Scottish Government Consultation on the Scottish Law Commission Report on Adults With Incapacity

Summary of Responses to Consultation

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The Scottish Government
Riaghaltas na h-Alba

SCOTTISH GOVERNMENT CONSULTATION ON THE SCOTTISH LAW COMMISSION REPORT ON ADULTS WITH INCAPACITY

SUMMARY OF RESPONSES TO CONSULTATION

Introduction

1. The Scottish Government consulted on the Scottish Law Commission's report on Adults with Incapacity from December 2015 to March 2016.

2. The consultation sought views on the approach taken by the SLC in their draft Adults with Incapacity Bill [1] to issues of deprivation of liberty for adults with incapacity both in hospital settings and within the community. This report summarise the responses received. All responses which the Scottish Government has permission to publish are available on line at https://consult.scotland.gov.uk/integration-partnerships/report-on-adults-with-incapacity.

Respondent Information

3. In total the consultation received 73 responses, 23 from individuals and 50 from organisations. Of the organisations who responded, these can be categorised into eight broad types.

Type of organisation	Number of Responses	Percentage
Local Government bodies	14	28
Health and Social care partnerships	5	10
Statutory regulators	1	2
Professional regulatory bodies	5	10
Other professional bodies	8	16
Health Boards	3	6
Other	4	8
Third sector	10	20
	50	100%

4. It should be noted that different respondents answered different questions which will explain why there are differing numbers of responses for each question.

[1] Scottish Law Commission report no 240 www.scotlawcom.gov.uk

SUMMARY OF RESPONSES

5. The main conclusions to be drawn from the responses are that there is a compelling need to provide a process for measures to deprive a person of their liberty in both a hospital and community setting, beyond that which already exists by virtue of welfare guardianship and powers of attorney. However there is definite concern that the changes proposed by the draft Scottish Law Commission Bill, notwithstanding its merits, would result in a huge increase in workload for an already heavily pressurised system and workforce. There was a substantial majority of respondents expressing the view that any changes to the law in this area should take place within the context of a wider revision of the Adults with Incapacity (AWI) legislation.[2] A majority of responses stated that the legislation was not working effectively and that change was required.

6. The most popular change suggested was a reshape of guardianship orders, to move away from the current system to a form of graded guardianship.

7. Other significant suggestions for change included changing the jurisdiction of AWI cases from the sheriff court to a tribunal and the need for some kind of emergency / interim order that could be used at short notice.

8. The Scottish Government is very grateful to all those who took the time to respond to this consultation. Particular reference should be given to the comprehensive responses provided by the Law Society of Scotland and the Mental Welfare Commission for Scotland. These, along with all the other responses which the Scottish Government has permission to publish are available online.

[2] Adults with Incapacity (Scotland) Act 2000, asp 4

ANALYSIS OF RESPONSES

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

9. There were fifty-six responses to this question. Fifty respondents expressed the view that an additional process was required to authorise the use of measures to keep an adult with incapacity safe whilst in hospital. Of those six who disagreed only three gave an explanation. One considered that the Mental Health (Care and Treatment) (Scotland) Act 2003[3], should be used for greater protection for the adult, another considered that this sort of new process would run a risk that a person with learning disabilities would become subject to this authorisation by default and the third was of the view that if there was a welfare guardian or power of attorney with appropriate powers, that was sufficient.

Question: Section 1 of the Commission's draft Adults with Incapacity Bill provides for new section 50A to 50C within the 2000 Act, creating measures to prevent an adult from going out of hospital. Is the proposed approach comprehensive? Please provide an explanation for your answer. Are there any changes you would suggest to the process?

10. There were sixty-one replies to this question, twenty-six respondents considered the approach was comprehensive, but 35 disagreed. The majority of those who disagreed expressed concerns about the fact that the measures can be authorised by a single medical practitioner, that the measures could last for an unspecified period of time and that there is no clear provision for a review. There was also concern that the reasons for an adult being admitted to hospital, and the discharge process are not clearly addressed. Additionally, there was a lot of disquiet about the fact that attorneys and guardians are not involved in the process, and that patients can effectively be detained without the same checks and balances that are in place under the Mental Health (Care and Treatment) (Scotland) Act 2003. A number of respondents expressed concern that there was no direct route for patients to be informed of their appeal rights, with the need for independent advocacy to be available to adults to enable them to express their views

11. Even amongst those who considered the approach was comprehensive, preference was expressed for a more direct role for welfare attorneys and guardians in the process and the need for independent advocacy to be available.

[3] 2003 asp13

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

12. There were fifty-four responses to this part of the consultation. Of those replies, nine respondents felt the draft provisions would well work alongside the existing provisions of the 2000 Act, particularly section 47 of the Act. However the remainder of replies to this question raised a number of concerns about the way the provisions would work together.

13. A number of respondents felt that rather than have a separate section, it would be preferable to update and review the existing provisions, and extend the powers within section 47 of the AWI Act (authority of persons responsible for medical treatment). It was felt that adding another certification process was unnecessary duplication. One respondent stated that there were a number of existing problems with the use of section 47 certificates and that having a different process and criteria for detention and treatment was likely to lead to confusion. Two respondents in particular raised concerns about the provision within s50A of the draft bill, allowing for administration of medication for the purposes of confining the patient to hospital.

14. A number of respondents were concerned that unlike section 47, there was no provision for consulting welfare attorneys or guardians under the draft provisions, and that this would lead to difficulties in practice.

Community Settings

Question: Is a process required to authorise the restriction of an individual's liberty in a community setting (beyond a guardianship or intervention order) if such restriction is required for the individual's safety and wellbeing? Please give an explanation for your answer

15. There were seventy-three responses to the first part of this question. Forty-nine respondents felt a process was required, seven disagreed and the remainder gave no clear answer. There were sixty-one responses giving an explanation.

16. Of those negative responses, one felt that guardianship processes were sufficient, another felt that they were sufficient but processes needed to be quicker. Another specifically said that the proposals were a restrictive and unnecessary intervention. One response stated that the proposals were unnecessary if powers of attorney were used and worded appropriately and another expressed concern that the new proposals would lead to institutional abuse.

17. The vast majority of responses however considered there was a need for a process, beyond a guardianship or intervention order, to authorise the restriction of a person's liberty. Fourteen responses felt the draft bill met the need for a clear and lawful process for deprivation of liberty but eleven expressed concern about the pressure on the workforce that the proposed changes would bring. Four responses

stated that the new process should be person centred, the principle of least restriction should be made more explicit and new processes developed to empower residents in a care setting. The need to involve the incapacitated person from the outset of the decision making process was highlighted in one response. Several responses stated that a welfare attorney or guardian should be able to refuse or consent to liberty. And two responses highlighted a specific need for an emergency provision to enable a person to be deprived of liberty quickly –but in accordance with the due process. Finally three responses expressed concern about the narrow scope of the provision and felt it should be extended to cover persons in respite care or in their own homes –where the situation might be considered to be a deprivation of liberty.

Question: The proposed legal authorisation process will not be required for a person who is living in a care home where the front door is ordinarily locked, who might require seclusion or restraint from time to time. Do you agree that the authorisation process should not apply here? Please give an explanation for your answer.

18. Twenty responses agreed with the above, thirty-eight disagreed and fifteen neither agreed or disagreed. There were fifty-nine explanations. Of the thirty-eight who disagreed with the proposal virtually all considered a locked door was a restraint that constituted a deprivation of liberty, and there was concern the courts would see it as such. Several responses considered this might create a loophole whereby persons might be deprived of their liberty 'through the back door'. One respondent stated that this approach might be considered appropriate within the day to day running of a care home but on closer analysis is overly restrictive. One response considered that if views have been sought from the person and their family, along with the professionals involved and it has been decided that the front door will be locked to avoid a person walking out inadvertently, and another restriction is applied e.g. the locking of an internal door, a process such as that proposed by the Commission report may not be necessary to protect the person. And one response considered that there needed to be safeguards in such situations to minimise the risk of institutional abuse. A significant majority of responses expressed concern about the use of the phrase 'from time to time'. It was considered that this phrase was open to wide interpretation and could be subject to abuse.

19. Of those who agreed with the proposal, very few gave an explanation. One considered that the approach was in accordance with ECHR and two considered that the workload implications of applying a process in these circumstances would be huge and may well render demands on the system such that it couldn't cope. One response stated that law would be unworkable and would be an intrusion on the rights of other residents and one considered that it was perfectly reasonable for a door to be locked to prevent intruders.

Question: In proposing a new process for measures that may restrict an adult's liberty, the Commission has recommended the use of 'significant restriction' rather than deprivation of liberty and has set out a list of criteria that would constitute a significant restriction on an adult's liberty. Please give your views on this approach and the categories of significant restriction.

20. There were sixty-two responses to this question. The nature of the question encouraged a discursive response rather than a yes/no answer followed by explanation. A small majority of thirty-five of those who answered this question felt that the approach taken by the Commission in using a statement of significant restriction was preferable to the use of the term deprivation of liberty. However virtually all of those responses had a number of reservations about the criteria.

21. Seventeen responses specifically stated that they supported the use of a statement of significant restriction but further clarity was needed. Eight responses considered that the list of criteria was appropriate but expressed concern that this will apply to the majority of care home residents and as such would make huge demands on stakeholders.

22. Of those responses which considered the approach taken by the Commission was not appropriate, the main concern, expressed by eight respondents was that the statement of significant restriction (SSR) and the criteria for that, did not meet the requirements of current case law. One response considered that this was not the best approach and that the legal framework needs to address the range of ways a person's freedom may be compromised. Another response considered that avoiding the Supreme Court meaning of deprivation of liberty, as established in the Cheshire West case[4], potentially risks losing focus in these matter being the fundamental human rights of individual's at stake. Several responses thought that it would not be any easier to determine what constituted an SSR than deprivation of liberty using the existing case law. Another considered that moving away from the concept of deprivation of liberty to a range of circumstances to that would require an SSR would be a risk to rights and interests of the adult.

23. Even amongst those who supported the use of SSR there was expressed a need for more clarity. Approximately ten respondents expressed concern about care home managers acting as relevant persons, and taking decisions about a person's need for restriction. There was concern about capacity and possible conflict of interest.

24. Another area for concern was the criteria. It was considered by twelve respondents that a wider range of criteria needed to be considered as restricting liberty such as use of surveillance/observation/ medication /lack of social contact. One respondent considered that if any of the listed restrictions existed then that would constitute a deprivation of liberty.

[4] P v Cheshire West and Chester Council:P and Q v Surrey County Council[2014] UKSC 19

25. There were eight responses that considered the proposals confused rather than clarified the position and that the categories would apply to most adults in care homes which wold render it unworkable. Finally, one response did not like the use of 'significant' and considered that restriction is restriction and another thought this approach was a 'Draconian step back into the dark ages'.

Question: The authorisation process provides for guardians and welfare attorneys to authorise significant restrictions of liberty. Do you have a view on whether this would provide sufficiently strong safeguards to meet the requirements of article 5 of the ECHR? Please give an explanation for your answer.

26. Thirty-four responses considered this would provide sufficiently strong safeguards, seventeen disagreed and twenty-two did not answer the initial question. There were sixty-one responses giving reasons. Of the responses which agreed that this process did provide sufficient safeguards, consistently respondents indicated that they were only comfortable with the concept of welfare guardians and welfare attorneys authorising significant restrictions of liberty if they had been granted specific powers to do so in their original appointment. Four respondents were concerned that there was no independent review unless there was a dispute about the placement and three commented that such restriction on a person's liberty needs judicial oversight to comply with Article 5. One respondent commented that it was entirely appropriate as the welfare attorney has the trust of the person who appointed them, and the welfare guardian has undergone a strict legal process. Another respondent suggested that there was a need for two people with an interest in the welfare of the person concerned to authorise an SSR.

27. Several responses stated that there should be access to advocacy for both parties in this process. And a number of responses stated that at present powers of attorney and guardianship orders were quite vaguely worded and perhaps there was a need for a prescribed form of words to be agreed if the guardian /attorney was to be permitted to authorise an SSR.

28. Of those responses that disagreed with this proposal, again it was the need for welfare guardians and attorneys to have specific authorisation to restrict liberty in their original appointment that was felt necessary before this met ECHR concerns. The need for regular review was also highlighted, as was the need for access to advocacy for the adult.

Question: The Bill is currently silent on whether it should be open to a relevant person to seek a statement of significant restriction in relation to a person subject to an order under the 1995 or 2003 Acts[5] which currently do not authorise measures which amount to deprivation of liberty. Please give your views on whether these persons should be expressly included or not within the provisions and reasons for this.

29. There were forty responses to this question. Fifteen responses considered that persons subject to an order under the 1995 or 2003 Acts should be expressly included within the provisions. Two responses considered it would be helpful to strengthen procedures, and one response suggested it would be a good safeguard. Three responses stated that clarity was needed on the interaction between the three Acts. Another stated that persons subject to the 1995 or 2003 Act should be given every opportunity to ensure views in relation to significant restriction were conveyed.

30. However twenty-five responses were of the view that the Bill should not extend to persons subject to orders under the 1995 or 2003 Acts. Four responses expressed concern about this approach creating parallel systems, three stated specifically that they considered it unnecessary. Ten responses stated that there was an anomaly in the law and that the need for compulsory treatment orders to authorise measures which could amount to a deprivation of liberty needed to be addressed but this should be through amendment to the 2003 Act rather than under AWI legislation.

Question: The process to obtain a statement of significant restriction would,as the bill is currently drafted, sit alongside existing provisions safeguarding the welfare of incapable adults and require the input of professionals already engaged in many aspects of work under the 2000 Act[6], such as mental health officers and medical practitioners. Please give your views on the impact this process would have on the way the Act currently operates. If you do not agree with the approach taken by the Commission, please outline any alternative approaches you consider appropriate.

31. There were fifty-seven responses to the first part of the question and forty-six responses to the second part. 32. Of the fifty-seven who responded to the first part, whilst there was recognition of the need for additional processes to resolve concerns around deprivation of liberty, forty specifically mentioned the fact that Mental Health Officers, social workers and medical staff were already under significant pressure and the provisions of the Bill, were they to be implemented, would compound these

[5] Criminal Justice (Scotland) Act 1995 c.20

[6] asp 4

difficulties. One response stated that the Bill potentially could create 20,000 guardianships which would cancel out any gains, and another stated that the Bill would create significant and unmanageable demands on existing systems and professionals.

33. Eleven responses considered the processes suggested would be a duplication and that changes to existing guardianship/ powers of attorney would be preferable. Six responses specifically mentioned increasing pressures on the courts – adding to existing delays. One response considered that the proposals contained a huge potential for challenge. One response was of the view that the provisions were not about safeguarding the welfare individuals rather they were about safeguarding formal systems against legal challenge.

34. Three responses were very positive about the proposed changes, saying that it sat well alongside existing provisions, that it would add to the support for incapable adults and that it added appropriate steps and processes to ensure people were not inappropriately deprived of their liberty.

35. In response to the second part of the question, a number of themes have emerged in respect of alternative approaches to that proposed by the Commission. Many of these were expanded upon in the last question. These themes were:

- Need for a review of AWI legislation generally –these changes should not stand alone.
- Consideration of graded guardianship.
- Allowing nurses to assess capacity.
- A specialist capacity court/tribunal.
- The need for independent advocacy to be freely available to both incapable adults and welfare attorneys/guardians.
- Preference for social worker to be relevant person rather than care home manager.
- Need to address banking issues in particular opening bank account for adults with incapacity.
- Need for distinction in approach where welfare guardianship/power of attorney is already in place.

Question: Is a process required to allow adults to appeal to the Sheriff against unlawful detention in a care home or adult care placement? Is the proposed approach comprehensive?

36. There were fifty-eight responses to this question. Fifty-two responses agreed that a process was required, six disagreed. Of the six that disagreed, five gave reasons. One response felt there was no need as judicial review would achieve the same end, one considered that no additional processes were required, two considered that it would just allow for more legal challenge and the use of advocacy

was to be preferred. And one response considered that an additional right of appeal was confusing and ran the risk of emphasising individual's rights to the detriment of their care.

37. One response did not indicate whether they agreed or not with the proposal but expressed concern about the proposal, namely that it requires action on the part of a potentially incapable adult which may not be feasible, or that raising an action is left to others' discretion, which might not be compatible with the safeguards required by the European Court of Human Rights.

38. Of the responses that agreed with the proposal, most gave no reason. One response was concerned about the potential for misuse in family disputes, another that services may be overwhelmed by unhappy relatives 'ending' a person's stay and the burden of trying to find somewhere else for the person to live. Another requested that careful consideration had to be given to the proposal to ensure it didn't convey the impression that people are routinely being held against their will in care homes.

Question: Over and above the question of deprivation of liberty considered by the Commission do you believe the 2000 Act is working effectively to meet its purpose of safeguarding the welfare and financial affairs of people in the least restrictive manner? If you have answered no can you please suggest two or three key areas which any wider review of the provisions of the 2000 Act might consider.

39. These questions were added to elicit from respondents, their views on the overall efficacy of the 2000 Act at present and whether addressing the question of deprivation of liberty alone was appropriate or viable or if the view of respondents is that wider change is needed.

40. There were fifty-six responses to the first question. Nineteen responses considered the Act was working effectively but thirty-seven considered that there was a need for change. There were forty responses to the last question. A certain number of responses, notably from the Law Society of Scotland and the Mental Welfare Commission for Scotland, suggested significantly more than two or three key areas for reform and the Scottish Government is very grateful for the time taken to compile these responses and suggestions for change. These responses are available in full online at https://consult.scotland.gov.uk/integration-partnerships/report-on-adults-with-incapacity

41. Here we will outline the main themes emerging from these last questions and signpost the other changes suggested. All the recommendations for change will be considered as the Scottish Government makes decisions about the next steps in review of the Adults with Incapacity legislation.

42. Just over half the responses received were of the view that any change in the law should take place within the wider context of a review of AWI. The most preferred area for reform was consideration of some form of graded guardianship, with nineteen respondents specifically requesting this. The view expressed by those respondents was that the 'one size fits all' guardianship model was no longer working and change was needed.

43. Eight respondents said that a comprehensive review of not only the AWI legislation but the Adult Support and Protection Act 2007, and the Mental Health (Care and Treatment) (Scotland) Act 2003, and the interplay between all 3 was required. Eight respondents considered that the AWI Act needed to be reviewed specifically to reflect the requirements of the United Nations Convention on the Rights of Persons with Disabilities. Nine responses suggested a need for some sort of emergency guardianship – the length of time involved in obtaining guardianship was cited by the majority of respondents as a concern.

44. A significant minority requested that a change in the jurisdiction of the Sheriff court for AWI cases be considered. Seventeen responses specifically requested that power be given to the Mental Health Tribunal to deal with AWI cases rather than the Sheriff court. One response suggested that there was a need for more consistency in approach across all sheriff courts and in particular more clarity needed over the use of safeguarders.

45. Six responses raised the need for cross border issues to be reviewed, and six responses also felt tighter controls over welfare and financial powers of attorney and guardians were necessary and that more training and guidance was needed for solicitors, guardians and attorneys.

46. The office of the Public Guardian was also seen as needing review, with four responses suggesting the need for it to be given more powers to investigate financial irregularities and lawyers' actions in guardian and attorney cases.

47. Finally two responses raised the overlap between ASP cases and AWI cases and the need to avoid duplication of investigations and involvement of professionals here. And one response requested that separate legislation be developed for those persons with learning difficulties who may be subject to AWI at present.

CONCLUSION AND NEXT STEPS

48. The Scottish Government is very grateful for the time taken by those to complete the consultation responses. There will be on-going consideration of all the responses, and decisions will be taken over the summer regarding the next steps the Scottish Government will take in this area of law.

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