

AWI Reform - Consultation Update for Sheriff Principal's Liaison Meeting 27/04/18

Background

The Scottish Government launched a public consultation on proposals to reform Adults with Incapacity legislation on 31/01/18. This is the first such review of the legislation since it was brought into law in 1999 being the first piece of legislation passed by the then re-established Scottish Parliament.

The consultation document amounts to some 70 pages and nearly 60 questions are posed to respondents.

A summary of the main points of the consultation can be found attached to this paper at appendix 'A' for ease of reference.

The full consultation document can be accessed on the Scottish Government's Website under Consultations: <https://consult.gov.scot/health-and-social-care/adults-with-incapacity-reform/>

The consultation closes on 30th April 2018.

Summary of Main Proposals for Reform

- Proposals for a range of lawful processes that can be relied upon to authorise placements which significantly restrict a person's liberty. Including definition of what constitutes significant restriction on liberty.
- Developing a strategy for support for decision making as a model in AWI.
- Proposal for a new principal to reflect Article 12 of the UNCRPD.
- Changes and clarifications to power of attorney
- Extending the range of persons who may undertake and carry out assessments of capacity for AWI.
- Creation of a Graded Guardianship system – 3 grades proposed
- Grade 1 for day to day welfare and simpler financial affairs under a threshold set by regulation.
- Grade 2 – for managing property and financial affairs above threshold as well as more complex welfare needs.
- Grade 3 for all powers suggested at grade 2 where there is disagreement between parties, including the adult about the application.
- Proposed repeal of the Access to Funds scheme in favour of graded guardianship, also revoking management of residents funds provision in favour of graded guardianship.
- Proposal to replace Intervention Orders with graded guardianship with limited, defined powers.

- Proposal for setting up new forum for hearing AWI cases to a two model system mix of Sheriff Court & Tribunal (possibly administered via MHTS)
- New arrangements for supervision and support for guardians – jointly between Mental Welfare Commission and OPG.
- Introduction for order for the cessation of a residential placement and creation of a short term placement.
- Consider continued need for S13ZA of the Social Work (Scotland) Act 1968 in light of changes proposed.
- Views on legislative provision for Advanced Directives
- Revision of S47 certificate to be enhanced to provide authorisation for medical treatment and use of measures to prevent an adult who lacks capacity who requires treatment for physical health issues leaving hospital unaccompanied.
- Changes to authority for research, reduction in restrictions currently in place.

Responses to Changes Proposed

Social Work Scotland has been consulting its members over recent weeks and also held a special meeting of its MHO Sub Group to consider the proposals and assist in informing the SWS response.

In general terms it is felt that reform of AWI legislation is required and the general approach is welcomed.

The comments below reflect the general view of the majority of SWS members who participated in our internal discussions the final response by SWS has not been agreed and the views undernoted should not be taken as the final position of SWS in respect of this consultation and the response remains a 'work in progress'.

Restrictions on a Person's Liberty

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

We welcome the overall approach and in particular the importance of recognising that restrictions on liberty are as much about how a person lives as where a person lives.

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?

We agree with the overall approach. However, it will be important to define 'continuous supervision' and 'close supervision' and surveillance'. With the developments in the use of technology enable care, increasing numbers of adults will use technology that monitors their movements and health through electronic monitoring and surveillance. It is important that definitions are clear to avoid unintended consequences as in many cases TEC may increase the capacity of adults to live more independently.

PRINCIPLES OF THE AWI LEGISLATION

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

Yes, we welcome this amendment to strengthen the AWI legislation and provide robust safeguards for a person's independence of thought and action when intervention is considered.

Does our proposed new principle achieve that?

We recommend that consideration is given to adding to the principle that there must also be a benefit to the adult in line with section (1) (2) of the current legislation

Powers of Attorney

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?

☒ Yes ☐ No

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

☒ Yes ☐ No

We support proposals to strengthen the system of granting power of attorney. In many cases a robust power of attorney can avoid the need for a guardianship application and we want a system that supports people make the right decisions about advance consent. We therefore propose that primary legislation and guidance makes clear what is required for a granter to express how their incapacity is to be determined.

Statutory reviews of the power of attorney to ensure it still reflects the wishes of the granter should be put in place.

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

☒ Yes ☐ No

Clear tests within legislation about when an attorney can use powers given by the granter should be in place.

These tests should also address situations of an adult with fluctuating capacity to consent to ensure that an adult's capacity to make decision about care and treatment are maximised in accordance with Article 12 of UNCRPD.

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

☐ Yes ☒ No

The intentions of the proposal to support adults exercise their will and preferences are clear. It is helpful for adults to think in advance how they should be supported and how they want their will and decisions to be carried out. However, if this measure were to be adopted there would need to be safeguards in place to mitigate the risks of any misuse of power.

We have some concern about the following unintended consequences:

- Regulating the role of support in this way may lead agencies, businesses and services to believe the role has more significant powers than the law allows. This may leave the principal more vulnerable to exploitation
- Safeguards such as registration are only useful insofar as there are checks and reviews on how the supporter is exercising their duties. However, the level of monitoring provided may be costly, bureaucratic or onerous and unrealistic for the individual supporter.
- Nominating paid carers as supports may increase their influence inappropriately

The increased risks of introducing this new role may outweigh potential benefits and careful consideration is required.

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?

☒ Yes ☐ No ☐ Prefer another term

There term is adequate if adopted. It is helpful that support, rather than powers, feature in the language to protect the principal and reflect the limits of the role.

Capacity Assessments

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

☒ Yes ☐ No

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

The conclusions of capacity assessments have serious and significant consequences for individuals as measures under the AWI act may give rise to limiting the rights of a person. It is important therefore that the most appropriate qualified professional, or professionals, carry out this assessment. This person should not only have the appropriate qualifications to carry out the assessment but ideally a relationship and prior knowledge of the person. We do not believe that some of the cursory psychiatric assessments undertaken at present meet the requirements of individuals.

We recommend that the following groups of professionals may be appropriate

- Psychologist
- A qualified Social Worker. Only a qualified MHO should be able to assess for Guardianship at Grade 3.
- An Occupational Therapist
- A mental health nurse or nurse specialising in learning disability.

The government should consider joint or multi-agency assessments to obtain robust assessments and safeguard individuals.

The government should also take the opportunity to revise the statutory requirements for preparing reports in order that specific reference is made to what powers are being requested and why.

Graded Guardianship

Do you agree with the proposal for a 3 grade guardianship system?

☐ Yes ☒ No

Please give reasons for your answer.

We welcome the intention to streamline the process for guardianship and to make it proportionate to the powers being applied for. However, the proposals as they stand for

Grade 1 do not have sufficient safeguards and may create increased risks to adults with incapacity from financial and other types of harm.

Weakening the scrutiny of financial guardians in particular may increase vulnerability of adults to financial harm.

We welcome the proposals for streamlining the process at Grade 2. This may assist with moving an adult to more appropriate accommodation and minimise unnecessary delays.

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?

☐ Yes ☒ No

Please give reasons for your answer.

We welcome the intention to provide flexibility with appropriate safeguards. We are concerned, however, that the current proposals do not provide sufficient safeguards given the potential range of welfare and financial powers that may be granted to the Guardian. We support the intention that only the powers that are absolutely required to address the adult's needs should be applied for and support the proposal that the incapacity certificate should refer to the powers chosen. We are concerned, however, that this safeguard may not in itself be sufficient. It is possible that extending the range of professionals who may sign the certificate may mitigate this risk, if this includes professionals who are able to combine a knowledge and understanding of the adult as well as the skills to undertake the assessment. This may include the adult's social worker. Clear guidance on the best person to sign the certificate would be required.

The financial powers for the applicant to choose from are far reaching (e.g. power to buy, lease and sell any asset; purchase a vehicle). Applicants may therefore choose more powers than necessary which will mean that the problem identified in the current system, in which wide ranging powers are applied for to avoid going back to court, will persist. Moreover anyone pre-disposed to exploit the adult is likely to seek to maximise the powers and will be able to do so without sufficient oversight.

We agree that a local authority social worker should provide a report in relation to welfare powers sought at Grade 1. The report should also include an assessment of the appropriateness of the welfare guardian given the extensive nature of welfare powers that are available.

We have concerns about the proposals that the intimations will be made by the applicant. This may be onerous for some applicants leading to delays and confusion. The system may also be exploited by any applicant pre-disposed to exploit the adult.

Are the powers available at each grade appropriate for the level of scrutiny given?

☐ Yes ☒ No

Please give reasons for your answer.

We support the intention that only the powers that are absolutely required to address the adult's needs should be applied for and support the proposal that the incapacity certificate should refer to the powers chosen. We are concerned however, that this safeguard may not in itself be sufficient. Joint assessments involving more than one professional (preferably who knows the adult) may mitigate some of the risks.

In relation to financial powers, the checks undertaken by the OPG appear limited. The interrogation as to the appropriateness of Guardian should be strengthened by a process that involves some professional judgement.

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?

It is helpful to have a financial threshold. In addition to cash savings the threshold should include areas such as other private income, investments, and property to ensure protection of the adult. £50,000 seems sensible.

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?

☒ Yes ☐ No

Please give reasons for your answer.

It would be a vital safeguard. It may insufficient, however, in cases where the adult might have only one close friend/relative who is also the applicant. In these cases professional judgement as to the suitability of the proposed guardian is a necessary safeguard and therefore the proposed safeguards of Grade 1 are insufficient.

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?

There are potential conflicts of interest where an interested party may be a beneficiary of the adult's money. Intimating other interested parties may mitigate some of that risk. It is important that a balance is struck, that is in the best interests of the adult, between hearing the application as soon as possible and ensuring all interested parties are intimated. 'Any other person directed by the sheriff' should include relatives who have current and frequent contact with the adult.

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?

We believe where such significant restrictions on an adult's liberty are proposed, these should automatically be considered at Grade 3. This seems proportionate and consistent with UNCRPD (12) (4).

Please add any further comments you may have on the graded guardianship proposals.

Over the previous 10 years a considerable amount of evidence and practice wisdom has developed in the area of adult support and protection. We remain concerned that the proposals pay insufficient attention to this body of knowledge in relation to the number of incidents where Guardians are found to have misused their power for personal gain. Reducing significantly the criteria (as proposed at Grade 1) which are required to be met before a Guardian can be approved may increase the vulnerability of some adults to abuse and harm.

Proposals for organisations applying for guardianship

We have serious reservations about the proposals to increase the pool of guardians by allowing individuals in organisations, other than the Chief Social Work Officer in a local authority, to act as guardian.

Welfare powers involve the loss of an adult's right to self-determination. Social workers have particular duties in decision making regarding the protection and welfare of individuals in such circumstances. These are outlined in Scottish Government Guidance on the reserved function of social worker which makes clear that for the assurance of all involved, *accountability* for these important decisions lies with a suitably qualified and trained professional - a registered social worker. One of the responsibilities of the Chief Social Work Officer, as detailed in statutory guidance, is to ensure that effective governance arrangements for the management of the complex balance of need, risk and civil liberties, in accordance with professional standards are in place. This applies to those within a local authority with delegated responsibility to act as welfare guardian. Similar levels of care governance, do not necessarily apply in other organisations and nor do they necessarily employ professionals with the requisite professional knowledge, skills and values to perform the duties of a welfare guardian as do social workers.

We note this proposal is being in the context of 'the pressures of local authority services'. This is not a robust premise for good legislation. The pressures of resourcing should be addressed rather changing the law to ameliorate the pressures.

We note the proposal is for organisations to apply to the Office of the Public Guardian to act as guardian and be subject to tests 'similar' to that applied by the Care Inspectorate. Given the responsibilities of welfare guardianship, related as they are to care, welfare and protection, We believe this function can only be properly discharged by an appropriate regulator - the Care Inspectorate. There is no proposal for the ongoing inspection of an organisation, once 'registered' to carry the function of welfare guardian, to assure the public

this is being undertaken appropriately. We do not believe that the OPG well placed as an organisation to carry out functions of registration, inspection and regulation.

We question whether it will be legally competent for an 'organisation' to be appointed as guardian. Within the law, can an organisation perform the same functions as an individual? For example, within the Adoption and Children (Scotland) Act 2007 the parental responsibility to maintain direct personal relations with a child cannot be given the local authority as only a person can perform this function.

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

☒ Yes ☐ No

Please give reasons for your answer.

The proposals seem straightforward but our concerns about the sufficiency of safeguards continues to apply (see above).

We support the proposals to address the concerns that an increasing number of intervention orders are being granted with open ended powers as this potentially increases the vulnerability of adults to abuse or harm.

However, we note that more safeguards should be built into the proposals for graded guardianship.

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

☒ Yes ☐ No

Please give reasons for your answer.

We welcome the intention to deal with the difficulties associated with the Access to Funds scheme. While graded guardianship offers a potential solution, we refer to the concerns above in relation to the safeguards for the proposed Grade 1 guardianship.

We also note the appointeeship system operated by the Department of Work and Pensions. While this is a reserved matter, a number of benefits will transferred to Scotland and some clarity on how the system of appointeeship will operate for these benefits would also be welcome.

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

☒ Yes ☐ No

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

☒ Yes ☐ No

We agree that organisations can perform the task of financial guardianship (but not welfare guardianship). However, we have concerns about the proposed safeguards for Grade 1 guardianship. Rather than the OPG undertake a test similar to that of the Care Inspectorate, it would be more appropriate for the Care Inspectorate to undertake any test of suitability for an organisation to act as financial guardian and use information drawn from the inspection regime to inform this decision.

Do you think that using OPG is the right level of authorisation for simpler guardianship cases at grade 1?

☐ Yes ☒ No

We do not agree the OPG provides the right level for authorisation for guardianship cases at this level. It is neither the right level nor the right sort of scrutiny such applications should be given.

The range of both financial and welfare powers are significant and therefore warrant the oversight of professional/legal judgement in addition to the assurance that process and procedure is followed.

Local authorities often have considerable information about families and individuals who would be affected by this proposal. None of this information would be able to be considered in respect to whether someone would be an appropriate person to become someone's financial guardian, although it would for welfare powers. The risk may be mitigated by a social worker providing a report for financial powers with an assessment of the applicant's suitability.

We have a concern that an unintended consequence may be more adults who have lost capacity being financially abused.

One leading authority on AWI Legislation has commented the proposal amounts to a 'Fraudsters Charter'

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. ☐ 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.

We have significant concerns with regard to the OPG processing applications at Grade 1 as outlined above.

We support proposals for applications for guardianship to be considered by a tribunal. We believe that this will

- Encourage adults concerned, families and interested parties to attend and participate
- Provide an environment for open discussion of an adult's best interests, wishes and preferences
- Lead to decisions being made in a timely manner
- Benefit from a relevant mix of legal, medical and social expertise

Taken together, this provides a good basis for better decision making.

We believe that in cases where significant restriction to liberty is proposed beyond five years (at review) then this should be referred to the Sheriff Court.

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

We favour operating a two tier graded systems with all applications being considered in the way being proposed at Grade 2 and where there is dispute, or severe restriction of liberty being proposed, this should be referred to Grade 3.

[Supervision and Support for Guardians](#)

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

☒ Yes ☐ No

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.

We have significant concerns about the proposals for a number of reasons.

We agree there should be a collaborative approach but the proposals appear to increase bureaucratic process without any clarity as to how support to, and supervision of, guardians will improve. The creation of register to be discussed between the OPG and MWC does not in itself create any more tangible resource to support guardians. The proposed bilateral

discussion will draw on reports from the local authority but excludes the local authority/IJB from the discussion. It is not clear then how this discussion will reduce the risks to adults who have lost capacity or use local information held by local partnerships to form a holistic view.

Moreover, the MWC and OPG can change the level of supervision required and therefore change the amount of statutory supervision provided by the local authority without the local authority being part of the discussion. This is not collaborative. It is not acceptable that such a bilateral discussion between two other agencies can stipulate the level of intervention of local authority social workers. The level of support required must also be informed by the professional judgement of a Social Worker and be overseen by the care governance arrangements put in place by the Chief Social Work Officer.

The proposals also appear to be in tension with the lead role that the Adult Support and Protection (Scotland) Act (ASPA) gives to the local authority. Instead of emphasising and reinforcing the **statutory duty** placed on both the OPG & the MWC to make adult protection referrals as “Public Bodies”¹ it suggests that the local authorities should instead report concerns to the OPG and for the OPG to be in the position of requiring more information from local partnerships and local authorities. This is not consistent with ASPA and does not facilitate local authorities carrying out their duties to investigate in a timely way.

The majority of adult protection cases involve an adult at risk experiencing more than 1 type of harm. It is therefore essential that adult protection investigations are informed by all information held by the OPG and MWC and a suggestion which places a duty on local authorities to report to the OPG/MWC, rather than the other way round, does not support the robust adult support and protection investigations.

In weakening the role of local authorities, and IJBs in this way, the proposals run the risk of undermining the capacity for local authorities and IJBs to plan for local support and supervision for guardians. The question is rather one of resources, and will not be resolved by centralising processes.

Any attempt to increase “cohesion” involved in supervision of all Guardians should be based on the needs of the adults subject to Guardianship. The proposal as it stands is not.

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

It is important that Guardians fully understand the responsibilities before undertaking this role.

The current Law Society (Scotland) system of accrediting solicitors as being experts or specialists in the field of incapacity law should be strengthened and clearly defined as to the level of skill, training, and expertise that the solicitor requires. And as many solicitors as possible who wish to undertake this type of work, should be required to obtain this accreditation. This would help raise the standard of interventions from solicitors and their

¹ 5(3) Adult Support and Protection (Scotland) Act 2007

engagement with the public in giving advice and guidance in these matters. Solicitors should assure themselves that their client understands fully what they are asking for in terms of the guardianship or POA and how it operates.

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

☒ Yes ☐ No

One proposal would be, at application stage, for there to be introduced a standard induction for all potential Guardians that would have to be gone through on a 1:1 basis. This would make clear the role/expectation/duties of a Guardian and completion of an induction could be part of the application process. Such an induction could be delivered by the OPG, Citizen's Advice, Independent Advocacy, Carers Groups/Centres, solicitors. It could be provided by the local authority but this is not necessary. Any such induction would need resourced.

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

☒ Yes ☐ No

The OPG and/or carers groups have role in providing support. If an attorney was starting to struggle in terms of carrying out their role in supporting someone who lacked capacity, the 3 point test for adult protection² may be met. It is therefore sensible for advice for attorneys to be available from local authorities as well.

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

☐ Yes ☒ No

If so, does the proposal cover all the necessary matters?

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

² 3(1) Adult Support and Protection (Scotland) Act 2007

☒ Yes ☐ No

If you agree, does the above approach seem correct or are there alternative steps we should take?

Please comment as appropriate.

There needs to be a quick and simple process, to allow for the safeguarding of adults at risk in community settings where the use of AWI legislation is preferable to invoking more restrictive powers under the mental health act. The proposal for a meeting arranged by the Integration Authority is helpful. We believe that engaging families in plans at all stages is better than the adversarial nature of appeals. We therefore believe that the adult, any guardian, welfare attorney or interested party should also be involved in such meetings unless this is clearly contrary to the welfare of the adult.

We draw attention the reserved functions of a social worker as outlined in the 2010 Guidance and therefore we agree that an MHO should be present at such a meeting to give professional advice in relation to such cases where adults with a mental disorder may be at risk from others or whose property is at risk or who are putting themselves at risk

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?

☒ Yes ☐ No

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.

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

☐ Yes ☒ No

Please give reasons for your answers.

We believe that the issue of advanced directives merits wide public debate and consultation in its own right. Therefore its insertion in the AWI is not the most appropriate place for legislative provision for advanced directives.

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

☐ Yes ☐ No

Please give reasons for your answer.

DRAFT