

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

Summary and analysis of consultation responses

August 2018

**ADULTS WITH INCAPACITY REFORM**

**SUMMARY AND ANALYSIS OF RESPONSES TO CONSULTATION**

**INTRODUCTION**

The Scottish Government carried out a consultation on the Adults with Incapacity (Scotland) Act 2000 between January and April 2018. The purpose of the consultation was to seek views on changes to the legislation and practice around AWI. These changes aimed to address both the need to reflect the requirements of the UN Convention on the Rights of Persons with Disabilities, and concerns that many of the processes within the legislation had become overly cumbersome and were no longer fit for purpose.

 The consultation paper contained detailed proposals on the following matters:

* Enhanced principles within the AWI legislation to reflect the need for an adult to have support for the exercise of legal capacity
* Changes to the use of powers of attorney
* Creation of graded guardianships
* Change of Judicial forum for AWI cases
* Creation of short term placement order
* Creation of a right of appeal against a residential placement
* Changes to authorisation for medical treatment
* Definition of significant restrictions on liberty for persons lacking in capacity

The consultation also sought views on changes to authorisation for medical research under the AWI Act, support and supervision for guardians and attorneys, legislative provision for advance directives. And although no questions were asked on the matters of support for decision making, and capacity assessments, the paper referred to the fact that we are taking forward work in these areas as this is fundamental to the reform of AWI, and the need to reflect the requirements of the UN Convention on the Rights of Persons with Disabilities.

**Summary of responses**

317 responses were received in total. All responses the Scottish Government has authority to publish can be accessed here:

<https://consult.gov.scot/health-and-social-care/adults-with-incapacity-reform/consultation/published_select_respondent>

The main themes emerging from the consultation are that there is strong support for change to the Adults with Incapacity (AWI) legislation and practice. There is consensus on the need to make changes to meet the requirements of the UN Convention on the Rights of Persons with Disabilities, and to address problems around overly burdened, complex systems, but a wide range of views as to how we might achieve those changes. Many respondents expressed concern that the proposals contained within the consultation do not go far enough in meeting the requirements of the UN Convention on the Rights of Persons with Disabilities and that actions are needed to provide support for decision making, and support for carrying out decisions.

In particular, the model for graded guardianship within the consultation was heavily criticized, with many respondents suggesting that it did not provide enough safeguards, nor provide enough support to enable the adult to make their own decisions. Further, rather than making the process less complex, we ran the risk of creating more bureaucracy, which certainly was not the intention.

The need for multiagency training was a recurring theme, as was the need for independent advocacy to be given the same priority in AWI legislation as it has in mental health legislation.

Many respondents commented on the need to strike the right balance between supporting individuals and upholding their rights, and the viable provision of care, and were of the view that the consultation proposals do not do this.

This report will provide a summary and analysis of the consultation, chapter by chapter, with the intentions of the Scottish Government outlined after each chapter.

**What happens next?**

The intention behind the proposed reforms to the AWI legislation is to maximise the autonomy and exercise of legal capacity of individuals with cognitive impairment so that genuine non - discriminatory respect is afforded for a person’s rights, will and preference, in keeping with the provisions of the UN Convention on the Rights of Persons with Disabilities.

However as will be clear from reading this paper, many consultation responses were of the strong opinion that this aim was not achieved. We will therefore be working closely with a wide range of stakeholders over the autumn to adjust the proposals where required so that they more accurately reflect the original aims for the reform of this legislation. To achieve this we intend to:

* Reframe the principles of the AWI legislation to ensure that the adult’s rights, will and preferences are paramount, that any intervention in an adult’s life is genuinely the least restrictive, and for the shortest period of time, and that the principles are adhered to by all persons involved in acting on behalf or in support of the adult
* Work with a small group of stakeholders to firm up the policy around deprivation of liberty for persons lacking in capacity
* Provide a more flexible means of guardianship so that it can be more easily tailored to a person’s individual situation and be less restrictive than at present, ensuring that the system fully accommodates the need to ensure the adult’s rights will and preferences are accounted for, but in doing so take account of the concerns that the consultation proposals are too wide ranging and risk creating more complex systems than before.
* Address the anomalies around powers of attorney ensuring that they are fit for purpose and both the granter and grantee are fully aware of the implications of the document
* Develop training and support models for both guardians and attorneys
* Improve the system of supervision of guardians
* Develop a strategy for support for decision making that will underpin all changes to the legislation and provide the framework for ensuring a person ‘s ability to exercise their legal capacity is maximised
* Address the issues around capacity assessments,

In taking this work forward we will also consider the need for independent advocacy to be available for all persons under AWI legislation, and the position of safeguarders in AWI cases, how they are appointed, trained and paid for.

The Scottish Government is very grateful to all those who took the time to respond to this consultation. The effort taken to provide thoughtful and considered returns is much appreciated. The contributions made will lead to much improved legislation and practice.

**Number of responses organised by chapter *(\*donates the difference in totals in the table and text as some respondents did not respond yes or no).***

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Responses organised by chapter** | **Number of responses**

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes**  | **No** |

 |
| **Total responses** | **317** |
| **Chapter Three – 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? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes**  | **No** |

142 118 18 |
| 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. |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes**  | **No** |

123 99 24 |
| Are there any other issues we need to consider here? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes**  | **No** |

61 |
| **Chapter Four – Principles of the Adults with incapacity legislation (Part 1, s.1)** |  |
| Do you agree we need to amend the principles of the AWI legislation to reflect Article 12 of the UNCRPD? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

 141 117 24 |
| Does our proposed new principle achieve that? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

 126 75 51 |
| 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? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

122 69 53 |
| Are there any other changes you consider may be required to the principles of the AWI legislation? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

114 41 73 |
| **Chapter Five – Powers of Attorney and Official Supporter** |  |
| Do you agree that there is need to clarify the use of powers of attorney in situations that might give rise to restrictions on a person’s liberty? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

140\* 135 5 |
| If so, do you consider that the proposal for advance consent provisions will address the issue? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

121 86 35 |
| Is there a need to clarify how and when a power of attorney should be activated? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

126\* 117 9 |
| **Chapter Five – Powers of Attorney and Official Supporter continued** |  |
| Do you think there would be value in creating a role of official supporter? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

138\* 82 56 |
| Countries that have created a role of supported decision maker have used different names, such as supportive attorney in Australia, or a Godman in Sweden, meaning custodian. We have suggested ‘official supporter’, Do you think this is the right term or is another preferred. |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

72\* 54 18 |
| **Chapter Six – Capacity Assessments** |  |
| Should we give consideration to extending the range of professionals who can carry out capacity assessments for the purposes of guardianship orders? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

143\* 93 50 |
| **Chapter Seven – Graded Guardianship** |  |
| Do you agree with the proposal for a 3 grade guardianship system? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

133\* 79 54 |
| 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? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

112\* 60 52 |
| Are the powers available at each grade appropriate for the level of scrutiny given? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

110\* 56 54 |
| 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? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

78\* 61 17 |
| 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? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

117\* 109 8 |
| Where there is a severe restriction on liberty and all parties agree do you think it is enough to rely on the decision of the sheriff/tribunal at grade 2 or should these cases automatically be at grade 3? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

80\* 62 18 |
| Do you think our proposals make movement up and down the grades sufficiently straightforward and accessible? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

107\* 69 38 |
| Do you agree with our proposal to amalgamate intervention orders into graded guardianships? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

104\* 79 25  |
| Do you agree with the proposal to repeal Access to Funds provisions in favour of graded guardianship? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

103\* 86 17 |
| Do you agree with the proposal to repeal the management of residents’ finances? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

95\* 79 16 |
| **Chapter Eight – 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 ? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

113\* 62 51 |
| **Chapter Eight – Forum for cases under adults with incapacity legislation continued.** |  |
| Which of the following options do you think would be the most appropriate approach for cases under the AWI legislation? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

122 |
| Please also give your views on the level of scrutiny suggested for each grade of guardianship application? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

35\* 14 21 |
| If you have any further comments on the proposals for the forum, please add them here? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

41 |
| **Chapter Nine – Supervision and Support for Guardians** |  |
| Is there a need to change the way guardianships are supervised? | 110 91 19 |
| If you consider an alternative approach would be preferable, please comment in full? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

37 |
| What sort of advice and support should be provided for guardians? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

89 |
| Do you have view on who might be best placed to provide this support and advice? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

89\* 62 27 |
| Do you think there is a need to provide support for attorneys to assist them in carrying out their role? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

105 99 6 |
| **Chapter Ten – Order for cessation of a residential placement, creation of a short term placement** |  |
| Order for cessation of a residential placement/creation of a short term placement/13ZA.Do you agree that an order for the cessation of a residential placement or restrictive arrangements is required in the AWI legislation? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

101\* 88 13 |
| Do you agree that there is a need for a short term placement order within the AWI legislation?Does our approach seem correct or are there alternative steps we should take? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

104 95 9 |
| Do you consider there remains a need for section 13ZA of the Social Work (Scotland) Act 1968 in light of the proposed changes to the AWI legislation? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

87 49 38 |
| **Chapter Eleven – Advance Directives** |  |
| Should there be clear legislative provision for advance directives in Scotland or should we continue to rely on common law and the principles of the AWI Act to ensure people’s views are taken account of? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

249\* 239 10 |
| If we do make legislative provision for advance directives, is the AWI Act the appropriate place? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

226 194 32 |
| **Chapter Twelve – Authorisation for medical treatment (s.47-50)** |  |
| Do you agree that the existing s.47 should be enhanced and integrated into a single form? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

103 83 20 |
| Do you think that there should be provision to authorize the removal of a person to hospital for the treatment of a physical illness or diagnostic tests? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

101 89 12 |
| **Chapter Twelve – Authorisation for medical treatment (s.47-50)** |  |
| Do you agree that a 2nd opinion (medical practitioner) should be involved in the authorization process? If yes, should they only become involved where the family dispute the need for detention? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

 104 91 13 |
| Do you agree that there should be a review process every 28 days to ensure that the patient still needs to be detained under the new provisions? How many reviews do you think would be reasonable? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

101 78 23 |
| Do you think the certificate should provide for an end date which allows an adult to leave the hospital after treatment for a physical illness has ended? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

91 70 21 |
| Do you think we should give consideration to extending further the range of professionals who can carry out capacity assessments for the purposes of authorizing medical treatment? Please give reasons for your answers? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

104 53 51 |
| **Chapter Thirteen - Research** |  |
| Where there is no appropriate guardian or nearest relative, should we move to a position where two doctors (perhaps the adult with incapacity’s own GP and another doctor, at least one of whom must be independent of the trial) may authorize their participation, still only on the proviso that involvement in the trial stops immediately should the adult with incapacity show any sign of unwillingness or distress? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

118 70 48 |
| When drafting their power of attorney should individuals be encouraged to articulate whether they would wish to be involved in health research? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

132 120 12 |
| Should there be provision for participation in emergency research where appropriate (e.g. if the adult with incapacity has suffered from a stroke and there is a trial running which would be likely to lead to a better outcome for the patient than standard care)? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

120 89 31 |
| Should authorization be broadened to allow studies to include both adults with incapacity and adults with incapacity in certain circumstances? (e.g. an adult with incapacity who has an existing condition not related to their incapacity may respond differently to different types of care or treatments to an adult with capacity) |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

110 79 31 |
| Should clinical trials of non-medicinal products be approached in the same way as clinical trials of medicinal products? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

102\* 77 25 |
| Should there be a second committee in Scotland who are able to share the workload and allow for appeals to be heard respectively by the other committee? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

104 84 20 |
| Should part 5 of the act be made less restrictive? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

75 44 31 |
| **Chapter 14 – Miscellaneous matters** |  |
| Are there any other matters within the Adults with Incapacity legislation that you feel would benefit from review or change? |

|  |  |  |
| --- | --- | --- |
| **Total** | **Yes** | **No** |

116 77 39 |

**CHAPTER THREE –RESTRICTIONS ON A PERSON’S LIBERTY**

After the introductions and scene setting in the first two chapters, chapter three contained the first questions in the consultation, relating to restrictions on a person’s liberty. The approach was loosely based on the proposals from the Scottish Law Commission, in their 2014 report on Adults with Incapacity and set out circumstances which would constitute significant restrictions on liberty rather than deprivation of liberty.

**Questions**

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

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

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

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

**Are there any other issues we need to consider here?**

There were 142 responses to the first question, 118 in favour, 18 against: 123 to the second question, with 99 agreeing and 24 disagreeing, and 61 answers to the third question.

Those who agreed with the approach felt it offered flexibility and more clarity than the current position, that it accurately described the careful and delicate decision making that needs to go into deciding whether restrictions are necessary. Many respondents stated that it was important to be clear that these proposals are intended to include all those situations where a person is deprived of their liberty, and that it is vital to include not only where a person lives, but how they live.

Those who answered no had concerns about consistency of terminology given ‘deprivation of liberty’ is the term used by the Supreme court. There could be danger of confusing the complex issues around deprivation of liberty.

Those who responded to the second question had concerns around the clarity of language, the need for strict guidelines to minimize misuse and the need to consider other types of restrictions such as meeting with people, the use of IT, and the way surveillance might be carried out. There was a minority preferring retention of the term ‘deprivation of liberty’ .

The answers to the third question brought up a number of issues . Principally the need to ensure that legislation can cope with short and long term loss of capacity, and dynamic, fast changing situations. We also need to consider the need to facilitate someone’s capacity to make a decision rather than simply assess capacity. There is also concern that in many situations everyday restrictions can become an infringement on a person’s liberty and this is not always acknowledged.

Numerous responses commented on the need to consider the role independent advocacy would have in these situations, and the need to consider a definition of valid consent. There was also a significant number of comments raising concern that this approach would result in every person in a care setting having a guardianship order.

**The way ahead**

There was no clear consensus regarding these proposals, other than agreement that clarity is needed in this area of the law. It is essential that we find the balance between protecting and upholding people’s rights, taking cognizance of Supreme Court rulings, supporting people to make their own decisions, and providing a viable system of care without creating an overload of bureaucracy. To that end the Scottish Government is carrying out further work on this issue over the summer period and will develop the policy with a small working group in the autumn of 2018.

**CHAPTER FOUR**

**PRINCIPLES OF ADULTS WITH INCAPACITY LEGISLATION**

This section of the consultation proposed a new principle with the aim of more closely aligning the legislation with the UN Convention on the Rights of Persons with Disabilities.

**Proposed new principle**

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

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

141 responses, 117 agreed, 24 disagreed

**2. Does our proposed new principle achieve that?**

126 responses, 75 agreed, 51 disagreed.

**3. 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?**

122 responses, 69 agreed, 53 disagreed

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

114 responses, 41 agreed, 73 disagreed.

Whilst the bald figures may look like a majority in favour of the principle as proposed, it is important to note that amongst those responses that were in agreement with the proposal, the vast majority did so with many caveats. In fact many respondents overlapped their responses to all four questions so a more accurate picture can be gained by considering the responses to all four questions as a whole.

The general consensus from these questions was that more prevalence needs to be given to the will and preferences of the adult. Many concerns were raised about the wording of the principle, and that in general the principles need to be more closely aligned to the whole of the UNCRPD, not just Article 12.

Preference was for the existing principles of the AWI legislation to be amended to reflect the requirements of the UNCRPD as a whole, with the expressed hope that this would strengthen support for the exercise of legal capacity.

But across all responses the strongest message by far was that the duties attached to the principles and the scrutiny of the performance of those duties requires to be much more robust. One response summed it up thus: ‘the problem with the principles has been they have not been enforceable and have been largely ignored’. This was a view expressed by a significant majority of respondents.

A number of respondents wished to know the implications any change to the principles had for people who have fluctuating capacity, or short lived incapacity.

A significant minority of respondents expressed concern about the need to address proportionality to the seriousness of any intervention, and the level of support needed to make a decision. And a majority of respondents recommended that consideration be given to an additional principle that requires risk of harm to the adult being identified as a basis for overriding the will and preferences of the adult.

**Next steps**

Consideration of the responses has brought us to the conclusion that whilst there is a need for the AWI principles to be amended to reflect the requirements of the UNCRPD, this will be better achieved by amending the existing principles, taking into account the whole of the UNCRPD, not just article 12 rather than adding a new standalone principle.

The Scottish Government will take this work forward over the autumn of 2018 and test out amended principles with stakeholders early in 2019.

**CHAPTER FIVE**

**POWERS OF ATTORNEY AND OFFICIAL SUPPORTER**

This chapter of the consultation tackled the issues around the clarity of a power of attorney document regarding when it comes into force and whether it gives enough authority to make certain decisions about a person’s care and welfare and whether it provides sufficient safeguards to ensure that an adult is not subject to unlawful significant restrictions on their liberty. A number of questions sought to address these issues.

**1. 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?**

There were 150\* responses to this part of the question. A majority of 135 agreed that there is a need to clarify the use of powers of attorney in such situations. Of the five respondents that answered no, only one provided further reasons, namely that the granter should be given guidance on best practice to select an attorney and that the greatest level of power should be delegated to the attorney who will interpret the appropriate level of restriction on a person’s liberty.

Of those 135 who responded yes, a number of common themes emerged from the responses. A commonly held view was that the powers contained in the power of attorney can be unclear and appropriate detailed powers need to be contained in the document including any issues with regards to restriction of liberty. Defined wording set out by regulation would be beneficial for ensuring clarity, in particular it will avoid different law firms developing different practices and styles in this regard.

Another consistent view amongst respondents was that the more individualised and comprehensive the power of attorney, with appropriate detailed powers including issues with regards to restrictions of liberty, the better it will protect the granter.

Some of the additional comments were that it was necessary for the granter to have considered properly the circumstances in which an attorney can consent to arrangements amounting to confinement. If a welfare power of attorney fails to mention issues around deprivation of liberty then it should not be automatically treated as having conferred powers to consent to a restriction of liberty. Other popular views were that if deprivation of liberty is the consequence then there ought to be periodic review by some form of judicial body or authority. Finally powers of attorney would require significant alterations in order to meet the requirements of Article 5 of the ECHR.

**2. If so, do you consider that the proposal for advance consent provisions will address the issue? Please give reasons for your answers**

86 respondents agreed that advance consent provisions would address the issue, but 35 disagreed. The majority of those who disagreed expressed concern that if advance consent provisions are to be effective they will have to provide a significant level of detail with regard both to the circumstances under which the granter will allow restrictions on their liberty to be put into effect, and as to the type of restrictions. Several respondents expressed concern that there was a risk that the adult’s view will change over time and this may not be taken into consideration if the advanced consent document has not been changed to reflect this. Additionally there was some disquiet as to how such powers would be monitored and by whom. There was also concern that substitute-decision makers should never be able to consent to arrangements which would amount to a deprivation of liberty.

Of those who responded yes, the overwhelming majority of respondents felt that this would provide much needed clarity on the powers the granter wishes to allow the power of attorney and consequently much needed assurance for all involved at times when decisions around the use of restrictions need to be made. Several respondents felt that the advance consent provisions would act as a safeguard for the adult, in that their future care arrangements would be clear. One respondent felt that they must support the exercise of legal agency by complying with Article 12 (4) CRPD and contain safeguards that ensure they both: are free of conflict of interest/undue influence, proportional and tailored to the adult’s circumstances, apply for the shortest time possible and subject to regular review by a competent , independent and impartial/judicial body.

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

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

There were 133\* total responses. 117 responses agreed with the above, 9 responses disagreed

Of the respondents that agreed, several felt it would be helpful if the granter specified how his lack of capacity should be determined and confirmed. One respondent felt that the current 16 (ba) clause in the AWI Act to confirm that one has considered how their incapacity will be determined, without the need to cite the outcome is in practice worthless. Several respondents felt that the power of attorney should include clear instruction on the management of fluctuating capacity. There was a view that ensuring that the document is registered straight away, distributed appropriately and there being a proper system of notification that a power of attorney has been activated which can be facilitated by Office of the Public Guardian was necessary.

Of the nine that disagreed, the view was that the complexity of the process will put people off declaring a power of attorney and that people generally did not want the extra cost or hassle of continuously reviewing their powers of attorney.

In response to the second part of the question the majority of respondents felt clear tests about when an attorney can use powers given by the granter should be in place and it should be clear when a power if attorney has been activated as a result of loss of capacity. There was suggestion that it would be useful to have a non-exhaustive menu of processes for activation as well as staged activation in cases where an adult loses capacity to take some decisions but not others. There was suggestion that there could be safeguards put in place by way of challenge to the Office of Public Guardian if it is perceived that a power of attorney has been activated early. Another suggestion was that a document should not be registered by the Public Guardian unless it expressly specifies the triggers for bringing its provisions into force immediately upon registration. This would preserve the grantor’s right to autonomy and self-determination and improve clarity regarding when a power of attorney has been activated.

**Conclusion**

From our analysis of the responses to this part of the consultation it is clear that there is a need for the law to be clarified on the use of powers of attorney in situations that might give rise to restrictions on a person’s liberty. The responses to our proposals for advance consent provisions were sufficiently positive to persuade us of the need to develop this policy further and detailed proposals for advance consent provisions will be developed over the autumn.

The need for clarity as to how and when a power of attorney should be activated was clearly stated by the majority of responses. There seems to be clear direction of views in this area and changes are needed to clarify the process, whilst being mindful of the concerns expressed that the process still needs to be accessible and that an overly complex process may put people off creating a power of attorney.

**Official Supporter for Decision Making**

In-keeping with the need to provide more support for adults to make their own decisions, the consultation proposed that a person who has capacity to understand the consequences of that decision, can appoint an official supporter, who can help the person understand situations and make decisions but does not have the authority to make decisions on behalf of the adult. We asked a number of questions on the value of creating such a role.

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

There were 155\* responses to this part of the question. 82 responses agreed that there would be value in creating a role of official supporter, 56 responses disagreed. A majority of the respondents agreed that the role of official supporter is an essential role in moving from a substitute decision making to supported decision making regime. Some respondents felt that official support should be available for everybody with no reference needed to a person’s capacity.

There was comment made that appointment of an official supporter was in line with CRPD General Comment 1, which states legal recognition of the support person formally chosen by a person must be available and accessible. Other respondents commented that they were in favour of the role reflecting the person’s choice or best interpretation and emphasized that the central starting point for a new-re-orientated AWI regime should be support, as understood in Article 12.3 of UNCRPD. There was also suggestion that a power of attorney would need to contain an appointment of a supporter, and for the supporter to be registered in the same way as an attorney is at present.

Of those respondents that disagreed there was concern that the creation of the new role and new system for appointment may make the system increasingly bureaucratic and complex. Some of those respondents felt that the proposed role could increase the chances of misuse of power and conflict of interest with a supporter potentially having the power to influence a power of attorney to take decisions in favour of supporter rather than adult. Other comments were that it was an unnecessary layer of duplication, it would undermine supporting informal networks, if the right support is in place, there should be no need for official supporter, and advocacy done well should achieve the same thing.

We then asked a follow up question:

**2. In response to the second part of the question, if you have answered yes, please give us your views on how an official supporter might be appointed.**

Some respondents felt that an official supporter could be registered through the power of attorney. There were suggestions that supervision could be undertaken by OPG or the Mental Welfare Commission. There was also comment made that the appointment should be made by the person themselves and it should reflect the adults wishes. Another suggestion was that there should be guidelines in place about the characteristics required of an official supporter, the safeguards in place and the training and support available. Another suggestion was that given the importance of such a role in terms of ensuring equality of enjoyment of the adult’s rights, a court or tribunal should make the appointment where a best interpretation situation arises. Suggestion of looking at the Irish model was also made ‘A Decision-Making Assistant appointed by way of a Decision Making Assistance Agreement’[[1]](#footnote-1).

**3. 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?**

There were 118\* responses to this question.

54 of the responses agreed that official supporter was the right term. 18 responses did not agree and 35 responses preferred another term. Of the responses that agreed that it was a good term, several were positive about the term stating it is a good choice as it does not imply carer and is considerate of person in need and it captures the legal nature of the term but differentiates it from attorney. Other views were that the name of the role was not important, but it was important that support is provided to people who want it regardless of their mental capacity, and that the supporter is chosen by the person themselves.

Of those responses that disagreed with the term, 4 respondents expressed concern that it had a lot of football connotations .One respondent felt that official supporter doesn’t convey the legal nature of this role. Other respondents felt that the term official should be removed as this is not a formal role and the label may be misleading and it sounds too bureaucratic. One comment was that whatever term is chosen it should carry no connotation of authority and language that is suggestive of passivity on the part of the adult should be avoided.

**Table of preference**

|  |  |
| --- | --- |
| **Prefer another term** | **Number of Respondents** |
| Supportive Attorney | 5 |
| Nominated Supporter | 5 |
| Registered Supporter | 3 |
| Appointed Supporter | 2 |
| Personal Supporter | 2 |
| Chosen Supporter | 2 |
| Decision Supporter | 2 |
| Custodian | 1 |
| Authorised Supporter | 1 |
| Statutory Arbiter | 1 |

34 respondents preferred another term. There were a range of views as to what other term should be used instead of official supporter. Respondents suggested a range of terms as you can see from the table above. The most popular term was favoured by five respondents who suggested the term supportive attorney, with a view being expressed that the term supportive attorney indicates that attorneys should support the adult’s wishes rather than impose their own views. Equally favoured by another five respondents was the term nominated supporter .The reason given was that it would be helpful that support rather than powers, feature in the language to protect the principal and reflect the limits of the role. Three respondents suggested the term registered supporter to convey the legal nature of the role and responsibility held.

Across all of the responses, the strongest message was that role of official supporter is essential in transition from substitute decision making to supported decision making regimes and that this was reflective of Article 12 of UNCRPD which requires States to provide help to people who may need support in making decisions. However there were many concerns about how an official supporter would be appointed, what safeguards might be necessary in such an appointment and whether there would be a need for supervision or training for official supporters. Given the responses in the consultation, this area of work will link into the on-going work on supported decision-making and taken forward there.

**CHAPTER SIX -CAPACITY ASSESSMENTS**

The Scottish Government is carrying out work over the coming months to find ways of developing consistent standards across law and medicine on the assessment of capacity. As part of this work it has been suggested that consideration be given to whether it would be appropriate for other professionals to carry out capacity assessments. Chapter six of the consultation paper tackled this.

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

There were 157\* replies to this question. 93 respondents agreed that the range of professionals should be extended, fifty disagreed. Of those who disagreed, several respondents stated that a supported decision making regime should be incorporated ensuring that the individual is given support when they need it and are not unduly deprived of their legal capacity. One respondent expressed concern that widening the scope of professionals authorised to assess capacity risked individuals being wrongly assessed. Other comments included that until matters of training, supervision and auditing are in place then there was no need to extend the scope of professionals and until a more consistent approach was taken across law and medicine on capacity issues then the discrepancies in approach would be exacerbated by widening the scope of professionals.

93 responses agreed with extending the scope of professionals. A number of respondents made the additional following points in respect of the capacity assessment approach:

* There should be a comprehensive review of how capacity is approached as the current AWI legislation is not clear about how professional can carry out capacity.
* The assessment of capacity cannot be undertaken by a tick box exercise.
* Another approach suggested that existing capacity assessments are a medical model approach and should be replaced by a social model approach with assessments carried out by a range of professionals who can assess the support a person needs to overcome any barrier they have to exercise their legal capacity.

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

 **Respondents suggested a range of different professionals**

|  |  |
| --- | --- |
| **Professional** | **Number of Respondents** |
| Clinical Psychologist | 32 |
| Social Worker | 20 |
| Mental Health Officer | 15 |
| Nurses | 14 |
| Community Psychiatric Nurse | 12 |
| Speech and Language Therapist | 10 |
| Neuropsychologist | 7 |
| Occupational Therapist | 3 |
| Allied Health Professional | 3 |
| Advanced Nurse Practitioner | 3 |
| Mental Health Nurse | 2 |
| Care Worker | 1 |

Respondents suggested a range of different professionals as can be seen on the table above. The majority felt clinical psychologists and appropriately qualified social workers should be considered. Mental Health Officers and nurses were a popular second choice.

However analysis of the responses suggest that whilst there was a majority of responses in favour of considering a wider range of professionals to carry out capacity assessments, there are many concerns around the way capacity assessments are carried out at present, with the lack of clarity within the current AWI legislation regarding capacity assessments giving particular cause for concern.

As stated, the Scottish Government is carrying out work over the coming months to find ways of developing consistent standards across law and medicine on the assessment of capacity. The views expressed within the consultation will help in taking this work forward.

**CHAPTER SEVEN – GRADED GUARDIANSHIP**

For a number of years there has been a view that the current guardianship model is not flexible enough and a system that provided more options for tailoring guardianship more appropriately to a person’s individual situation was required.

To that end this chapter put forward a model of graded guardianship and asked a number of questions based on this.

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

149\* responses –No 54 Yes 79.

The question was followed up by an invitation to give reasons for the answer given.

Of the respondents that disagreed, 52 gave reasons for this. The largest group expressed concerns about grade 1. They felt there were not enough safeguards at this level, the powers granted were too wide for an administrative decision and there was no judicial scrutiny. Some stated that grade 1 did not meet the requirements of Articles 5, 6 and 8 of ECHR. Others considered that there was a particular risk of an adult being subject to financial abuse.

12 respondents were of the opinion that all substitute decision making should be abolished, referring to Article 12 of the UNCRPD, and replaced by support for decision making. Nine respondents thought the 3 grade system was too complicated, added more bureaucracy and preferred a two grade system.

6 respondents thought development of support for decision making options was preferable to making applying for guardianships easier and five were concerned about ascertaining the views of the adult at grade 1. Mental Health Officer reports and the use of independent advocacy were mentioned as ways to get the adult’s views.

Other comments included a possible disincentive to get a power of attorney if grade 1 guardianship was so easy. Another suggestion was to replace the term ‘guardianship’ with one more representative for the support for the exercise of autonomy as ‘guardianship has negative and paternalistic connotations’.

Of the 79 respondents that agreed, 60 gave a reason for this. 12 were of the opinion that a three grade system would make a guardianship much speedier to put in place. 5 thought it would make the application simpler and 2 indicated it would be more flexible should the adult’s circumstances change.

Furthermore, 5 respondents considered that a three tier graded guardianship could be more tailored to the adult’s circumstance and 2 stated that it would make guardianships more accessible. 2 respondents also thought the system would be less expensive.

Some respondents whilst answering yes to the initial question, had some reservations about parts of the proposal. Several expressed a concern that grade 1 granted powers were too wide for an administrative decision and expressed a preference for an alternative grade 1 model following that of a ‘registered supporter’.

**Question: 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?**

127\* responses – No 52 Yes 60.

All those who did not agree with the proposal gave reasons with the large majority of these expressing the sentiment that the range of powers was too extensive at grade 1 and that there were insufficient legal safeguards in relation to judging suitability for appointment. Three thought that grade 1 was not compatible with the UNCRPD or ECHR.

13 stated that, although grade 1 provided for a wide range of situations, having these powers available in a tick box would not guarantee that the applicants would seek the least restrictive powers, they felt the temptation would be to tick all of the available powers to save coming back at a further point in time.

9 expressed concern with the applicant having to intimate the application on interested parties. They were concerned that there were not sufficient safeguards here and that the applicant could pick who they intimated to, resulting in interested parties not being served with the application. 5 felt the administrative process was complex, onerous on the applicant and needed to be streamlined.

9 respondents considered that there would be added pressure on local authority services. Further views expressed were that additional investment from government would be needed for training for social workers at grade 1 and for the additional volume of work that grade 1 would bring. 5 stated that a Mental Health Officer should provide the report at grade 1 as they have independence, expertise and experience in this area.

Other responses expressed the view that independent advocacy should be required to ascertain the adult’s views, that the Office of the Public Guardian was not a suitable body to determine whether powers are necessary and proportionate especially with regard to welfare and that having a financial threshold was discriminatory.

Of the 60 who agreed with the proposal 29 gave a reason for this. 8 said the proposal made things simpler and easier. 3, although agreeing with the question, felt that grade 1 needed clarity in relation to supervision of financial and welfare matters.

Across all of the responses there was a strong message that whilst a majority respondents supported the idea of a flexible approach to guardianship applications, the proposal did not provide for enough safeguards and judicial scrutiny for the wide range of powers proposed at grade 1.

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

122\* responses – No 54 Yes 56.

Of the 54 that responded no, 50 left a reason. A majority expanded on their answer by saying that there were insufficient safeguards and scrutiny at grade 1. Powers proposed at this grade were too wide ranging, could impact significantly on an adult’s life and therefore were more suitable for a higher grade. 5 in particular voiced concern about decisions in relation to medical treatment being at grade 1 and two about powers in relation to the day to day care of the adult. Two considered that all welfare powers were unsuitable for grade 1.

4 respondents stated that the inability to consent or absence of consent by the adult should not be considered tacit consent. Therefore the same scrutiny should be applied to grades 2 and 3.

A number expressed concern that the adult’s views would not be heard at grades 1 and 2. Two thought that the paper exercise at grade 2 did not provide opportunity for the adult’s views to be heard and that there should be a hearing instead. One commented that the process of application for guardianship should trigger the appointment of a publicly funded independent advocate or supporter so that the adult’s views could be heard independently of carers or the proposed guardian.

One response considered that ‘a court or tribunal should be involved to a greater or lesser extent and with varying degrees of formality, in all applications’.

Of the 56 that responded yes, 18 gave reasons for their answer. The reasons were in the majority of cases very brief and agreed that the powers at each grade were appropriate. In the cases that gave more detailed answers, some concerns were expressed, such as fixed powers at grade 1 needing to be clarified and that there would be tendency to select all powers from those available just in case they were needed.

One comment suggested a review for grade 1 cases after 1 year to cater for the potential for capacity to return in cases of delirium or other short lived loss of capacity.

There were 12 responses from those who had ticked neither yes or no to the question, largely reflecting the concerns above. One comment referred to the lack of scrutiny at grade 1, suggesting grade 1 should be reformulated as a supported decision making model, in which case a lower standard of scrutiny could be applied.

**Question: 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?**

110\* responses – 39.2%

61 respondents agreed with the principle of a financial threshold and seventeen did not. The remainder made no comment, or did not express a preference.

Of those who agreed with the principle 25 agreed with the suggested level of £50,000. The majority of these responses simply stated they agreed with the suggested level. Comments that were included were that above this level the estate was likely to include property or other assets and deserved greater scrutiny and that the level should be kept under review, for instance because of rising property prices.

Three of those agreeing with the principle thought the level should be higher than £50,000. Comments were that the level should be higher as fees for financial advice could be significant and levels were suggested for above £80,000 and for £100,000.

23 of those agreeing with the principle of a financial threshold considered the level should be lower. There was no one level that respondents agreed on. Two thought it should be £10,000 in line with the management of residents’ funds regulations, one thought £16,000 in line with state benefits income and three considered the upper capital limit for means tested welfare benefits would be appropriate. Another respondent stated £17,500 should be the limit in line with the threshold for care costs and three respondents stated £20,000 would suffice. A further respondent felt it should be £36,000 in line with the small estates threshold. Further comments were that the limit should be in line with the average self-directed payment, or the same level as personal care, or the same as the CRAG charging policy.

Of the 17 who did not agree with the principle of a financial threshold, 9 considered the proposal was flawed as there was insufficient scrutiny at grade 1, with the risk that it would leave adults open to abuse and the application should be tailored to the individual’s needs. 5 thought the proposal was flawed as there should be no substitute decision making. They stated there should be a system of graded supported decision making. Another 5 were of the opinion that a financial cut off was not a good barometer of power and that the level of power vested in the decision maker should be considered. A further 5 considered a financial threshold was discriminatory and that wealthier adults would be afforded more scrutiny. 2 respondents commented that it was not clear that there was a relationship between the size of the estate and the complexity of administering it. A further respondent felt that welfare matters should be decoupled from financial matters.

Of those that expressed no preference, 3 thought the Access to Funds scheme could be used if it was more flexible, had more oversight and was promoted more. 2 noted that a financial assessment would be required for a threshold and that powers would be needed to measure this. One voiced a concern that some applicants would not declare the adult’s estate in order to come under grade 1.

**Question: 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?**

131\* responses – Yes 109 No 8

Of those who responded no, seven left a reason. One advised that there should be hearings at all grades. 2 responses thought this was an insufficient safeguard and would be ineffective if the adult only had one close friend who had ulterior motives to be a guardian, leaving no-one to disagree. Two respondents stated that this was still under the paradigm of substitute decision making, where supported decision making was the desired system.

The vast majority of respondents agreed with the proposal. The reasons for agreement can be summarised as follows: the need to involve the adult in proceedings, protecting the rights of the adult, a necessary safeguard and the application being subject to sufficient scrutiny.

7 of those that agreed thought there should be a hearing at every grade. 2 respondents expressed the opinion that if an adult can’t give valid consent, then a hearing should take place. Four felt the proposal would only be effective if all parties, including the adult, were made aware of their right to request a hearing.

Of other comments made, 2 considered there should be an obligation to involve the adult at an early stage before a specific route of intervention had been decided and that an attributable duty to provide support must be designed into the process. Further to this 2 thought that an independent advocate should be appointed to ensure the adult’s request was meaningful in practice.

2 respondents were concerned that vexatious objectors would be encouraged and thought the case could be explored at further case management meetings. One response considered the perceived cost of a hearing could be off putting to genuine objectors and that grade 2 could be granted on an interim basis so as not to delay the process.

**Question: 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?**

100 responses

There were a wide variety of responses to this question. Many responses gave more detail than is listed in the table below, however for clarity the responses have been distilled and grouped together. To give an idea of the variety of response the groups have been listed in the table below in descending order of popularity, with the number of responses that referred to the group indicated on the right.

It is noticeable that the most popular groups were those that were drawn most widely and had elements of regularity, support, caring, and present and ongoing contact with the adult. A significant number of respondents considered that the discretion to decide on who would be intimated with the case should be decided by the Sheriff or Tribunal dependent on the adult’s particular circumstances.

|  |  |
| --- | --- |
| Close friend or relative having supportive relationship | 14 |
| Anyone having a regular and caring input into the adult’s life | 13 |
| Anyone with significant, current and ongoing contact with the adult | 12 |
| Discretion of Sheriff/Tribunal | 11 |
| Conflict of interest issues – e.g. interested party may be beneficiary of adult’s money | 10 |
| Advocacy worker | 9 |
| Anyone demonstrating an interest in the adult | 6 |
| Consideration given as to whether all information supplied or restricted information | 6 |
| Legal representatives | 5 |
| Medical Practitioners | 5 |
| Other health professionals | 5 |
| Primary carers | 4 |
| Social Worker | 4 |
| Nature of interested parties depends on adult’s circumstances | 4 |
| Long term relationship | 3 |
| Family even if little contact | 3 |
| Blood relation | 2 |
| Financial partner, shared business concerns, creditors | 2 |
| Immediate relation of the adult | 2 |
| Unpaid carer (family or friend) | 2 |
| ‘Official Supporter’ | 2 |
| Children | 2 |
| Someone whose decision affects the adult on a day to day basis | 1 |
| Nearest relatives able to consent | 1 |
| Long term friend | 1 |
| Adult | 1 |
| Anyone who can provide relevant information | 1 |
| Any other person having an interest in the affairs of the adult in the preceding five years, other than on cause shown, as directed by the [decision-maker] | 1 |
| Support services | 1 |
| All parties entitled to inherit as if the adult was intestate | 1 |
| Beneficiary of will | 1 |
| Anyone having consent to information in an advanced directive | 1 |
| Care Manager/Provider who is not primary carer | 1 |
| Legal spouse | 1 |
| At grade 1 discretion of OPG | 1 |
| Named Person | 1 |
| Greater discretion for MHOs to decide who to interview and in what circumstance | 1 |

**Question: 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?**

109\* responses

18 responses stated they would prefer to rely on the decision of the sheriff/tribunal at grade 2 and 62 thought the cases should automatically go to grade 3. The remainder did not express a preference either way.

Of those who preferred to rely on the decision of the sheriff/tribunal at grade 2 one of the comments was that adequate power should be provided to the sheriff to allow him or her to move the matter up the grades where necessary. Another comment thought the principle of least restriction suggested the initial hearing should be made at grade 2 with a decision to refer being made at this grade. One response, whilst preferring grade 2, also stated that the process of review was just as (if not more) important. A guardianship in these circumstances should be granted for short periods and an independent advocate should be available.

Of those in favour of an automatic remit to grade 3, three respondents, whilst agreeing that grade 3 should be used in the circumstances described, thought it should be extended to cases, not just where parties disagree, but where complex issues and ethical concerns are present. Similarly three responses thought any restriction of liberty should be dealt with at grade 3. A further three respondents considered that the level of safeguard should be matched with the powers being sought rather than the criteria being disagreement between interested parties.

One respondent stated that significant restrictions on liberty could be granted under the Mental Health (Care and Treatment) Act 2003 and compared these with guardianship orders. The respondent considered that grade 3 would be suitable on the basis of the potentially lengthy duration of a guardianship order compared with those under the 2003 Act.

Another respondent considered that grade 3 would be suitable given the findings in Cheshire West and breaches of Article 8 ECHR that occur at present in some care settings. One further response thought that the present proposals would not make a marked difference on the current system as local authorities would be likely to have to continue to seek grade 3 guardianships.

The majority of respondents were of the opinion that, given the intrusive nature of the circumstances and the complex ethical issues that need to be addressed, grade 3 was the appropriate forum. It was commonly felt that this grade would provide the proper level of judicial scrutiny. Ten respondents stated that this would be consistent with Article 12 of the UNCRPD.

Of those that did not express a preference either way one thought severe restrictions on liberty should be discussed in multi-disciplinary meetings and signed off by a psychiatrist. Three did not agree with the appointment of a substitute decision maker and preferred support for decision making and a further three opined that they did not agree with the graded guardianship proposals, but cases of this nature required the highest level of judicial scrutiny.

**Question: Please add any further comments you may have on the graded guardianship proposals**

60 responses

The nature of this question meant that responses varied widely and therefore there was much less opportunity to group similar comments together. Some respondents had put very detailed responses together for this section, which will be thoroughly considered, but which cannot be repeated in this analysis. All the responses in full can be accessed at:

[**https://consult.gov.scot/health-and-social-care/adults-with-incapacity-reform/consultation/published\_select\_respondent?\_b\_index=0**](https://consult.gov.scot/health-and-social-care/adults-with-incapacity-reform/consultation/published_select_respondent?_b_index=0)

The analysis and comments mentioned here have attempted to focus on those that have not been dealt with in other sections of the consultation.

Of the 60 responses there were some responses that had common themes. 6 respondents considered that reducing the criteria to be applied when taking over the money of an incapacitated adult will lead to increased adult protection incidents under the ASP Act. On the same theme 7 respondents thought that grade 1 was flawed in that it did not have enough safeguards.

Some concerns revolved around organisations being able to apply to be a guardian. 4 responses were concerned about who would supervise organisations and thought there would be a conflict of interest if they were providing care to the adult. 3 commented that the way to take pressure off local authorities was to review resourcing rather than allowing organisations to become guardians. One respondent considered that development of new legislation needed to be paralleled by long term workforce planning, particularly for mental health officers.

One response stated pressure on local authority for social work reports at grade 1 will carry through to mental health officer reports for grades 2 and 3 and that timescales for these reports need to be realistic.

On the subject of capacity assessments 2 responses considered that capacity assessments at grades 2 and 3 should require agreement between two practitioners experienced in assessing cognitive functioning and mental disorder. The capacity certificate should make clear the process of assessment and the evidence for incapacity. A further response referred to a possible conflict of interest with approved medical practitioners making recommendations to move to a new environment and also have bed management roles in hospitals with pressures to move people out. Another comment was that to have social workers and others signing capacity assessments could lead to too much power concentrated in one person.

Three respondents were concerned about the extra work involved in applying for renewals once a guardianship term was complete. They thought the option of ‘life-long’ incapacity should be present where there is clear clinical evidence of not regaining capacity, along with a robust appeals process.

Two comments revolved around training, advice and guidance for guardians. Two responses felt there needed to be more of this at grade 1 and one thought that guardians should receive training before appointment on supported decision making and shared decision making. A further 3 stated that there should be no substitute decision making and that supported decision making should take its place. One response stated that the proposals seemed to move in the direction of more, rather than less, substituted decision making. Most recent law reform internationally and most legal academic commentary on Article 12 CRPD trend was towards supported decision making frameworks.

Two comments related to safeguarders. One thought that there should be more regulation in the appointment of safeguarders and one considered that independent safeguarders should be appointed in every case.

Other comments were:

• There should be a specific role for advocacy services

• Calling ‘grade 1 guardianship’ something other than guardianship might improve its image

• AWI being reviewed in isolation from ASP and mental health legislation is a retrograde step

• Clarification was required regarding the OPG guardian declaration as it could be discriminatory if suitability is based on applicant’s current financial circumstances

• If there are no interested parties, there should be a full hearing

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

117\* responses – No 38 Yes 68

73 left a reason for their response. 27 reasons were given in agreement and all 38 who disagreed gave a reason.

A number of respondents for both yes and no expressed dissatisfaction with grade 1 with regard to the wide array of powers available and the relative lack of safeguards.

Amongst those who said yes, there were comments such as:

• A reformulated grade 1 registered with the tribunal might further assist with ease of movement

• Movement between two grades should be possible in either direction. This could be achieved by case management discussion where the level of scrutiny can be determined.

• Sheriffs should be able to extend renewed guardianships beyond five years with an upper limit of ten.

• Stipulated timescales are recommended to avoid delays in process.

• It is unclear how the step up and down would be triggered and by whom.

• It is not clear how monitoring and review of grades would be undertaken in light of fluctuating conditions. This could add another layer of complexity.

Of those who said no, a theme emerged around the lack of clarity in the proposals and that more detail would be necessary. One respondent commented that more detail was needed around the transition between grades, including timescales around completion of reports. Another expressed concerns over how and who would take responsibility for determining which grade was applicable. A further respondent felt there was no option for the local authority to request a change of grade and the process for doing so was not clear. For a downgrade a mental health officer report should be required to evidence why a higher grade was no longer needed.

Three respondents were of the opinion that the clarity of guidance would be important. There were some that thought that moving down the grades was straightforward, however moving upwards from grade 1 was more complex, requiring extra reports. One respondent felt that firm timescales were required for these reports and another stated that if there were time limits for reports, this would pressure on mental health officers and doctors.

A number of respondents were of the view that the proposals were adding another layer of complexity and that they should be simplifying an already complex system.

**Question: Do you agree with our proposal to amalgamate intervention orders into graded guardianships?**

119\* responses –No 25 Yes 79

Of the 119\* responses received, 82 left a reason for their answer. 79 respondents answered yes with 42 giving reasons. All 25 who answered no left a reason for this. 15 respondents answered neither yes nor no and left a reason for their answer.

3 of the respondents who answered yes and 3 who answered no both commented that the graded guardianship proposals were flawed in their current form.

4 respondents agreed, as long as local authorities could apply for financial guardianship as they are able to apply for financial intervention orders at the moment. 3 respondents stated that the processes for intervention orders and guardianship orders was the same, so there was no more work in applying for a guardianship order.

3 respondents agreed as they stated that intervention orders were rarely used and more commonly the adult requires a series of interventions. Another observed that welfare intervention orders were not supervised by the local authority and there was a lack of safeguarding of the adult at present. An opposite view from a respondent who said no was that courts can impose supervisory duties on local authorities in relation to intervention orders and local authorities can investigate when an adult’s welfare is at risk.

One respondent in replying yes, advised there was a lack of clarity about whether to apply for an intervention order or a guardianship order. More examination of current practice may be needed. This theme was echoed by 3 respondents who replied no, in that they thought there was no problem with use of intervention orders. However, if there was, they thought it was being incorrectly interpreted and applied and should be raised as practice issue with Sheriffs Principal and Sheriffs, and training and guidance should be supplied to applicants and professions, rather than remove intervention orders from the legislation.

Other comments from those that agreed with the proposal were:

• Supportive of reducing the numbers of orders available under the Act.

• Important that a degree of flexibility is retained in whatever form of revised structure is put in place.

• Uncertainties regarding supervision of intervention orders should be addressed

• Adults or family may not feel comfortable that a ‘guardian’ is appointed for a one off or time limited power.

• Intervention order useful to get direction from court when there are 2 valid possibilities. If S.3 direction can deal with this, then no need for intervention orders

Of those who answered no, 8 considered amalgamating intervention orders into graded guardianship would be removing a least restrictive option. 3 were of the opinion that incorporation of intervention orders into the guardianship regime could encourage applications for too many powers. Another 3 respondents stated that it was not clear who would determine when the intervention was concluded. 2 stated intervention orders constituted substitute decision making and were non-compliant with UNCRPD. They thought a supported decision making regime should be preferred.

Other comments from those that disagreed with the proposal were:

• It would be useful to separate the role of intervener and guardian as it might not be appropriate or possible for the same person to carry out the specific task.

• It would be more useful for processes around intervention orders to be used more flexibly to deal with more urgent and immediate actions for lower level support of adults in their daily lives.

• There should be evidence of actual use of intervention orders, before abolishing or amalgamating with guardianship orders.

• There is a place for a specific issue order as can apply for this for a higher grade intervention, when day to day the guardianship is at a lower grade.

As there was not a question relating to organisations applying for guardianships, some respondents entered their observations in this section.

Some comments were:

• Organisations would have to have a range of duties imposed upon them as do the local authority at present, given the substantial powers in relation to the adult’s liberty granted to them.

• There is a conflict of interest and lack of accountability.

• It is not clear how suitability would be assessed.

• It is not clear how organisations would be supervised.

• Responsibility for substitute decision making might rest with an individual in the organisation with little understanding of the adult, who may have responsibility for more people than they can manage and responsibility could be passed from one individual to another without independent external scrutiny.

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

118\* responses – No 17 yes 86

There was a clear majority from those who responded in favour of the proposal. Of those who responded 86 left a reason for their decision. Of those who responded no, 17 left a reason, and of those who responded yes, 54 left a reason.

Four of those who responded no acknowledged the difficulties with Access to Funds and considered it required review. They were in favour of keeping a reviewed version as they thought it was a less restrictive method of intervening with the adult’s finances than graded guardianship. A further response referred to the least restrictive means and that there was straightforward governance from the Office of the Public Guardian, with notification to the local authority. One responded ‘Access to Funds is a valuable legislative pathway for our HSCP to support vulnerable clients’.

Some responses were founded in disagreement with the graded guardianship proposals. 3 respondents stated that there should be supported decision making rather than substitute decision making and therefore they disagreed with the proposal. Two didn’t support the graded guardianship proposals due to the lack of safeguards and therefore did not agree with amalgamating Access to Funds into this.

Of those that agreed with the proposals a clear theme emerged that the present Access to Funds scheme was considered underused and complex. 26 respondents stated that they said yes because it would simplify a poorly understood and complex system. 26 respondents referred to the lack of use of the Access to Funds scheme.

13 respondents qualified their support for amalgamation with a wish to see the flaws in the graded guardianships system resolved, including proper safeguards for the adult.

Some respondents were concerned about what happens for adults with no family members or interested parties to act on their behalf. 3 advised it was difficult for local authorities to appoint solicitors where the adult’s estate is small. They were of the opinion that if graded guardianship is to be an effective replacement for Access to Funds it would be necessary to remove the prohibition on local authorities directly acting as financial guardians. A further respondent suggested people who have no -one to act should have access to state based support to exercise their legal capacity. They thought consideration should be given to models such as court appointed decision making representatives to provide support to help people make decisions about their welfare and financial affairs.

One respondent wished there to be easier access to information about the adult’s finances than there was at present. They stated at present Access to Funds has to be applied for to decide whether financial guardianship is necessary, however financial information is needed to apply for Access to Funds. On this theme two respondents stated many adults were not receiving legal protection as a result of the cumbersome rules and restrictions which apply.

Four respondents wanted clarity on how the system of appointeeship will work for the benefits that have been transferred to Scotland. Other comments were:

• Having one system rather than two would reduce the cost

• Perhaps change name, as those applying for simpler powers might be put off by the term ’guardian’

Given that there was not a question about organisations, some took the opportunity to enter their opinion on this in this section. Three respondents voiced concerns about extending the category of those who may be appointed guardian to organisations, solicitors and care providers. They considered there was significant potential for conflict of interest or concentrations of power.

**Question: Do you agree with the proposal to repeal the management of residents’ finances?**

108\* responses – No 16 Yes 79

75 of the 108\* responses left a reason for their decision. 14 of those who answered no left a reason and 48 of those who answered yes left a reason.

Of those who answered no, conflict of interest was the main reason, provided by 6 respondents. An example given was that a care company could use residents’ money for services it should be providing or use one residents’ finances to pay for the care of another.

3 responses did not agree with graded guardianship as they preferred a supported decision making model and one did not agree with grade 1 proposals due to the lack of safeguards.

One response felt management of residents’ finances works well, particularly for those in hospital and care homes should be encouraged to take part. They thought this scheme could be utilised further if the £10, 000 ceiling was removed.

A further response considered it would be too complex for a care home to be financial guardian due to the amount of work involved.

Of those who answered yes a significant number referred to the lack of use of the scheme at present and that amalgamation into graded guardianship would simplify the process. This included the number of legal avenues available to manage an incapable adults’ finances. Eleven respondents each were of these opinions.

7 respondents were in favour of the proposals, but only when the flaws in grade 1 had been addressed, in particular the lack of safeguards at this level. On the same theme, 6 respondents felt that a graded guardianship scheme with more safeguards would be more flexible and would be likely to have a higher uptake. A further 6 respondents considered that organisations should be financial guardians but not welfare. 2 respondents thought organisations, including care homes, would be unlikely to take this on.

A number of responses were on the theme of supervision of organisations. 3 considered that the Office of the Public Guardian was better suited than the Care Inspectorate and hospitals to supervise financial management. One respondent thought the Care Inspectorate should receive intimation when an application for guardianship is received from a registered care service/provider. One felt organisations seeking to become financial guardians should be vetted and inspected by a regulatory body such as the Care Inspectorate. One response stated that the supervision and training of organisations would be very important and another suggested a separate body could be responsible for managing and approving release of funds on application by care home or a social worker.

Other comments were:

• Expanding the range of organisations seems to be driven by lack of funding for local authorities and doesn’t appear to be a good reason for making such a change.

• More work should be done around the issue of conflict of interest with care homes having guardianship powers to collect their own fees.

• An organisation providing a service to an incapable person should not be both financial and welfare guardian as it is an undue concentration of power.

A number of respondents did not indicate yes or no, however left a response. 6 of these were concerned about conflict of interest. 2 thought there was a danger that concentration of power in a care situation could diminish an adult’s autonomy. One commented that care homes would not apply to be financial guardians as they would not want the additional administrative burden and financial risk should something go wrong.

A number of respondents referred in this section to the proposal that organisations can apply to become guardians, given that there was not a specific question about this.

Respondents commented that:

• They did not agree with individuals in organisations being welfare guardians. This is a specific duty for social workers.

• They were concerned about the lack of accounting and scrutiny of decision making.

• They were concerned about the practical issues of operating guardianships where the organisation is subject to closure or funding issues.

• The local authority not vulnerable to service closure and social workers have strict code of conduct.

• There would be difficulties when adult changes places when the care home is guardian.

**CHAPTER EIGHT**

**FORUM FOR CASES UNDER ADULTS WITH INCAPACITY LEGISLATION**

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

123\* responses – No 51 Yes 62

Of the 123\* responses, 92 gave a reason for their answer. 32 left a reason for answering yes and 49 for answering no.

 7 respondents commented that the application was simpler and a further thought it was a light touch by a body with experience of AWI legislation. 4 thought it was less formal and less intimidating than court, the same number considered that it would ease the pressure on the system and two stated it was quicker.

5 respondents concentrated on the qualities of OPG and referenced their experience, expertise, knowledge and training. One was of the opinion that OPG was modern, digital and Scotland specific.

A number of respondents gave qualified approval, dependent on other matters. 3 respondents gave their approval subject to amendment of grade 1. One was concerned with OPG’s lack of experience in dealing with disabilities, for example with challenging behaviour and autism and lack of experience in dealing with mental health services.

Further comments were:

• Consideration needs to be given to the process of participation of the adult and interested parties. Where face to face discussions are required OPG staff should be able to travel.

• There is a resource implication for OPG as there could be a whole number of existing guardianships to be renewed at grade 1.

• Potential for joint role with the Care Inspectorate.

Of those answering no, the majority centred on the lack of safeguards at grade 1 and the lack of judicial oversight.

20 considered the wide range of powers at grade 1 would require judicial scrutiny and decision making not suitable for an administrative body. 3 of these thought this was especially in relation to welfare powers. 3 respondents considered there was insufficient scrutiny for the wide range of welfare and financial powers at grade 1, without specifying whether there should be judicial involvement. Eleven respondents felt OPG had insufficient experience of dealing with welfare matters.

A number of responses focussed on adult protection concerns, especially around finances. 7 stated there was a lack of safeguards and they were inadequate to protect adults with incapacity from financial abuse. As a result they were of the opinion abuse cases would increase. Two thought social work providing a report for financial powers would mitigate this. Another four were doubtful OPG were capable of working closely enough with local adult protection partnerships and local authorities who lead on adult protection under the Adult Support and Protection (Scotland) Act 2007. One felt OPG would not be able to cope with the number of adult protection concerns they would be required to investigate.

6 respondents were in favour of using OPG at grade 1 for low level financial powers only and that welfare powers require judicial oversight at grade 2. 7 stated they did not support the grade 1 proposals overall and therefore did not support using OPG at grade 1.

Further comments were:

• OPG may need extra manpower and additional training for the additional volume.

• A Social worker should be included in assessment of applications.

• Disagree with substitute decision making, should be supported decision making.

• Concern with lack of participation of the adult.

• Not ECHR or UNCRPD compliant.

• No evidence base for assertion that court intervention is unhelpful, inconsistent or lacks expertise.

• Sheriffs are aware of local resources and can tailor orders as to needs and resources available.

• Discriminatory on grounds of poverty and serious disability.

• Conflict of interest of OPG are making decisions on guardianships and then regulating the same guardianship.

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

122 responses

17 - OPG/Sheriff in Chambers with documents received/ Sheriff conducting hearing.

53 - OPG/Legal member of Tribunal with documents received/ 3 member Tribunal hearing.

Of the 122 responses, 103 left a reason for their response. From the 17 who preferred the sheriff court, 12 left a reason. From the 53 who preferred the tribunal, 38 left a reason. Therefore the total of those leaving a reason, who expressed a preference for either the sheriff court or the tribunal, was 50. This left another 53 respondents who did not express a preference for either the sheriff court or tribunal and yet left a comment. 14 of these actually preferred the tribunal to be the forum for all three grades. An extra two preferred the sheriff court. Therefore an amended view of the preferences expressed at grades 2 and 3 is:

18 – Sheriff in chambers with documents received/Sheriff conducting hearing

67 – Legal member of tribunal with documents received/3 member tribunal hearing

**Sheriff Court Route**

As can be seen, significantly less respondents were in favour of the OPG/Sheriff court route. Of those who were, 5 thought sheriffs were experienced in conducting hearings, case management and producing reasoned written decisions. Another 5 considered the sheriffs had expertise in considering evidence, making findings in fact and coming to a decision on the legal tests. 5 stated the court could be made less formal, for instance by moving it, under existing AWI powers.

3 respondents considered that keeping the process within OPG and the courts provided continuity and reduced red tape. Another 4 cited the sheriffs’ experience in property and financial matters as a reason for their decision.

2 stated the courts were seen as being impartial, respected and authoritative and for 2 the development of case law and having access to court reports and dicta surrounding the decision and circumstances of a case was the important factor in their decision.

2 respondents described the process in the courts as flexible. They stated sheriffs look at papers before setting a hearing and most applications are granted in a short timescale. They considered hearings could also be organised in a short timeframe if required as the sheriff is in court daily. They stated the same sheriff tends to retain responsibility for the application and sheriffs are experienced in the AWI Act in both city and rural locations. They observed that the court process was likely to be less expensive and that sheriffs can call for evidence when there are complex care or social issues.

Other reasons given for disadvantages of the tribunal were:

• Tribunal panel’s medical or social care views on what is in the best interests of the adult cloud the legal and factual issues about the need for a guardian and the suitability of the candidate.

• Tribunal does not require evidence to be given on oath and does not welcome cross examination of expert witnesses.

• Tribunals don’t test evidence in relation to SIDMA rigorously enough. They have a reluctance to refuse applications for compulsory treatment orders.

**Tribunal Route**

By far the most common reason given (by 22 respondents) for being in favour of tribunals was that they were seen as less daunting and gave easier access for adults and family members, encouraging participation. 3 considered it ‘decriminalised’ the whole process. 10 respondents were of the view that professionals present at tribunals have greater cumulative knowledge, experience and expertise of issues relating to mental health. A further 2 considered they had an overlap in skills required to make capacity judgements with mental health. 5 respondents thought the tribunal had a more balanced and informed approach to considering the needs of individuals.

6 respondents were of the opinion that decision making was more consistent and hearings and decision making was more timely in the tribunals. However, 6 respondents, whilst in favour of the tribunals, expressed concern regarding the burden placed on mental health officers and other professionals to attend the tribunal in support of applications. 5 felt tribunal members would require further training, for instance on financial matters, principles of AWI and human rights legislation.

4 respondents thought a tribunal venue would bring mental health and incapacity legislation together, providing framework for better collaboration, expertise and processes with one tribunal service. 2 observed that at present restricted tribunals for very complex or highly contentious cases are chaired by a sheriff. 3 considered that the Mental Health Tribunal would need to change its name to reflect its wider range of duties.

Other views of those in favour of the tribunal route were:

• Takes pressure off the courts

• Decisions would have to be available for inspection

• However some concerns regarding the Mental Health Tribunal’s capacity to take on this work

• More venues

• Better placed to review and supervise cases

• Over time will become more proficient than sheriff court, due to specialism.

• Decision should be based on what is best for the adult and applicant, rather than financial considerations

**Neither Route**

A considerable number of respondents did not express a preference for either route and a significant number of these stated that they did not agree with grade 1 proposals. Some could see the benefits of both routes and could see how, with some training and resource, both could fulfil the required roles. Others felt they required more evidence or did not feel they had enough expertise to express a preference.

Some, although not decided either way, left suggestions. 3 considered the court could be made less formal, for instance by moving it, under existing AWI powers. One suggested that the sheriff court, as a civil court, has a wide range of powers and remedies at its disposal, for instance contempt of court. They stated tribunal powers are statutory and typically less widely drawn. Another thought there should be a requirement that the judicial authority should meet the adult to whom the application relates. A further respondent considered the order of court could be more readily enforceable than one from the tribunal.

For tribunals, 3 respondents thought that the forum could be the Mental Health Tribunal but a sheriff should be used as the legal member where there might be a significant restriction on liberty. One felt all applications should be dealt with by a full tribunal hearing. A further respondent thought that carers would be put off by a formal sheriff court setting.

A small number of respondents did not agree with either route. 2 did not agree with substitute decision making and considered there should be a supported decision making regime. Another 2 thought graded guardianship was not compliant with human rights and one respondent stated that both options would lead to adults with incapacity being harmed unnecessarily.

One respondent brought up the matter of legal aid and pointed out that different requirements applied to cases under the Adults with Incapacity Act in the sheriff courts and those under the Mental Health (Care and Treatment) Act in the Mental Health Tribunal. They stated adults with incapacity cases are generally available for civil legal aid, whereas ‘Assistance By Way Of Representation’ (ABWOR) has more commonly been made available for some tribunal proceedings. They commented that current financial eligibility rules are in some respects more generous under civil legal aid than ABWOR and that could have an impact on the number of people who were eligible for legal aid, depending on the route taken.

**Question: Please also give your views on the level of scrutiny suggested for each grade of guardianship application?**

68\* responses

There were 68\* responses to the question. A number of these referred to comments made in the previous question regarding the forum at each stage of graded guardianship. A minority made no comment. The remainder could be split into those who thought the scrutiny provided was adequate and those who did not. The split was as follows:

Adequate: 14

Not adequate: 21

Of those who thought scrutiny was adequate the vast majority of comments did not elaborate on why they thought this was the case. One comment stated that the Mental Health Tribunal was well versed in taking the least restrictive method and could take on the role with training.

Many more comments were left by those who considered that the level of scrutiny was not adequate. A large proportion of these referred to grade 1 provisions being inadequate. 7 respondents specifically referred to this. 6 went on to clarify that they thought grades 2 and 3 did have sufficient scrutiny. A further 6 respondents wanted to dispense with grade 1 altogether and go with a 2 tier system, using the grade 2 and 3 proposals. One respondent considered finances should be less at grades 1 and 2 and selling houses should be at grade 3. Another thought the tribunal should scrutinise grade 1, rather than OPG.

Some respondents were of the opinion that a maximum level of scrutiny should apply to all grades. 3 respondents thought this because of the seriousness of the powers at each grade. One commented that there should be a full Mental Health Tribunal hearing at each grade and another considered that scrutiny should be the same for all guardianships otherwise it would be discriminatory on the grounds of disability. 3 stated it would be a major retreat from the efforts to safeguard more vulnerable adults under Adult Support and Protection (ASP) legislation and there would be an increase in ASP cases.

Two respondents were concerned that paper exercise tribunals were not a good way forward as the legal member may not be cognisant with medical complexities. A further two did not support graded guardianship at all as they were of the opinion that it was not UNCRPD compliant.

Other comments were:

• Independent legal advice should be available at all times.

• Should have independent guardians to avoid conflict of interest.

• Local authority not involved with supervision, with MWC and OPG leading. At odds with ASP legislation.

• Concerns those compliant with a decision are treated differently from those who disagree with the decision. This is the crux of Bournewood case. Should be treated the same.

• Certificate of incapacity should be provided by 2 practitioners experienced in assessing cognitive functioning and mental disorder.

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

41 responses

There was a much lower response to this question than to the other related questions on this subject. The question invited a wide range of responses which did not lend itself to grouping responses on similar themes. Some responses repeated comments that have been captured elsewhere. Other responses were as follows:

• Tribunals may attach too much weight to medical evidence given the presence of a medical member on the panel.

• There may be problems with accessing suitable facilities for tribunals.

• The importance of an experienced social worker to support guardianship should be emphasised.

• Hearings should always apply inclusive communication best practice so as to optimise communication accessibility for vulnerable people.

• Significant resource issues for local authorities if Mental Health Officers and social workers are expected to attend a much larger number of hearings in a tribunal setting.

• A tribunal containing two or three jurisdictions would hopefully lead to greater synergy, efficiency and consistent rights protection.

• An independent safeguarder should be appointed to safeguard the interests of the adult. They could ensure access to independent advocacy.

• Apart from the initial application, there are a range of AWI applications that go to court that need to be included in the consideration of preferred forum.

• The safeguarder’s function seems to end when the guardianship case has been decided. However it doesn’t seem to be available if the adult wishes to make an appeal.

• It would be helpful if the principles of the Triangle of Care were built into the process. Friends and Family Care network is the third and equally important party in the care and decision making process, along with the patient and professionals.

• Adult should have access to tailored support through the process. Including giving views and visiting the room in advance of hearing and consideration of timings.

• Young adults turning 16 and coming under guardianship legislation should be screened for criminal activity and checked if they are on the child protection register.

• The tribunal model, or UNCRPD compliant court, could be more expensive, unless reforms reduce number of cases requiring judicial hearing.

• The scrutiny and safeguards in place must be commensurate with powers being sought by the guardian.

• Facilitation of the personal participation of the adult is one of the important elements.

• If the Mental Health Tribunal is the agreed forum, then consider possible renaming of tribunal as ’mental health’ refers to a diagnostic threshold.

• Another option could be to hold shrieval tribunals with a sheriff in attendance.

• Principles governing tribunal process should be reviewed to take into account up to date research on how to make them as inclusive and welcoming to service users as possible.

**Summary**

The information we received via the consultation was both quantitative and qualitative. The quantitative information gives an indication of preference but we also looked at the detailed reasons given for the response for a qualitative perspective.

Whilst the numbers may indicate that a majority agreed with a proposal it was often the case that a significant proportion of these responses gave no reason, or a very brief reason, for the response.

There are also some issues raised which we have to take into consideration when shaping policy. For instance in relation to graded guardianship similar issues tended to surface in different responses. In the working group we will have to deal with concerns raised, such as:

• the lack of judicial scrutiny for the wide powers proposed at grade 1

• possible discrimination in relation to finances and disability

• Ascertaining the views of the adult at grades 1 and 2

• Grades making the system more complicated

• ECHR and UNCRPD compatibility

These concerns are likely to result in the graded guardianship proposals being amended significantly from those in the consultation.

We have looked at the information received regarding the forum in the same manner and of course this is tied up with what the guardianship application process might look like in the future. Therefore, while quantitatively the responses indicated a preference for the Mental Health Tribunal, the working group will have to add to this a consideration of the detailed responses received for the different forums proposed.

**CHAPTER NINE**

**SUPERVISION AND SUPPORT FOR GUARDIANS AND ATTORNEYS**

Chapter nine of the consultation papers sought views on whether there is a need to change the way guardianships are supervised and if so whether our suggestion of developing a model of joint working between OPG, MWC and local authorities was viable. The next question asked whether there is a need for more support for guardians and attorneys and if so what form this support might take.

**Is there a need to change the way guardianships are supervised? If your answer is yes please give your views on our proposal to develop a model of joint working between the OPG, Mental Welfare Commission and local authorities to take forward changes in supervision of guardianships. If you consider an alternative approach would be preferable please comment in full.**

We received 110 responses to this questions, 91 answering yes and 19 no.

A clear majority of those answering felt there was need for change. The general sense was the supervision of guardianships should become more meaningful and sustainable. A number of responses suggested a risk based system, and a register of ‘high risk’ guardianships orders. Whilst there was some concern about the potential for conflict of interest with local authorities it was felt they had a vital role given their local knowledge of cases.

Those who disagreed considered there was no need for change – the problem is one of resources not procedure. And there were concerns that the proposed model might lead to confusion regarding roles and duties of the agencies, might undermine the ASP and that guardianship should be replaced with SDM.

37 responses considered an alternative approach would be preferable. Most felt this was a complex area and a working group was required to address all the issues. Suggestions included having local authorities supervise all guardianships, provision of additional funding to local authorities to enable early intervention monitoring and support – reducing potential for high risk cases.

**What sort of advice and support should be provided for guardians? Do you have views on who might be best placed to provide this support and advice? Please give reasons for your answers.**

We received 89\* responses to this question, 62 answering yes and 27 no.

The Office of the Public Guardian provides a lot of training for professional financial guardians and they do support financial guardians . But most responses considered that there should be comprehensive training for guardians and their roles and responsibilities. As well as preliminary advice and training, there should be a means of provision of further advice and support when needed.

Many local carers’ centres provide information and support to carers who are considering becoming guardians but suggestions for change included creating a dedicated team to educate and inform guardians which would in turn reduce the pressure on an overworked system.

The current code of practice is seen as complicated –but obviously any change in law and practice will need to be reflected in updated codes of practice. And one suggestion was made to educate the public through schools. The ‘trickle down’ approach has been effective in taking home messages around homelessness and dementia to other family members.

In response to who might be best placed to provide advice and support suggestions included persons with lived experience, advocacy organisations, mental health practitioners, solicitors, medical, social, financial professions, carers’ centres, local authority /local advice agencies or maybe a new independent body composed of specially trained staff.

The last question in this section asked about attorneys and the need to provide support for them in their roles. The role of an attorney is quite different to that of a guardian, the former arising from a private arrangement, the latter being a court appointment. So one cannot really make training a condition of becoming an attorney in the way that one might in respect of a guardian.

But 99 responses considered that there is a need to provide support for attorneys to assist them in carrying out their role. The consensus was that investment is needed in the whole process.

Suggestions included training being made available for attorneys on their role and responsibilities, with various training platforms – online training, support groups, etc being mentioned. An easy to access website providing support was suggested as was the desire for the Act to be clearer about the role and responsibilities of attorneys.

There was caution expressed by those who did not see a need to provide support for attorneys that compulsory measures might deter people from acting as attorneys –but given that it is a private arrangement that creates a power of attorney, any support or training would have to be advisory rather than compulsory.

The mix of responses to these questions indicates that much work needs to be done to develop firm proposals on supervision and support of guardians and support for attorneys but it is clear that this is an area that needs reform and investment. The Scottish Government is setting up a third working group to consider the way forward in this area and proposals will be tested out amongst stakeholders early in 2019.

**CHAPTER TEN**

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

Chapter ten of the consultation concerned 3 separate issues, the question of a lack of an order for cessation of a residential placement within AWI and whether this is necessary, and the need for creation of a short term placement and whether in light of proposed changes there remains a need for s 13ZA of the Social Work (Scotland) Act 1968.

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

**104\* responses to this question, 88 said yes, 13 no.**

Section 259 of the Mental Health (Care and Treatment) (Scotland) Act 2003 provides for such an order though it is rarely used. Of those who agreed such an order was needed in AWI legislation, it was considered such an order was necessary but as with MH legislation, likely to be used only rarely. Examples of its use were given such as where section 13ZA had been used inappropriately or if a person’s ongoing service provision has become inappropriate. But a number of responses stated that clarity as to what the alternative to the placement might be was required. However work will be taken forward to create an order for cessation of a residential placement within the AWI legislation.

**Do you agree that there is a need for a short term placement order within the AWI legislation? Does our approach seem correct or are there alternative steps we should take?**

**104 responses to this question with 95 in agreement and 9 against.**

Despite the huge majority in favour of a short term placement, those who agreed with the proposal did so with caveats. The approach suggested was criticised for lacking in safeguards – a more appropriate route was considered to be an emergency type order granted quickly by a court or tribunal, or an approach similar to short term detention orders under the mental health act. Concerns were expressed by a number of respondents that a short term order might lead to a longer term placement by default and safeguards must be put in place to ensure this is not a short cut to guardianship. And concern was also expressed about the lack of sufficient care home places and community social work services –without these no orders can be given effect to at all.

It is clear therefore that whilst there is a need for a short term order, how such an order might be authorized needs more consideration and this work will be taken forward over the autumn by the Scottish Government.

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

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

**87 responses to this question with 49 in favour of retention, and 38 against.**

Section 13ZA permits local authorities to provide services to incapable adults where it has been decided that an adult’s needs call for the provision of a community care service and it appears to the local authority that the adult is incapable in relation to decisions about the service, the local authority may take any steps which they consider would help the adult to benefit for the service –including moving the adult to a residential care service

Of those who answered no, many considered other proposals for change covered the existing provisions in 13ZA, and most considered that 13ZA lacked sufficient safeguards, contravened the spirit of the human rights agenda and was based on an outdated concept of incapable adults rather adults who are cognitively or intellectually impaired.

Of those who answered yes, the majority felt the use of the section should be restricted to the provision of care services to enable people to stay at home. A number felt there was still the need for the flexibility 13ZA provided, that its use remains appropriate but it requires updated guidance and consensus across the country. If properly used it could work in conjunction with supported decision making. One response was very clear that it needed to remain in some form and that greater emphasis was needed to make it clear it should not be necessary to receive judicial authorisation to provide care and support for adults with impaired decision making ability.

So whilst there may be a small majority in favour of retention of s13ZA we do need to address the concerns there are around this section. So when there is a clearer picture of the new nature of guardianship, of short term orders and of support for decision making, then the context in which a version of 13ZA might operate can be more clearly seen and therefore we can consider at that stage how the current provision might be amended to fit that context.

**CHAPTER ELEVEN- ADVANCE DIRECTIVES**

An advance directive sets out a person’s wishes about future healthcare should he or she become incapable of taking decisions about treatment. A person who has legal capacity can accept and refuse any treatment, but an advance directive is a way of trying to ensure that doctors respect the wishes of the adult in the future, should he or she become incapable of such decisions. Currently only the Mental Health (Care and Treatment) (Scotland) Act 2003 provides a legal framework for recognition of ‘advance statement’ where a patient is subject to a compulsory order.

Views were sought on whether there is a need for advance directives in legislation and if the AWI legislation is the most appropriate place for this.

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

There were two-hundred and sixty-nine\* responses to this part of the question. Two-hundred and thirty-nine agreed that there should be legislative provision for advance directives. Ten respondents disagreed. A commonly held view by the majority in favour of the proposal was that it would provide peace of mind knowing that an individual wishes would be respected and implemented and that statutory recognition for advance directives in Scotland would provide clarity and direction to both relatives and clinicians in a terminal situation.

Of those who disagreed, there was a commonly held view that it would further complicate a system which is already difficult to navigate. Some respondents felt that there is little understanding of the current legislation and this should be addressed first. In particular criticism was levelled at the Mental Health legislation, the poor uptake of advance statements under that legislation and the mixed experiences many have had of the effectiveness of advance statements. Any new legislation must learn from the difficulties with the mental health legislation.

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

There were 244\* responses to this question. Over 192 respondents felt that the AWI Act is the appropriate place for legislative provision. The majority of those who agreed felt that the AWI Act is the logical and relevant place to deal with advance directives. Some of the comments felt that it was important that statutory provisions were codified in the same place. One respondent felt that the Mental Health (Care and Treatment) Act 2003 is not sufficient to address advance directives. Having legislative provisions would simplify and streamline the processes. Another respondent suggested that an existing framework around power of attorney and guardianship order would be appropriate for the recording and scrutiny of advance directives.

Thirty two respondents did not agree with the question. Amongst those who responded no to this question, a common view expressed was that there should be a wide public debate and consultation on its own right. A few respondents expressed the view that it is a complex area and it should have its own legislative framework. One respondent expressed the view that reliance should still be placed on the common law and principles of AWI.

In view however of the large majority in favour of placing advance directives on a legislative footing, the Scottish Government will be carrying out further work in this area. We will ensure that teams from Mental Health, Realistic Medicine , Anticipatory Care Planning and Palliative Care as well AWI leads will work together to ensure that the best approach is taken to take forward the work around this issue. Particular attention will be paid to the issues around advance statements under the mental health legislation and further announcements on the next steps for advance directives will be made later in 2018, with a separate consultation on this particular issue under consideration .

**CHAPTER TWELVE**

**AUTHORISATION FOR MEDICAL TREATMENT (s47-50)**

At present, there is no legislated process which can authorise measures to prevent a patient from leaving a hospital if this is required to keep them safe during and after treatment for physical health problems.

The AWI act does though provide a safeguarding process when medical treatment of an adult without capacity is needed to promote physical health. This process is authorised and documented via a section 47 certificate.

The questions in this section focussed on proposals to introduce a new section 47 certificate. This will be enhanced to provide for the use of measures to prevent an adult with incapacity who requires treatment for physical health from leaving a hospital unaccompanied.

The proposals somewhat mirror the existing procedures used under the Mental Health Act when someone is placed on a short term order – to that end, we suggest:

* Authorisation by the lead clinician that treatment is needed
* An attorney or welfare guardian must be consulted and the adult themselves should be supported to participate in the decision making process
* 2nd opinion required as part of the authorisation process
* Ability to appeal the decision regarding treatment in hospital
* regular reviews before a judicial body becomes involved as well as the ability to revoke the certificate if the adult recovers sufficiently
* Setting of an end date to support the discharge process

**Response Overview**

We asked 5 questions and received an average of 110 responses per question with 80% of those supporting our proposals.

Of those expressing an opinion the consensus was that proposals appear to be simple, straightforward and transparent and could help ensure that adults do not remain in hospital beyond need.

Respondents also highlighted that these reforms need to be clear, provide detailed safeguards and also ensure that good quality training and guidance is provided.

For those who are not supportive - there are some who do not think that treatment should be provided without consent in any case

**The questions then focussed on new procedures:**

* **Introducing a new s.47 certificate** – 80% agree that it would help simplify the process, those against would like the issue of treatment kept separate.
* On the ability to **remove an adult to hospital** then 90% agree the provision should be available although some asked if this should be for urgent cases only – there was also a suggestion that a judicial route take place for these cases
* **2nd Opinions** – we asked if there should be a 2nd opinion in the authorisation process and 90% agree – a further 68% think this should be standard practice, even with consent. Although some disagreed they were supportive of a 2nd opinion but suggested a professional who is non-clinical would be preferable for example, a MHO.
* **Review Period** – 80% agree that this need be included in the process although there was a difference of opinion on whether 28 days was too long before a review 1st takes place. Interestingly there was no consensus on how many reviews should take place before a judicial review is held.
* We suggested setting **End Dates** so that there is a mechanism to provide for discharge and prevent the adult remaining in hospital unnecessarily. 70% agree. For those who do not support this approach, the main reason citied was that it would be too difficult to fix an end date especially as recovery can fluctuate.

The last question in this section asked whether we should extend the range of professionals who can carry out capacity assessments for the purpose of authorising medical treatments

* There was a 50/50 split on this question – those who agree suggested a variety of professionals from speech and language therapists, psychologists, MHO’s chiropodists, pharmacists, occupational therapists
* Those against are concerned that other professionals may not be suitably qualified and it would be unwise to increase the range of people who are able to assess an adults capacity in regard to them understanding and making decisions about their treatment.

**Summary**

The work in other areas of these AWI reforms will affect the development of these proposals but the consultation has proved a useful first step in understanding concerns and firming up the way forward for authorisation of measures to prevent a patient from leaving a hospital where this is required to keep them safe during and after treatment for physical health issues. Further work in this area will be taken forward over the autumn of 2018.

**CHAPTER THIRTEEN**

**Research**

There are differences in the way that research involving adults with incapacity is handled between Scotland and the rest of the UK. The Chief Scientist’s office has been aware of the issues for over a decade and has taken the opportunity this consultation affords to address the concerns with a number of questions on the issue of research.

Broadly there was a divide between health professionals who recognized the issues but did not necessarily agree with the proposed solutions offered by the consultation , and other respondents who were opposed to any health research involving adults with incapacity, certainly at least where they had not consented to being involved prior to loss of capacity.

**Questions**

**Where there is no appropriate guardian or nearest relative, should we move to a position where two doctors, may authorise their participation, still only on the proviso that involvement in the trial stops immediately should the adult with incapacity show any signs of unwillingness or distress?**

There were 118 responses to this question, 70 in favour, 48 against but many of the responses on both sides had concerns about this proposal.

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

There were 132 responses to this question with 120 agreeing and 12 disagreeing.

**Should there be provision for participation in emergency research where appropriate?**

This question drew 120 responses with 89 in favour and 31 against.

**Should authorisation be broadened to allow studies to include both adults with incapacity and adults with capacity in certain circumstances?**

This question received 110 responses with 79 in favour and 31 against the proposal

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

Again this question received 110\* responses with 79 in favour, 25 against and the reminder unsure.

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

This question had 104 responses, 84 in favour, and 20 against, with many looking for greater clarity on the issue.

**Should part 5 of the act be made less restrictive?**

This question had 75 responses, with 44 in favour and 31 against. But again more clarity was sought.

Whilst the bold figures may suggest that the proposals have been broadly approved, what came across strongly from the detailed responses is that more clarity is required on all of the proposals and therefore the Scottish Government intends to spend more time on the detail of the proposals and come back with a further consultation in due course.

**CHAPTER 14**

**MISCELLANEOUS MATTERS**

This chapter asked if there were any other issues within the AWI legislation that respondents felt would benefit from review or change.

There were 116 responses to this question. Special mention must be given to the comprehensive responses received from the Public Guardian and the Law Society which can be accessed in full here: <https://consult.gov.scot/health-and-social-care/adults-with-incapacity-reform/consultation/published_select_respondent>

The main themes emerging from this final question were on the whole matters that had been brought up at different stages during the rest of the consultation. These included:

* The need for a wider review of AWI, Mental Health and adult support and protection legislation
* The removal of substituted decision making altogether
* Changes of name for guardians-and possibly the whole Act
* Significant investment in training
* The ability for Mental Health Officers to charge for private guardianship reports
* Clarity around the use of safeguarders, their fees, appointment and training structure
* Consolidation of welfare power of attorney with other roles such as named person in mental health legislation
* Change in definition of ‘mental disorder’
* Access to independent advocacy to be given the same status as in the mental health legislation.

All of these issues are being considered in detail as the Scottish Government takes forward its work on reform of Adults with Incapacity legislation, and associated practices. Progress in this work will be publicised at @AWI- reform.

1. Assisted Decision-Making (Capacity) Act 2015 [↑](#footnote-ref-1)