

Social Work Scotland: Response to the Scottish Government Proposals for Reform of the Adults With Incapacity (Scotland) Act 2000

Social Work Scotland is the professional leadership body for the social work and social care professions. We are a membership organisation which represents social workers and other professionals who lead and support social work across all sectors. Social Work Scotland welcomes the opportunity to comment on the proposals for reform of the Adults with Incapacity (Scotland) Act 2000.

Chapter 3: 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

Social Work Scotland welcomes 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. Social Work Scotland also believes that restrictions on an adult's liberty should only be taken when there is a clearly assessed risk of harm to the adult.

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?

Social Work Scotland agrees with the overall approach. Financial controls are also a significant restriction. However, it will be important to define 'continuous supervision' and 'close supervision' and 'surveillance' within guidance. Individuals who lack capacity may be subject to high levels of supervision within the community as well as in residential settings and this should be made clear in the definitions on restrictions to liberty. With the developments in the use of technology enabled care (TEC), 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.

Are there any other issues we need to consider here?

No

CHAPTER 4: 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, Social Work Scotland welcomes this amendment to strengthen the AWI legislation and provide robust safeguards for a person's independence of thought and action when intervention is considered. It is right legal principles enshrine an individual's right to maximise their autonomy, express their will and preferences and make decisions.

Does our proposed new principle achieve that?

Social Work Scotland supports the principle, in line with UNCRPD, that adults should be given all practicable support to make a decision in order to mitigate recourse to substitute decision making.

As it is currently written the principle does not draw any distinction between providing all practical help and support to an adult to express their will and preferences and providing support to an adult to make a decision based on the ability to weigh up the consequences of both acting and not acting on the expressed will.

Clear Guidance defining 'all practical help and support' will be important as these terms are subjective and will be open to wide interpretation. Social Work Scotland would welcome the opportunity to participate in the development of such guidance.

Social Work Scotland recommends 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.

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?

Social Work Scotland recommends that consideration is given to an additional principle that requires a risk of harm to the adult being identified as a basis for overriding the will and preferences of an adult.

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

No

CHAPTER 5: 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

It is important that individuals are able to make arrangements for how they wish certain welfare and/or financial decisions to be made by someone they trust should they no longer have capacity to make such decision for themselves. Social Work Scotland therefore supports 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 to make the right decisions about advance consent. Social Work Scotland therefore proposes that primary legislation and guidance make clear what is required for a granter to express how their incapacity is to be determined to mitigate the risk of abuse and exploitation. Training is required for solicitors in relation to drawing up POAs to ensure that a POA is specific to the individual wishes and circumstances of the granter. Wider training for professionals advising and supporting families is necessary and the Government should give consideration to public messages and information campaigns.

In reviewing the legislation, Social Work Scotland recommends that consideration is given to some flexibility in the 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.

Social Work Scotland does not believe that the proxy should be given the authority within a power of attorney to determine when a POA should be activated. This gives rise to the potential for abuse or exploitation of the granter.

These tests should also address situations of an adult with fluctuating capacity to consent to ensure that an adult's capacity to make decisions about care and treatment are maximised in accordance with Article 12 of UNCRPD. A POA should include clear instructions of what to do in circumstances of fluctuating capacity.

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

Social Work Scotland fully supports the principle that adults, no matter how severely cognitively impaired, should be given support to express their will and preferences and make decisions. The rights of those disabled adults with cognitive impairment are all too often undermined by an assumption that adults cannot come to a decision. Social Work Scotland therefore supports processes and resources directed at assisting a person with cognitive disability build their capacity to make decisions for themselves and enjoy equal access to the law. All those working and communicating with an adult with incapacity should provide assistance to allow them to communicate their wishes, preferences and come to decisions. We need a range of measures to ensure adults' rights are appropriately safeguarded.

We recognise that the adult may ask someone to support then make or communicate decisions, for example in a formal meeting. Regulating such support and making it an official position may create additional bureaucracy and if this measure were to be adopted there would need to be safeguards in place to mitigate the risks of any misuse of power.

In creating an official role, Social Work Scotland has concerns 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 adult 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 appropriate, if adopted. It is helpful that support, rather than powers, feature in the language to protect the adult and reflect the limits of the role.

CHAPTER 6: 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 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 have a relationship and prior knowledge of the person. Social Work Scotland does not believe that some of the psychiatric assessments undertaken at present meet the requirements of individuals.

Social Work Scotland recommends that the following groups of professionals may be appropriate for assessment for grades 1 and 2 (as they are currently proposed).

- Clinical Psychologist
- A qualified, registered Social Worker.
- A registered Occupational Therapist
- A qualified, registered mental health nurse or nurse specialising in learning disability
- A registered Speech and Language Therapist

Only a qualified MHO should be able to assess capacity for Guardianship at Grade 3.

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, why and for how long.

CHAPTER 7: Graded Guardianship

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

Yes No

Please give reasons for your answer.

Social Work Scotland welcomes the intention to make the guardianship process proportionate to the powers being applied for. However, the proposals as they stand for Grade 1 do not have sufficient safeguards and we believe they will create increased risks to adults with incapacity from financial and other types of harm. The proposed method of appointment of guardians is not commensurate with the proposed level of legal authority at Grade 1.

Weakening the scrutiny of financial guardians, in particular, may increase the 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. A system of 2 grades of guardianship with legal oversight at both grades would balance the need for safeguards and proportionality.

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.

Social Work Scotland welcomes 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 do not

support the wide range of proposed powers at Grade 1 being granted in a process that appears largely administrative with limited checks and balances.

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). The proposed method of appointment of guardians is not commensurate with this level of legal authority.

Applicants may choose more powers (welfare and financial) 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. As proposed, there is no robust process for scrutiny that would mitigate this risk to ensure powers sought are specific to the adult. Moreover, anyone predisposed to exploit the adult is likely to seek to maximise the powers and will be able to do so without sufficient oversight.

Social Work Scotland would propose that a local authority social worker should provide a report in relation to welfare powers sought at Grade 1 (if such a proposal goes forward). The report should also include an assessment of the appropriateness of the welfare guardian given the extensive nature of welfare powers that are available. This would create demand pressures within local authorities, for social work in a particular, and would require additional resource in order to provide the requisite safeguards for adults.

Social Work Scotland has 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. Applicants would need guidance. The system may also be exploited by any applicant predisposed to exploit the adult. There is a risk that the views of interested parties in relation to any concerns or opposition to the plans would not be known.

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

Yes No

Please give reasons for your answer.

Grade 1

Social Work Scotland does not support Grade 1 Guardianship as currently proposed. 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 is not in itself be sufficient. The proposed welfare and financial powers are wide ranging with limited scrutiny in terms of appointment of

guardians. 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 are limited. The interrogation as to the appropriateness of the 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?

Grade 1 as proposed is intended to provide powers for day to day decision making. As such the level of £50,000 is too high. The example given on the consultation of the power to sign a tenancy agreement is not commensurate with a limit of £50,000. The government should consider using the capital limits for entitlement to welfare benefits as a guide to limits at Grade 1.

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 be 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 between hearing the application as soon as possible and ensuring all interested parties are intimated. 'Any other person directed by the sheriff' should include, but not be restricted to, 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?

Social Work Scotland believes 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. Social Work Scotland is 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

Social Work Scotland has 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 workers 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 are in place for the management of the complex balance of need, risk and civil liberties, in accordance with professional standards. 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, Social

Work Scotland believes 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 is well placed as an organisation to carry out functions of registration, inspection and regulation in this area.

Social Work Scotland questions 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 to the local authority as only a person can perform this function. Further, there is concern that organisations providing direct care may apply to become Guardians. This may set up a conflict of interest between the needs of the individual and that of the organisation.

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 Social Work Scotland’s concerns about the sufficiency of safeguards continues to apply and we do not support the proposed 3 grade guardianship.

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?

No

Please give reasons for your answer.

Social Work Scotland welcomes the intention to deal with the difficulties associated with Access to Funds. We are aware, however, that in some areas Access to Funds is working well. We recommend that further work and analysis is undertaken before replacing Access to Funds with the more restrictive measure of guardianship, especially given the concerns we have about the scheme as proposed in the consultation document. Social Work Scotland would be willing to support the Government with such an endeavour.

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 be 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

Social Work Scotland agrees that organisations can perform the task of financial guardianship (but not welfare guardianship). However, Social Work Scotland has 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.

CHAPTER 8: Forum For Cases Under Adults with Incapacity Legislation

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

Yes No

Social Work Scotland does 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 for such applications that restrict an adult's rights.

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.

Social Work Scotland has a concern that an unintended consequence may be more adults who have lost capacity being financially abused.

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.

Social Work Scotland has significant concerns with regard to the OPG processing applications at Grade 1 as outlined above.

Social Work Scotland supports 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 work expertise

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

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

Social Work Scotland does note, however, that in many areas of the country local authorities are stretched to meet requirement of the Tribunal in relation to the Mental Health Act applications. A recent report by Social Work Scotland, [The Mental Health Officer: capacity, challenges, opportunities and achievements](#) highlighted the pressures on the MHO service and recruitment and retention of MHOs will be addressed as part of the National Health and Social Care Workforce Plan. Therefore a move to a tribunal system would need to be properly resourced to ensure it meets the intentions of this change in approach to approving Guardianship applications.

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

Social Work Scotland favours 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.

CHAPTER 9: Supervision and Support for Guardians

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

- 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.

Social Work Scotland has significant concerns about the proposals for a number of reasons.

The level of support required must be informed by the professional judgement of a Social Worker/MHO and be overseen by the care governance arrangements put in place by the Chief Social Work Officer.

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 appears to exclude the local authority/integrated authority 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 proposals also appear to be in tension with the lead role that local authorities have with regard to the Adult Support and Protection (Scotland) Act. 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 Act and does not facilitate local authorities carrying out their duties to investigate in a timely way.

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

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 robust adult support and protection investigations.

In weakening the role of local authorities, and integrated authorities in this way, the proposals run the risk of undermining the capacity 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 does not.

Amendments as introduced by the Adults with Incapacity (Supervision of Welfare Guardians) (Scotland) Regulations 2014 enable local authorities to direct support and supervision to those who require it most. Social Work Scotland believes this should remain the case and the supervision of Guardians should remain a social work role. We do, however, note the demand pressures on social work services but these should not be addressed by a change in the law that may increase risks to vulnerable adults. Rather, the Government should take cognisance of the professional role performed by social workers and resources made available to ensure the delivery of services to adults and their guardians.

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. 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 legal practice and their 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 to introduce, at application stage, a standard induction for all potential Guardians. 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. Peer support and advice may work well.

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.

CHAPTER 10: Order for Cessation of a Residential Placement

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

Yes

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?

Yes No

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

Please comment as appropriate.

Social Work Scotland believes that in cases of emergency, where there is a clear and identifiable risk of harm to the adult, provision of an order to allow for the safeguarding of adults at risk in community settings 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

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

such meetings unless this is clearly contrary to the welfare of the adult. The involvement of a MHO in such meetings would act as check and balance and support the focus on the needs of the adult.

Social Work Scotland draws attention the reserved functions of a social worker as outlined in the [Scottish Government Guidance](#) 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?

Social Work Scotland supports the principle of using the least restrictive option and providing robust support to adults with decision making. Section 13ZA is less restrictive than guardianship and can only be used to provide services where an adult and any interested party agree. Therefore supporting the adult understand and decide upon the service being recommended is preferable and more in line with UNCRPD than using a short term order (which we recommend should only be used in emergency situations) or through graded guardianship.

CHAPTER 11: Advance Directives

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

Yes No

Please give reasons for your answers.

Social Work Scotland believes 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.

CHAPTER 12: Authorisation for Medical Treatment

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.

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?

Yes

Social Work Scotland believes that medical authorisation to remove a person to hospital should only be permitted where an adult is at risk of harm and a second medical opinion is sought. Social Work Scotland also recommends an earlier and more frequent review process than is currently proposed (see below). The first review should be within 7 days.

If, as is planned, the certificate can also prevent an adult leaving hospital, any provision that also allows detention of an adult for treatment, may lead to short cuts to detention without the safeguards currently enshrined in mental health legislation. Clear safeguards will be required.

Do you agree that a 2nd opinion (medical practitioner) should be involved in the authorisation process?

Yes No

If yes, should they only become involved where the family dispute the need for detention?

Yes No

The imposition of treatment is a significant intervention which warrants a second opinion. Social Work Scotland therefore supports the additional proposed safeguards. Further detail is required in relation to rights to appeal and a quick and accessible way to request that any such certificate is revoked.

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?

Yes No

How many reviews do you think would be reasonable?

Social Work Scotland agrees that there should be a review process, but we believe that 28 days is too long to detain an adult in hospital without a review. We believe that 7 days is sufficient for the initial stages of treatment of physical illness and diagnostics to be undertaken and for support to be put in place to assist an adult understand the treatment and express their will and preferences. If an adult continues to be detained under S 47, reviews should take place every 21 days thereafter.

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?

Yes No

As section 47 applies to the treatment and diagnostics of physical illness, authorisation to certify an adult under this section should be confined to registered health practitioners who are primarily responsible for the treatment.