

Adults with Incapacity Amendment Act consultation

The Scottish Social Services Council is the regulator for the social work, social care and children and young people workforce in Scotland. Our work means the people of Scotland can count on social services being provided by a trusted, skilled and confident workforce.

We protect the public by registering social service workers, setting standards for their practice, conduct, training and education and by supporting their professional development. Where people fall below the standards of practice and conduct we can investigate and take action.

We:

- publish the national codes of practice for people working in social services and their employers
- register people working in social services and make sure they adhere to the SSSC Codes of Practice
- promote and regulate the learning and development of the social service workforce
- are the national lead for workforce development and planning for social services in Scotland
- publish data and official statistics on the social work, social care and children and young people workforce.

Questions

Part 1 - Principles of the legislation

- 1. Do you agree that the principles of the AWI Act should be updated to require all practicable steps to be taken to ascertain the will and preferences of the adult before any action is taken under the AWI Act?**

We agree that there should be a requirement that the will and preferences of an adult are ascertained before any action is taken under the AWI Act. The SSSC requires social service workers, through the codes of practice for social service workers, to protect and promote the rights of individuals and carers when carrying out their roles. The proposed amendment to the AWI Act aligns with our view that a person-centred approach is essential for public protection and will lead to the best results for individuals subject to the Act.

- 2. Do you agree that in the AWI Act we should talk about finding out what that adult's will and preferences are instead of their wishes and feelings?**

Yes.

- 3. Do you agree that any intervention under the AWI Act should be in accordance with the adult's rights, will and preferences unless not to do so would be impossible in reality?**

Yes.

- 4. Do you agree that the principles should be amended to provide that all support to enable a person to make their own decisions should be given, and shown to have been unsuccessful, before interventions can be made under the AWI Act?**

Yes.

- 5. Do you agree that these principles should have precedence over the rest of the principles in the AWI Act?**

We have no view.

- 6. Do you have any suggestions for additional steps that could be put in place to ensure the principles of the AWI Act are followed in relation to any intervention under the Act?**

We have no view.

- 7. Do you agree with the change of name for attorneys with financial authority only? Please add any comments you have around this.**

We believe that the proposed change would be welcome so long as changing the name from continuing attorney to financial attorney clarifies the roles and responsibilities of people carrying out that role.

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

We believe that extending sheriff's powers to compel former attorneys or guardians to provide information is essential for making sure the operation of functions by these individuals under the AWI Act is transparent and will also allow potential issues to be resolved more speedily. We also support the widening of sheriff's powers to in relation to directing other parties to provide information where it is necessary for the operation of the AWI Act. We believe this extended power will allow attorneys and guardians to carry out their functions more effectively.

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

Yes. We believe that enabling the Office of the Public Guardian to continue investigations after the death of the adult, in the manner laid out in the consultation document, is essential for maintaining public confidence in the system.

10. Do you agree that the investigatory responsibility between OPG and local authority should be split in the manner outlined above?

We have no view.

11. Will these changes provide greater clarity on the investigatory functions of OPG and local authority?

We have no view.

12. Will this new structure improve the reporting of concerns?

We have no view.

Part 2 – Powers of attorney

13. Do you agree with the proposals for training for attorneys?

We have no view on this.

14. Do you agree that OPG should be given power to call for capacity evidence and defer registration of a power of attorney where there is dispute about the possible competency of a power of attorney document?

Yes.

15. Do you agree that OPG should be able to request further information on capacity evidence to satisfy themselves that the revocation process has been properly met?

Yes.

16. Do you agree that OPG should be given the power to determine whether they need to supervise an attorney, give directions or suspend an attorney on cause shown after an investigation rather than needing a court order?

Yes.

17. Should we extend the class of persons that can certify a granter's capacity in a power of attorney?

Yes. We believe that extending the class of people who can certify capacity will ensure the process is not unnecessarily held up and will be of benefit to the public. We believe that to make sure there is sufficient oversight to uphold public protection, that these individuals should be themselves subject to professional regulation.

18. Do you agree that a paralegal should be able to certify a granter's capacity in a power of attorney?

No. Paralegals are not subject to professional regulation.

19. Do you agree that a clinical psychologist should be able to certify a granter's capacity in a power of attorney?

We agree that clinical psychologists should be granted this power, provided they are registered with the Health and Care Professions Council or other equivalent professional regulator.

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

We have no view beyond the requirement for the profession to be regulated.

21. Do you agree that attorneys, interveners and withdrawers (under Part 3) should have to comply with an order or demand made by OPG in relation to property and financial affairs in the same way as guardians?

Yes. This proposal would increase consistency across the landscape.

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

Yes.

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

We have no view.

Part 3 – Access to funds

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

We have no view.

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

We have no view.

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

We have no view.

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

We have no view.

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

We have no view.

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

We have no view.

30. Should we add the same transition provisions to intervention orders as there are for guardianships?

We support this measure as it will lead to greater consistency across the AWI Act functions.

31. Do you agree that sheriffs, under certain circumstances, should be able to grant powers to access funds under our new proposal?

Yes. In the circumstances detailed in the consultation document and provided this is done in the best interests of the adult.

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

Yes, but we would want make sure this did not place undue burden on care services which could in turn place additional burden on social service workers.

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

We have no view.

Part 4 – Management of residents’ finances

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

We have no view.

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

We have no view.

Part 5 – Authority to medially treat adults with incapacity

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

Yes.

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

We have no view.

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

Yes.

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

We have no view.

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

No.

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

Yes.

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

Yes.

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

No.

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

Yes.

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

We have no view.

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

We have no view.

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

We have no view.

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

Yes.

Part 6 - Guardianships

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

We have no view.

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

Yes.

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

Yes.

52. Do you think the 'person with sufficient knowledge' form can be improved, making it more concise whilst retaining the same information?

We have no view.

53. Should the person with sufficient knowledge continue to be the person who prepares the report for financial and property guardianship?

We have no view.

54. Do you agree with our proposal to replace the second part of the 'person with sufficient knowledge' report with a statutory requirement to complete the OPG guardian declaration form?

We have no view.

55. Should sheriffs be afforded the same discretion with Mental Health Officer report timings as they are with medical reports?

Yes, we believe this proposal will allow for greater clarity and will allow applications to proceed more quickly.

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

Yes.

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

Yes.

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

Yes.

59. Do you agree that further medical reports are not required when varying a guardianship to add either welfare or financial powers?

No.

60. Does the current approach to length of guardianship orders provide sufficient safeguards for the adult?

We have no view.

61. Do changes require to be made to ensure an appropriate level of scrutiny for each guardianship order?

We have no view.

62. Is there a need to remove discretion from the sheriff to grant indefinite guardianships?

We have no view.

63. If you consider changes are necessary, what do you suggest they would be?

We have no view.

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

- a. consenting to marriage or a civil partnership,
- b. consenting to have sexual relations,
- c. consenting to a decree of divorce
- d. consenting to a dissolution order being made in relation to a civil partnership
- e. consenting to a child being placed for adoption by an adoption agency,
- f. consenting to the making of an adoption order,

- g. voting at an election for any public office, or at a referendum**
- h. making a will**
- i. if the adult is a trustee, executor or company director, carrying discretionary functions on behalf of them,**
- j. giving evidence in the form of a sworn affidavit**

Yes.

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

No view.

Part 7 – Approach to Deprivation of Liberty (DOL)

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

Yes. We agree that keeping the term deprivation of liberty undefined in legislation will better allow for individual cases to be decided on their own merits.

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

Yes. As is stated in the consultation document, the difference between a deprivation of liberty and a restriction of liberty is simply a matter of degree or intensity rather than necessarily of nature. We believe that there are many scenarios, particularly in social care settings, that by their nature would be considered restrictions of liberty that may benefit from additional safeguards to ensure that adults' article 5 rights are respected. We would welcome the opportunity to comment on and contribute to the scheme in regulations you mention in the consultation document.

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

Yes.

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

We agree that these are the correct issues to consider as they place the utmost importance on the adult's views.

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

We have no view.

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

We believe that any staff that are working with adults subject to deprivation of liberty should be trained in how to recognise when an appeal may be necessary and to help an adult raise such an appeal.

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

We have no view.

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

We have no view.

74. Do you agree with the proposal to set out the position on DOL and guardianships in the AWI Act?

Yes.

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

We believe that the proposed initial maximum of 12 months is the correct length of time.

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

We support the right of appeal but we believe that the phrasing of anyone with an interest in the adult is very broad and could include many different social service staff working with the adult. These staff would potentially be registered with the SSSC so we would want to be clear of the expectation on these staff so that we could develop appropriate learning resources for them.

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

We believe that proper training and guidance are needed for staff working in situations where adults are subject to deprivations of liberty are needed to improve the accessibility of appeals.

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

Yes. However, this will have implications for the Care Inspectorate and potentially for workers registered with the SSSC.

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

We have no view.

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

Yes, however as per our response to question 76, we believe there should be greater clarity around the expectations of social care staff to support his right of appeal.

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

Yes. This proposal will need the support of the Care Inspectorate and staff registered with the SSSC to facilitate these investigations if they take place in social care settings.

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

We support this proposal as it stands. We do not believe there is a need to register safeguarders on a separate register as individuals carrying out that role are either registered with the Law Society of Scotland or with the SSSC. We do not support dual registration but do believe the appointment of safeguarders themselves should be subject to regulation.

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

Yes.

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

We have no view.

85. Do you think there should be a specific criminal offence relating to financial abuse of an adult lacking capacity?

Yes.

86. If so, should the liability be the same as for the welfare offence?

Yes.

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

We have no view.

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

The workforce working in care settings who are regulated by the SSSC will require the right skills and support.

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

We have no view.

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

The capacity and training of the social work and social care workforce to support the move.

Part 8 – Proposals to amend the AWI Act in respect of governance of incapacitated adults participating in research

91. Should the AWI Act be amended to allow the creation of more than one ethics committee capable of reviewing research proposals involving adults lacking capacity in Scotland?

We have no view.

92. In research studies for which consent is not required for adults with capacity to be included as participants, should adults with incapacity also be permitted to be included as participants without an appropriate person providing consent for them?

We have no view.

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

We have no view.

94. Should the AWI Act be amended to allow researchers to consult with a registered medical practitioner not associated with the

study and, where both agree, to authorise the participation of adults with incapacity in research studies in emergency situations where an urgent decision is required and researchers cannot reasonably obtain consent from a guardian, welfare attorney or nearest relative in time?

We have no view.

95. Should the AWI Act be amended to allow researchers to enrol adults with incapacity in research studies without the consent of an appropriate representative of the adult, in emergency situations where a decision to participate in research must be made as a matter of urgency, where researchers cannot reasonably obtain consent from an appropriate representative of the adult, and where researchers act in accordance with procedures that have been approved by Scotland A REC (or any other ethics committee constituted by regulations made by the Scottish Ministers)?

We have no view.

96. Should the AWI Act be amended to permit researchers to nominate a professional consultee to provide consent for adults with incapacity to participate in research, in instances where researchers cannot reasonably obtain consent from a guardian, welfare attorney or nearest relative?

We have no view.

97. In addition to being permitted to participate in research that investigates the cause, diagnosis, treatment or care of their incapacity, should the AWI Act be amended to allow adults lacking capacity to participate in research that investigates conditions that may arise as a consequence of their incapacity?

We have no view.

98. In addition to being permitted to participate in research that investigates the cause, diagnosis, treatment or care of their incapacity, should the AWI Act be amended to allow adults lacking capacity to partake in research that investigates conditions they experience that do not relate to their incapacity?

We have no view.

99. Should the AWI Act be amended to allow adults with incapacity the opportunity to participate in any research; regardless of whether the research explores conditions that relate to their

incapacity or investigates conditions that they experience themselves?

We have no view.

**Scottish Social Services Council
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