or the tribunal. There would be no template powers at this grade and it is envisaged that solicitors would be involved in drawing up the powers required. Again it is important that only the powers required are sought. Each application should be unique to the needs of the adult. We do not intend there to be an application form at grade 2. The details contained in the application form at grade 1 should be contained in the application to the court or Mental Health Tribunal.

Reports required for Grade 2 applications

Incapacity Certificate

For all applications at this level, we propose that one incapacity certificate signed by a s.22 doctor is required, along the same lines as the present guardianship incapacity certificate. The difference would be that a second medical practitioner certificate would not be required.

OPG guardian declaration

For applications seeking financial powers, an OPG declaration will be required. This would be a separate form to be completed and submitted along with the application. The purpose of this is to assess the suitability of the applicant to manage the adult's finances. This will be considered from the perspective of their current financial circumstances and also from their awareness of the duties of a guardian and preparedness to take these duties on.

Mental Health Officer Report when welfare powers are sought

For those applications where welfare powers are sought, we propose that a mental health officer's report is required along the same lines as present guardianship applications. The report should consider the suitability of the proposed welfare guardian and the powers proposed. The Mental Health Officer would also require to have consulted the nearest relative, primary carer and any continuing/welfare attorney or guardian or named person. Interested parties are omitted from this requirement, to reduce the extensive number of reports that are currently required in some cases.

Medical report

For those cases where a change of accommodation is required, and:

- The adult is unable to consent to the change of accommodation
- The change of accommodation will result in the adult being subject significant restrictions on their liberty

then the medical report prepared by the s.22 doctor, will be required to make specific comment on the necessity of the change in accommodation and the restrictions that will be in place, are necessary for the benefit of the adult.

If the move is inconsistent with the will and preferences of the adult, then the matter must be considered by a full hearing as with a grade 3 guardianship application.

Duration of the order

The length of the order would be requested in the application and we propose a maximum of 5 years for a grade 2 application.

The applicant will be required to give the reason behind the application and how they have complied with the principles of the Adults with Incapacity legislation, including in particular what they have done to ascertain the adult's will and preferences.

Intimation

Once the Sheriff Court or Mental Health Tribunal receive the application and they have checked that all reports are in place, then they will return the documents to the applicant for them to send it to interested parties, including the adult.

If for any reason it was considered by the applicant that that the adult should not be sent the application, then the application should automatically be referred to grade 3 because of the significance of omitting any views of the adult from the process. At grade 3, a certificate from a s.22 doctor stating that intimation would cause a serious risk to the adult's health will be required in order that the Sheriff or legal member of the Mental Health Tribunal can consider the matter. This would be clearly set out in guidance for Grade 2 applications.

If there is any disagreement in relation to the application, for instance from the adult or other interested parties, then a full hearing should be convened.

And as with grade 1 applications, if an adult or interested party requests a hearing, then the application should be considered by a full hearing.

A single legal panel member or Sheriff in chambers would decide on whether the application should be granted and would be sent the application, along with any objections or queries, by the administrative staff after the 21 day period had expired.

If there are any objections the legal panel member/Sheriff would refer the matter to be considered by a full hearing. If there are no objections, or if the objector is now satisfied, then the application could be granted after the 21 day period.

Grade 3

We intend that grade 3 guardianship applications should be made only where the adult or any interested party might disagree with the application, whether it seeks welfare or financial powers or both. Interested parties at grade 3 are the same as grade 2, with the Sheriff or full tribunal directing if any other person should be served with the application. The application would be either be made directly at grade 3, or it would have been transferred from an application originally made at a lower grade. The process would be very similar to the existing guardianship process.

Where OPG, local authority or Mental Welfare Commission was referring a matter to court following an investigation this would be treated as a grade 3 application.

Application process

At grade 3 there would be an application to Sheriff Court or the Mental Health Tribunal as in a grade 2 application.

Reports required

OPG guardian declaration

This would be a separate form to be completed and submitted along with the application as in grade 2.

Mental Health Officer Report where welfare powers are requested

This would be the same process as for grade 2 applications.

Incapacity Certificate

This would be the same process as for grade 2 applications.

Medical report where authority to change of accommodation is sought

Again this would be the same process as for grade 2 applications.

Duration of the order

The length of the order would be requested in the application and we propose that a maximum of 5 years should be available at grade 3.

The applicant will be required to enter the reason behind the application and how they have complied with the principles of the AWI legislation, including ascertaining the adult's will and preferences.

Intimation

Intimation at grade 3 would be the same as for grade 2 applications but the difference would be that a full hearing at the Sheriff Court or a 3 person Mental Health Tribunal hearing will consider the case.

Appeals

Any party to the case can make an appeal.

We propose that appeals from administrative decisions made by the OPG at grade 1 will be to either the Sheriff with a court hearing, or to the 3 member Mental Health Tribunal. This can be on matters of fact or law.

Appeals from a decision made by a Sheriff at grades 2 and 3 will be to the Sheriff Appeal Court. This can be on matters of fact or law. The decision of the Sheriff Appeal Court may be appealed, with the leave of the Sheriff Appeal Court or the Court of Session, to the Court of Session. Appeals at this level can only be on a point of law.

Appeals from a decision made by the legal member of the Mental Health Tribunal will be to the three member Mental Health Tribunal and can be on matters of fact or law. Appeals from the three member Mental Health Tribunal (shortly to be the First-tier Tribunal for Scotland - Mental Health Chamber) will be to the Upper Tribunal for Scotland and also can be on matters of fact or law. Decisions of the Upper Tribunal for Scotland may be appealed, with the leave of the Upper Tribunal for Scotland or the Court of Session, to the Court of Session. Appeals at this level can only be on points of law.

Transfer to another Grade

If an application is made for example at grade 1 and it is considered by the OPG that an application at a higher grade is necessary, this should be as simple as possible and should not involve the applicant going back to the beginning again. The extra reports required at the higher level of application should be all that is needed, together with an explanation from the OPG, court or tribunal as may be as to the reason for the change in the application to a higher level.

In the same manner, if an application is made at the higher grades of 2 and 3 and the Sheriff, legal tribunal member or full tribunal consider that it is suitable for a lower grade, then the application should be sent to that grade. As the requirements for a higher grade are more stringent, it will automatically satisfy the lower grade requirements. For example, if all parties have decided that they all agree with the application made at grade 3 it could be considered that a grade 2 application would be more appropriate.

Caution

Presently the Sheriff may require a financial guardian or intervener to find 'caution' (pronounced 'cayshun'). This is an insurance bond to safeguard the adult from any loss that may be caused by the actions of the person authorised under the order. The Sheriff can use his/her discretion to dispense with caution in certain circumstances.

In the graded guardianship system we propose that at grade 1 all cases, where there is any financial element, will be required to obtain caution, which may be by a low value, one off, life time bond.

We propose that cases at grades 2 and 3, which have any financial element, will require cautionary cover with judicial discretion to dispense with this on cause shown.

Case Examples

Grade 1 Finance and Welfare Powers

Background

Andrew is a 16 year old adult who received a diagnosis of childhood autism when he was 3 years old. This is a life-long condition. He is unable to use language, gesture or symbols to communicate and initiates almost nothing. He requires constant support with personal care both day and night. He can't read or write and has no insight into financial matters. He requires 24 hour care and supervision.

Andrew has just left a school placement and now lives at home with his parents. They now need to think about alternative care arrangements for Andrew and together with social work are considering devising a care plan with the intention of addressing his needs. Andrew receives Disability Living Allowance of £134.40 per week and has one bank account with approximately £3,000.

Andrew's parents have been advised by their child social worker that now he is 16 he is no longer a child and they will require to have some legal authority if they wish to carry on taking care of him in the way that they have been doing. They are finding this hard to understand as they are his parents and have always taken care of him. They resent the interference of 'authorities'. The social worker is aware of guardianship and has pointed them in the direction of the Office of the Public Guardian website where they can find further information.

On looking at the information they find that they can apply for a grade 1 guardianship and do this themselves for the following reasons:

- Andrew has funds below the grade 1 threshold. They will be able to manage the funds in his bank account and manage his benefits using the guardianship
- They wish to apply for self-directed support payments to pay for Andrew's care services.
- Andrew is unlikely to be moving from home in the near future and the range of welfare powers available at grade 1 would enable them to deal with his day to day welfare needs.

The parents find the grade 1 guardianship application form on OPG website, and consider from the powers available at this grade, what powers they might need to support Andrew. They select the powers they think they need, then approach the GP who has had contact with Andrew throughout his life and is well aware of his capabilities. She, using her own knowledge of Andrew and consulting previous medical diagnosis completes a certificate stating that he is incapacitated in relation to the powers the parents wish to take. The parents approach the social worker who has provided help and support to their son, and he is able to complete a form which comments on the necessity of the application in terms of the AWI principles and also their suitability as welfare guardians. Andrew's parents then complete the form the OPG needs in relation to their application for financial powers for Andrew. This is also on the OPG website.

Having gathered all the forms together they send them off to OPG. They receive the forms back from OPG along with notification that they have to send copies of the form within a week to 2 other relatives they had named in the application, along with the Chief Social Work Officer of the local authority and the Mental Welfare Commission. The parents have to notify OPG once they have done this.

The notification also advises that if there are no objections for a 21 day period (they are given the final date) then the application will be granted subject to finding a bond of caution. After the 21 day period there are no objections and OPG send them a letter advising them that a bond of caution requires to be found.

The parents contact the cautionary company, organise a bond of caution and send this to OPG. OPG then send them a certificate of appointment for 3 years.

Grade 2 Financial Powers

Ethel is a 77 year old woman residing in a care home. Ethel had previously resided at home with the benefit of a care package, but after a bad fall her mobility deteriorated severely and she needed more support. At an early stage of her dementia, whilst Ethel was still able to make decisions with the support of her family, she decided to move to the care home she is in now.

Ethel now has a diagnosis of severe dementia. A doctor advises that she shows no awareness of her surroundings or circumstances. Her dementia has progressed such that she is now very frail and her ability to communicate is severely impaired. She has no verbal communication and only limited non-verbal communication. It is not possible to have a conversation about her finances or welfare and she can't demonstrate that she can retain information or that she can use the information to make an informed decision. Ethel's condition is progressive and indefinite.

Finances

Ethel has indicated that she is happy in her care home and has no wish to move. Ethel has a house worth £200,000 with no mortgage. She also has a bank account holding approximately £150,000. Ethel's income consists of state and private pensions totalling £1500 per month. Ethel has been assessed as self-funding in relation to her care home fees, which are £4,000 per month. Ethel's house is sitting empty and although it is not necessary in the immediate future to sell this in order to pay for care fees, it is likely to depreciate in value if it is left as it is for a substantial length of time.

What next?

Ethel's son and daughter in law are interested in looking after her finances and in selling her house. Ethel has no other next of kin. They have been to a solicitor to seek advice about what to do and she has advised that in the absence of a power of attorney, they will require a guardianship order to manage Ethel's finances but no powers are required to manage Ethel's welfare at present. The solicitor is aware of graded guardianship and advises that they will require a grade 2 guardianship for the following reason:

- Ethel's estate is above the grade 1 threshold (including her house)

Ethel's son and daughter in law agree to employ the solicitor to make an application for a grade 2 guardianship, with the solicitor claiming her fees from Ethel's funds once the guardianship has been granted.

The solicitor puts together a summary application to appoint Ethel's son and daughter in law as joint financial guardians with the powers they will require to manage Ethel's property and financial affairs. This will enable them to sell the house, pay Ethel's accrued and ongoing care fees and use the remaining funds taking into account Ethel's will and preferences.

Along with this Ethel's son and daughter in law have to complete the OPG guardian's declaration form in relation to their fitness to act as a financial guardian.

The solicitor also asks a s.22 doctor to complete a form certifying Ethel's incapacity in relation to the powers sought by her son and daughter in law.

The solicitor then sends the summary application, OPG guardian declaration and incapacity certificate to the Sheriff in chambers / legal tribunal panel member.¹⁵ She receives notification of intimation as in grade 1, which she duly carries out, returning notification of completion to the court/MHT.

¹⁵ Chapter 8 asks for views on which forum should be used.

Once the intimation period is complete the Sheriff/ legal tribunal panel member looks at the papers in chambers/private and makes a decision on the case, in this case granting it. The solicitor receives notification that the case is granted, subject to a bond of caution being found for £350,000. The solicitor duly contacts the cautionary company, gets the bond of caution and sends this to OPG. OPG then send Ethel's son and daughter in law their certificate of appointment as joint financial guardians.

Grade 3 Finance and Welfare Powers

William is an 84 year old man, widowed 5 years ago by his wife Mabel. William has severe dementia and stays in a care home, where he is settled. He goes on short outings to a day care centre.

William previously owned a farm business, together with associated buildings that have an estimated worth of £950,000. William does not have any direct descendants, however there are two parties who express a wish to be his financial and welfare guardians. Alastair was brought up with William and Mabel as their own child. William made a will prior to his diagnosis of dementia leaving his property and finances to Alastair. Alastair and his wife Cheryl have been involved in the adult's life for many years and more recently have actively been involved in his care since his diagnosis of dementia.

The other party wishing to be appointed are Peter and Nicola. They are the half brother and sister of Mabel. They feel William was under undue pressure when he left his property and finances to Alastair and have indicated that they will contest the will. They take some interest in the adult's life, although do not care for him daily, as Alastair and Cheryl do.

Alastair and Cheryl engaged a solicitor to look into guardianship as they were aware of the level of the adult's estate and thought a solicitor would be required. The solicitor looked at graded guardianship and considered that ordinarily, considering the level of the adult's estate, a grade 2 application would suffice. However, having heard the background and the inevitable disagreement from Peter and Nicola she considered that a grade 3 application would be required as regardless of the welfare requirements of William or the level of his estate, there was contention about the appointment of Alastair and Cheryl.

Alastair and Cheryl agree to employ the solicitor to make an application for a grade 3 guardianship.

The solicitor prepares a summary application to appoint Alastair and Cheryl as joint financial and welfare guardians with the powers they will require to manage William's, welfare, property and financial affairs. This will enable them to sell the farm business and accompanying outbuildings, pay William's accrued and ongoing care fees and use the remaining funds taking into account William's will and preferences.

Along with this Alastair and Cheryl have to complete the OPG Guardian's Declaration form in relation to their fitness to act as financial guardians.

The solicitor also gets a s.22 doctor to complete a form certifying William's incapacity in relation to the powers sought by Alastair and Cheryl. She also engages a Mental Health Officer to complete a report on the appropriateness of the application.

The solicitor then sends the summary application, OPG guardian declaration, Mental Health Officer report and incapacity certificate to the court/Mental Health Tribunal (MHT) in order for them to convene a court or tribunal hearing. She receives notification of intimation as in grade 1, which she duly carries out, returning notification of completion to the court/MHT. Once the intimation period is complete the hearing takes place, with the Sheriff or tribunal panel members hearing the views of all interested parties. The Sheriff or tribunal panel then makes a decision on the case, in this case granting powers to Alastair and Cheryl. The solicitor receives notification that the case is granted, subject to a bond of caution being found for £950,000. The solicitor duly contacts the cautionary company, gets the bond of caution and sends this to OPG. OPG then send Alastair and Cheryl their certificate of appointment as joint financial guardians.

Questions

- Do you agree with the proposal for a 3 grade guardianship system? Please give reasons for your answer.
- Our intention at grade 1 is to create a system that is easy to use and provides enough flexibility to cover a wide range of situations with appropriate safeguards. Do you think the proposal achieves this? Please give reasons for your answer.
- Are the powers available at each grade appropriate for the level of scrutiny given?
- We are suggesting that there is a financial threshold for Grade 1 guardianships to be set by regulations. Do you have views on what level this should be set at? For example the Public Guardian requires that financial guardians have to seek financial advice on the management of the adult's estate where the level is above £50,000. Would this be an appropriate level, or should it be higher or lower?
- We are proposing that at every grade of application, if a party to the application requests a hearing, one should take place. Do you agree with this? Please give reasons for your answer.
- We have listed the parties that the court rules say should receive a copy of the application. One of these is 'any other person directed by the Sheriff'. What level of interest do you think should be required to be an interested party in a case?
- We have categorised grade 3 cases as those where there is some disagreement between interested parties about the application. There are some cases where all parties agree, however there is a severe restriction on the adult's liberty. For instance very isolated and low stimulus care settings for people with autism, or regular use of restraint and seclusion for people with challenging behaviour. Do you think it is enough to rely on the decision of the Sheriff/tribunal at grade 2 (including a decision to refer to grade 3) or should these cases automatically be at grade 3?
- Please add any further comments you may have on the graded guardianship proposals.

Renewal of a Guardianship order (s.60)

Present situation

An application to renew a guardianship has to be made any time before the guardianship or renewal has expired. If an application has been made before expiry but not yet determined, then the original order continues until the renewal is decided upon.

A renewal requires:

- A summary application.
- One relevant medical practitioner's (section 22 doctor) report regarding the adult's incapacity dated not more than 30 days before the lodging of the application.
- A mental health officer report or Chief Social Work Officer report if welfare issues relate to inability to communicate (where there is a welfare element). This will contain the officer's opinion as to the appropriateness of continuing the guardianship and the suitability of the applicant to continue to be the adult's guardian. It should be dated not more than 30 days before the lodging of the application.
- A report from the Public Guardian if the powers relate to property and finance containing her opinion as to the applicant's conduct as financial guardian and the suitability of the applicant to continue as the financial guardian.

Renewals in the graded system

The same factors taken into account when granting new applications should be applied when renewals are considered. Therefore the adult should have received every support to exercise their own decisions and actions throughout the guardianship and this knowledge can be applied to deciding what powers are suitable at renewal. The powers should be the least restrictive consistent with the purpose of the intervention and should be tailored to the adult's circumstance.

We are aiming to ensure that the minimum necessary powers are sought and granted and it should be easy to move down or up the grades should circumstances change.

Grade 1 renewal at Grade 1

We propose the initial grade 1 application should consist of an application form, a social work report (for cases with a welfare element), an OPG guardian's declaration (for cases with a financial element) and a certificate of incapacity.

For renewal at this grade there will have to be a renewal application form. If all the details are the same (interested parties, powers, length of time required etc) then it would make sense to be able to indicate this, so the applicant doesn't have to complete the remainder of the form. If some things have changed, then the applicant could be instructed to only complete the relevant changed parts of the form.

The requirements would be as follows:

- A grade 1 application form.
- A social work report for cases with a welfare element.
- If property and finance is involved no OPG guardian declaration form would be required and instead the same brief report, as at present, from OPG could be required.
- A certificate of incapacity, (we are asking for views on which professionals might be appropriately placed to grant this certificate).

We propose that at grade 1 there is an initial maximum appointment for 3 years but this could be increased on renewal to a maximum of 5 years.

Grades 2 and 3 renewal at Grade 1

There will be cases where the initial circumstances warranted a grade 2 application, such as finances above the Grade 1 threshold set by regulations or moving the adult to accommodation where there may be restriction on the adult's liberty. On renewal however these circumstances may have changed, so finances may be below the Grade 1 threshold set by regulations, or the adult may have moved and now be settled in their accommodation. These circumstances would warrant renewal at grade 1.

So, on renewal the requirements could be the same as an initial application at grade 1. The requirements would be:

- A grade 1 application form.
- An OPG report, as at present, on the opinion of the financial guardian's conduct and the suitability of the applicant to continue as financial guardian will be required.
- A social work report for cases where welfare powers are sought.
- A certificate of incapacity.

Grade 1 renewal at Grades 2 and 3

There may be occasions at renewal where circumstances have changed such that a higher grade application may be required. For instance the adult may have inherited a property, may have to move accommodation or there may be contention about the renewal.

On each occasion the renewal requirements for grades 2 and 3 would be as follows:

- A summary application.
- An OPG report, as at present, on the opinion of the financial guardian's conduct and the suitability of the applicant to continue as financial guardian will be required.
- A Mental Health Officer report where welfare powers are sought.
- A certificate of incapacity (from s.22 doctor).
- A medical report where a change of accommodation which may result in restrictions on liberty, is sought.

Variations (s.74)

Present Situation

Changes to the adult's circumstances may happen during the lifetime of the guardianship and not just at the time of renewal.

At present applications for variations are made to the Sheriff. The Sheriff considers the application and can vary the powers as requested. This is apart from where a welfare guardian is requesting property or financial powers and vice-versa. In those cases the present guardianship application process and relevant reports have to be adhered to.

Variations under proposed graded guardianships

We propose that the system should be similar under graded guardianship. The only difference would be to where the application is made. This would be governed by the same factors that govern the initial graded guardianship application.

For instance an adult with a grade 1 guardianship may require to add powers from the standard powers available at grade 1, which they did not already have. This would be an application to OPG using the existing application form. The applicant could indicate on the form those details they had provided previously and then pick the extra powers from the list. No guardian declaration form would be required for finances as that will have already been provided previously.

Or the adult may inherit property or require to move accommodation, which would require additional guardianship powers to deal with this. If there was no disagreement about the powers, then an application could be made for a grade 2 guardianship, which would require the application to be to the Sheriff or legal tribunal member. If there is disagreement, then the application would be made at grade 3, which would require the Sheriff or 3 member tribunal to hold a hearing.

Where a financial guardian was applying for welfare powers and vice versa, the application would have to follow the procedure for applying for a welfare guardianship or vice versa for a financial guardianship at the relevant grade, with the relevant reports.

QUESTIONS

Do you think our proposals make movement up and down the grades sufficiently straightforward and accessible?

Please give reasons for your answer.

Intervention Orders (s.53-56A)

Present Situation

The AWI Act gives power to the Public Guardian to supervise an intervener in the exercise of his/her functions relating to the property and financial affairs of the adult. Unlike guardianship, the Act does not detail the form of this supervision, nor give the Public Guardian discretion to determine the form. The Public Guardian cannot charge fees for supervision of interveners, as the idea is that the intervention order ends when the action is complete. For the same reason, there is also no scale of fees to be paid from the adult's estate for the work of an intervener, as there is in guardianships. Consequently the extent of the Public Guardian's involvement in such cases could at best be described as 'monitoring'.

'The AWI Act does not give power to local authorities to supervise an intervener in the exercise of his/her welfare functions. The AWI Act does give the local authority the power to investigate complaints made in relation to a welfare intervener's exercise of their functions.'

Intervention orders are applied for in the same way as guardianships, with the same reports being required. The idea behind intervention orders is that they are to take specific actions or decisions, either welfare or financial, after which the order comes to an end. They are not designed for ongoing actions, that is what guardianships are for.

We have been told of an increasing number of intervention orders being granted with ongoing / open powers. These 'quasi guardianship' intervention orders are unsupervised.

The Act does not give power to the Public Guardian to 'fix' remuneration for an intervener. However, many of the orders which grant open powers also contain a power to permit the intervener to be paid. A guardian's remuneration is fixed by the Public Guardian, proportionate to the estate value. There is no such constraint on an intervener's award.

Intervention orders becoming graded guardianships

In order to address the issues above we propose that we repeal the provisions for intervention orders. What would currently be termed an intervention order would become a guardianship but with limited, defined, powers. The 'intervener' is then a guardian - application, supervision, duration and caution would all be catered for.

In the same way that intervention orders come to an end when the decision or action has been completed, we propose the same approach for guardianship powers that cover these specific decisions or actions.

For instance if the guardianship powers consist solely of specific actions or decisions that have an end (i.e powers that would previously have been in an intervention order), then we propose that the guardianship should come to an end in the same way that an intervention order would have.

There could be cases where there are some powers that have an end and others that are ongoing. In these cases we propose that the powers that cover specific actions or decisions come to an end when those actions or decisions are taken. The ongoing powers would then be the only powers left in the guardianship.

If intervention orders become graded guardianships we propose that existing intervention orders become graded guardianships automatically. The grade would depend on the powers given in the original intervention order.

QUESTIONS

Do you agree with our proposal to amalgamate intervention orders into graded guardianships? Please give reasons for your answers.

Organisations applying for guardianship

The AWI Act at present allows the Sheriff to appoint as guardian an individual whom he considers suitable for appointment and has consented to being appointed, and where the guardianship relates only to the personal welfare of the adult, the chief social work officer of the local authority.

We think there is merit in extending the category of those appointed to include organisations. Examples of this would be third sector organisations such as registered charities, community groups, social enterprises, mutuals and co-operatives, as well as solicitors firms and care providers. We are suggesting this because we have been told about cases where an adult has property and financial affairs that need managing but there is no-one available to apply to be a financial guardian, leaving the adult without someone with the legal authority to help

with these matters. At present the local authority often steps in and applies for a local solicitor to become the financial guardian but this may not always be appropriate or possible.

In terms of welfare the local authority can apply to appoint the chief social work officer as the welfare guardian. The chief social work officer will in practice delegate his functions to a social worker. However we are conscious of the pressures on local authority services, and organisations who wish to be welfare guardians (with a nominated person operating the guardianship) could provide a valid alternative, increasing the pool of available guardians.

The supervision of organisations that become guardians will be split into welfare and financial matters, as is the case for other guardians. Before being able to apply to be a guardian an organisation would have to complete a fit and proper test to be authorised by the Office of the Public Guardian, similar to that currently applied by the Care Inspectorate. Organisations would have to nominate an employee to act on its behalf. Thereafter OPG will apply the appropriate level of supervision to the organisation, based on a risk assessment.

Welfare supervision will be by the local authority, with the Mental Welfare Commission and Care Inspectorate also having roles in relation to investigation and inspection. We intend that our welfare supervision proposals (Chapter 9) will bring about more co-ordination and co-operation between these organisations.

Access to Funds (ATF) (s.24-34)

The Access to Funds scheme is a scheme administered by the Office of the Public Guardian (OPG). It allows an Individual(s), or an Organisation (excluding care homes) to have access to funds to pay for products and services that will benefit the incapable adult. The person or organisation is called a withdrawer, the role of which is unpaid.

Application is to the OPG and was intended to be straightforward so that the services of a solicitor are not required. However the process is complex and members of the public often require extensive support from OPG staff with its completion.

Prior to the introduction of this scheme it had been expected that up to 20,000 applications to access funds may have been received per annum but the reality is less than 400 applications per annum are received. The cost of administering this highly labour intensive service is disproportionate to the relatively few individuals who benefit from it and the scheme is little understood, despite extensive awareness raising and training by the OPG. We are therefore considering repealing the Access to Funds provisions.

We think that an application for a grade 1 guardianship would be simpler, provide more functionality and more safeguards than the present ATF system. There are some safeguards in the ATF scheme that should be catered for in graded guardianship as follows:

1. A single medical certificate confirming the adult's incapacity is required.
2. There is commentary on an individual's suitability to act as withdrawer.
3. The application is intimated on all relevant parties.
4. Duration is limited.
5. The withdrawer has access only to the designated account to use the funds for the reasons specified in the application.
6. The Public Guardian reviews the operation of every case at a set point to ensure the transactions are occurring as authorised.

7. A fund holder can be asked to produce information on accounts administered by a withdrawer.
8. An organisation is assessed on its suitability by the Public Guardian.

We suggest that graded guardianship will cover the above points as follows:

1. A similar medical certificate will be required at grade 1, with views sought in Chapter Six on who may be able to sign the certificate.
2. This is provided for by the questionnaire devised by the Office of the Public Guardian called the OPG guardian declaration.
3. The application will be returned to applicants for intimation.
4. There will be a limit of 3 years at grade 1.
5. One of the reasons behind the unpopularity of ATF was the restricted nature of its operation. Graded guardianship will have wider powers.
6. OPG will provide tailored, risk based supervision to guardianship cases.
7. The existing investigative powers around guardianships will cater for this.
8. We propose that before applying for a graded guardianship an organisation will have to apply to OPG to complete a similar form to the present Care Inspectorate form showing their fitness to act on behalf of the person in relation to their welfare, property or finance. Once passed as fit, the organisation will then receive a reference that they will then quote to whichever body they will be applying (OPG, MHT, courts). They will only require to do this once and can then quote the same reference for subsequent applications.

Therefore we are recommending that the Access to Funds scheme under Part 3 of the AWI legislation is repealed in favour of graded guardianship.

Management of Residents' Finances under Part 4 AWI (s.35-46)

Part 4 of the Adults with Incapacity Act allows managers of hospitals and care homes limited scope to manage the financial affairs, moveable assets and personal belongings of incapacitated adults in their establishments. There are 2 supervisory bodies for this. They are the local health board for NHS hospitals and the Care Inspectorate for care homes.

Authority is given to managers to claim, receive, hold and spend any money to which a resident is entitled, up to a value of £10,000 as long as it is for the benefit of the resident and taking into account any sentimental value the resident puts on any item. This does not include Department of Work and Pensions (DWP) benefits.

For a variety of reasons, uptake has not been what was expected and is very low.

On speaking to people possible reasons for this are:

1. The £10,000 limit.
2. An establishment can't spend a residents' funds on items or services which are provided by that establishment as part of normal service. This excludes care homes and other accommodation providers from being an adult's guardian in order to pay care home fees.
3. The process is very slow. Care homes and hospitals often have temporary residents where it would be advantageous to have very quick access to their finances in order to remove risk to their estate from themselves or others.

4. The health boards have employees and act as supervisory bodies, as well creating a possible conflict of interest.
5. Where the adult's DWP benefits and other money are mixed together in one account, there are difficulties in telling the value of each one and therefore accessing these funds.
6. The complexity of the system outweighs the benefits.

We think that the purpose that management of residents' finances was designed for could be fulfilled by organisations under graded guardianship. Organisations would then be scrutinised by a fit and proper test from the Office of the Public Guardian, similar to that currently applied by the Care Inspectorate, before being allowed to apply to be a guardian. Organisations would have to nominate an employee to act on its behalf.

This would allow hospitals and care homes to manage residents' funds by being their guardian, with the supervision by OPG that that would bring. This would address the points above as follows:

1. There would be no limit on the level of funds, there would only be a different application process and different supervision depending on the level.
2. This would remove the barrier on spending a residents' funds on items or services which are provided by the establishment as part of normal service to allow for payment of care home fees. The criteria would be wider and the same as for individual guardians at present, with the need, at all times to act under the AWI principles.
3. We expect the appointment process to be much quicker overall, especially at grade 1. There will still be the option for interim appointments at grades 2 and 3 if the risk is perceived to be great enough.
4. The conflict of interest for health boards would be removed as there would be a different supervisory body.
5. DWP benefits would be able to be managed as part of the powers given as guardian.
6. The graded guardianship application and powers will be tailored to the adult's circumstance. The powers that are given are likely to be wider than those under the Management of Residents' Finances scheme.

Therefore we are proposing that Part 4 of the AWI Act is repealed in favour of the graded guardianship system.

Consequential or ancillary AWI applications

There can be applications to the Sheriff at present not covered under the applications described above. For instance, under Section 3 of the AWI Act an applicant can apply for directions from the Sheriff as to the exercise of functions under the Act.

We propose that under a new system these applications are lodged to the Sheriff or legal tribunal member in the first instance. If the Sheriff or legal tribunal member considers a hearing is required, then the Sheriff could convene a hearing or the mental health tribunal could convene a three member tribunal hearing.

QUESTIONS

Do you agree with the proposal to repeal Access to Funds provisions in favour of graded guardianship?

Please give reasons for your answer.

Do you agree with the proposal to repeal the Management of Residents' Finances scheme?

If so, do you agree with our approach to amalgamate Management of Residents' Finances into Graded Guardianship?

Please give reasons for your answer.

CHAPTER EIGHT

FORUM FOR CASES UNDER ADULTS WITH INCAPACITY LEGISLATION

As previously noted, the UNCRPD emphasises that every available support should be given to a person with a mental disability to maximise their decision making ability.

This support should continue through the adult's life and especially when consideration is being given to appointing a guardian with powers to act on behalf of the adult.

We want to improve the participation of adults and interested parties in the guardianship appointment process. We think that the environment for a hearing should be welcoming and more accessible to all interested parties, particularly the adult who is the subject of the application.

We think that the key features of the forum for appointment of guardianships should include:

- Informality
- An approach which maximises the participation of the adult (although this need not always be at the hearing itself)
- An awareness of the needs of people with mental disorders
- A consistent approach across Scotland
- The development of the case law

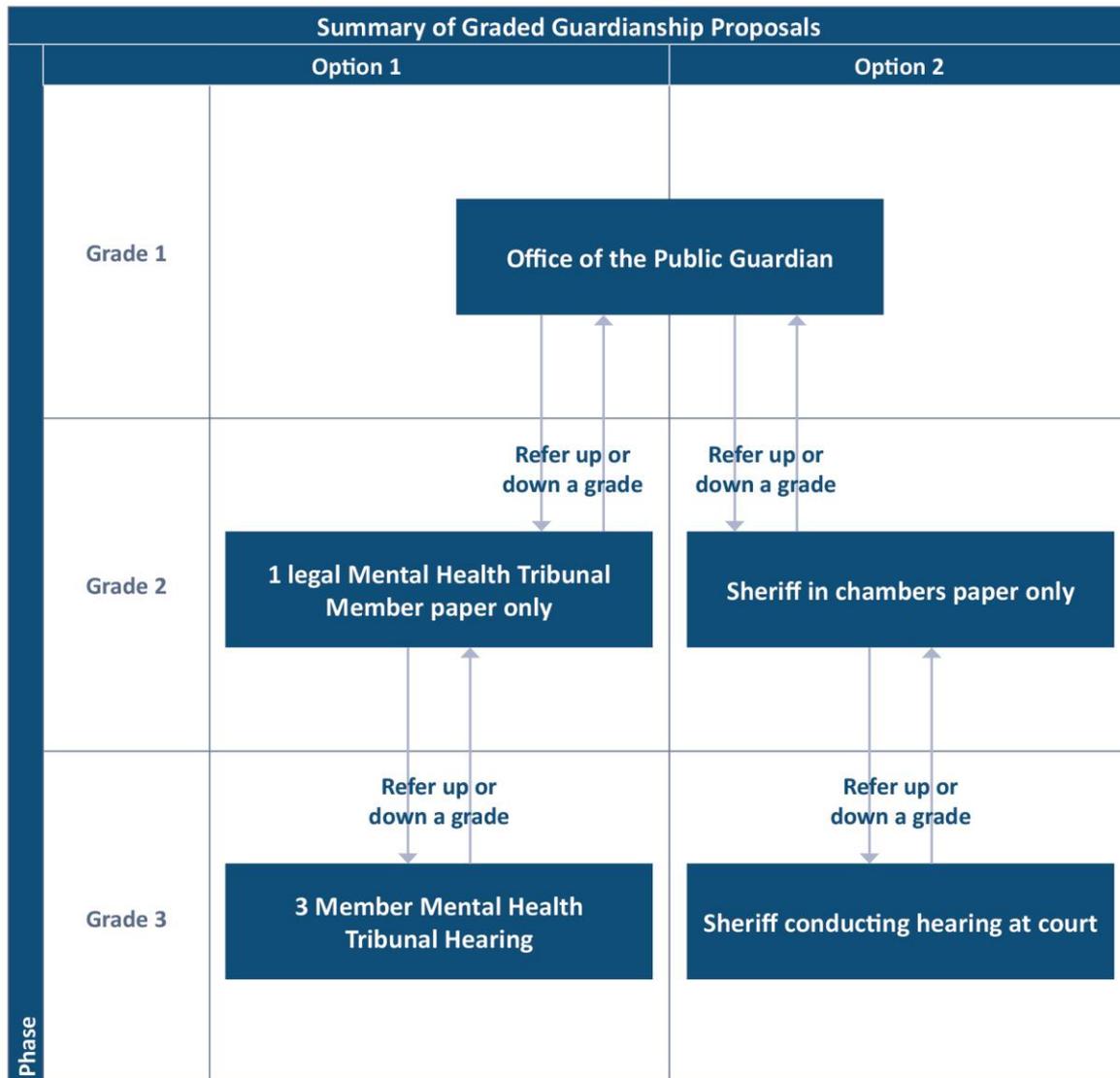
At present the forum for all guardianships is the Sheriff Court. Part of our AWI reform proposals are graded guardianships. So we need to consider the appropriate forum for each grade of guardianship. In earlier consultations and at stakeholder meetings, we have been asked to consider using the Mental Health Tribunal for Scotland (MHTS) as an alternative forum for cases under the Adults with Incapacity legislation. We are therefore proposing two models with the Sheriff Court on one side and the Mental Health Tribunal on the other.

We should say at this point that should the decision be made to transfer cases under the AWI legislation to the Mental Health Tribunal for Scotland, consideration will be given to changing the name of the tribunal, as well as the membership to more accurately reflect the range of work the MHTS would be undertaking.

We propose that grade one guardianship applications should be considered by the Office of the Public Guardian. Thereafter we propose:

- 1. A Sheriff considering grade 2 applications in chambers and a Sheriff conducting a full hearing for grade 3 applications: or**
- 2. A Mental Health Tribunal legal panel member considering grade 2 applications and the existing 3 member Mental Health Tribunal considering grade 3 applications**

The process is summarised by the flowchart below:



Grade 1

At grade 1 we propose that the Office of the Public Guardian should process applications.

OPG staff have a lot of experience already in processing applications under the AWI Act for powers of attorney, access to funds, intervention orders and guardianships and staff are well trained at doing this.

We think that there should be no discretion on OPG at grade 1 to make judicial type decisions and therefore OPG duties would be to look at whether the application meets the requirements in the legislation for registration, much like they do with power of attorney applications.

We expect that there might be a lot of advice and guidance needed for members of the public to complete the grade 1 application form. OPG are experienced in providing advice and guidance and have a direct equivalent in assisting the public to complete forms for Access to Funds.

OPG will be able to refer the case to grade 3, if there is any opposition to the application, including from the Public Guardian.

We are proposing an administrative process, to ease the pressure on the system for simpler cases. However we are also aware that we are trying to get greater participation from the adult and interested parties. Therefore we are proposing that if any of the parties requests a hearing, that will be granted automatically at grade 3.

QUESTIONS

Do you think that using OPG is the right level of authorisation for simpler guardianship cases at grade 1? Please give reasons for your answer.

Grade 2

For grade 2 applications we propose that either a legally qualified member of the Mental Health Tribunal would consider the application on the basis of the paper application or a Sheriff sitting in chambers would consider it in a similar way to undefended civil actions at present.

We think this will provide an appropriate level of legal scrutiny for cases at this grade as well as providing a more efficient process, minimising delays that can cause difficulties for people in the current system.

Again, we propose that if any of the parties request a hearing, that it will be granted automatically and a hearing like those for grade 3 cases will be held.

Grade 3

The options for grade 3 applications would be a hearing in front of the Mental Health Tribunal, or a hearing in front of a Sheriff.

FACTORS FOR CONSIDERATION

We think there are a number of factors which should be considered when coming to a view on which would be the best forum at grades 2 and 3:

The 'one door' approach

It is useful to look at the Scottish Law Commission's (SLC) report of 1995¹⁶, which was influential in shaping the AWI Act. At the time of the report the Sheriff Court dealt with the majority of orders affecting the welfare or finances of incapacitated adults. The Commission was strongly in favour of the 'one-door approach' where 'people should not be required to go to several different courts or tribunals to obtain the desired spread of remedies'. This was a major factor in their recommendation of the Sheriff Courts.

The situation has changed now in that some matters that were previously dealt with by the Sheriff Court are now dealt with by the Mental Health Tribunal under the Mental Health (Care and Treatment) (Scotland) Act 2003. There are 2 different bodies dealing with mental health legislation in Scotland at present.

Presently Mental Health legislation in Scotland is spread between 3 Acts; the Adults with Incapacity (Scotland) Act 2000, the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007. There is some enthusiasm to fuse this legislation in the future into a single Act, however in the shorter term it might be advantageous for all of the above orders to go through the same forum, beginning with the AWI Act and the 2003 Act.

Venue:

Courts: At present guardianship hearings are held in courtrooms in the 39 Sheriff Courts in Scotland. It will be the court closest to where the adult resides. Generally these hearings are held in private and a small number of hearings are held in Sheriff's chambers. Normally there is a solicitor present who is putting forward the application and occasionally a solicitor will represent interested parties, including the adult.

Presently the court rules allow the Sheriff, where he or she considers it appropriate taking into account all circumstances, to appoint that a hearing should take place in a hospital, or any other place than the court building, or in private. Given the requirements of the UNCRPD we expect that going forward there would be a greater emphasis on these options in order to encourage the adult and interested parties to attend. The courts also have video technology available to enable evidence to be given remotely.

Mental Health Tribunals: Presently mental health tribunals are held in hospitals or community venues across Scotland. There are approximately 80 such venues. The venue will be the closest to where the person resides. A mental health tribunal at present solely focusses on matters arising from the Mental Health (Care and Treatment) (Scotland) Act 2003.

These tribunals consist of a 3 member panel, made up by a legal member (solicitors), a medical member (psychiatrists) and a general member (from a broad variety of mental health professional backgrounds – such as nurses, psychologists, mental health officers – or with a background as a mental health service user or carer for such a person). They sit around a table with a mix of the adult, solicitor, doctor, community psychiatric nurse and advocacy worker. The hearing is held in an inquisitorial manner, where the Convener asks

¹⁶ Report on Incapable adults Scot Law Com no 151 (1995)

each party for their opinion, asks the other panel members to ask any questions and then comes to a decision. The panel can continue the hearing to ask for further reports. The tribunals also have video technology available to enable evidence to be given remotely.

Continuity

The Scottish Law Commission report on Incapable Adults in 1995 , felt that the courts had the benefit of continuity over any new tribunal system. That would remain the case now but given the MHTS has been established for over 10 years, the same argument could be said to apply to the MHTS.

Make up of Panel/Court

The tribunal panel is made up of a legal convener, a medical expert (a doctor) and a lay person (who has generally worked in the health field). This allows a greater perspective on the case and all parties are focused on mental health. The panel is less likely to be versed in financial matters. The legal convener may have some prior experience of financial matters.

Applications under the AWI legislation form a small percentage of the civil business for sheriff courts. This can mean sheriffs in more rural areas may deal with only a handful of such cases in a year. There are a number of sheriffs who specialise in AWI matters, and a number of courts now run specialised AWI hearings but at present these are mainly in the larger city centres.

Training

In terms of training, the MHT is solely focused on mental health matters. At present it receives input from organisations providing advisory services enabling the tribunal to provide a service which is focused on the care and treatment of the patients who come before the tribunal. The tribunal members would require training on financial matters and the different requirements of the AWI legislation and UNCRPD.

In the event of AWI matters remaining within the court system, we would anticipate additional training being provided for sheriffs on the requirements of the UNCRPD and how best to facilitate those requirements within the court system. The Judicial Institute which provides training for the judiciary has a well established reputation for not just legal training but specific skills training required for the judiciary such as court and case management, and has developed modules on matters such as diversity awareness and equal treatment so would be well placed to provide such training.

Costs

As mentioned in chapter 2, as part of the consultation process we will be gathering information to enable us to fully assess the costs of the proposals within the consultation, including of course costs that would be involved in changing sheriff court practice to reflect the requirements of amended AWI legislation, or costs incurred in transferring AWI cases to the MHTS, and the changes that would be subsequently required to that tribunal.

QUESTIONS

Which of the following options do you think would be the appropriate approach for cases under the AWI legislation?

Office of the Public Guardian considering grade 1 applications, a Sheriff in chambers considering grade 2 applications on the basis of documents received, then a Sheriff conducting a hearing for grade 3 applications.

Or

Office of the Public Guardian considering grade 1 applications, with a legal member of the Mental Health Tribunal for Scotland considering grade 2 applications on the basis of the documents received, then a 3 member Mental Health Tribunal hearing grade 3 applications.

Please give reasons for your answer.

Please also give your views on the level of scrutiny suggested for each grade of guardianship application.

If you have any further comments on the proposals for the forum, please add them here.

CHAPTER NINE

SUPERVISION AND SUPPORT FOR GUARDIANS

SUPERVISION OF WELFARE GUARDIANSHIPS

Supervision of guardians is split between property and finance, and welfare. Currently the OPG has a responsibility to supervise property and finance, and the local authority has responsibilities in relation to welfare (alongside the responsibilities of the Mental Welfare Commission (MWC)).

In speaking to people about the way the system works at the moment, we have been told that there are concerns about the supervision of welfare guardians. The statutory supervisor for welfare guardians is the local authority. For a variety of reasons the local authorities have not always been able to carry out their supervisory functions as well as they would like.

As well as the local authority, the MWC has a role in welfare supervision. It regularly visits people subject to welfare guardianship and can also visit people subject to a welfare power of attorney or welfare intervention order. They look at any concerns the adult or their guardian might have, the arrangements for their care and support, and how well the principles of the AWI are being applied. Currently it can only visit a proportion of people subject to welfare guardianship. The Commission can also investigate concerns about the welfare of the adult, where they are not satisfied with an investigation carried out by the local authority, or where no investigation was carried out. They can also offer advice and guidance regarding welfare matters to guardians and to adults subject to guardianship.

In order to target resources more effectively, we think that supervision should be tailored depending on a risk assessment of the adult's circumstances. The social worker or Mental Health Officer would state a level of welfare supervision in their report that they thought was appropriate based on agreed criteria. OPG would recommend a level of financial supervision based on their questionnaire. OPG, the tribunal or the Sheriff would reflect this in the final order.

The assessment of the level of supervision required will be independent of the grade of guardianship that was applied for. Supervision will be at 3 levels, with level 3 being the highest. It will be possible in some cases for a grade 1 or 2 guardianship to have level 3 supervision, depending on the circumstances. Grade 3 guardianships will have level 3 supervision. Level 3 supervision, where there are welfare powers, will involve having a supervisory visit from the local authority. We think a visit at 6 months would be optimum, however this would be flexible and would depend on the case.

We know that welfare and financial matters are very closely linked. If someone requires care, or something to improve their welfare, such as extra clothes or a holiday, then someone will require the financial powers to be able to facilitate this. In the same way, if there is a concern about the way a welfare guardian is acting, then there may very well be concerns about the way the person's finances are being managed, if it is the same person and vice-versa.

We consider that greater cohesion would be desirable between the organisations involved in supervision. We are therefore proposing a more collaborative approach between the MWC, OPG and the local authorities. We propose that OPG keep a register of high level risk cases (level 3) for both welfare and finance, which would be shared with the MWC. The local authorities would refer to OPG, for recording on this register, any guardianship cases that they consider to be at level 3 and therefore at higher risk. The OPG and MWC would meet routinely to monitor this register.

The outcome of the local authority supervisory visits would be sent to MWC and copied to OPG. Having looked at the local authority visit report and any other evidence, the MWC/OPG may reduce the supervisory status, notify the local authority and remove the case from the register. The local authority could then reduce the supervisory contact to a level, including none, that their professional assessment considered appropriate.

OPG will continue to be the supervisor of property and financial affairs, with a focus on level 3 supervision (which includes all grade 3 guardianships). These cases would be recorded on the high level case register and discussed as part of the routine review with the MWC.

We also recognise that a transitional system will need to be developed for the existing guardianship cases.

But before we develop this model we would like your views on whether there is a need to change the way guardianships are supervised at present and if our approach is the best way forward.

QUESTIONS

Is there a need to change the way guardianships are supervised?

If your answer is yes, please give your views on our proposal to develop a model of joint working between the OPG, Mental Welfare Commission and local authorities to take forward changes in supervision of guardianships.

If you consider an alternative approach would be preferable, please comment in full.

SUPPORT FOR GUARDIANS

We are keen to ensure that guardians are fully prepared and aware of the duties and requirements of the role before they take it on and that they can access help whilst they are acting as a guardians. We have received feedback that guardians are often surprised at the requirements of their role and having taken this on, feel unprepared for what they have to do.

We also think it is very important that guardians are aware that they must act under the principles of the AWI legislation and in particular they must seek to act in accordance with the will and preferences of the adult.

Sometimes guardians receive a lot of help and support from a solicitor when they first enquire about a guardianship, but sometimes guardians are unaware of the role they are taking on until the order is granted by the Sheriff.

This is clearly not helpful for either the adult or the guardian themselves. We would like your views on how such situations can be avoided and how support and advice can best be provided for guardians.

QUESTIONS

What sort of advice and support should be provided for guardians?

Do you have views on who might be best placed to provide this support and advice?

Please give reasons for your answers

SUPPORT FOR ATTORNEYS

The appointment of an attorney is quite different to that of a guardian. An attorney is appointed by a private individual to act on their behalf in the event that the individual is unable to take decisions for themselves. It is essentially a private agreement and as such attorneys are not subject to any supervision requirements, though if there are concerns about the way an attorney is acting in his/her role this can be brought to the attention of the OPG who can investigate the matter.

However, taking on the role of attorney can be daunting and whilst there is advice available online and the OPG office can often help with enquiries, it has been suggested to us that more could be done to provide advice and support to attorneys. We would like your views on this, in particular whether you think there is a need to provide additional support for attorneys and what form of support this should take?

QUESTIONS

Do you think there is a need to provide support for attorneys to assist them in carrying out their role?

If you answered yes, what sort of support do you think would be helpful?

CHAPTER TEN

ORDER FOR CESSATION OF A RESIDENTIAL PLACEMENT, CREATION OF A SHORT TERM PLACEMENT

The Scottish Law Commission, in their report¹⁷ on Adults with Incapacity, recommended that there should be a provision, like the provision in section 291 of the Mental Health (Care and Treatment) (Scotland) Act 2003 in relation to persons who were in fact detained in a care setting other than a hospital setting and were not free to leave

We agree that notwithstanding the rights of review and appeal within the guardianship provisions and the placement order, there should be available a means by which an order can be made to the court or tribunal to bring to an end;

- a placement in accommodation provided or arranged for by a care home service or adult placement service for which there is no authorisation under the 2000 or 2003 Act, in respect of which there is no capacity on the part of the adult to consent to the placement and which has resulted in the adult being subject to significant restrictions on his/her liberty; or
- arrangements within a placement provided or arranged by a care home service or an adult placement service for which there is no authorisation under the 2000 or 2003 Act in respect of which there is no capacity on the part of the adult to consent to the arrangements and the arrangements are such that they result in significant restrictions on the person's liberty.

The test to be applied would be that the tribunal or court would need to be satisfied that the person is being subject to significant restrictions on his or her liberty in the absence of authority under either Act, or lack of capacity on the part of the adult to consent to the placement.

QUESTIONS

Do you agree that an order for the cessation of a residential placement or restrictive arrangements is required in the AWI legislation?

If so does the proposal cover all the necessary matters?

SHORT TERM PLACEMENT

We are intending that the changes to guardianship processes will mean it is easier and quicker to obtain a guardianship order when it is needed.

¹⁷ Scot LAW Com 240

However we recognise that there are situations when someone may need to be moved quickly for their own safety, and they are not in a position to consent to such a move because of a lack of capacity.

In certain situations it may be appropriate to use an order under the Mental Health (Care and Treatment) (Scotland) Act 2003 but this is obviously not always the case.

We suggest that there is a need for a short term care order that can be used in situations where:

- **A person needs to be moved quickly to alternative accommodation, or have restrictions placed on their existing accommodation.**
- **There is no pre - existing authority for the change.**
- **The change would result in the adult being subject to continuous supervision and being unable to leave without permission.**
- **An independent medical assessment has considered the changes are necessary for the safety and wellbeing of the individual or others and the changes are proportionate.**

We are proposing that a multi-disciplinary decision making meeting arranged by the relevant Integration Authority¹⁸ should be held to consider the proposed placement. The meeting must include the involvement of a Mental Health Officer.

We suggest that the placement should be for no longer than 28 days, and that can be renewed once, with an appeal to either the sheriff court or a tribunal, depending on the forum that is decided for AWI work in general terms. The adult, any guardian in respect of the adult, any welfare attorney in respect of the adult and any other person expressing an interest in the adult's care may appeal. But it should be noted that even if there is evidence that the adult does not wish this move, we consider that it will be necessary to allow for the move, with the proviso that robust appeal provisions will be in place. We intend there to be a short timescale in which an appeal can be intimated, with no move taking place until the end of the intimation period. If an appeal has been lodged, no move should take place until the outcome of the appeal and obviously only then if the appeal against the move is unsuccessful. Early consideration of the case would be essential.

Clearly, support will need to be provided to the adult to enable them to be as involved as possible in the process and to ensure their will and preferences are taken account of.

During the period of the placement order the long term needs of the adult should be considered, which could result in a guardianship application, or the adult being able to express his/her will or preference in any given situation, with the appropriate support to make decisions.

¹⁸ Integration authorities as established by the Public Bodies (Joint Working)(Scotland) Act 2014 asp 9.

QUESTIONS

Do you agree that there is a need for a short term placement order within the AWI legislation?

If you agree, does the above approach seem correct or are there alternative steps we should take? Please comment as appropriate.

Use of section 13ZA of the Social Work (Scotland) Act 1968

This provision permits local authorities to provide services to incapable adults. Where it has been decided that an adult's needs call for the provision of a community care service and it appears to the local authority that the adult is incapable in relation to decisions about the service, the local authority may take any steps which they consider would help the adult to benefit from the service including moving the adult to a residential care service. Such action can only occur if there are no objections from the adult or anyone claiming an interest in the adult.

The local authority must not take any action under this section that will result in significant restrictions on a person's liberty because this is not specifically authorised under the Social Work (Scotland) Act 1968.

When using section 13ZA, Scottish Government guidance recommends that all of the circumstances of each individual case requires to be taken into account, and that incapacity of itself does not automatically mean that there will be a deprivation of liberty in the provision of the care or intervention package to that adult.

We are considering whether in the light of proposed changes to the AWI legislation, there remains a need for section 13ZA in its current form. We are also aware that the use of section 13ZA extends beyond moving persons into residential accommodation and includes more general provision of services. It may be therefore that what is required is a change to the provision to restrict its use to the provision of services with the exception of a move to residential accommodation.

We would like your views on this matter to help us determine the best way forward.

Questions

Do you consider that there remains a need for section 13ZA of the Social Work (Scotland) Act 1968 in light of the proposed changes to the AWI legislation?

If you answered yes, should the section remain in its current form or are changes required to, for example, restrict its use to the provision of care services with the exception of residential accommodation? Please give reasons for your answers.

CHAPTER ELEVEN

ADVANCE DIRECTIVES

An advance directive sets out a person's wishes about future healthcare should he or she become incapable of taking decisions about treatment. A person who has legal capacity can accept and refuse any treatment, but an advance directive is a way of trying to ensure that doctors respect the wishes of the adult in the future, should he or she become incapable of taking such decisions.

An advance directive can be in writing, in a letter to a doctor or in a formal document signed and witnessed. A doctor may record the person's wishes following discussions with the person and keep this with the patient's records.

A person may make an advance directive in any area of medicine but only the Mental Health (Care and Treatment) (Scotland) Act 2003¹⁹ provides a legal framework for recognition of 'advance statements' where a patient is subject to a compulsory order.

For persons not subject to any orders under the 2003 Act, the common law prevails. Every competent adult is free to make decisions about his/her medical treatment, including the refusal of medical treatment even if to do so may result in death or serious injury. A person who is competent to take such decisions about treatment should also be able to make decisions about future treatment. Sometimes these decisions are referred to as living wills but generally in Scotland the term advance directive is used.

The English courts have recognised the validity of advance directives,²⁰ and the General Medical Council and British Medical Association both recognise the validity of advance directives. The Scottish Law Commission in its 1995 report recommended that the Adults with Incapacity Act should clarify the law, but the then Scottish Executive believed at the time that the courts should continue to develop the law in light of changes in medical practice and ethics.

Since that time, although there has been little by way of significant court decisions on these issues in Scotland, much guidance has been developed across the health sector in Scotland, to highlight the benefits of advance directives.

In particular, Healthcare Improvement Scotland, supported by the Scottish Government, provides guidance on anticipatory care planning and the use of advance directives.²¹

Although the AWI Act does not make any specific provision for advance directives, the principles of the Act should mean that any advance directive has considerable force as a doctor is bound by the principles to consider an advance directive as evidence of the person's wishes and feelings.

But it has been suggested to us that there needs to be clear legislative provision for advance directives beyond the scope of advance statements in the 2003 Act. In particular the Essex

¹⁹ asp 13

²⁰ Re T (Adult: refusal of treatment) [1991]4 All ER 649; Re C (Adult; Refusal of Medical Treatment) [1994] 1 WLR 290.

²¹ lhub.scotland

Autonomy Project has recommended that advance directives should be recognised for their potential as instruments of support for the exercise of legal agency in circumstances where decision specific capacity is impaired.

And the Council of Europe has recommended, in principles concerning continuing powers of attorney and advance directives for incapacity, that states should promote self determination for capable adults by means of continuing powers of attorney and advance directives.²²

In the rest of the UK, provision is made in statute for advance directives, but before any decision is made on the best way to proceed in Scotland, we would like your views on the issue.

QUESTIONS

Should there be clear legislative provision for advance directives in Scotland or should we continue to rely on common law and the principles of the AWI Act to ensure peoples' views are taken account of?

If we do make legislative provision for advance directives, is the AWI Act the appropriate place?

Please give reasons for your answers.

²² Council of Europe recommendation CM/Rec (2009) 11.

CHAPTER TWELVE – AUTHORISATION FOR MEDICAL TREATMENT(s.47-50)

At present, there is no legislated process for the authorisation of measures to prevent a patient from leaving a hospital where this is required to keep them safe during and after treatment for physical health problems.

However, where an adult is admitted to hospital for psychiatric treatment and is unable to consent, the Mental Health (Care and Treatment) (Scotland) Act 2003 can be used to keep that person from leaving hospital. The AWI Act does provide for an authorisation and a safeguard when medical treatment of an incapable adult is needed promote to physical or mental health. This provision does not extend to authorising detention, save in circumstances where it is immediately necessary. This is process is authorised and documented via a section 47 certificate.

We recognise that a transparent, simple and straightforward process is needed which will allow an adult with incapacity to be prevented from going out of the hospital or some part of the hospital whilst they are undergoing treatment or a period of assessment in relation to their physical health.

We therefore propose to introduce a new section 47 certificate. This will be enhanced and integrated to provide for authorisation of medical treatment and if needed, also provide for the use of measures to prevent an adult with incapacity who requires treatment for physical health from leaving a hospital unaccompanied.

Extension of powers under section 47

We envisage extending the scope of the existing section 47 certificate to incorporate the ability for the lead medical practitioner to authorise that an incapable adult patient can be prevented from leaving hospital whilst undergoing medical treatment (including diagnostic tests) for a physical illness.

The intention is that there is authority to treat and, if needed, prevent a person from leaving hospital whilst that treatment is ongoing. Under current legislation, the section 47 certificate does not authorise the removal of a person to hospital for treatment and we would like views about whether in extending the provisions of the certificate we should include that as an additional provision.

Alternatively, the authority would only extend once a person has been admitted to hospital and does not authorise removal to hospital.

The model for the process for authorising this detention would be similar to a Short Term Detention Certificate (STDC) under the Mental Health (Care and Treatment) (Scotland) Act (“the 2003 Act”). However, unlike a STDC there will be no statutory requirement for a MHO to be involved and we also propose to introduce the ability for review and renewal after 28 days. We also intend to propose a limit on the number of times that this could happen without judicial involvement in the decision, which will remove the possibility of a patient remaining in hospital indefinitely and also aims at ensuring suitable accommodation is available when needed.

Authorisation: It would be for the medical practitioner primarily responsible for the medical treatment or assessment of a patient to certify that the adult is incapable in relation to the decision of whether they can go out of hospital.

The medical practitioner remains responsible for undertaking regular reviews and also has the ability to revoke the certificate.

Consultation: By applying Principle 4 of existing AWI legislation there needs to be consultation with a patient's family/guardian/attorney wherever reasonable and practicable and with the new enhanced principle, the adult with incapacity must be supported to participate in the decision. Therefore we propose to adopt provisions similar to those of section 50 which require the medical practitioner to seek consent to the proposed medical treatment. If consent is provided the treatment can begin, and this includes the ability to prevent a patient from leaving a hospital where this is required to keep them safe for physical health reasons.

Again and in line with existing provisions, if there is a disagreement between the practitioner and the proxy decision-maker, the practitioner must request that the Mental Welfare Commission provide a "Nominated Practitioner" to give a further (2nd) opinion.

Appeal: The adult or their family/proxy/guardian should be able to appeal the decision if they disagree with the medical practitioner's decision to issue a certificate which allows for the adult to be prevented from leaving hospital. They would also have the right to request that the certificate be revoked.

Review: The majority of patients lacking capacity who are admitted to hospital remain there for a relatively short period of time to receive treatment for an acute medical problem therefore the new process is intended to be used during these stays in hospital.

We propose that under this new process there be provision for a regular review to ensure that the need to prevent an adult with incapacity from going out of the hospital or some part of the hospital whilst they are undergoing treatment or a period of assessment in relation to their physical health remains.

As part of the review process the patient must be supported to participate in the process as well as the relevant guardian or attorney being consulted. In common with a STDC, issued under the 2003 Act, we propose an interval of 28 days before first review. We also propose that there should be a restriction placed on how many times detention can be renewed by doctors before a judicial body must be involved in the review of detention.

End Dates: The purpose of this new process is to provide for the use of measures to prevent an adult with incapacity who requires treatment for physical health from leaving a hospital unaccompanied. In redesigning the provisions to prevent a person from leaving a hospital, then equally there should be provision which does not allow for an adult to remain without therapeutic reason. Therefore the introduction of an end date would be used to remove the authority to impose measures of restriction and place more emphasis on alternative accommodation being available when required. However, when that treatment is no longer required and the patient is well enough to leave the hospital facility we propose that there be a mechanism to provide for discharge with the aim of reducing the risk of an adult being kept in hospital because it is not possible to identify suitable alternative

accommodation. This decision making process could be designed to fall in line with the proposed enhanced principles of the AWI legislation and could include the use of short term placements as described in Chapter Ten.

Questions:

Do you agree that the existing s.47 should be enhanced and integrated into a single form?

Do you think that there should be provision to authorise the removal of a person to hospital for the treatment of a physical illness or diagnostic tests?

Please explain your answer.

Do you agree that a 2nd opinion (medical practitioner) should be involved in the authorisation process? If yes, should they only become involved where the family dispute the need for detention?

Do you agree that there should be a review process every 28 days to ensure that the patient still needs to be detained under the new provisions? How many reviews do you think would be reasonable?

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?

In chapter 6 we have asked if we should give consideration to extending the range of professionals who can carry out capacity assessments for the purpose of guardianship orders.

Section 47 currently authorises medical practitioners, dental practitioners, ophthalmic opticians or registered nurses who are primarily responsible for medical treatment of the kind in question to certify that an adult is incapable in relation to a decision about the medical treatment in question. It also provides for regulations to prescribe other individuals who may be authorised to certify an adult incapable under this section.

Do you think we should give consideration to extending further the range of professionals who can carry out capacity assessments for the purposes of authorising medical treatment ? Please give reasons for your answers.

CHAPTER THIRTEEN – RESEARCH (s.51-52)

There are now differences in the ways that research involving adults with incapacity is handled in Scotland and in the rest of the UK. In response to concerns expressed by some members of the research community in an informal consultation, Scottish Government officials have worked with stakeholders to identify areas which may benefit from change and invite comment on how these and any other issues are approached.

Currently, adults with incapacity cannot engage in emergency research; research cannot be conducted on adults with incapacity where it can be conducted on adults with capacity. For example, in respect to research into poisoning, there will be patients who lack capacity (temporary) because of the poison or alcohol co-ingestion and there will be patients who do have capacity. The current legislation means researchers cannot include anyone without capacity in such studies (because similar research could be done on adults who can consent). This limits recruitment and excludes an important group who may be different to those with capacity (such as may have more severe toxicity or respond differently due to alcohol exposure).

Research can only be conducted where there is a benefit to the direct cause of their incapacity; assent to engage in research is required by the nearest relative; clinical trials of medicinal products are permitted within the parameters set out above, but those involving non-medicinal products (e.g. medical devices, research studies etc) are not.

There is only a single committee in Scotland able to consider applications for research with adults with incapacity. Unlike every other ethics committee in the UK, this means there is no appeals process. A single committee also gives potential for a conflict of interest as research-active members can only apply in Scotland to the committee on which they serve. Part 5 (Section 51) of the Act may also be unnecessarily restrictive.

QUESTIONS

Where there is no appropriate guardian or nearest relative, should we move to a position where two doctors (perhaps the adult with incapacity's own GP and another doctor, at least one of whom must be independent of the trial) may authorise their participation, still only on the proviso that involvement in the trial stops immediately should the adult with incapacity show any sign of unwillingness or distress?

When drafting their power of attorney should individuals be encouraged to articulate whether they would wish to be involved in health research?

Should there be provision for participation in emergency research where appropriate (e.g. if the adult with incapacity has suffered from a stroke and there is a trial running which would be likely to lead to a better outcome for the patient than standard care)?

Should authorisation be broadened to allow studies to include both adults with incapacity and adults with capacity in certain circumstances? (e.g. an adult with incapacity who has an existing condition not related to their incapacity may respond differently to different types of care or treatments to an adult with capacity)

Should clinical trials of non-medicinal products be approached in the same way as clinical trials of medicinal products?

Should there be a second committee in Scotland who are able to share the workload and allow for appeals to be heard respectively by the other committee?

Should part 5 of the act be made less restrictive?

CHAPTER FOURTEEN

MISCELLANEOUS MATTERS

This consultation has focussed on the recommendations for change that arose from informal discussions with a range of stakeholders. There may however be other areas for change within the Adults with Incapacity legislation that you feel we should consider. If so please add any comments below.

QUESTIONS

Are there any other matters within the Adults with Incapacity legislation that you feel would benefit from review or change? Please give reasons for any suggestions.



Scottish Government
Riaghaltas na h-Alba
gov.scot

© Crown copyright 2018

OGL

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78851-506-1

Published by The Scottish Government, January 2018

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS341107 (01/18)

W W W . G O V . S C O T