

# Consultation on the Scottish Law Commission Report on Adults with Incapacity



## RESPONDENT INFORMATION FORM

**Please Note** this form **must** be returned with your response to ensure that we handle your response appropriately

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### 3. Permissions - I am responding as...

Individual

Group/Organisation

Please tick as appropriate

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**Please tick as appropriate**

X Yes  No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

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X Yes  No

Yes, make my response,  
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or

Yes, make my response  
available, but not my  
name and address

or

Yes, make my response  
and name available, but  
not my address

**(d)** We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

**Please tick as appropriate**

**Yes**

**No**

**QUESTIONS RELATING TO THE DRAFT BILL PROVISIONS ON HOSPITAL SETTINGS**

**1. Is a process (beyond the process of applying for guardianship or an intervention order from the court) required to authorise the use of measures to keep an adult with incapacity safe whilst in a hospital?**

**Yes**

**X**

**No**

**Please provide an explanation for your answer**

The Mental Health (Care and Treatment)(Scotland) Act 2003 allows for the treatment of mental disorder and cannot, therefore, be used to prevent someone leaving hospital when the principal aim is to treat physical ill health.

Not all adults who lack capacity are subject to an order under the Adults with Incapacity (Scotland) Act 2000. It would be unrealistic and disproportionate to apply for guardianship in every case to allow for medical treatment. Furthermore, it would be unrealistic to expect a guardianship application to be made in relation to an adult with incapacity who attempts to leave hospital in these circumstances. Regardless, S47 of the 2000 Act, guardianship or an intervention order would not provide authority to detain an adult with incapacity in hospital in these circumstances.

There is little evidence to suggest that there are significant numbers of occasions where adults who do not have capacity are attempting to leave a ward where they are being treated for a physical condition. Adults with a significant cognitive impairment, admitted on a planned basis, usually continue to be supported by their community care providers whilst in hospital- thereby presumably reducing the likelihood of an unplanned discharge through anxiety and confusion.

There are reports, however, of nursing staff occasionally having to spend significant amounts of time supporting and re-directing these patients. It **is** clear, however, that there is no consent to the treatment that is being provided.

Social Work Scotland is of the view that, in principle, there should be a legal framework for allowing medical staff to seek to prevent an adult with incapacity from leaving hospital- when to do so would be detrimental to their health and wellbeing. Section 47 (7) covers the authorising of medical treatment issued by the doctor and would prohibit force or detention unless immediately necessary and for as long as is necessary. Emergency treatment, therefore, could be enforced in such circumstances.

Our view is that there should be consideration given to amending the current S47 process in order that it would accommodate the provisions of the European Convention on Human Rights (ECHR). Furthermore, that the issue of restraint to

keep adults safe in any setting would be better addressed in the wider review of the Adults with Incapacity Scotland Act 2000 (AWI).

**2. Section 1 of the Commission’s draft Adults with Incapacity Bill provides for new sections 50A to 50C within the 2000 Act, creating measures to prevent an adult patient from going out of hospital.  
Is the proposed approach comprehensive?**

Yes

No

**Please provide an explanation for your answer**

We are of the view that more clarity is required on the legal basis of the decision to admit the adult to hospital in the first place (as with the 2003 Act). Social Work Scotland does not feel that S47 certificates are adequate for this purpose.

A certificate could be issued alongside a section 47 certificate to authorise restraint in a hospital ward to allow for treatment. However, Social Work Scotland has some concern that adult patients will effectively be detained in hospital without the checks and balances afforded to clients being detained under the Mental Health Care and Treatment (Scotland) Act 2003 i.e. the consent of the Mental Health Officer /a S50 certificate. We note, however, that there are routes of appeal to the Sheriff. We are interested in how ‘reasonable steps’ is to be defined.

There is further concern that adults in hospital with physical health needs and lacking capacity as a result of, for example, dementia, could, on completion of the proposed section 50 certificate, be held in hospital where consideration should be given to detention under the Mental Health Care and Treatment (Scotland) Act 2003.

**Are there any changes you would suggest to the process?**

Social Work Scotland recommends that proxies be consulted over such intentions and, if they are not immediately available, the doctor should be required to say what s/he has done to gain the views of guardians and welfare attorneys if applicable, or the named person/nearest relative if there is no proxy.

There is no proposed limit of time on the certificate, although the Medical Practitioner is required to undertake a review from ‘time to time’ and assess if the certificate continues to be necessary. It is also noted that the patient (or any other person) may apply to the sheriff for an “end date”. In keeping with the MHA 2003, we suggest that no –one should be detained for more than 28 days without a tribunal considering the case and in any case for not longer than 56 days from the point of detention. This will support consistent practice across the country.

**3. Please comment on how you consider the draft provisions would work alongside the existing provisions of the 2000 Act, in particular section 47( authority of persons responsible for medical treatment).**

See above.

Section 50 would seem to comfortably sit with Part 5 and S47. The condition under S47 (7) reflects that of S50A (3)(b) regarding the use of force unless immediately necessary and then only for as long as is necessary in the circumstances. As detailed above, we would wish to avoid a position where this could be deemed as an easier and more convenient way of keeping patients in hospital- not just for their physical condition but also for an impacting mental disorder.

In addition, we are concerned by the power created to administer medication specifically to keep the patient in hospital. The emphasis here is different to that concerning the use of medication to treat distress. Social Work Scotland is of the view that the use of the Mental Health Act would be more appropriate and is consistent with the expectations placed on psychiatrists treating mental disorder in a psychiatric hospital.

We have concern that there is no requirement for consent here and no stated time limits. The proposals as they stand seem to negate the role of existing welfare guardians/ power of attorneys.

As previously stated, adjustments to the S47 process may be a better option to additional certification.

**Are there any changes you would suggest to the process?**

|            |  |           |  |
|------------|--|-----------|--|
| <b>Yes</b> |  | <b>No</b> |  |
|------------|--|-----------|--|

**Please provide an explanation for your answer**

As above

**QUESTIONS RELATING TO THE DRAFT BILL PROVISIONS ON COMMUNITY**

## SETTINGS

**1 .Is a process required to authorise the restriction of an individual’s liberty in a community setting (beyond a guardianship or intervention order), if such restriction is required for the individual’s safety and wellbeing?**

Yes

No

**Please provide an explanation for your answer**

Social Work Scotland agrees in principle but does not agree with the proposal as it stands in the draft Bill.

Social Work Scotland would prefer that a wider consideration is given to developing systems and behaviours in care settings that empower residents as a part of a review of the 200 Act. This work should be person and outcome centred, rather than starting from the point of protecting services from legal challenge.

If an adult is subject to a welfare guardianship under the AWI Act, or has a welfare attorney with powers to decide where the adult should live, then there should be a simplified process in these circumstances. The proxy should be consulted and should consent (or otherwise) to the restriction.

Adults should be supported to have as much freedom as possible within the care home and in the care home grounds and, therefore, the principle of least restriction for the adult should be made explicit in the process. A notification to the Mental Welfare Commission stating the justification for the restriction may be required as an extra safeguard, along with an opportunity for an interested person to appeal against the restriction.

Social Work Scotland is of the view that the more robust measures proposed would more appropriately protect the rights of those who do not have a proxy in place. An example would be individuals who have gone into a care home voluntarily and lost capacity whilst a resident- or alternatively may have been admitted under S13ZA Social Work Scotland Act 1968.

In the longer term, a wider review of the AWI Act should consider whether S13ZA is sufficient to allow admission into care settings- given that most cater for older people often with reducing capabilities and people with profound disabilities. The establishments are restrictive for reasons of safety. Social Work Scotland has concerns that ‘tiers’ and measures are being added to existing process that may lead to confusion and legal challenge. There may be advantages to considering the requirement for ‘guardianship’ on admission to a care setting, given that the proposed process appears to be as administratively onerous.

Social Work Scotland suggests, therefore, that the Commission considers the inclusion of the ‘power to restrict liberty’ within guardianship application process. Furthermore, that the introduction of a short term certificate of up to 28 days be

considered to allow for significant restriction whilst an application for a guardianship was in process.

**2. The proposed legal authorisation process will not be required for a person who is living in a care home where the front door is ordinarily locked, who might require seclusion or restraint from time to time.**

**Do you agree that the authorisation process suggested by the Commission should not apply here?**

Yes

No

x

**Please provide an explanation for your answer**

Social Work Scotland is of the view that current guardianship powers would cover this area, as would a properly constructed Power of Attorney with well-defined powers.

It is problematic to define "from time to time" and therefore inconsistencies in practice are likely. A locked door is a significant restriction if the person cannot use a key pad or lock or does not know where the door is or how to use the door.

**3. In proposing a new process for measures that may restrict an adult's liberty, the Commission has recommended the use of 'significant restriction' rather than deprivation of liberty and has set out a list of criteria that would constitute a significant restriction on an adult's liberty.**

**Please give your views on this approach and the categories of significant restriction.**

We feel this section tends to confuse rather than clarify. The Commission recommends that a legal authorisation process will not apply universally to all adults in care settings but only to those who are subject to a significant restriction in a community setting, defined by having more than one measure of restraint on a regular basis. We are unsure as to the logic and theoretical basis of the '2 or more' test.

The categories are far reaching and seem to apply to most adults in care homes. Many care homes lock the front door as a preventative measure and have different sections for residents with different levels of need. We are concerned that these proposals place the burden upon care home staff to act as gatekeepers in this process, metaphorically and literally, and that risk averse practices may result

with, for example, residents who normally have freedom to leave without restriction being prevented from doing so in order that the 'applies to all residents' test can be met. This would be to the detriment of individual, creative planning.

Building design would have a significant impact on whether all residents would fall under the significant restriction category, therefore, which does not seem to be consistent with personalisation principles. Additionally it is increasingly unusual for people to be admitted to a care home if they are both cognitively able to decide *and* physically able to leave.

It is also possible to restrict someone's liberty at home either through constant supervision by a carer, care provider or through the use of telecare. The fact that people living at home are excluded seems inconsistent.

The Commission's intention to institute a specific Scots Law term 'significant restriction' maintains a helpful distinction from the European Human Rights Law concept of 'deprivation of liberty'- which is undefinable in any general or criterion based way. This serves to provide an element of clarity, domestically, in relation to when formal powers must be in place.

The criteria are not comprehensive but they are successful in providing an acceptable means of defining cases that will require the use of domestic provisions. It is also very possible that situations will arise which will constitute a deprivation of liberty but will not fall within their ambit. In particular, the criterion used in S52A (1)(c) would appear to amount to a deprivation of liberty on its own in most situations.

Section 52A (C) appears to be unclear – for example, does the term "physical force" also include hands on redirection of an adult making attempts to leave or going into the kitchen area? We are unsure how the terms 'measure of restraint', 'significant restriction' and 'cumulative effect' (as described in the notes to the Bill) are to be usefully defined. The Code of Practice will be essential in achieving consistency in defining these terms.

An issue for consideration is that a number of adults are given medications which will effectively sedate them and assist in behavioural management- although the relevant person could view this as 'treatment' of a mental disorder rather than as it is described under this section.

Also, Care Home managers may be perceived as not acting independently within this process and it is essential that any legal framework works to reduce the likelihood of institutional abuse. Managers will also have varying levels of expertise in matters of AWI/ legal issues. There will inevitably be more burdens placed on MHOs – for example as advisors and trainers - as a result of these proposals.



**4. The authorisation process provides for guardians and welfare attorneys to authorise significant restrictions of liberty. Do you have a view on whether this would provide sufficiently strong safeguards to meet the requirements of article 5 of the ECHR?**

Yes

No

**Please provide an explanation for your answer**

Yes, if all parties were in agreement, we consider measures, if properly constructed, would give sufficient powers to guardians and welfare attorneys.

It should be noted, however, the powers vested in guardians and welfare attorneys are not always specific. It is our view that solicitors require improved guidance and exemplars to ensure that applications are sensitive to the specific needs of the individual and are not 'standardised'. It would be helpful if solicitors more consistently advised clients, when completing powers of attorney, to consider the relevance of specific powers that would cover future eventualities in relation to liberty restrictions.

**5. The Bill is currently silent on whether it should be open to a relevant person to seek a statement of significant restriction in relation to a person subject to an order under the 1995 or 2003 Acts which currently do not expressly authorise measures which amount to deprivation of liberty.**

**Please give your views on whether these persons should be expressly included or not within the provisions, and reasons for this.**

It is likely that there will be adults in a community setting who are subject to Hospital Based Community Treatment Orders (on suspension) or Community Based Treatment Orders under the 2003 Act. The focus of the 2003 Act is clearly to provide hospital or community treatment for a mental disorder. These individuals could also be subject to a significant restriction of liberty if they lack capacity to consent to the restrictions. There does not appear any specific benefits in including the relevant person's ability to seek a statement of significant restriction in the 2003 Act when this can be managed through the proposed AWI process.

**6. The process to obtain a statement of significant restriction would, as the bill is currently drafted, sit alongside existing provisions safeguarding the welfare of incapable adults, and require the input of professionals already engaged in many aspects of work under the 2000 Act, such as mental health officers and medical practitioners.**

**Please give your views on the impact this process would have on the way the Act currently operates.**

This new legislation gives a pivotal role to GP's and/or medical practitioners in providing an initial report on capacity and a subsequent report for the statement of significant restriction. The introduction of the Bill will likely impact on MHOs receiving timeous medical reports for the CTO's and AWI applications.

It is clear that there would be a significant impact on the workload of MHO's and their capacity to complete other pieces of statutory work- for example social circumstances reports required under the 2003 Act – an area which has already suffered as a result of resourcing issues. As noted in the Mental Welfare Commission report, there has been an 84% increase in AWI applications since 2009/10 and no equivalent increase in MHO posts. The additional duties will impact on local authority resources (MHOs, Safeguarders, Curators ad litem etc.) and on medical resources, including finance. It is anticipated, taking into account experiences in England, that costs will be considerable.

**If you do not agree with the approach taken by the Commission, please outline any alternative approaches you consider appropriate.**

Social Work Scotland considers that any review of the Adults with Incapacity (Scotland) Act should take into account case law as it relates to matters of human rights and also the position taken by the ECHR. There is an opportunity to streamline current guardianship processes making them more robust and 'fit for purpose'.

We recommend further exploration of the issues of 'graded Guardianship' as suggested by the Office of the Public Guardian some years ago. This recommended wider review should address restraint and other forms of deprivation of liberty. If this issue is addressed in isolation, then the effect of this change is in danger of being disproportionate, administratively inefficient and not consistent with the principles of the legislation.

As it currently proposed, the criteria for significant restriction would apply to most adults in care homes and indeed to some people living at home. If implemented,

this will impact severely on Mental Health Officer resources and the officer's ability to exercise their statutory duties- all at a time when significant national concerns exist over shortages of MHOs and of the impending retirement of many experienced staff. Similarly medical professionals and the Sherriff Courts would experience a considerable increase in workload.

Of further concern is that processes, as described in the report, would result in a duplication of effort given that an application for restriction of liberty is similar to an application for an Intervention Order or Guardianship. Social Work Scotland is of the view that it is disproportionate to require an Incapacity report, a MHO report and a court process when an order is already in place along with a proxy who can consent (or otherwise) to decisions that significantly impact the adult's health, safety, wellbeing and liberty.

We accept that a more robust legal process will be required in some circumstances- for example, there is currently no legal framework to cover people who have entered a care setting voluntarily and subsequently lost capacity. However, if as part of the legal process to restrict liberty in these circumstances Sheriffs exercise their power to instruct the local authority to also apply for guardianship, (as per the draft Bill), it could mean that an adult would be unnecessarily subject to two separate orders.

Social Work Scotland has concerns that the draft Bill is neither proportionate nor manageable.

We recommend that the Commission consider whether the consent to significant restriction may be part of the guardianship application. Furthermore, if the court were able to confer powers on a welfare guardian to consent to significant restriction if it was shown to be necessary, this would provide benefit and would be the least restrictive option.

Our view is that managers of care settings should not have responsibility for undertaking the statement of significant restriction but should rather be a significant contributor to the assessment. Care provision often operates under contract to the local authority and, therefore, the responsibility for assessing whether significant restriction of liberty applies should rest with the local authority. The consideration of restriction of liberty should be routinely considered by the multi-agency team and family at reviews. Regardless, mandatory training programmes will be required for managers of care settings to ensure consistency in identifying when the criteria for significant restriction appears to be present or is met.

**POWER TO MAKE ORDER FOR CESSATION OF UNLAWFUL DETENTION**

**1. Is a process required to allow adults to appeal to the Sheriff against unlawful detention in a care home or adult care placement?**

Yes

No

**Please provide an explanation for your answer**

Yes but clarification is required on how this would be used and who would instigate this to avoid conflict of interest?

**2. Is the proposed approach comprehensive?**

Yes

No

X

**Please provide an explanation for your answer**

As above, clarity is required on how this would be workable, who would initiate it as the adult lacks capacity?

**3. Are there any changes you would suggest?**

As above.

## NEXT STEPS/WIDER REVIEW

**Over and above the question of deprivation of liberty considered by the Commission do you believe the 2000 Act is working effectively to meet its purpose of safeguarding the welfare and financial affairs of people in the least restrictive manner?**

Yes

No

X

**Please provide an explanation for your answer**

**If you have answered no, can you please suggest two or three key areas which any future wider review of the provisions of the 2000 Act might consider**

Social Work Scotland believes that the AWI legislation requires to be comprehensively reviewed to determine if it is fit for purpose- rather than subjected to peripheral adjustments over time.

The numbers of guardianships are growing year on year with some areas experiencing an increase of 90%. Current wording within the AWI legislation around timescales is contradictory and does not 'fit' best current practice. The number of applications for combined 'Welfare and Financial Guardianships' is high, although the reason for many of the applications is actually to obtain financial powers alone. Further consideration requires to be given to "graded guardianships" in place of the present process which is not always least restrictive.

There also requires to be a focused consideration of who needs to be consulted in the legal process. Often, MHO time is preoccupied with tracing family members who have been estranged from the patient for periods in excess of 25 years. We would question the relevance of this activity. In addition, legal aid process are complex and lengthy, resulting at times in delays in hospital discharges that are not in the interests of any party.

- A complete review and update of the current AWI Act is required, including a consideration of 'graded guardianship' and how to widen this further to welfare powers and applications.
- Consideration should be given to the advantages of the Tribunal system, presently used for the 2003 MH Act, being used for the AWI process. This has the potential for enabling a far more discursive and holistic approach as opposed to a legalistic one (although arrangements would need to be robust

to prevent further delay and additional costs.)

- Guidance and training for solicitors in AWI/POA is essential.

**The Scottish Government is also currently consulting on the Draft Delivery Plan 2016 - 2020 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). That plan includes the following commitment: - We will consult on the Scottish Law Commissions review of the Adults with Incapacity Act in relation to its compliance with Article 5 of the ECoFHR, specifically in relation to Deprivation of Liberty and thereafter carry out a scoping exercise in relation to a wider review of the Adults with Incapacity legislation.**

**All responses to this consultation will be carefully considered as part of the scoping process in relation to a wider review of Adults with Incapacity legislation. To further assist that process we would therefore welcome responses to the following questions**

**1. Over and above the question of deprivation of liberty considered by the Commission do you believe the 2000 Act is working effectively to meet its purpose of safeguarding the welfare and financial affairs of people in the least restrictive manner?**

No not in all aspects.

**Please give an explanation for your answer**

Please see answer to question 2.

**2. If you have answered no, can you please suggest two or three key areas which any future wider review of the provisions of the 2000 Act might consider.**

The power to admit an adult with incapacity to a care home under Section 13ZA of the Social Work (Scotland) Act 1984 needs to be reviewed as it is our opinion that these provisions are problematic in relation to human rights legislation.

We believe, as previously stated, on balance, that intervention orders and guardianships should be considered and granted by the Tribunal Service rather than the Sherriff Courts (as with compulsory measures under the Mental Health Care and Treatment Scotland Act 2003).

There seems to be, at times, a "one size fits all" approach taken by solicitors in relation to the range of powers sought in their applications. 'Power of Attorney' should also be reviewed in terms of whether there is sufficient scrutiny over its requirement and whether it should be overseen and administered by the Tribunal Service rather than by solicitors.

MHOs feel that there is, at times, disparity between their professional advice to

Sheriffs on the limited interventions required for individual cases and the subsequent granting of guardianships with restrictive powers for lengthy periods. This issue may be progressed through opportunities for dialogue and shared training.