



Law Society
of Scotland

Consultation Response

Adults with Incapacity Reform

April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation: Adults with Incapacity Reform. The sub-committee has the following comments to put forward for consideration.

General comments

Abbreviations and references

For convenience, we have adopted the abbreviations in the Glossary of Terms on pages eight and nine of the consultation document, except that:

2000 Act: We use this rather than 'AWI' to mean the Adults with Incapacity (Scotland) Act 2000

2007 Act: The Adult Support and Protection (Scotland) Act 2007

AWI: We use this to mean the general topic of adults with incapacity, rather than the 2000 Act

SLC: We use this, rather than 'the Commission', to mean Scottish Law Commission (to avoid risk of confusion with Mental Welfare Commission for Scotland)

SLC 1995: Scottish Law Commission Report No 151 (September 1995) on Incapable Adults

SLC 2014: Scottish Law Commission Report No 240 (2014) on Adults with Incapacity

Our headings from 'Chapter One' onwards replicate those in the consultation document. The numbering of questions is our own.

Previous papers

Rather than repeat the content at length in this response, we refer to three previous papers and annex them to this response. We refer to them as follows:

2004 paper: 2004 Note by Adrian D Ward (convener of the sub-committee) for the Mental Welfare Commission for Scotland (MWC) on Authorising significant interventions for adults who lack capacity, 11 February 2004

2012 paper: Response by the sub-committee dated 12 July 2012 to Office of the Public Guardian (OPG) Graded guardianship paper of 2011

2016 response: The Law Society of Scotland's response, March 2016, to Scottish Government consultation on the Scottish Law Commission Report on Adults with Incapacity

Context and background

We have had the benefit of ongoing engagement with the Scottish Government on issues relating to Adults with Incapacity over the course of many years. This consultation has provided a welcome opportunity to revisit the Adults with Incapacity (Scotland) Act 2000. The 2000 Act contains much to be proud of, but is in need of significant reform 18 years after it was passed. As the Scottish Parliament's first legislation on a major policy area, it enabled Scotland to be the first country in the world in respect of which the Hague Convention on the International Protection of Adults was ratified. Reforming the law relating to adults with incapacity provides Scotland with the chance to ensure that the law best serves some of the most vulnerable people in our society, and is fully compliant with our human rights obligations in the UK, Europe, and with the UN. We thank the Scottish Government for the discussions held at early stages of this consultation, and for the invitation to look beyond the proposals in the consultation paper when formulating our response. We understand that this is the beginning of a longer process, and look forward to continuing to engage on this important reform project as it progresses.

Our response to this consultation is made in the context of the following points:

1. The question of the appropriate forum for the Adults with Incapacity (Scotland) Act 2000 (AWI) jurisdiction was a major issue during the consultation and consideration that led to the Scottish Law Commission (SLC) 1995. Consideration focused on three options: court, tribunal, or hearing.¹ An important aspect was to achieve a 'one-door' approach.² At that time tutors (the precursors of AWI guardians) were appointed in the Court of Session. The mental health jurisdiction was with the sheriff

¹ SLC 1995, para 2.20

² SLC 1995, para 2.21

court. There were considerable reservations about the sheriff court for the AWI jurisdiction: “The courts were regarded by many respondents as intimidating, legalistic, adversarial and only willing to look at the issues put in front of them, lacking in understanding of the needs of the mentally incapable, slow, expensive and associated with criminal proceedings.”³ We analysed the requirements and nevertheless proposed the sheriff court, subject to the important proviso that “proceedings should be conducted by specially selected ‘designated sheriffs’”; SLC responded: “We think the Law Society’s suggestion is an excellent one that would go a long way to address the concerns addressed by those opposed to the use of the courts.”⁴

2. The concept of a ‘one-door’ approach in the sheriff court lasted only until introduction of the Mental Health Tribunal for Scotland (MHTS) under the 2003 Act. Specialist sheriffs have never been introduced. Consequently, administration of the AWI jurisdiction by the sheriff court continues to attract the concerns and criticisms described above. In these circumstances, our 2016 response proposed a unified tribunal jurisdiction for the 2000 Act, the 2003 Act and the 2007 Act. We stress that we did not propose transfer of the AWI jurisdiction to MHTS. Our proposal was, and remains, the establishment of a new unified tribunal, albeit with the advantages of the working methods and efficiencies of MHTS, coupled with the relatively widespread availability of some 76 venues (contrasted with the reduction in sheriff court venues from 49 in 2012 to 39 now, producing unacceptable travel difficulties for families with vulnerable members). For these reasons, we do not see the court model or the tribunal model as simple alternatives to which the proposals in the consultation document and our responses in this document can be applied equally. Except where otherwise indicated, our response to this consultation is made in the context of this overarching proposal, and references to a tribunal or tribunal member are references to this proposed unified tribunal. Substantial adaptation and strengthening would be required if the sheriff court were to remain the forum.
3. While the contrasting models of sheriff court or unified tribunal were expected, the proposal of a purely bureaucratic process for many guardianship applications was unexpected. This appears to be based on the original “graded guardianship” proposal of 2011 from OPG, taking account neither of the issues in our 2012 paper nor major developments since. In particular, it is not indicated that the question of European Convention on Human Rights (ECHR) compliance has been addressed. Without doubt, the proposed bureaucratic process with no identified judicial or quasi-judicial decision-maker would not comply with ECHR and accordingly would be outwith the competence of the Scottish Parliament. The process would also clearly violate UK obligations under United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), with the likely consequences of complaints under the First Protocol to UNCRPD and censure by the UN Committee. See also the points in our comments in response to chapter eight.

³ SLC 1995, para 2.28

⁴ SLC 1995, para 2.28

4. All of the proposals to achieve compliance with UNCRPD in our 2016 response, and all of our proposals in the 2016 response for statutory amendment, remain necessary and should be taken as incorporated in this response. For reference, these are included in the annex to this response.
5. To achieve human rights compliance and to best serve the real-life needs and circumstances of people with relevant disabilities, and their families and supporters, the concept of support should not be an add-on, but at the core of re-orientated legislation. This point is developed immediately after our replies to questions in chapter five.
6. UNCRPD should receive qualified incorporation into Scots law, at least to the extent of a presumption requiring compliance, with a high bar for rebutting that presumption.

The way forward

The Scottish Government team working on this matter is to be commended for taking matters this far. There is a risk that the review process may now falter under the weight and diversity of responses. On the one hand there are those with lived experience who feel that guardianship has been imposed unnecessarily and that they have been denied a sufficient level of participation in matters concerning their own lives. Their voices must be heard and respected, but not to the detriment of the very different needs of those who are actually incapable in some degree of safely taking at least some actions and making at least some decisions with full legal effect. From one of these extremes to the other, a wide spectrum of both need and opinion requires to be systematised into a coherent overall provision. The existing 2000 Act was the product of much work first by SLC, then by a campaigning alliance of some 70 stakeholders, including some 30 national organisations. The 2003 Act was the outcome of the work of the Millan Committee. A similarly broad-based, comprehensive and authoritative approach, adequately resourced, is now required to take this review process forward.

Once a relevant coherent overall provision has been structured, detail will require to be fleshed out in a consistent and comprehensible manner in all of its applications. There will be many interfaces with other legislation, requiring consequential amendments on a scale probably similar to those required in the original 2000 Act.

The envisaged reforms will introduce new roles, concepts and terminology. In order to ensure adequate understanding by the general public and all those who will need to understand the new regime in the performance of their roles, it will be essential to repeat the processes supervised and coordinated by the implementation steering group following the passing of the 2000 Act. In addition, this will – as a matter of international obligation – require to be integrated with the process of training of everyone involved in the administration of justice in accordance with article 13.2 of UNCRPD.

Consultation questions

The consultation document does not have any consultation questions directed to the content of chapters one and two. The content of those chapters nevertheless gives rise to matters of significant importance, and we would make the following comments.

Chapter One

Background

It is important in references to 'one size' to distinguish between procedures and supervision arrangements, on the one hand, and powers granted, on the other.

Scottish Law Commission Report

The proposal for consideration of a change of jurisdiction goes beyond AWI cases, and includes Adult Support and Protection as part of a unified tribunal, as discussed above.

The UNCPRD has already been ratified on behalf of all UK jurisdictions by the UK Government, and the requirement is now to comply, rather than to implement the convention.

Context

The 2000 Act's existing scope has contributed to it being seen as a world leader, and giving us a starting-point of greater compliance with UNCPRD than many other jurisdictions. The Act is concerned with both acting and deciding, not merely with making decisions. One situation exemplifying decision-making is whether or not to accept an offer of compensation. The much broader concept of acting encompasses understanding that something that has happened may warrant either a claim in reparation or a claim upon an insurance policy; taking steps to pursue the matter, perhaps by obtaining appropriate professional advice; and then doing everything that has to be done (or instructing it) to reach a point where a settlement offer is made. A modern human rights compliant regime must cover the exercise of legal capacity in that broader sense. It would be wholly retrograde to move in the opposite direction to eliminate this broad concept of acting. 'Acting and deciding' reasonably encapsulates the concept of exercise of legal capacity as it appears in UNCPRD.

There is a clear error in this regard in the bullet-points at the foot of page five. Element (a) of the definition of 'incapable' in section 1(6) of the 2000 Act reads 'acting' not 'acting on decisions'. References within the

consultation to the 2000 Act relating only to making decisions should instead be to the broader concept of acting or deciding.

We welcome the acknowledgment of the difference between capacity and still knowing what is happening and being involved in decisions, but stress that capacity itself is not an all or nothing concept. Many people have capacity for some matters, even though it is impaired in relation to others; or, within those parameters, at some times and/or in some circumstances, but not in others.

Medical treatment decisions

We note that authorisation under section 47, which empowers doctors to authorise themselves or others “to do what is reasonable in the circumstances, in relation to the medical treatment in question” is wider than just providing treatment.

Principles to be followed

The concept of ‘action or decisions’ is less clear than the use of ‘intervention’ in the 2000 Act itself. In the 2000 Act ‘intervention’ has a wide meaning that has developed since the introduction of the Act. It includes a decision not to do or authorise something.

The focus of Principle 2 is “the least restrictive option in relation to the freedom of the adult” (consistent with the purpose of the intervention). This is different to the concept of “minimum necessary” action or decision, which is given in the consultation paper. Granting a guardianship order might be a lesser restriction of the freedom of an adult than allowing matters to continue to be managed under an arrangement with fewer safeguards, or no formal procedure at all to assess needs and circumstances. If the proposals in the consultation document were to be adopted, yet all existing principles retained if not strengthened, then one might speculate as to whether the proposed grade 1 procedure, with its lack of ECHR-compliant procedural safeguards, would ever represent the least restrictive option in relation to the freedom of the adult (in comparison with grades 2 and 3), and thus would ever properly lead to a guardianship order being granted.

In relation to Principle 3, rather than a requirement that “the adult should be offered appropriate assistance to communicate”, any possible means of communication must be employed. It is important to stress that this is a requirement, not just good practice.

The addition in section 3(5A) of the 2000 Act should also be considered here. This additional principle is applicable in sheriff court proceedings, regarding the role of “a person providing independent advocacy services.” It is stronger than Principle 4 in that it is not subject to the qualification “insofar as it is reasonable and practicable to do so.” In accordance with the drive to support the exercise of legal capacity, it may require to be enhanced but certainly should not be downgraded.

Chapter Two

The proposal that updated legislation be future-proofed for the next 20 years is realistic and important. We suggest this should take account of current trends to a greater extent than is yet proposed.

We would be interested in understanding the evidence behind the statement that there are a “significant number of cases where a full court process adds little value”. This assertion cannot be accepted unless it is clarified and supported by properly researched evidence.

In relation to additional areas for consideration at this stage, we also feel that it is worth re-visiting the provisions of clause 41 of the draft Bill annexed to SLC 1995, on withholding and withdrawal of medical treatment from incapable adults. Both that and the whole range of end-of-life issues should be addressed, particularly as (a) it is not suggested that the reasons for clauses 40 (on advance statements) and 41 of the original Draft Bill no longer apply, (b) comparative examples now exist, such as the comprehensive regime introduced in France, and (c) there is now a Scottish Parliament Cross Party Group on End of Life Choices. The wider use of advance directives, in accordance with the Council of Europe Recommendation (2009) 11, should also be provided for and encouraged.

We welcome the opportunity to comment on wider issues. If legislation resulting from this review is to be future-proofed, the review must cover all aspects of adult incapacity, mental health and adult support and protection legislation, and all of the points for reform in our 2016 response. This includes, for example, references to Department for Work and Pensions appointees, and to clauses 40 and 41 of the original draft Bill.

With reference to the comments on the UNCRPD, we note that this has already been ratified in full, by the UK Government on behalf of all of the UK jurisdictions. The Scottish Government is required to implement the requirements of the Convention in full. The proposals in our 2016 response represent the minimum necessary to achieve compliance.

We note the existence of a scoping exercise and related work, referred to in the last paragraph on page 10 and on page 11 of the consultation paper. We would be interested to know the expected timescales for this exercise, and how it will relate to this consultation, to see the outcome, and to have an opportunity to comment.

Chapter Three

1. Do you agree with the overall approach taken to address issues around significant restrictions on a person’s liberty? Are there any other issues we need to consider here?

We observe that, whatever statutory mechanism is adopted, and notwithstanding the (understandable) reasons for wishing to avoid the term ‘deprivation of liberty’ in statute, it is necessary that underpinning the

legislation is a clear governmental understanding of who are, in fact, considered to be deprived of their liberty for purposes of Article 5(1) ECHR. Where individuals are, in fact, so deprived, then it is necessary:

- For a suitably robust procedure to be followed to ensure that the deprivation of liberty complies with the requirements of Article 5(1)(e),⁵ including the procedural requirement that there be medical evidence that the individual is of unsound mind (whatever definition this is given in domestic Scots law), and also that it is necessary and proportionate to the risk of harm that they would suffer otherwise, or the risk of harm to which they might put others. It is also clear that there must, in cases of deprivation of liberty, be ‘operational’ independence between those who are involved in providing the relevant care and treatment to the individual in circumstances amounting to a deprivation of liberty and those who are responsible for authorising the deprivation of liberty.
- For the person both to have regular reviews of the deprivation of liberty to ensure that it continues to comply with Article 5(1)(e) and to have an effective right of access to a judicial body able to order their release, “effectiveness” in this context signifying support (including by way of advocacy) to exercise the right and access to non-means-tested legal aid to ensure that the individual is legally represented before that body.

The obligations imposed by Article 5 set out above are deliberately onerous. They are onerous in financial terms (which, in reality, will often mean a trade-off between paying for care and paying for safeguards around that care), onerous in terms of staff time, but perhaps above all, onerous in terms of the degree of scrutiny upon individuals – and, potentially family members (as any regime will need to include authorisation for those who are deprived of their liberty in non-institutional settings, which may well include where care is being given by family members).⁶

The definition of deprivation of liberty must therefore be addressed very carefully before any statutory framework is developed, and we have considerable reservations about taking the approach set out in the consultation paper to the objective element of confinement which widens the net very substantially further than the (already) wide net cast by the Supreme Court in *Cheshire West*,⁷ at least in isolation.

We consider that a critical element that must be addressed, and for which clear statutory provision must be made, is the so-called ‘subjective element’ of deprivation of liberty – in other words the circumstances under which a person should (or should not) be taken to be validly assenting to any confinement to which they may appear to be subject. We make the following observations:

⁵ A useful recent summary of the requirements of Article 5, together with references to the relevant case-law, can be found in Appendix B to the Mental Capacity and Deprivation of Liberty Report of the Law Commission of England & Wales (Law Com No 372, March 2017).

⁶ See, by analogy, and for an explanation of the wide scope of the concept of ‘state imputability’ *SSJ v SRK* [2016] EWCA Civ 1317, where the English Court of Appeal made clear that the state should be considered to be responsible for non-consensual confinements it knows of or ought to know of, no matter where those confinements are taking place.

⁷ Whilst this case concerned the position in England and Wales, the definition given by the Supreme Court was one as to the interpretation of Article 5 ECHR, rather than English legislation, so it is at a minimum highly persuasive as regards the situation in Scotland.

- a) In line with the principles of the AWI, the UNCRPD and the ECHR, any objective confinement should be the minimum necessary to enable the delivery of the care, treatment and/or support that that the individual requires (taking into account in that determination the individual's rights, will and preferences).
- b) As part of that process, all practicable steps should be taken to support the individual to express a view in relation to the circumstances under which care, treatment and/or support are being delivered (with appropriate measures in place to ensure that the individual is not coerced or otherwise pressured into expressing a view).
- c) Where a person is subject to an objective confinement but they express a positive desire to receive care, treatment, or support in those circumstances, then they should be taken as validly consenting to it, such that no deprivation of liberty is occurring. For purposes of domestic law, and so as to avoid confusion with (for instance) consent to specific medical interventions which may be provided to the individual, the term 'assent' may be the right term to use here,⁸ albeit that the term used by the European Court of Human Rights is 'valid consent'.
- d) We recognise that adopting this model, which we consider complies with the principles of the AWI, the ECHR and the UNCRPD, does run the risk that compliance or lack of objection could be taken as valid consent/assent. To alleviate this risk, and to ensure compliance with the positive obligations imposed upon the state under Article 5 ECHR to protect vulnerable individuals against the risk of arbitrary deprivation of liberty, we suggest that there is a presumption that circumstances that amount to a confinement (however this is defined ultimately in legislation) also amount to a deprivation of liberty unless the person or body responsible for those circumstances⁹ can establish that the individual concerned is validly consenting.

In parallel with this approach, which applies in relation to those who (for whatever reason) require care, treatment, or support in circumstances amounting to a confinement where they did not give prior consideration to this, we also consider that individuals should be able to give consent in advance. This could be done in one of two ways:

- a) expressly consenting to a set of arrangements – for instance, admission to a hospice – where it is clear that the individual's ability to give consent will diminish over time; or
- b) empowering an attorney to consent on the individual's behalf.

Neither of these scenarios has been tested before the courts, either in the United Kingdom or before the European Court of Human Rights, but both would appear in our view to be conceptually sound and to fit with the principles of the ECHR and UNCRPD. However, in relation to both scenarios, it is critically important to understand that, for so long as that consent is considered to be valid, the individual in question

⁸ See in this regard the paper dated 11 February 2004 entitled "Authorising Significant Interventions for Adults who Lack Capacity," (the 2004 paper) attached to this Response.

⁹ Which may include a state agent responsible through the operation of state imputability for the actions of private individual(s), for instance in the home environment.

will fall outside the scope of Article 5 ECHR, and will therefore be subject to (or benefit from) none of the safeguards provided for under that article. It is therefore equally critical that there is clarity on the part of the individual giving the advance consent (either expressly or by way of delegation) as to what they are consenting to.

We therefore agree that there is a need to clarify the use of powers of attorney regarding restrictions on a person's liberty. We consider that it is necessary that the granter has expressly addressed their mind to the question of whether and under what circumstances an attorney can consent to circumstances amounting to a confinement. Those could either be expressly limited to a particular institution, or made more general, for instance relating to particular types of arrangement, but they could not be entirely open-ended or vague (for instance "I am happy for my attorney to do whatever they see fit to enable my care" would, we suggest, be too vague).

Any provision must also address existing powers of attorney, not just future ones. Particular care will need to be taken regarding existing powers of attorney, as the grantor may have carefully considered the extent of the powers being granted and intentionally not included allowing decisions relating to restriction of liberty.

We are strongly of the view that a welfare power of attorney that is silent on deprivation of liberty should not automatically be treated as having conferred powers to consent to what would otherwise be a deprivation of liberty.

Importantly, where the requisite valid consent cannot be identified in any given welfare power of attorney, then the circumstances will amount to a deprivation of liberty, whether or not the attorney agrees with them, and must be subject to the requirements of Article 5 ECHR outlined above.

In relation to both forms of advance consent, statutory provision will be required to make clear when an individual is to be taken to be expressing a level of dissent that renders it invalid.¹⁰ We note that Council of Europe Recommendation (2009)¹¹ leaves it to states to consider the circumstances in which a power of attorney ceases to have effect, but as regards advance directives it provides that they "shall be revocable at any time and without any formalities." We also note, and commend for consideration, the approach adopted by the Law Commission of England and Wales to the statutory recognition of the ability to give advance consent by way of express instrument,¹¹ which (mirroring the approach under the Mental Capacity Act 2005 to advance decisions to refuse medical treatment) requires the consent to be both valid and applicable, and contains the following discussion of the two concepts:¹²

¹⁰ In the case of a power of attorney, this should be capable of being exhibited without necessarily being taken as an expression that the granter now wishes to revoke the power in its entirety.

¹¹ But not advance consent by way of delegation to an attorney, the Law Commission of England and Wales taking the – conservative – view that this was not a measure that it could recommend.

¹² Footnotes deleted.

“Deciding whether the advance consent remains valid:

15.12 If a person has given advance consent to specified arrangements then – in line with advance decisions – it would not remain valid if:

- (1) the person withdraws their consent when they have capacity to do so;
- (2) there are reasonable grounds to believe that circumstances exist which the person did not anticipate at the time of giving the advance consent and which would have affected their decision had he or she anticipated them; or
- (3) the person does anything else clearly inconsistent with the advance consent remaining their fixed decision.

15.13 We intend by the third criterion, which mirrors that relating to advance decisions to refuse treatment, to cover two potential situations:

- (1) the person does something while they still have the capacity to appreciate that their actions will have the consequence of invalidating their advance consent. They could, for instance, make a further statement which is plainly incompatible with the advance consent. Alternatively, a person who had previously given advance consent to treatment arrangements in a hospital, might lose the power of verbal communication but (whilst they retain capacity) seek to leave the hospital and make clear that they no longer wish to be there; and
- (2) a person is subject to a confinement to which they do not have the capacity to consent, and to which their advance consent would on its face apply, but where their actions provide a clear indication that that advance consent should not be relied upon. This might include the level of distress exhibited by the individual at the circumstances in which they now find themselves.

15.14 In addition, the draft Bill confirms that advance consent is not valid if the advance consent contains a time period within which it is valid, and that period has ended. For example, the person may consent in advance to specified care or treatment arrangements in a hospice for up to a week, in order to reflect their prognosis. The advance consent would come to an end at the end of the period specified. The draft Bill gives power to prescribe, in regulations, limits on the duration of advance consent which would apply if no period was specified by the person giving consent.

Deciding whether the advance consent is applicable

15.15 Again by analogy with advance decisions to refuse treatment, advance consent would only apply to arrangements that were being put into effect while the person who had given it did not have the capacity to give or withhold consent to them. The arrangements must fall within the parameters specified by the advance consent.

Chapter Four

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

Yes, but this is a misconceived question. In terms of Article 4 of UNCRPD, by ratification the UK has undertaken to comply with UNCRPD, not merely to reflect Article 12 or any of its other provisions. Further changes to the content and scope of Part 1 of AWI 2000 are also required: see below. In general terms, compliance requires amendments to AWI to strengthen support for the exercise of legal capacity, to strengthen the “constructing decisions” methodology which already represents best practice under the 2000 Act, and robustly to prevent “best interests” decision-making. To achieve such outcomes both upon the face of legislation and delivered in practice requires both amendment to the Act and true informed specialisation on the part of whatever forum in future deals with the AWI jurisdiction.

3. Does our proposed new principle achieve that?

No. See below. The principle proposed in the consultation document requires to be strengthened. The requirements to give all reasonable assistance in communicating (in s 1(4)(a) and s 1(6) of the 2000 Act) should become a robust obligation upon specified persons, and should be extended to an obligation upon specified persons to provide all support necessary to enable an adult to exercise such capacity as may – with such support – be within the adult’s capabilities. In applications to the court or tribunal, there should be a requirement to include averments, incorporating full specification, and evidence demonstrating to the satisfaction of the court or tribunal that these obligations have been complied with to the full.

4. 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?

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

We are answering these two questions together. We agree that it will be necessary to amend the principles to achieve compliance with Article 12 of the UNCRPD. However, the proposed new principle, strengthened as above, would not be sufficient in itself to achieve compliance. In our response to the Scottish Government’s 2016 consultations on the UNCRPD Draft Delivery Plan 2016-2020 and the Scottish Law Commission’s Report on Adults with Incapacity, we identified a number of further requirements representing the minimum necessary to ensure UNCRPD compliance. Some of these are also necessary to achieve ECHR compliance. A full list of these required changes can be found in part one of the annex to this paper.

Chapter Five

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

Yes. We refer to our answers relating to chapter three above, for further detail.

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

Yes. We believe that the present provision requiring the grantor to declare that the grantor had considered how entry into force should be determined, without specifying the outcome of that consideration as a provision of the power of attorney document, is unacceptable.

We suggest that a document should not be registered by the Public Guardian unless it expressly specifies the triggers for bringing its provisions into force, or, in the case of continuing powers, that they should come into force immediately upon registration. This would preserve the grantor's right to autonomy and self-determination, while improving clarity around when any given power of attorney should be activated.

7. Do you think there would be value in creating a role of official supporter? We have suggested 'official supporter' Do you think this is the right term or is another term preferred?

We are generally in favour of the creation of such a role, though we prefer the term 'registered supporter'.

The appointment of a supporter should reflect the person's choice, or best interpretation of that choice. It may be that the form proposed in the consultation paper for a grade 1 guardianship could become the basis for a supporter role.

The choice of a registered supporter could, and should, be contained in a power of attorney. A registered supporter may become useful before the point that a power of attorney would be activated.

We suggest that there may be a role for a tribunal application to be made when a person does not have capacity to appoint a registered supporter and does not have a power of attorney to ensure that a suitable person is appointed. A purely administrative process is unlikely to be sufficient in that situation.

There is also potential for such a role to be used by family members and carers who currently struggle to access the information they need to enable them to properly support an individual. An unequivocal right to receive information might be a specific benefit to be achieved by the creation of the role of registered supporter.

As indicated in our general comments above, the concept of support should be a central starting point for a new re-orientated AWI regime. 'Support' must be understood in the broad sense used in article 12.3 of UNCRRPD, giving rise to the question expressed in the report of the Essex Autonomy Project as follows:

“What measures should be taken to support the exercise of legal capacity, both by supporting persons with disabilities to make decisions themselves wherever possible, and by supporting their ability to exercise their legal agency even in circumstances when they lack the ability to make the requisite decisions themselves?”

In general, all measures should embrace both types of support, both separately and in combination, to cover the realities of both vertical variation, under which the same individual will at any one time have different levels of capability and of support needs for different matters, and also horizontal variation, where capabilities vary, and often deteriorate, over the course of time. Generally, such variety cannot be separated out and put in separate boxes. There requires to be a continuous spectrum from simple facilitation or support to make entirely competent decisions, through supported decision-making and co-decision-making, and through to situations where acts and decisions require to be taken and made for an individual, rather than by an individual, but still with maximum input from and knowledge of that individual, to construct what can still be assigned the status of that individual's act or decision. This general approach should permeate many of the matters addressed in various chapters of the consultation document. Particularly in the area of less formal arrangements, or more formal arrangements where concepts such as assent play a significant role, the following principles can reasonably be applied to a coherent scheme which could be seen as an amalgam of 'pure' supported decision-making and the intentions of grade 1 guardianship:

1. Effect should be given to the broad concept of assent, viewing not only current conduct but past conduct, such as apparently willing integration in a stable family unit.
2. The safeguards in article 12.4 of UNCRRPD must nevertheless be applied.
3. Where points 1 and 2 above are satisfied, there should be a rebuttable presumption in favour of validity and (importantly subject to that) protections for parties acting in accordance with the AWI principles and in good faith, akin to those in section 5 of the Mental Capacity Act 2005 or ss.9-12 Mental Capacity Act (Northern Ireland) 2016.
4. Just as assent may underpin such arrangements, an equivalent level of dissent should end them.
5. Circumstances should nevertheless be identified in which neither a low level of assent nor lack of dissent will suffice, and where the requirement will be for clear evidence of positive assent, shown to be free of undue influence, pressure, inducements or other such factors.
6. All arrangements under 1–3 above should be registered with and where necessary monitored by the tribunal, with fast-track procedures to take remedial or protective action where necessary. In case of emergency, registration should not be required in advance of action, but must be effected as soon as

practicable.

7. In all cases, including emergency situations, the principles contained in the 2000 Act must be complied with.
8. Such new arrangements will require to be integrated carefully and fully into a wide range of legislation. For example, they will require to be integrated into the justice system (both criminal and civil) so that, at all stages – commencing in the criminal system with police interview – all concerned have clarity as to whom they should engage with and what are relevant roles. The potential for overlap or duplication of roles must be avoided. This is an example of the general points made under ‘The way forward’, above.

Chapter Six

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

Yes. The range of professionals who can carry out capacity assessments for guardianship orders could be expanded. However, it will be necessary to underpin that with adequate resources for training.

Psychologists are likely to be an obvious category for such expansion. Restricting the ability to carry out capacity assessments to medical professionals, such as psychiatrists, reinforces the notion that capacity is strictly a medical issue, when it is actually a much broader concept. Allowing other professionals, such as psychologists, into the area may support a broader understanding of capacity. We suggest that it is important to ensure that assessments are made by professionals who are appropriate for the purposes of the assessment, and who have received training for the specific purposes of the 2000 Act.

There should be a clear statutory requirement for such training, and evidence that the training has been undergone and completed; and it should be recognised that competence to assess capacity for one specific purpose at a particular point in time may well not amount to competence to assess capacity projected into the future in relation to a range of acts and decisions, and which is likely to require particular specialists such as those of suitably specialised psychiatrists.

Chapter Seven

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

We do not oppose the general proposal of introducing a system of graded guardianships, but we do not fully support the detail of the proposed system. We have particular concerns that the proposed system

does not address key issues around ensuring ECHR compliance including Articles 6 and 8, the lack of expertise of OPG in welfare matters, and the fundamental principle that the appointment of a guardian is a significant matter in relation to the rights of an adult, and warrants a judicial process with careful consideration and scrutiny.

10. 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?

A purely bureaucratic process for the granting of any guardianship powers, and welfare powers in particular, is not appropriate. Greater safeguards are required, and we believe that it would be beneficial for a tribunal member to be involved in all applications, and in any situations where a complaint or concern is raised in relation to how a guardian is exercising powers. This could be a less formal process in simple cases, with the ability for the tribunal member to escalate the matter if they feel it is appropriate to do so. This approach would also be beneficial to DWP appointees, providing better protection and more flexibility than the current arrangements, which are not ECHR compliant.

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

As noted above, we do not agree that welfare powers are suited to an administrative process such as that proposed for grade 1. We also do not agree with many of the financial powers being categorised as simple, and suited to a less rigorous set of procedures. This includes, for example, the power “to receive or renounce any testamentary or other entitlements; to grant Deeds of Covenant or make other provision for the adult’s estate; to set up any form of trust, and the powers to make gifts, to acquire a vehicle, to implement tax planning and similar arrangements, and the general unlimited power to incur expenditure.” These are significant matters, and should not be granted without significant consideration and safeguards, not only as to powers conferred but also as to exercise of those powers. It would be wholly inappropriate for the level of safeguards in personal welfare matters to be linked to wealth.

12. 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?

We believe that the level of safeguards and formality of process should be based on the types of powers being sought, in conjunction with the circumstances and abilities/disabilities of the individual, not the amount of money involved. The exercise of powers over any amount of money can be very significant for the person involved, particularly when that amounts to control over their entire resources, whether large or small. It is the nature and significance of the powers that should determine the process.

13. 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?

As discussed above in relation to the proposed grade 1, we suggest that the tribunal should be involved in all applications, to the appropriate degree. The tribunal member involved would be able to use their discretion to ensure that a hearing was held in all necessary cases, which would likely include at the request of a party to the application, or any lack of identifiable and unqualified assent, free from undue influence, from the adult.

In order to comply with section 1(4)(a) of the 2000 Act, interpreted in the light of UNCRPD, the individual to be subject to the guardianship should be interviewed or take part in the process whenever possible unless there is clear assent for not being so involved. A form of case management discussion with all parties and an inquisitorial approach from the tribunal would be a good approach, with the potential for a paper based exercise in situations where only limited powers are being sought, such as those for a DWI appointee.

14. 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?

We think that in principle any relative, friend or neighbour, or a solicitor who has had an involvement with the adult and has formally or informally assisted the adult should receive intimation. There should perhaps be provision to enable a person claiming an interest to seek to be added to the list of people invited to express an opinion. We do think however that if such a person was made known there could be scope for the tribunal member to refuse to allow a copy of the application to be served as this might contain material information that the interested party is not aware of and the adult may be distressed if that information was automatically divulged. The interested party could instead be invited to the case management discussion, or to make a written representation. At that point their views can be taken into account and if the matter is to proceed to a full hearing, then the single Tribunal member could decide after hearing representations whether the application should be sent to that interested party.

Decisions about to whom to intimate, and authorisation to do so, should be by a tribunal member, or the sheriff. There should be no lessening of current protections in that regard.

All intimations should be by OPG or a tribunal member except where they are carried out by solicitors (with their enforceable professional responsibilities, including to the tribunal or court). Otherwise there would be obvious and unacceptable risks of malpractice. Even miscellaneous applications under current legislation require intimation by OPG, not the applicant.

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

The level of safeguard provided should be linked to the powers being granted, and not dependent on the ability of a person to express disagreement. Safeguards should only be dispensed with when assent or agreement has been given by the adult, rather than safeguards being added only when disagreement is evident. In particular, in cases where there is a severe restriction on a person's liberty, the same considerations as raised in our comments under chapter three will apply.

16. Do you think our proposals make movement up and down the grades sufficiently straightforward and accessible? Please give reasons for your answer.

We agree that there is a need to be able to move between grades, in both directions. A unified tribunal should have discretionary power to re-categorise an application if appropriate.

We note that the concept of grades applying from the time of application, and the process of considering both which is the appropriate grade at which to apply, as well as possible changes of grade, is likely to add significantly to workloads in both the public and private sectors which, one way or another, would require to be funded.

17. Do you agree with our proposal to amalgamate intervention orders into graded guardianships?

We suggest that there is a need for evidence of actual use of intervention orders before abolishing them or amalgamating them with guardianship orders.

We strongly believe there is a place for them in principle, and that the types of decisions they should be used for are more appropriate for a formal process, and should not be delegated to a guardian.

Section 53(5) of the 2000 Act provides that an intervention order may not only authorise a person to act or make decisions, but may, upon the non-delegated authority of the court, direct the taking of any action specified by the court. Following trends in the Court of Protection in England & Wales, consideration should be given to matters of sufficient importance that they require a decision by the tribunal, rather than a decision made by someone empowered to decide the matter. An example would be making a Will for an adult. In addition, there is a role for orders like this in situations where a specific issue requires to be dealt with, but a guardianship is not required or desired for any wider purpose.

It is important to ensure that there is judicial flexibility in both directions, allowing an application for an intervention order to be transferred to a guardianship application, as well as the existing converse provision in s 58(3) of the 2000 Act.

18. Do you agree with the proposal to repeal Access to Funds provisions in favour of graded guardianship? Please give reasons for your answer.

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

Yes. We agree with these proposals, subject to our comments on the graded guardianship proposals

Chapter Eight

19. Do you think that using OPG is the right level of authorisation for simpler guardianship cases at grade 1? Please give reasons for your answer.

No. We do not believe that any level of guardianship powers should be granted through an administrative process. In particular, the OPG lacks the experience and expertise in dealing with welfare powers. We suggest that all applications at all levels should be subject to some form of judicial scrutiny, given the significance of a guardianship in relation to the rights of an adult, and we believe that a unified tribunal would be an appropriate forum. This may include a less formal process for certain applications, as discussed in our answer relating to chapter seven, above. A simplified judicial procedure might be appropriately applied to updated equivalents for access to funds, management by establishments, and management of DWP benefits.

The proposed bureaucratic processing of guardianship applications is entirely inappropriate and would be outwith the competence of the Scottish Parliament as non-compliant with ECHR. Ever since the introduction of statutory guardianship in Scotland in 1913 it has been recognised that the process of appointing a guardian to an adult represents a major intrusion upon that adult's rights and requires a high quality of evidence and of judicial care: "... *the responsibility put upon the medical practitioners who certify such cases, and upon the sheriff who grants a judicial order for dealing with them, is a grave one*"¹³. The comments in our 2012 paper should be read as incorporated here.

¹³ Edward Graham, *The Mental Deficiency and Lunacy (Scotland) Act 1913* (1914).

With reference to the proposals in the consultation document, it would violate both ECHR and UNCRPD, and be unacceptably discriminatory against some people with relevant disabilities:

- a) to have such decisions made under an anonymous bureaucratic process, with no identified decision-maker of judicial status;
- b) to have welfare matters dealt with by staff in OPG who have expertise in property and financial matters, but none in personal welfare matters;
- c) to disqualify people on grounds of poverty (because they are below a particular financial limit) or on grounds of more serious disability (because they lack the capability to express objection) from proper judicial consideration of their cases, even in relation to personal welfare matters;
- d) to impose policies deterring the involvement of legal expertise in advising regarding applications and formulating them;
- e) to create a process susceptible to abuse under which applicants could, by tick-box, select whatever powers they wanted and would even be responsible for intimations. On the last point, intimations under even provisions for miscellaneous applications currently require to be given by OPG. That should be the minimum standard in all cases. The only alternative should be intimation by professionals, such as solicitors, who have enforceable responsibilities to the court (or tribunal, as the case may be). The concept of bureaucratic processing which underlines grade 1 must be rejected. As noted above, we have concerns that the concept of grading itself could lead to much dispute, debate and difficulty over the simple question of which grade is appropriate for any particular application. Our other responses should be considered subject to this overriding point.

20. Which of the following options do you think would be the appropriate approach for cases under the AWI legislation?

Office of the Public Guardian considering grade 1 applications, a Sheriff in chambers considering grade 2 applications on the basis of documents received, then a Sheriff conducting a hearing for grade 3 applications.

Or

Office of the Public Guardian considering grade 1 applications, with a legal member of the Mental Health Tribunal for Scotland considering grade 2 applications on the basis of the documents received, then a 3 member Mental Health Tribunal hearing grade 3 applications.

As explained in our answers relating to chapter seven, above, we believe that a tribunal member (in a new, unified tribunal), should be involved in all guardianship applications. For cases involving a lower level of powers, this could be dealt with by a single tribunal member as a paper-based exercise, with the ability for the tribunal member to escalate the process to include a hearing, or additional tribunal members as appropriate.

21. Please also give your views on the level of scrutiny suggested for each grade of guardianship application. If you have any further comments on the proposals for the forum, please add them here.

We refer to our answers above and in relation to chapter seven, and would emphasise again that the level of safeguard provided should be linked to the type of powers being sought, and that many of the powers classified as simple in the consultation paper can in fact have a very significant impact on an individual's rights.

We would point out that in its judgement of in *AN v Lithuania* the European Court of Human Rights made it clear that the same procedural requirements and safeguards as apply for deprivation of liberty cases (see our response to chapter three) are also required to ensure human rights compliance in guardianship applications, particularly with reference to articles 6 and 8 of ECHR.¹⁴

Chapter Nine

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

Yes, we agree that there is a need to change the way guardianships are supervised. The system can be confusing as supervision in an individual case may currently involve the OPG, MWC and local authority. A more flexible system with different levels of supervision has the potential to allow resources to be concentrated on cases that merit additional scrutiny.

As an additional point, we suggest that consideration should be given to replacing the term 'guardian' with a new term which captures the move towards supporting legal capacity in the context of involuntary as well as voluntary measures.

23. If your answer is yes, please give your views on our proposal to develop a model of joint working between the OPG, Mental Welfare Commission and local authorities to take forward changes in supervision of guardianships.

We agree that joint working is necessary. This is particularly the case given the recognition on page 56 of the consultation paper that welfare and financial matters are closely linked. Concerns about financial management would normally also cause some enquiry into welfare decisions and vice versa.

¹⁴ *AN v Lithuania* Application no 17280/08, European Court of Human Rights

However, we would have some concerns about the suggestion about the way the level of risk/supervision would be determined.

Firstly, we are not sure that the level of guardianship should automatically determine level of supervision required. For example, many level 3 guardianships will involve adults moving into residential care. However, once the initial decision has been made we would question the benefit of the guardian automatically requiring ongoing additional supervision (potentially every six months). Of course, there is a clear need for regular reviews of the actual care regime in place in such cases.

Secondly, we do not agree with creating a direct link between the amount of assets and the level of supervision. In the absence of any evidence that there is a link between the likelihood of financial abuse and the adults resources, supervision should be based on the circumstances of a particular case rather than being triggered by the value of an estate.

Finally, we suggest that consideration be given to decoupling formal review from renewal. The linking of these two elements goes back to the regime of tutors to adults, where the only way of ensuring review was to time-limit appointments. Formal reviews at specified intervals could be built into orders, the reviews being by the same co-ordinated methods as supervision; the levels of formality being graded; and it being competent for the reviewer to require the guardian to apply formally for renewal.

24. If you consider an alternative approach would be preferable, please comment in full.

The proposal to create a register of 'higher risk cases', reviewed regularly by the OPG and MWC is resource intensive and unnecessary. It would be simpler if the legislation set out a minimum supervision requirement but gave the supervising body the power to hold more regular reviews. This would allow flexibility without creating an additional level of bureaucracy.

If it is considered preferable to have various set levels of supervision, then we suggest the tribunal or court could allocate an appropriate level when the order is first granted. This could be revisited at each review and the supervision status revised where necessary. There could also be a provision for an interested party to ask the tribunal to change the supervision status at any time. This means that all parties can have opinions heard rather than the suggested procedure where the decision is based on the local authority's supervisory report.

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

We agree there is a need to improve the level of knowledge guardians have about their role and responsibilities.

In our experience there are several reasons why guardians have limited knowledge, and these are not easy to resolve. It is not uncommon for a guardian to see the court hearing as the end of a process which

they can forget about until the time for renewal. Guardians are usually referred to websites and codes of practice. While these contain very valuable information the content is overwhelming and repetitive and there is no real incentive to gain and maintain knowledge of the role. Also, most individuals apply for guardianship in relation to sons, daughters, parents, etc. who they know and care for well. Understandably, they are not hugely receptive to a third party implying that they need to 'learn' how to make decisions. Moving to a system involving ongoing supported decision making will involve a significant culture shift.

We believe that immediate post-appointment advice and support is needed, and that the solicitor who acted for the guardian is best placed to provide this in a face to face meeting. This is explained further below.

Additional initial support may be appropriate for some guardians. An example would be the option of a short online course or additional interview with the OPG prior to the certificate being issued. It might be necessary to trial different ways to support guardians and assess effectiveness before significant additional resources are committed.

Thereafter, support and advice should be provided by the existing statutory bodies unless the guardian needs independent legal advice. Where possible, guardians should have the option to discuss concerns or responsibilities with someone directly, rather than being referred to online material.

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

Guardians require initial advice immediately after appointment to explain their role and responsibilities until the next renewal. Where a solicitor has been instructed then they are best placed to provide this. Where a Civil Legal Aid Certificate is in place, then a final meeting after the court decision should routinely be funded.

The solicitor will have an established relationship with the client and be viewed as independent from any supervisory authority. The solicitor has full knowledge of the case and knows the client. He or she is best placed to provide initial advice to the client about the ongoing role. This can include directing to information sources, explaining accounts forms and discussing ongoing responsibilities.

Currently, the Scottish Legal Aid Board often rejects claims for a post-hearing meeting. This is on the basis the client should have been advised in the initial meeting of the ongoing responsibilities. However, this initial meeting will have been some months before and at a time the client is focused on the procedure to be appointed rather than ongoing duties.

A face to face meeting discussing the ongoing role would normally take around an hour. This would be a cost-effective way to provide initial information.

Because of the great variation in relevant disabilities, such case-specific advice will generally be far more effective and efficient than generic material.

27. Do you think there is a need to provide support for attorneys to assist them in carrying out their role? If you answered yes, what sort of support do you think would be helpful?

Yes. The role of an attorney is not substantially different from acting as a guardian so similar support is necessary. Again, the advice should be specific to the particular case, from someone familiar with both the case and the relevant requirements of law and good practice. Because the time between grant and operation can be lengthy, there should also be provision of advice to attorneys before they decide whether to accept appointment, and do so.

Chapter 10

28. Do you agree that an order for the cessation of a residential placement or restrictive arrangements is required in the AWI legislation? If so does the proposal cover all the necessary matters?

An order for the cessation of a residential placement or restrictive arrangements will be necessary in situations that amount to deprivation of liberty under Article 5 ECHR but which do not meet the substantive criteria contained in Article 5(1)(e), in particular where the court is not satisfied that the deprivation of liberty is necessary and proportionate. Applying the benefit principle, the court shall defer operation of the order and assessment of any damages until the court is satisfied that the adult will immediately be able to access suitable accommodation and services. This is without prejudice to the options available to the court under section 3 of the 2000 Act.

Legislation on this point should follow the pattern of orders in relation to excessive security under s 268 Mental Health (Scotland) Act.

29. Do you agree that there is a need for a short term placement order within the AWI legislation? If you agree, does the above approach seem correct or are there alternative steps we should take? Please comment as appropriate.

Yes, we agree that there is a need for a short term placement order within the AWI legislation. However, the approach taken must be in the context of ensuring full support for the exercise of legal capacity and decision making, as discussed in our comments under Chapter Five.

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

No, we do not believe that s 13ZA should continue. The other measures available or proposed would be adequate to address the situations currently covered by s 13ZA.

Chapter Eleven

31. 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 peoples' views are taken account of?

We support the promotion of advance directives, and putting them on legislative footing.

In addition, it is important to ensure that advance directives are not limited to healthcare matters. In accordance with Council of Europe Recommendation (2009)11, “advance directives may apply to health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian, should one be appointed”, and it should be possible for them to take the form of both binding instructions given, and wishes recorded. Such provision for, and use of, advance directives goes substantially further than the advance statements provided for in section 40 of the draft Bill annexed to SLC 1995.

We strongly recommend that the Scottish Government initiates arrangements for Scots law and the Scottish legal system to be as fully represented on the Council of Europe's European Committee on Legal Co-operation (CDCJ) as is at present provided for England by the (UK) Ministry of Justice, which in such matters has competence only in respect of the law of England & Wales. Likewise the Scottish Government should ensure that it receives full feedback on the work of CDCJ, including in particular in relation to advance directives (and other matters relevant to the current AWI review, and on developments of human rights significance to be anticipated from recent published agendas. Such developments should be provided for in any legislation following upon the current review.

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

Yes.

Chapter Twelve

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

Do you think that there should be provision to authorise the removal of a person to hospital for the treatment of a physical illness or diagnostic tests?

Do you agree that a 2nd opinion (medical practitioner) should be involved in the authorisation process? If yes, should they only become involved where the family dispute the need for detention?

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?

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?

In response to this set of questions, we suggest that it is critical to consider this process in the wider context of a revised framework for AWI and deprivation of liberty. This will be a necessary part of an overall coherent regime. Further detailed work will be required on these issues once the broader framework has been established, and we would welcome further engagement with the Scottish Government at that stage.

34. In chapter 6 we have asked if we should give consideration to extending the range of professionals who can carry out capacity assessments for the purpose of guardianship orders.

Section 47 currently authorises medical practitioners, dental practitioners, ophthalmic opticians or registered nurses who are primarily responsible for medical treatment of the kind in question to certify that an adult is incapable in relation to a decision about the medical treatment in question. It also provides for regulations to prescribe other individuals who may be authorised to certify an adult incapable under this section.

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

We refer to our answer to question 33, and suggest that no change is made to this area until further work is undertaken on the s 47 regime to integrate it into a revised regime for deprivation of liberty.

Chapter Thirteen

35. 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 authorise 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?

The appropriate response to this situation cannot be determined until such a stage that we understand the overall structure of the AWI reforms and have a coherent regime for AWI and deprivation of liberty.

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

We agree that grantors should be encouraged to expressly consider the issue of participation in health research. It may be appropriate to consider whether there should be a presumption in favour of involvement, unless this has been expressly refused in the power of attorney.

37. 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)?

Provisions relating to research will need to be addressed in light of the wider overhaul of the 2000 Act that we have outlined above, and we will comment further upon the specific proposals here when the wider framework has been developed.

It is acknowledged that some research is important and has societal benefit. However, a person with capacity has the right to refuse to participate in research. It must be remembered that research may impact on personal, bodily and mental integrity, autonomy and liberty. It often involves the viewing and sharing of confidential personal information and invasive procedures which a person with capacity may or may not be happy about. Why therefore treat an adult with incapacity differently? It should not be assumed that an adult who appears to be compliant is consenting to participate in research. In these situations it is therefore important to respect the adult's present and past wishes and feelings through ensuring the exercise of legal capacity through appropriate supported decision-making which includes, but is not confined to, clearly defined consent or refusal to participate in research in advance planning mechanisms.

38. Should authorisation be broadened to allow studies to include both adults with incapacity and adults with capacity 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)

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

We refer to our answer to question 35, above.

39. 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?

We believe that the existing statutory Ethics Committee is capable of being organised to allow it to manage the workload, including reviews or appeals. However, we suggest that transparency of the membership and work of the Ethics Committee could be improved. An annual report of its work and membership would assist with this.

40. Should part 5 of the Act be made less restrictive?

We are unclear what information is being sought by this question.

Chapter Fourteen

41. Are there any other matters within the Adults with Incapacity legislation that you feel would benefit from review or change? Please give reasons for any suggestions.

We suggest that a review should be undertaken of all remaining unimplemented provisions of SLC 1995. That applies in particular not only to section 40 of the Draft Bill annexed to that Report (dealing with advance statements) but section 41 on the withholding and withdrawal of medical treatment from incapable adults. The original decision not to include sections 40 and 41 in the 2000 Act was in the expectation that the law would be adequately developed by the courts. Given that that decision was made subsequently to

the Law Hospital case,¹⁵ it cannot be said that the law has been developed, or further developed, adequately.

The issue of end-of-life decision-making should be considered in the light of modern examples such as the integrated regime (including use of advance directives) which has been introduced in France. This created rights for patients and persons at the end of life and improved existing provisions regarding advance directives, which can be drafted by any adult and can be used to express that adult's wishes about their end of life in respect of the conditions for continuing, restricting, discontinuing or refusing treatment or medical interventions, can be reviewed and revoked at any time and by any means and, in particular, are binding on the doctor.¹⁶

In our response to the 2016 consultation on the SLC report on Adults with Incapacity, we identified a number of additional changes to the 2000 Act that we would continue to stress as important for ensuring compliance with ECHR and UNCPRD, and the improvement of Scotland's system relating to adults with incapacity and their family and carers. These changes can be found in annex A to this paper – part one dealing with the necessary changes for human rights compliance, and part two looking at other recommended changes to the 2000 Act. We have covered some of these issues in more detail in our response to chapter four, above. In addition, as stated above, we strongly support a move to a unified tribunal handling the combined jurisdictions of AWI, ASP, and mental health.

As mentioned above, we also suggest that consideration should be given to replacing the term 'guardian' with a new term which captures the move towards supporting legal capacity in the context of involuntary as well as voluntary measures.

We believe that the suggestion in the case of *J, Applicant*¹⁷ that the words of s 57(1) allowing applications to be made by "any person...claiming an interest" should be read as if qualified to be limited to "claiming a sufficient interest" is seriously incorrect and contrary to the intention of the legislature, and risks failure or delay in ensuring that the court discharges its responsibilities to adults whose needs are brought before the court. Legislation should clarify that the words in the statute have the full and unrestricted meaning that they indicate.

Finally, we would note our concerns around inconsistency in practice in the sheriff courts across Scotland, in particular regarding the use of safeguarders. We refer to our comments on s 3(4), (5) and (5A) of the 2000 Act in part two of annex A to this paper.

¹⁵ *Law Hospital NHS Trust v Lord Advocate* 1996 SC 301

¹⁶ Law No 2016-87, 2 February 2016

¹⁷ *J, Applicant* [2016] SC EDIN 24

Annex A - Recommendations for reform of the 2000 Act contained in our 2016 response

Part One: Amendments required for compliance with UNCRPD

- a) The requirements to give all reasonable assistance in communicating (in s1(4)(a) and s1(6) of the 2000 Act) should become a robust obligation upon specified persons, and should be extended to an obligation upon specified persons to provide all support necessary to enable an adult to exercise such capacity as may – with such support – be within the adult’s capabilities.
- b) There should be an explicit rebuttable presumption in favour of capacity in relation to any adult for the purposes of any particular act or decision.
- c) In statute, it should be declared that the starting-point for decision-making should be a requirement to ascertain the adult’s past and present ‘wishes and feelings’, as the primary element in achieving respect for the adult’s ‘rights, will and preferences’.
- d) In statute, there should be a rebuttable presumption in favour of implementing consistent (and not mutually conflicting) will and preferences.
- e) In practice, items c) and d) should be implemented from now on by adopting the ‘constructing decisions’ approach.
- f) A range of techniques (DWP appointeeships, management of damages payments, and so forth) are not CRPD-compliant. Part 1 of the 2000 Act should apply to all situations where someone acts, manages or decides on behalf of an adult.
- g) Under private ‘third party measures’, where trustees are in effect exercising management functions in respect of funds allocated to, or which they have discretion to allocate to, a person with some degree of relevant disability (or under arrangements predicated upon such relevant disability) the s1 principles of the 2000 Act, and perhaps some other provisions, should apply.
- h) Under s67(5) of the 2000 Act, deemed validity is conferred upon transactions authorised by a guardian. This could be extended to transactions authorised by an attorney.

- i) Either in the 2000 Act or in relevant rules of court, there should be a clear requirement to facilitate the personal participation of the adult, to supplement this where necessary, to record how this has been done, and in the absence of participation to record the reasons and to record the steps nevertheless taken to ascertain the ‘will and preferences’ of the adult. (Recently introduced rules of court in England & Wales are designed to ensure that this is done and recorded.)
- j) Implementation of the “one door” approach unanimously favoured by all stakeholders and interest-groups in the 1990s during the processes of consultation and discussion which led to the 2000 Act, combining the three jurisdictions of AWI, mental health, and ASP
- k) Consideration should be given to introducing concepts of ‘assisting’ and ‘acting with’ the granter in Powers of Attorney; and the introduction of the role of supervising attorney. As Scotland does not have prescribed forms of Powers of Attorney, these features could initially be introduced as a matter of good practice where desired by granters.
- l) For full compliance, the principle of reversed jurisprudence will probably be required.

Part Two: Other areas for review in the 2000 Act

For convenience, paragraphs in this section are identified by reference to Parts, sections, Schedules or their paragraphs, of the 2000 Act. This section does not replicate the identification of areas for review in other sections of this response, but does contain some selective cross-references to them.

A general concern relates to unnecessary differences in provisions as between different Parts of the Act (and indeed as between the 2000 Act and the 2003 Act, or the 2000 Act and the 2007 Act). As a matter of strict interpretation, this could mean that a provision applicable only in one context was expressly intended not to be applicable in other contexts. In each case, that was not necessarily in fact the intention of the Parliament. We raise general points under the provision of the 2000 Act where they at present arise, or first arise, but they should be understood as each having more widespread application.

Section 1(1) – We are aware that it has been questioned whether here and elsewhere references to “an adult” should be limited to adults with some relevant impairment of capacity. In our understanding the use of “adult” was deliberate, and in our view it should be retained. The view that such provisions should be limited to adults with identified impairments of relevant capacity would contravene the requirements of CRPD to avoid discrimination on grounds of disability, and in any event would be impractical in many cases as it would give rise to a need to assess

capabilities in relation to a particular purpose and in the particular circumstances, which in relation to general provisions such as section 1(1) would create an impossible circularity.

Section 1(5) –

- a) The term “continuing attorney” causes confusion. It requires countless repeated explanation to members of the public. In a wider context, it is inconsistent with the more logical use of “continuing power of attorney” in Council of Europe Recommendation (2009)11 as meaning any power of attorney (whether covering property and financial matters, or welfare matters, or both) intended to enter into force or continue into force following relevant incapacity of the granter. It is a further difficulty and cause of confusion that the terminology “continuing attorney” and “welfare attorney” is not replicated in relation to guardians. One of the basic distinctions throughout the 2000 Act is between an adult’s property and financial affairs, on the one hand, and an adult’s personal welfare (including healthcare matters) on the other. We would recommend careful consideration of the introduction for all purposes, including in the primary legislation itself, of terminology such as “financial/property attorney” (or “financial attorney”), “financial/property guardian” (or “financial guardian”), “welfare attorney”, and “welfare guardian”. Similarly, there should be introduced descriptions such as “financial/property powers” (or “financial powers”), and “welfare powers”.
- b) Other provisions of the 2000 Act can unduly restrict the performance of the obligation in section 1(5). For example, it may be appropriate to allow and encourage an adult to have access to, and operate, an account held by a guardian or subject to Part 3 administration. Such an arrangement would present issues of control and accountability, but these are issues which should be addressed.

Section 2 –

- a) See section 4 of this response.
- b) Current exploration of the potential for mediation in contested AWI proceedings should be encouraged and provisions added to the 2000 Act to ensure that mediation is attempted in contested situations except where there is self-evidently no prospect of mediation succeeding even in narrowing the areas of dispute.

Section 3(2)(d) – It is a matter of significant concern that the requirements of section 11, providing for strict criteria and procedures for an application or other proceedings not to be intimated to the adult, can be circumvented – and sometimes have been circumvented – by seeking an interim

order in terms of this section. Compliance with section 1(4)(a) should be a strict condition before a sheriff makes an interim order. Even in matters of immediate urgency, there should be a requirement for what is proposed to be effectively communicated to the adult, and for the court to be satisfied that this has been done.

Section 3(3) –

- a) The power to give directions to people exercising functions under the 2000 Act (or foreign equivalents of functions under the Act) should be widened to include persons formerly exercising such functions, so that (for example) a former attorney or guardian could be ordered to provide information, deliver items held, execute documents, and so forth, where reasonably required by an attorney or guardian currently acting, or by executors.
- b) The power under section 3(3) should be extended to a discretionary power to give directions to anyone where that is appropriate for the proper operation of provisions of the 2000 Act. An example would be to instruct and authorise a pension provider to transfer payments into an account which could be operated under Part 3.

Section 3(4), (5) and (5A) – See comments at section 4.16 of this response. There is insufficient clarity as to the respective roles of safeguarders, persons appointed to convey the views of the adult and advocates, and what are the criteria by which they should discharge their functions: particularly as to the extent to which they should act in accordance with the wishes, will and preferences of the adult, rather than any views which they themselves form and which might be contrary to what the adult wants. There is also at present insufficient requirement to involve the adult directly in proceedings – see item i) of paragraph 6.4 of this response. The actual participation of adults themselves also requires to be strengthened in accordance with the “rule of personal presence” developed by the ECtHR in cases such as *Shtukaturov v Russia* (App No 4409/05) (2008) 11 CCL Rep 440.

Section 3(5A) and (5B) – These provisions should be transferred to section 1, so as to form part of the principles, and should be of general application.

Section 6(1) – The principal post is now that of Public Guardian. The functions of the Accountant of Court are still required, but are of minor relevance in comparison. Section 6(1) should now read “There shall be a Public Guardian”. There should be a further provision that “the Accountant of Court shall be either the Public Guardian, or such person responsible to the Public Guardian as may from time to time be appointed as Accountant of Court by the Public Guardian”.

Section 6(2)(b) – It is clear from the SLC 1995 Report that it was intended that the full text of any relevant order or document (including, for example, a power of attorney document) should be held on a public register and made available to anyone upon payment of a prescribed fee. It was further intended that prescribed relevant matters occurring subsequently to initial registration should be registered and should similarly be made publicly available. These provisions were conceived before cyber crime, identity theft, and other risks became significant threats, particularly to vulnerable adults. They probably take insufficient account of rights to data protection, and to protection of privacy under ECHR Article 8. The Public Guardian in fact currently seeks to exercise control over disclosure of information on the registers established under this section. On the one hand, she is at risk of being forced to disclose (for example by an application under section 3(3)). On the other, there are frequent complaints that information is not disclosed where reasonably required, for example where an adviser whose client complains about the actions of an attorney requires to see the terms of the power of attorney document in order to advise whether the attorney is acting in accordance with them. The envisaged regulations have in any event never been promulgated (raising *inter alia* a question as to whether it is a breach of ECHR for responsible ministers to fail to prescribe matters by regulation where that is provided for in the primary legislation). It should be noted by contrast that the Rules of Court in relation to registration of international deeds are precise and specific as to what should be registered (though the extent of that requirement may give rise to the risks identified above: there should be a clear review of the position, then consistency across all provisions regarding registration and release of information).¹⁸ Under the [unified] tribunal model suggested [...] above, issues about disclosure of registered information could often be resolved on a “desktop” basis by an in-house tribunal convener, without requiring a cumbersome court application under section 3(3).

Section 6(2)(c) and (d) – It appears to be necessary to specify that these powers are not exercisable following the death of the adult in question, though it should also expressly be provided that an investigation in relation to a deceased adult is competent where another adult could be at risk (for example, where the same person is attorney or guardian both to an adult now deceased and an adult still alive). There should also be review of the position where (for example) the executor who would normally be expected to challenge the actings of an attorney is the same person as the former attorney. It would be appropriate to review the respective positions of beneficiaries, executors, and former appointees under the 2000 Act, including where the same person occupies more than one of those roles.

¹⁸ Act Of Sederunt (Summary Applications, Statutory Applications And Appeals Etc. Rules) 1999

Section 6 generally – Consideration should be given to creating a register of persons found to have acted wrongfully, or wilfully to have acted inappropriately, in roles under the 2000 Act. Such entry on the register would be grounds, or at least *prima facie* grounds, for refusing any future such appointment, removal from any other such appointment held, and disqualification to act as an executor (and perhaps in other fiduciary categories). Rules on disqualification from acting as a company director could be considered as a comparator. Such disqualification might be one of additional grounds for inclusion in the proposed register.

Section 7(1) – See previous comments regarding section 6(2)(b).

Section 9 – The investigatory powers of the Mental Welfare Commission have been transferred to the 2003 Act, but issues such as those raised in relation to section 6(2)(c) apply to those powers.

Section 10(1)(c) and (d) – See comments on section 6(2)(c) and (d).

Section 11 – See comments on section 3(2)(d).

Section 12 – There should be full co-ordination of investigations under the 2000 Act, the 2003 Act and the 2007 Act, and better correlation of criteria.

Section 13 – Existing codes of practice require review for accuracy, and there should in future be requirements for consultation prior to amendment to codes of practice, as well as prior to original issue. In consequence of inadequate consultation, an amendment to the code of practice for guardians and appointees under intervention orders erroneously suggests that administration of a direct payment is competent under a welfare guardianship order, when this is clearly a financial matter.

Section 15(3)(ba), and also section 16(3)(ba) – The outcome of the granter's consideration (and not just the fact that the granter has considered) must be included in the document.

Sections 15 and 16 – Scottish provisions are relatively unusual in that registers disclose powers of attorney which have been granted and registered, but will not necessarily indicate which are in fact being operated. Consideration should be given to a simple form of notification to the Public Guardian where an attorney (who may have been appointed very many years previously) has commenced acting.

Section 15(5) – It is inappropriate that bankruptcy of the granter should bring a power of attorney to an end. It would be obviously inappropriate for the attorney to act in circumstances where it would no longer be competent for the adult to act, but beyond that the protections of having an attorney

are likely to be more necessary in such situation. “Bankruptcy” for the purposes of this provision should be more clearly defined. Similar provisions should apply to guardians, appointees under intervention orders, and also withdrawers acting under Part 3, as regards property and financial powers. In principle, there should be provisions for reinstatement of an attorney (or guardian or appointee under an intervention order or withdrawer), by application, when the bankruptcy is “spent”.

Sections 15 and 16 generally – It should be explicit that only a person who has attained the age of 16 may act as an attorney (there may be circumstances in which it might be appropriate to appoint them at a younger age, but the appointment could only be accepted and acted upon once the person appointed has reached the age of 16).

Section 16(6) – See comments on section 64(2).

Section 17 – Upon a strict interpretation, it would appear that guardians, withdrawers and appointees under intervention orders are required to act even in circumstances where, under section 17, an attorney is not obliged to act. This provision should be translated into a provision requiring proportionality, and included in section 1.

Section 19(2) – The Public Guardian should be authorised to defer registration on cause shown, pending a decision under section 3(3) whether to register or not. The Public Guardian should be able to call for additional reports or information on cause shown and make a decision whether to register or not (subject to application to the court). The same should apply to registration of a revocation notice under section 22A.

Section 19(2)(b) – The meaning of “send” should be reviewed, throughout the 2000 Act, and likewise “receive” should be defined. The new definition should include electronic transmission and provision for e-signatures.

Section 19(2)(c) – “give notice” should be similarly reviewed.

Section 19(4) – There appears to be widespread confusion about the requirement for authentication by the Public Guardian. Many banks and financial institutions appear to have procedural requirements to see a certificate “with a red seal”. This section should be expanded to cover all competent methods of authentication of copies, including by the granter or others in accordance with the Powers of Attorney Act 1971

Section 19(5)(b) – This should be replaced by a provision entitling the person who has submitted the document for registration to be provided, upon request, with up to a stated maximum number of

authenticated copies (or alternatively for these to be provided to the granter). It would then be for the recipients of those copies to do with them as they wished.

Section 20 – Upon cause shown following investigation, the Public Guardian should be entitled (subject to appeal to the sheriff) to put an attorney under supervision, to give directions to an attorney, and to suspend an attorney from acting pending a decision by the sheriff under section 20.

Section 20(2) – It should be clear that where there are joint attorneys the various powers of the court may be exercised in respect of one only, or in respect of both, or differently in respect of each.

Section 22 – There is reference in the fees order to a “Deed of Amendment” but no provision in the Act for notification of more than the matters set forth in section 22. Consideration should be given to explicitly prohibiting any amendment to any of the effective provisions of a power of attorney document, the appropriate procedure in such an event being to grant and register a fresh document. On the other hand, it should be possible to notify some events and obtain a fresh certificate. Examples would be changes in the name or other particulars of granter or attorney.

Section 22A – There should be provisions similar to those in relation to section 19(2) noted above relevant to revocation notices, and a further provision permitting removal of a revocation notice from the register, and reinstatement of the power of attorney, where a purported revocation notice is shown to be vitiated by lack of capacity, undue influence or other factors.

Section 22A(2)(b) – A power of attorney is a contract between granter and attorney. It should not be competent effectively to end such a contract by notice only to a third party (the Public Guardian) and subsequent intimation to the attorney. The certificate should require inclusion of confirmation that the contract has been ended by notification in writing to the attorney, with particulars of the date and method of intimation of that notification.

Section 24 – There should be provisions for the termination of a power of attorney upon the incapacity of the attorney.

Part 2 generally

- a) There should be provisions equivalent to section 64(6) permitting an attorney to delegate, but remaining accountable.
- b) There should be better provision in relation to joint attorneys, including a presumption that provisions equivalent to those of section 62(6) (in respect of joint guardians) shall apply if and to the extent that the power of attorney document does not stipulate otherwise.

- c) There should be better provision in relation to substitute attorneys, including a requirement for the substitute to submit notice to the Public Guardian, including notice of acceptance of substitute appointment, upon the substitution being triggered.
- d) There should be provision expressly permitting the appointment of a supervising attorney (as under some other jurisdictions) particularly having regard to the requirement for effective safeguards in Article 12 of CRPD.
- e) Also having regard to the requirements of CRPD and the terms of the General Comment, there should be express provision for incorporation of supported decision-making and co-decision-making clauses in power of attorney documents.

Section 24B(2)(c) – This provision as worded is illogical and could be interpreted as preventing one of the very situations in which an intervention order can properly be used, namely to transfer funds (perhaps from the sale of a house or other asset) into an account that in accordance with the least restrictive intervention provisions of section 1(3) ought thereafter to be administered under Part 3. The words “has been granted” should be amended to “is in force”.

Section 25(5) – It is unclear whether “already authorised to intromit” means authorised under Part 3, or authorised under any other provisions as well. The latter interpretation can inhibit appropriate use of Part 3 where there is already some other source of authority, such as a DWP appointment. That can cause disadvantageous inflexibility.

Section 26(1)(b) – The requirement for the account to be “in the adult’s sole name” can be cumbersome, where proper organisational use of a single account, coupled with appropriate technology, can still be operated with adequate protection for each individual adult.

Section 26A(1)(b) – There can be consideration of allowing wider powers to the withdrawer, for example to vary the terms of an existing standing order without having to proceed under section 26F.

Section 28(3) – The word “may” is potentially ambiguous. Does it protect the fundholder from criticism that the fundholder ought to preserve confidentiality, or does it give the fundholder discretion to refuse? The fundholder should be obliged to provide information upon request, and should be protected in doing so.

Section 31E – It is a major defect of Part 3 that equivalent transfer from an intervention order is not permitted. This can result in an unnecessary guardianship, rather than the lesser intervention of an intervention order, where the expectation is that funds released can ultimately be administered under Part 3.

Part 4 – We have no separate comments on Part 4, but comments upon provisions of Part 3 apply where those provisions of Part 3 are reflected in similar provisions in Part 4.

Part 5 –

- a) The procedure for authorisation under section 47 is the only procedure under the Act under which there are no provisions for notifying the adult or anyone else that a certificate has been issued, or for registration of issued certificates anywhere. The lack of any requirement to notify, particularly even to the adult, may be in breach of ECHR. In any event, these characteristics should be reviewed.
- b) In relation to Part 5, the lack of adequate training, such as followed the original passing of the 2000 Act, is particularly obvious. The membership of MHDC has had direct experience of situations where section 47 certificates have been issued in respect of a large number of residents in a nursing home, every one of them certifying dementia, even in relation to people who have other intellectual disabilities but certainly not dementia.

Section 53 – There is no provision in relation to intervention orders equivalent to the power of Scottish Ministers under section 64(11) to define the scope of the powers which may be conferred on a guardian. Any better definition, and thus potentially limitation, on powers under an intervention order should not be other than by primary legislation, as it should not be open to government by executive act to remove altogether a potential solution under the 2000 Act, and the role of intervention orders as a “safety net” where other provisions of the 2000 Act are not available is important. On the other hand, there appears in some quarters to be a growing practice of using intervention orders as a form of quasi guardianship, avoiding the supervision of guardianship, and also the controls available under guardianship upon the amount of remuneration paid to appointees. There should be provision to prevent granting of intervention orders where a guardianship would be more appropriate. A common definition adopted by commentators has been that intervention orders are appropriate for a single act or a linked series of acts of self-limiting duration. However, that concept could be extended to cover a series of separate acts in relation to the same purpose over an indefinite period. An example would be powers to enter a lease, which could properly under the same order be exercised at intervals into the future to deal with matters

concerning the lease, such as agreed arrangements to vary the terms, rent reviews, extensions, and the like. See also comments on section 64(2).

Section 53(6) – This and the equivalent provisions in relation to guardianship in Schedule 2 paragraph 6(1) require better clarification. For example, the full requirements of these provisions should apply in relation to the adult’s last principal private residence, unless evidence is produced that there is no prospect of the adult returning to live there. Moreover, there should be at least some lesser requirements in relation to any sale or disposal of heritable property, such as at least a requirement to give to the Public Guardian a specified period of notice of intention to do so.

Section 57 – In view of the acute shortage of mental health officers (see section 4.2 of this response) the limitation to mental health officers as defined in the legislation for reports under section 57(3)(b) should be widened to permit “private” reports and to specify the required qualifications for persons to be able to do so. There should be a time limit for local authorities to increase numbers of mental health officers to enable them to meet their statutory obligations, and beyond that time limit local authorities should be responsible for reimbursing the costs of obtaining a “private” report if a report by a local authority mental health officer has not been provided within the period of 21 days required by section 57(4), or in the event of the local authority intimating that it will not be able to comply with that time limit.

Section 57(3)(a) – Given that the principal issue under the jurisdiction is the existence of incapacity, not diagnosis of a mental disorder causing incapacity, and given the importance of not presuming incapacity where the ability to act or decide can be enhanced by provision of skilled support, the quality of evidence provided by a clinical psychologist is likely to be at least as valuable as that of a “relevant medical practitioner” (as defined). The evidence of a clinical psychologist was generally acceptable to the Court of Session for purposes of appointment of tutors. They should be included in section 57(3)(a) as alternatives to both medical practitioners and relevant medical practitioners.

Section 57(4) – Preliminary notice of intention to apply should also be given to the Public Guardian in relation to all Part 6 applications, in a form to be prescribed. It is understood that it is at present the practice of the Office of the Public Guardian to contact proposed guardians and appointees once the application has been intimated. In a proportion of these, when the requirements and duties are explained, the proposed guardian or appointee regrets having agreed to that role. By then, however, significant expense will have been incurred and the application will already be underway. It is better that such action by the Office of the Public Guardian take place at a much earlier stage.

Section 58(3) – It is essential that there be greater flexibility. The sheriff should be able to make a guardianship order where an intervention order has been sought, or put in place provisions for access to funds under Part 3 where either an intervention order or a guardianship order has been sought, and the sheriff should be able to make alternative disposals of different parts of the same application. In practice, from time to time the courts have granted an intervention order to deal with part of a guardianship application, and a guardianship order to deal with the rest. The reassurance of statutory authorisation of such dual or multiple outcomes should be provided in statute.

Section 58(7) – All interlocutors in all court proceedings under the 2000 Act should be notified to the Public Guardian and to other relevant parties, so that they are aware of the progress of the application and any issues arising. This will also facilitate supervision and control of failure to dispose of applications at first hearing except for good and necessary reasons. Equivalent procedures are already in place under MHTS, and their application to proceedings under the 2000 Act would be a welcome consequence of implementation of the recommendations in section 4 of this response.

Section 59 – It would appear that some guardians do not realise the nature and implications of their appointment until after they have been appointed. In some jurisdictions guardians require to produce evidence that they have undertaken a specified course of instruction, before the appointment is finalised. This principle should be considered with a view to application to Scottish conditions. Conscientious and competent candidates for guardianship are usually pleased to be offered opportunity to inform and educate themselves. Appropriate educational institutions could be encouraged to provide suitable modular courses, and candidates for appointment could be required to produce evidence of having completed such a course, preferably at time of application, or alternatively as a prerequisite for issue of the certificate of appointment,

Section 60 – There have been suggestions that if an appointment has been allowed to expire without a renewal application having been lodged, the guardian could continue acting as such under the principle of necessity. Alternatively, they might claim to be continuing to act as *negotiorum gestor*. Such arrangements should be either prohibited, or regularised.

Section 61(7) – It is understood that the Office of the Public Guardian quite frequently have to “chase” guardians for the updated Land Certificate (or endorsed interlocutor), and are often uncertain whether section 61 has been complied with or not. A simple administrative solution would be for the updated Land Certificate or endorsed interlocutor to be sent by the Keeper to the Office of the Public Guardian, who would then be able to note their records and pass the certificate of interlocutor on to the guardian.

Section 62 – Similar provisions should apply to the appointment of joint appointees under intervention orders.

Section 63 – Substitute appointments should also be competent under intervention orders. There should be consideration of greater clarity and flexibility, such as specifying the order of substitution where there are joint guardians, or where there is more than one substitute; and allowing for temporary substitution followed by reinstatement of an original guardian.

Section 64(1) – Each guardianship order should be required to specify to which of the categories (a) – (e) the powers, or groups of powers, conferred belong.

Section 64(1)(e) – This power should be automatic in all appointments in respect of financial and property affairs. If the guardian does not have such powers, the guardian cannot authorise transactions in accordance with section 67(1), and would thus be unable to comply with the mandatory requirement of section 1(5) to encourage the adult to exercise and develop skills insofar as it might be reasonable and practicable to do so. Where this combination of provisions prevents an adult from acting in any “transaction” of which the adult is in fact – or has become – capable, that would amount to a form of “incapacitation”, contrary to the principles of the 2000 Act, demonstrably unjustly, and contrary to CRPD.

Section 64(2) (and equivalents in relation to attorneys and appointees under intervention orders) – There is uncertainty as to whether the stated exclusions are the only required exclusions. Council of Europe Recommendation R(99)4 on Principles Concerning The Legal Protection Of Incapable Adults (23 February 1999) recommends that states should explicitly specify acts and decisions which cannot be taken by anyone else on behalf of an incapable adult. Thus, MCA specifies that an appointee cannot vote in an election on behalf of the adult, but the 2000 Act contains no such prohibition. In matters such as voting, marriage, and even granting consent under the 2003 Act, there is uncertainty as to the inter-relationship between the 2000 Act and other legislation. For example, there has been litigation as to whether guardians under the 2000 Act can act or decide on behalf of the adult for the purposes of the 2003 Act. These uncertainties should be resolved by including a comprehensive list of matters excluded from provisions of the 2000 Act. Beyond that, there are matters which should perhaps be permissible only under an intervention order, and which should have additional requirements. An example is Will-making and similar acts. There seems at present to be a considerable range of practice. Only one such case has gone to appeal, so far as we are aware. In *Application by Adrian Douglas Ward*, decided by Sheriff Principal B A Kerr on 17th December 2013, the Sheriff Principal set stringent and limiting requirements for proof before execution of a Will could be authorised. On the other hand, in at least some sheriffdoms it appears that simple powers to execute a Will, without specification of the terms of the Will or enquiry into the

appropriateness of it, appear to be routinely included among guardianship powers. We would suggest that execution of a Will, and other documents with testamentary effect, should be possible only by specific intervention order and that there should be provisions and requirements broadly equivalent to those under MCA for execution of “statutory Wills” in England & Wales.

Section 64(7) – This requirement should apply to all appointees acting in financial or property matters under provisions of the 2000 Act.

Sections 68 and 69 – Consideration should be given to allowing greater control by the Public Guardian, including to modify or withhold remuneration, subject to application to the court or (preferably, in the event of implementation of the proposals in section 4 of this response) determination of objections by an in-house convener.

Section 70 – These powers should also be available to attorneys and to appointees under intervention orders.

Sections 72 and 73 – It should be competent for a guardian to apply for discharge where powers have been recalled by the Public Guardian.

Section 74 –

- a) Variation procedure should be available to vary any of the terms of a guardianship order.
- b) The Public Guardian should be able to vary caution in all cases.

Section 74(4) – Something less than the full requirements of section 57 will often suffice in this situation. This provision should perhaps be replaced with a specific requirement upon the court to consider, immediately upon presentation of an application for variation, whether to exercise powers under section 3 to call for any reports (or further reports).

Section 76 – For the purposes of this section and elsewhere, including in particular Schedule 3, it is unacceptable that when an adult moves, habitual residence and ordinary residence may diverge, and that current government guidance as to change of ordinary residence differs as between England & Wales on the one hand and Scotland on the other. This position should be reviewed and if possible resolved.

Section 78 – There would be advantages of consistency and administrative efficiency if the obligation under section 78 rested with the guardian rather than the Public Guardian, as with the

obligation under section 61(7), and that such provisions should also apply to triggering of a substitution under section 63 and the death of a guardian under section 65A.

Section 85 – The definition of adults for the purpose of section 85, and thus for Schedule 3, differs significantly from the definition in Hague Convention 35 on the International Protection of Adults. It has been suggested that this discrepancy means that Hague Convention 35 has not been effectively ratified in respect of Scotland. The discrepancy requires to be addressed and resolved.

Schedule 2: 1(1) – It is inconsistent that the Public Guardian may dispense with an inventory but not with a management plan. The Public Guardian should be able to dispense with both.

Schedule 2: 6(3) – Remit to the court should not be automatic. The Public Guardian should be authorised to hear objections, the Public Guardian's decision being appealable to the court.

Schedule 3 – There requires to be clarification as to the extent of the Public Guardian's responsibilities where a guardian appointed in Scotland acts in another country; there should be provision for transfer of supervisory responsibilities to the other state where supervision by the Public Guardian is impractical.

Schedule 3: 1(1)(b) and (c) – Paragraph (c) suggests that if an adult is not habitually resident in Scotland the Scottish courts have jurisdiction in relation to property belonging to the adult situated in Scotland only as a matter of urgency, whereas paragraph (b) renders situation of property in Scotland a separate ground of jurisdiction without the need for urgency. This inconsistency requires to be resolved, though it is acknowledged that it is an inconsistency deriving from Hague Convention 35.

Schedule 3: 7(2) – This does not properly address the situation in which the United Kingdom has ratified in respect of Scotland but not in respect of England & Wales.

Annex B – The 2004 paper

NOTE

by

ADRIAN D. WARD

for

**THE MENTAL WELFARE COMMISSION
FOR SCOTLAND**

on

**"AUTHORISING SIGNIFICANT
INTERVENTIONS FOR ADULTS WHO LACK
CAPACITY"**

1 Introduction

- 1.1 Ms Patrick's paper helpfully identifies and discusses the issues, and it accurately reports the two contrasting approaches which appear to have emerged, which she terms "universalist" and "selective". I believe that both of those approaches are in some key respects inconsistent with Scots incapacity law as it now stands and inconsistent with the principles underlying it. The universalist approach, as described, implies wrongful imposition of measures under the Act in cases where they should not be applied; and the selective approach, as described, implies failure to give some adults the benefit of measures under the Act (with related safeguards) where they ought to be provided.
- 1.2 In this Note, "the difficulty" refers (firstly) to the question of whether local authorities are obliged to use Part 6 procedures in all cases where a significant welfare intervention is proposed, the adult is expected to be compliant but has not the capacity to give valid assent, no mechanism is already in place to authorise the intervention, there are no other reasons for initiating Part 6 procedure and no-one else intends to do so, everyone with an interest is in agreement with the proposal, and there are no grounds on which the proposal could reasonably be challenged on behalf of the adult; and (secondly) to the perceived difficulties for local authorities in using Part 6 procedure in all such cases because of the alleged volume of such cases and the alleged difficulties, delays and costs of processing them.
- 1.3 I reject both the universalist and selective approaches. I believe that the true area of difficulty is smaller than seems to be assumed, and can be further minimised. I question the assumptions giving rise to the perceived difficulties. I therefore offer the comments in this Note. They are summarised briefly in paragraphs 1.5 - 1.8, and set out more fully in section 3 "Defining the difficulty", section 4 "The law" and section 5 "The Facts" below, preceded in section 2 by some background material which can be passed over by those already familiar with it.
- 1.4 In this Note, "the Act" and "the Incapacity Act" means the Adults with Incapacity (Scotland) Act 2000 asp4. Statutory references are all to that Act.

1.5 The area of difficulty can be reduced by the following:

- Many adults with impairments of capacity will nevertheless have the relatively limited capacity necessary to assent to a proposed significant welfare intervention in circumstances where there is no realistic alternative. Their ability to give such assent should always be respected and facilitated.
- Adults at risk of progressive impairment of capacity can be encouraged to grant welfare powers of attorney while still competent to do so, or to make advance decisions.
- The whole circumstances and requirements should always be reviewed. There may be other reasons necessitating Part 6 procedure.

1.6 Potential reasons for not dispensing with Part 6 procedure where it would be competent include:

- The Incapacity Act specifically provides for *inter alia* intervention orders in welfare matters where the adult is compliant.
- Significant interventions without authority under Part 6 may amount to abduction or assault in criminal law, and/or be actionable as civil wrongs.
- The principles of *negotiorum gestio* and necessity are not relevant to the situation under discussion.
- Because the minimum necessary intervention principle must be satisfied for any intervention under Part 6, it is questionable whether situations can exist where Part 6 procedure if initiated would be competent yet the local authority does not have a duty to initiate such procedure.

1.7 The difficulty and a proposed solution could be submitted for judicial direction under section 3(3) of the Act.

1.8 There should be no moves to establish administrative alternatives to Part 6 procedure unless the "perceived difficulties" are robustly quantified and shown to justify exploration of alternatives.

That has not yet been done. The "perceived difficulties" appear to be questionable because:

- Intervention and guardianship orders are so far well below the level anticipated, and for which funding has been provided.
- Where cases are properly prepared and presented, there is no evidence of delays in the courts. Where shown to be necessary, interim orders can be obtained very quickly.
- Under any alternative administrative process, most of the work necessary for Part 6 Applications would in any event be done. There is no evidence that the additional costs of going to court thereafter would exceed the costs of any administrative procedure by sufficient to justify alternative arrangements.

2.1 I believe that some of my past comments accurately describe the background to the reforms now embodied in the Incapacity Act and the principles upon which modern Scots incapacity law is now based. I also believe that they are relevant to the present discussion. The following extracts have been edited to update and generalise the terminology, but have not been otherwise altered. The texts mentioned should be referred to for the unedited versions and the full contexts in which they appeared.

2.2 *Scots Law and the Mentally Handicapped*, 1984

(page 108) In recent years there has been a general trend towards developing the full individual potential of people with impairments of capacity, enhancing their human dignity, integrating them into the community, and giving them as normal and independent a lifestyle as possible.

Against this background the law is the laggard.

(*ibid* page 112) No existing legal procedure can establish more limited rights to control place of residence, conduct, etc., such as parents have over a minor child. (The powers of a Mental Health Act guardian are clearly interventionist, and do not include general control of conduct.) There is perhaps room for such a relationship in the area between the relative independence of people with mild impairments of capacity, on the one hand, and the substantial degree of dependence of the more severely incapacitated, on the other. As regards management of affairs, if the adult with impaired capacity cannot manage some of his affairs, and a curator bonis is appointed, the curator bonis takes over entire management, and the adult loses all capacity to transact any business, however simple, and even if in fact within his capability.

2.3 *The Power to Act*, 1990 (pages 8–9)

Can we define, in general terms, the principles which should govern the special provision which the law makes for people with learning disabilities – the ideal towards which we would wish development of the law to lead us? I think that we can, and that the answers are valid for all those lacking full capacity, whether through learning disability or from other causes. We can apply to the law the same fundamental principles as underlie the approach of other professions in their work with people with such disabilities. Ideally, for any adult with impairments of capacity, the same general law as applies to all of us should apply fully and without differentiation, except only to the minimum extent that special provision is necessary. Where special protection or special provisions are needed, they should be provided, but limited to the essential minimum. Where the price of protection is restriction, that price must be clearly worth paying, and the restrictions should be minimised. Decision-making should be taken away from the adult to the minimum possible extent, and to that end he should if necessary be helped to make and communicate his own decisions. In areas of doubt, there should be a presumption of competence. When decision-making is transferred to others, they should still try to involve the adult in decision-making as much as possible. Anyone appointed to a supervisory or decision-making role should be appointed by legal procedure entailing careful assessment of needs and circumstances; the appointment should be subject to periodic review; and, when appropriate, the appointee's performance should be monitored. The total regime applying to the adult (made up of special rules and protections, and supervisory and decision-making appointments) should be co-ordinated to minimise doubt and conflict, and should be directed towards serving his best interests, enhancing his development and human dignity, and minimising the effects of his disability upon all areas of his life.

2.4 *The Power to Act*, 1990 (pages 11 – 12)

The areas of decision-making in which help and guidance may be required range from mundane and everyday matters such as what to eat and what to wear, what to do and where to go, to major decisions such as where and with whom to live. There are decisions about taking part in work, training and social activities; decisions about whom to associate with and whom not to associate with. Then there are decisions about medical, dental and other health care. In these and many other matters, individual adults may be unable, at least without help, to make sound and reasonable judgements or decisions for themselves. No-one has any automatic right to make such decisions for another adult, however handicapped. In every legal system, specific procedure is required in order to appoint someone to such a supervisory role. The essential elements of such procedure will include an assessment of whether such an appointment is needed, and a decision as to who should be appointed. Such an appointment does represent a diminution of the rights of the adult, but if the powers conferred are limited to those which are necessary, the only rights lost will be those which the adult is unable to exercise for himself. There is greater risk of infringement of the rights of the adult where there is no judicial determination that such an appointment is necessary, yet someone simply assumes such a role without any legal authority to do so.

2.5 *A New View*, English-language edition, 1993 (page 26)

It is not always necessary to appoint someone else to make decisions. Some other form of legal intervention may suffice [other forms of personal and management orders are referred to]. No such legal intervention may be needed at all. A person may be able to make decisions, if given help, training or encouragement. Or the real need may be for provision of services, rather than formal intervention. Applying the principle of minimum necessary intervention, no order should be made unless shown to be necessary. If an order is required, then the least restrictive alternative should be selected. Appointment of a guardian or manager is usually the most restrictive alternative. In several countries there is now a strong movement against use of intervention which is too restrictive, and against use of formal intervention when it is unnecessary.

2.6 *A New View*, 1993 (pages 33- 35)

Most adults with impairments of capacity can make some personal decisions for themselves. It is helpful if the law recognises this by

- safeguarding their right to make personal decisions for themselves, and
- confirming the validity of those decisions

except only where it is established that they cannot validly make a particular decision, or a particular category of decisions.

It is often necessary to balance two different types of limitations on a person's rights and freedoms in personal matters. Firstly, it is a limitation of a person's rights and freedoms to impose any special legal provisions, such as appointing a guardian. But secondly, it is also an infringement of the person's rights and freedoms if someone else is in fact making decisions, or exercising the control of a guardian, without any legal authority to do so.

There should be no intervention in the form of special legal provisions, except when shown to be necessary. Such intervention should be limited to the extent shown to be necessary, but to that extent it should be provided.

It may be possible to meet needs without applying special legal provisions.

The adult may need facilities and services which ought to be provided, but which are not being provided. Or the adult may be able to make decisions, but may need help in communicating them. Or the adult may be able to make decisions if given some help in making them. If the adult's needs can be met by providing facilities, services or help, then these should be provided if possible. If an authority has a duty to make such provision, then if necessary that duty should be enforced.

Adults with impaired capacity are likely to have difficulty in asking for facilities, services and help, and difficulty in making decisions about such matters. Some may be unable to do these things. In these matters, also, there should be the minimum necessary intervention. If possible, such adults should be helped to do these things, rather than have someone else do them. Help can take two forms.

[Firstly, arrangements such as self-advocacy, advocacy, and use of key workers are described. Secondly, the importance of encouraging authorities and other providers of facilities and services to play their part is explained.]

... There is a danger in arrangements such as befriending and advocacy schemes. The danger is that the views and preferences of the friend or advocate may dominate. This risk can be minimised with trained, sensitive friends and advocates, whose minds are always open to the possibility that sometimes they may not interpret accurately the needs and wishes of the adult. But if there is a significant risk that someone else's decision may be imposed, then it may be better that this be done formally, with the requirements and protections of legal procedures, rather than informally without those requirements and protections.

2.7 *A New View*, 1993 (page 44)

"No person rendering direct services to the mentally retarded should also serve as his guardian" (Declaration on General and Special Rights of the Mentally Retarded, ILSMH, see p185).

In some countries providers of services, or people employed by providers of services, are not permitted to act as guardians. This disqualification includes providers of accommodation, and their employees. Other countries may permit an employee of a provider of services to act as guardian, but only if

- no other suitable guardian is available, and
- the proposed guardian is not directly involved in the provision of services to the adult.

2.8 *Adult Incapacity*, 2003 (paras 15-14 and 15-15)

In practical terms there may be no significant difference between a competent decision by the adult as to one dominant element in a process of composite decision-making, and a decisive choice which might not fit into any theoretical model of competent decision-making, but which may nevertheless be decisive to the extent that other related decisions require to be arranged

around it. While analyses of the processes of competent decision-making can be helpful in addressing the validity of particular decisions, the most important decisions of all may not be susceptible to such analysis. Made by people whose competence and capacity is not in doubt, those most important decisions are often made instinctively. Such an instinctive decision becomes the "given", around which other decisions are made, logically and systematically, as best as circumstances permit. Instinctive elements are frequently decisive in decisions about the most important personal relationships in one's life, about the general nature of a preferred career, the preferred type of home environment and living arrangements, the general nature of preferred hobbies and leisure activities, and so forth. When such an instinctive decision is made, it is likely to be irrelevant to analyse the "decision-making process" by which it has been reached, and may well be impossible to do so. It is probably better to describe it as a choice, rather than as the outcome of a decision-making process which can be analysed; and because decision-making processes which are capable of analysis are irrelevant, the person's capacity in relation to such processes is also irrelevant.

... There are some situations in which a choice by an adult will be decisive even though the adult has severe impairments of capacity. Such a choice will be decisive if a similar choice, by a competent adult, would have equally decisive status. To proceed otherwise would be to discriminate against, and indeed to de-personalise, the adult with impairments of capacity, however severe. Respect for such instinctive and entirely individual expressions of one particular person's personality is one of the fundamental elements of non-discrimination. Such choices are no less valid because they are communicated with difficulty and understood only by someone who knows the adult well, or who has advanced skills in understanding non-verbal communication or otherwise establishing communication. If these are the only ways in which a severely disabled adult can have some control over his own life, then it will be a grave and cruel injustice not to facilitate the communication of such decisive choices, and to respect them.

3 Defining the difficulty

- 3.1 My understanding is that the area of difficulty as to whether Part 6 procedures must be used in all cases, or alternatively may sometimes not be used, is limited by the factors which I have summarised under "(firstly)" in paragraph 1.2. I believe that the area of difficulty is smaller than some local authorities may assume. If the area of difficulty is significantly smaller than assumed, then the perceived difficulties referred to at "(secondly)" in paragraph 1.2 will be proportionally reduced, and may be found to be manageable. This section explores those limitations.
- 3.2 The debate between universalists and selectivists seems to assume that there is something optional about the extent of efforts which must be made to ascertain whether the adult can decide or assent, and if so to facilitate this. That is fundamentally incorrect. The requirement to determine whether the adult has relevant capacity, and if so to enable the adult to exercise that capacity, is absolute. Local authorities must in all cases analyse the decision or assent required and determine whether the adult, even with all necessary assistance, is incapable of such decision or assent. By definition (see 1.2 above) the difficulty only arises where all that is required is competent assent to the implementation of a significant intervention, such as a move from one home to another, where there are no other realistic options. If, as in an example quoted in Ms Patrick's paper, some people with learning disabilities in such a situation were capable of communicating (by whatever means) disappointment or distress that a move to a community setting was being delayed, then it is difficult to understand how they

could be regarded as incapable of assenting to the move, and indeed as not having in fact assented to it – see in particular 2.8 above. It is fundamental that intervention under the Incapacity Act can only be competent if the individual is incapable of the decision or act which is actually required. Many adults with very serious impairments of capacity may nevertheless be capable of communicating by some means their assent to a move to proposed new accommodation. In my own experience of responsibility for many adults with severe and profound learning disabilities, I continuously observed how important it is for those working closely with such adults to be constantly aware of positive indications towards something, however communicated, and to reinforce those indications by responding to them. There is a large difference in the degree of capacity required, on the one hand, to decide whether and where to move when there is realistic choice, and on the other hand to assent to the act of moving when that is all that is required. There are of course issues about definition of situations of "no realistic choice" and about ascertainment of them, but I would expect that where there is indeed no realistic choice and all that is required is assent, there will be relatively few cases where despite best efforts to enable the adult, in the most basic terms, to agree or disagree and to communicate (by any means whatsoever) sufficient assent or dissent to be competent in the circumstances, the adult is unable to do so. There will be such cases of compliance but no competent assent, but they will be relatively few.

- 3.3 Just as in individual cases the use of intervention is limited by the principles in section 1 (and in the case of guardianship also by section 58(1)(b)), likewise it is an entirely proper objective for local authorities to adopt policies which in a more general sense will limit the circumstances in which intervention under Part 6 might become necessary. That would be so whether or not a particular local authority had concerns about the perceived difficulties described in 1.2 above. It would be appropriate and helpful for local authorities to encourage people, particularly those contemplating or facing deterioration of capacity, to consider whether they would prefer to appoint a welfare attorney of their choice on terms of their choosing, rather than risk leaving matters to be determined by a court under Part 6 procedure. My own experience indicates that there is still lack of information about welfare powers of attorney, that if public information were better very many more people would choose to grant welfare powers of attorney, and that if the full potential for this were realised, then the perceived difficulties would probably be reduced to manageable proportions.
- 3.4 I see no reason why the principles of a medical advance directive should not be equally applicable to an advance decision in other welfare matters. A decision or act of assent today does not automatically cease to be valid tomorrow, or next week, or thereafter. If it were competently made, it would apply to future circumstances provided they were in contemplation and provided something does not vitiate them in the meantime. In my view, a past competent authorisation of a specified significant intervention would remain sufficient to authorise that intervention if the foregoing criteria were met. Of course, if the authorisation included authorising someone else to make some decision or choice, then (whatever the terminology employed) the formalities of the Act in respect of a welfare power of attorney would become obligatory; but not if a simple document authorised a specified intervention in specified circumstances without authorising someone to make a choice or decision at the time. Most people would probably prefer to grant a welfare power of attorney, but some might prefer a simple advance authorisation akin to a medical advance directive.
- 3.5 The difficulty about whether Part 6 procedure is mandatory or optional will be eliminated, and the area of perceived difficulty thus reduced, if there are other reasons apart from the "significant intervention" why Part 6 procedure is necessary. In my experience, local authorities

focusing upon an immediate issue about a proposed significant welfare intervention have sometimes failed to consider whether there are other reasons, including perhaps reasons of a long-term nature, for a guardianship application. Some local authorities appear to have a "blind spot" about financial management needs when addressing welfare issues: if a financial guardian is required, then there will have to be a Part 6 Application, so the contemplated welfare intervention may as well be addressed in the same Application. There may be a need for a welfare guardian on an ongoing basis, to decide and authorise the various matters which welfare guardians are commonly authorised to determine.

4 The law

- 4.1 The Incapacity Act addresses incapacity both in relation to deciding and to acting. It does so, for example, in the definition of "incapable" in section 1(6), in the criteria for an intervention order in section 53(1), and in the criteria for a guardianship order in section 58(1)(a). There is no definition of a precise boundary between deciding and acting, but it seems reasonable to suggest that the former would encompass deciding whether and where to move, where there is choice, and the latter would encompass actually assenting to the physical act of moving. The difficulty only applies to the act of assenting, because it can only arise if there is no realistic choice (see definition of "the difficulty" in para 1.2 above). It is significant that the Parliament has chosen to include in the options available under Part 6 an option, in the form of an intervention order where an adult is incapable of acting, only for the purpose of a situation where the adult is compliant. Section 70 contains provisions to deal with situations of non-compliance only in relation to the decisions of welfare guardians, and not in relation to the decisions of appointees under intervention orders, therefore welfare intervention orders are only appropriate where the adult is expected to be compliant. The Parliament cannot have intended that Part 6 should not be used in the situation of a significant welfare intervention where the adult is compliant but incapable of competent assent, when the range of measures provided under Part 6 includes one solely for that situation.
- 4.2 On abduction, Gordon *Criminal Law*, 3rd edition, 2001 (para 29.52) and the authorities there referred to, do not address the situation of adults lacking relevant capacity. The only distinction made is between (impliedly capable) adults and children. Force is necessary to demonstrate abduction in the case of the former, but not in the case of the latter. The principle to be drawn, surely, is that compliance is only relevant in the case of persons able to make a valid decision as to whether they consent to what is happening or not, and could reasonably be expected to resist if they did not consent. Gordon and the authorities which he quotes do not address the situation of an adult whose apparent compliance derives from incapacity rather than from competent though tacit assent to what is happening. I do not accept that it would not be criminal for anyone whatsoever to "capture" an adult with incapacity and spirit that adult away to some quite other location. If our law were not to provide such protection, that would be a breach of ECHR (cf *X and Y v The Netherlands*, decision 26 March 1985 on application No 16/1983/72/110). If there is doubt, the ECHR-compliant interpretation of our law should be favoured.
- 4.3 If the act of removing a compliant but incapable adult from one home setting to another were to involve any physical intervention, even touching, that would be likely to be at least technically an assault in criminal law if not lawfully authorised (see Scottish Law Commission Discussion Paper No 94 *Mentally Disabled Adults*, para 3.4 and authorities there cited, *Stair Memorial Encyclopaedia*, vol. 14, para 1130 and authorities there cited).

- 4.4 The actions referred to in 4.2 and 4.3 above would be actionable as civil wrongs.
- 4.5 I do not believe that the principles either of *negotiorum gestio* or of necessity are of assistance in addressing the difficulty. *Negotiorum gestio* is a form of quasi agency, not quasi guardianship. While I would not rule out entirely the possibility that *negotiorum gestio* could be available in relation to some welfare matters as well as to matters of financial management, I am unaware of any authority for this. Moreover, there is a distinction between using the principle to justify a decision or transaction, on the one hand, and seeking to use it to justify an act such as physically implementing a decision to change residence, on the other.
- 4.6 Turning to the principle of necessity, I would consider that it would justify moving an adult without consent out of a house which was on fire. The only authorities for the principle of necessity of which I am aware relate to the medical context. It seems to me that one can only safely rely on that principle in a medical context where there is either no time, or no available procedure, to obtain authorisation by other means of something necessary to save life or prevent serious deterioration. The Part 5 Code emphasises on the one hand that it would be contrary to good practice to risk prejudice to health through any delay in order to follow the procedures under Part 5 of the Act (para 2.4), but on the other hand that the new authority should be used in every case where it is reasonable and practicable to do so (para 2.6). I do not see that the principle of necessity, either as a matter of law or as a matter of good practice, is available to make and implement a welfare decision without other authority when there is time to obtain lawful authority under Part 6 – and where there is a procedure available to do so, which distinguishes the English authorities including *re F* [1989] 2 WLR 1025. I do not believe that it is appropriate or safe to rely on dicta about incidental touching in the course of providing care, when considering significant interventions such as moving an adult without competent consent from one home to another.
- 4.7 There is a fundamental legal difficulty about any solution which in effect substitutes an administrative "due process" created by a local authority for the intervention order procedure specifically provided by the Parliament to authorise acts which amount to significant interventions in respect of an adult who is not capable of consenting to that intervention. If the actual intervention in contemplation, such as the act of moving the adult from one home to another, is believed to be of benefit to the adult and otherwise to satisfy the Act's section 1 principles, then it would be contradictory to suggest that procedure to authorise that intervention would not satisfy the Act's principles. If in fact anyone claiming an interest were to apply to the sheriff for an intervention order to authorise the intervention, and if they can demonstrate that the proposed intervention would benefit the adult and otherwise comply with the section 1 principles, then the Application should be granted. To justify the proposition that there could be cases where a compliant but incapable adult could (for example) be moved from one home to another by virtue of an administrative due process rather than with the authority of an intervention order, then it would be necessary to demonstrate that there could be cases where on the one hand an intervention order would be granted if sought because it could be shown that the proposed intervention satisfies the section 1 principles, yet on the other hand the local authority does not have an obligation to seek such an intervention order by virtue of its duty under section 53(3). I am not aware that any persuasive argument has yet been advanced that there could be cases which would simultaneously justify an intervention order if sought but would not trigger the duty of the local authority under section 53(3) to apply for precisely the same intervention order, if no-one else does.

- 4.8 Under section 53(3), local authorities have a duty to apply for an intervention order if such order is necessary and no-one else has applied or is likely to apply. Section 57(2) creates a similar duty in relation to guardianship orders. In deciding whether it has such a duty in a particular case, a local authority is intervening in terms of section 1(1). A decision not to do something is an intervention – see para 4-3 of *Adult Incapacity* and the reference there to the Scottish Parliament Official Report. The local authority must comply with the section 1 principles in making such a decision.
- 4.9 If a local authority were to seek to establish an administrative due process as an alternative to procedure before the sheriff under Part 6 of the Incapacity Act, then in my view it would be both competent and advisable for the local authority to seek directions from the sheriff in accordance with section 3(3) authorising the procedure which the local authority proposes to adopt. In determining whether they have a duty to apply under section 53(3) (or under section 57(2)), the local authority are exercising functions conferred by the Act. Section 3(3) refers to "an adult" and "the adult". A court might or might not be prepared to accept such an Application in respect of a class of adults, defined appropriately. A safer course might be to select, by agreement, one or more adults in respect of whom the local authority reasonably anticipate that need to make relevant decisions will arise in the foreseeable future. The local authority could seek a direction that it would be appropriate for them to exercise their function of deciding whether or not to proceed under Part 6 by following the proposed administrative due process which they had prepared. Obviously, any such adult will be within the scope defined in paragraph 1.2 above, therefore the adult will be compliant and no-one with an interest will be in disagreement. I would suggest, accordingly, that it would be appropriate to seek intimation of the Application upon the Lord Advocate as representing the public interest.

5 The facts

- 5.1 The perceived difficulties encountered or feared by local authorities are described (secondly) in para 1.2 above, and the fears and perceptions of local authorities are accurately described in Ms Patrick's paper: these are a belief that if Part 6 orders were required in all cases within the area of "the difficulty", as I have defined it, then "the numbers could run into thousands"; that there are or will be significant delays in the courts resulting in bed-blocking; and that the processing of such applications will use significant local authority resources, both legal and social work. Unless these fears and perceptions can be shown to be well-founded, there can be no case for substituting any administrative due process for the Part 6 procedure provided by the Parliament. The following paragraphs examine each of these elements in turn.
- 5.2 No problem as to volume of cases has yet emerged. On the contrary, there has been substantial under-use of Part 6 procedure compared with the anticipated volume on which funding was based. Ms Patrick quotes in her paper that Part 6 orders were expected to run at the rate of 1,500 per annum, but the total number of applications in the first 18 months was 756, annualised at 504, or only about one third of the anticipated volume. Only intervention orders are relevant to the present discussion, and in the case of intervention orders the shortfall is even greater – only about 20% of the predicted volume. To demonstrate a potential problem, there would require to be robust evidence of likely volume of orders significantly above prediction in the category where an alternative administrative due process could be applicable: that is to say, cases within the definition (firstly) in paragraph 1.2 above, after making reasonable efforts to encourage the granting of welfare powers of attorney as referred to in paragraph 3.3 above and perhaps advance directives in terms of paragraph 3.4 above, excluding all cases where a Part 6 order is in any event required for some other reason as

described in paragraph 3.5 above, and restricted to cases where after every effort has been made to enable the adult to demonstrate and exercise capacity for the limited act of assenting, and to communicate such assent, the adult has been unable to do so- as described in paragraph 3.2 above. There must clearly be an onus upon those asserting a difficulty in relation to volume of potential cases to prove that assertion. I am not aware that any have yet done so, or attempted to do so.

- 5.3 I am aware of no evidence of delays in the courts in unopposed Part 6 applications. I am aware of no potential for delays where cases are properly prepared and presented. In all cases the hearing must take place within 28 days of the first order. A precise period of 28 days is the norm. Following some initial "teething troubles", I am aware of no unopposed applications not determined at a hearing at most 28 days after first order. Moreover, if there is urgency an interim order can be obtained. In my experience there is no reason whatsoever why an interim order, if required, cannot be obtained within a matter of days of the three reports being received. Perceptions of difficulties over delays would require to be robustly demonstrated, and I doubt whether the facts would enable that to be done.
- 5.4 Any perceived difficulties in relation to the demands upon resources and the costs of following Part 6 procedure would require to be demonstrated in relation to the *additional* costs of such procedure over and above the demands and costs of what the local authority would in each case require to do whether or not Part 6 procedure were followed. Put the other way round, it would require to be demonstrated that an administrative due process such as is suggested in Ms Patrick's paper would provide significant savings compared with Part 6 procedure, and that the savings would justify the lesser protection for adults in not following the procedure provided by the Parliament. It seems to me that the proposed administrative due process does not in the main involve something different from the work which might result in Part 6 procedure: rather, it would appear to involve precisely the same work which would be likely to precede Part 6 procedure. Whether Part 6 procedure is followed or not, every effort must be made to ascertain whether the adult is in fact capable of the simple act of assenting and – if so – to facilitate exercise of that capacity and communication of the assent. The Act's principles must be fully complied with. The question of whether there are other reasons why Part 6 procedure must in any event be followed must be fully explored. When all this has been done, all of the necessary preparatory work for applying for a simple intervention order will have been done. The only *additional* demands and costs will be those of the formal preparation of the papers to be lodged in court, obtaining the first order, serving the application and attending the hearing. The *work* of assessing capacity will already have been done, and all that will be required of the doctors will be to put the results into the relatively simple medical reports. The more extensive *work* of ascertaining and assembling the information required for the mental health officer's report will already have been done, and all that will remain will be actually to prepare the statutory report. By definition, everyone with an interest will be in agreement with what is proposed, it will in any event be good practice to record that agreement, and all that will be required is to ensure that that record takes the form of letters to be lodged with the application, thus minimising the requirements for service of the application. All of the information required to draft the application itself will already have been assembled, and it will be a relatively quick and easy task for anyone with relevant expertise actually to draft the application. The court fee for the application will have to be paid. Someone would have to attend the hearing. There will be *additional* cost if Part 6 procedure is followed, but to justify any policy of not following Part 6 procedure for some significant interventions local authorities would have to demonstrate significant *additional* costs and demands even if that additional work were done properly and efficiently. I am not aware of any attempt so far to cost and demonstrate this.



5. 5 It appears that to date local authorities are substantially under-utilising the resources made available to them to enable them to comply with their obligations under the Act. I am not aware that any factual case has been made out and demonstrated to justify instituting arrangements for an administrative due process as an alternative, in some cases, to using the statutory procedures provided by the Parliament. There must be a question as to whether local authorities would not be better to apply their energies and resources in engaging fully with the Act's requirements and procedures and learning how to follow them effectively and efficiently, rather than in trying to find and justify ways of avoiding following the statutory procedures in relation to significant but non-controversial interventions in those cases where the adult is compliant but incapable of giving valid assent.

Annex C – The 2012 paper

EARLY DELIBERATION ON GRADED GUARDIANSHIP

Initial comments by Adrian D. Ward
Convener, Mental Health and Disability Committee, Law Society of Scotland

Abbreviations etc.

The Act, the Incapacity Act: The Adults with Incapacity (Scotland) Act 2000 (asp4)

References to Parts, sections and Schedules are to the Incapacity Act except where otherwise stated

1968 Act: The Social Work (Scotland) Act 1968

2007 Act: The Adult Support and Protection (Scotland) Act 2007 (asp10)

The Committee: The Mental Health and Disability Committee of the Law Society of Scotland

DWP: Department of Work and Pensions

OPG: Office of the Public Guardian

MWC: The Mental Welfare Commission for Scotland

D Report: Report by MWC on “An investigation into the response by statutory services and professionals to concerns raised in respect of Mr and Mrs D” (published 13th February 2012)

ECHR: European Convention on Human Rights

OPG Paper: Early Deliberation on Graded Guardianship (drafted by Sandra McDonald, Public Guardian, November 2011, and published by the Office of the Public Guardian)

Paragraph: Refers by number to a paragraph of the OPG Paper except where otherwise stated

Section 13ZA: Section 13ZA of the 1968 Act, inserted by the 2007 Act

SLC: Scottish Law Commission

The Society: The Law Society of Scotland

GENERAL

- 1 This paper has been written by the Convener of the Mental Health and Disability Committee of the Law Society of Scotland. It takes account of comments of that Committee on a first draft, has been approved for circulation by that Committee, but seeks only to encourage and widen debate, and does not represent the concluded views of the Society, nor of the Committee, nor of the author. The views expressed are to a significant extent tentative, and subject to re-consideration as the debate proceeds.
- 2 The OPG Paper helpfully addresses a range of issues, contains some suggestions worthy of development, stimulates further thought about the issues identified, but is self-evidently constrained by a view limited to the functions of the OPG. If it is accepted that yet further review of our adult incapacity régime is required, it is essential that other perspectives and other issues be added, so that such review be comprehensive and co-ordinated, not fragmented.
- 3 The Committee agrees that further review of our adult incapacity law and procedure is required. This paper seeks to add a different perspective, including other issues of which the Committee is aware.

- 4 There is always a tendency for emphasis to shift from the purposes of legal provisions to their procedures. The purpose of adult incapacity legislation is to promote and safeguard the rights and interests of adults whose ability to do so for themselves is impaired by incapacity. There can be no greater intervention in the rights and freedoms of an adult than to transfer to another person the power to make decisions and take action in relation to the adult's own personal welfare, property and finances. In limited cases some such transfer may be by bureaucratic process, provided that there is ready access to the protection of the courts. Any more general transfer of such rights must be by judicial process. That is not to say that there is not room to improve our judicial processes: in the Committee's view, there clearly is, such improvements are overdue, and subject to careful consideration they should be promptly implemented.
- 5 In terms of general provision to meet their essential needs, people with disabilities and their families are suffering more than any other section of society from current financial constraints. In this situation, it is even more important that essential safeguards of their fundamental rights and freedoms should remain robust. But, again, that does not mean that they cannot be made more efficient: they can.

Personal welfare

- 6 The OPG Paper notably makes only passing and limited reference to personal welfare matters. It ignores the major debates and developments which have already occurred in that regard, leading to section 13ZA procedure. It does not take account of the simplified personal welfare procedures in Part 5 of the Incapacity Act, nor does it take account of the current debate about the major issue of deprivation of liberty, and the current work of SLC on that topic. In places it reads as if all guardianships are financial only, or at least does not make clear that it is referring only to financial guardianship, or fails to point out distinctions relevant to welfare matters. Examples are the last paragraph on page 4, the first paragraph on page 5, and paragraphs 2, 6, 72, 73, 79, 102, 106, 107, 114, 119 and 123. The D Report provides a timely reminder of the distinction between an adult's property and financial affairs, on the one hand, and personal welfare matters on the other, including the different and significant ethical issues in relation to the latter. It would be fundamentally wrong for personal welfare matters still dealt with by guardianship and intervention orders to pass to some form of bureaucratic decision-making. The OPG in particular – with respect – understandably has no experience of such matters beyond its registration functions.
- 7 Section 13ZA has already, in effect, created a form of “graded guardianship” in personal welfare matters. Taking the legislation along with relevant guidance (under which local authorities perform their functions, by virtue of section 5 of the 1968 Act), care has been taken to ensure that where appropriate a case will be dealt with under Part 6 rather than section 13ZA. A properly researched evaluation of the effect and effectiveness of the introduction of section 13ZA should precede any further “grading” reforms in relation to personal welfare matters.
- 8 There has certainly been an increase in welfare guardianships since non-means-tested legal aid became available, but interestingly registration of financial only Powers of Attorney has decreased even more dramatically over the same period, suggesting that what has occurred is an increase in awareness of the importance of properly conferred lawful powers to decide personal welfare matters for people without sufficient capacity to make such decisions for themselves, rather than any consequences of legal aid changes which affect guardianship but not Powers of Attorney. If welfare

powers are on occasion granted unnecessarily or inappropriately, then that is attributable to failure of some sheriffs to follow the clear requirements of the Incapacity Act and to apply the section 1 principles.

The place of guardianship in the existing legislative scheme

- 9 Under section 58(1)(b) of the Incapacity Act, one of the criteria for guardianship is that “no other means provided by or under this Act would be sufficient to enable the adult’s interests in his property, financial affairs or personal welfare to be safeguarded or promoted”. Currently, accordingly, guardianship may be seen as appropriate for cases requiring the maximum procedural and supervisory protections. While the point might be only terminological, grading guardianships could be said to be inconsistent with that approach.
- 10 Within the Incapacity Act, the only “other means” in personal welfare matters are welfare Powers of Attorney, intervention orders and the provisions of Part 5. The section 1 principles do however eliminate the intervention of guardianship where that would not benefit the adult, and thus point us to consideration of “other means” outwith the Incapacity Act, notably section 13ZA; and the common law principle of necessity may at times still be relevant (and in medical matters is preserved by section 47(2A)(a)).
- 11 In property and financial matters “other means” under the Incapacity Act are continuing Powers of Attorney, intervention orders, the expanded but still under-used range of “Access to Funds” provisions of Part 3 of the Incapacity Act, and management of residents’ finances under Part 4. “Other means” outwith the Act are many. Notably, they include the appointment of DWP appointees. For people whose only income comprises DWP benefits, that is a form of plenary financial guardianship without any adequate protection or supervision. In many cases that system is incompatible with ECHR Article 6. Any review initiated by the OPG Paper should extend outwards to cover such procedures beyond the provisions of the Incapacity Act. It would not be a tenable position to express concerns about some guardianships becoming more akin to bureaucratic procedures, yet to support continuance of the existing DWP appointee régime.

Non-correlation

- 12 There is not necessarily any correlation between the size of the finances which might be subject to guardianship and:
 - (a) welfare issues;
 - (b) difficulties over assessment of capacity;
 - (c) suitability of proposed appointee(s);
 - (d) extent of controversy or conflict; or
 - (e) risks of plundering.
- 13 As regards the nature of an adult’s property and finances, risks of plundering are likely to be higher in relation to easily realisable assets such as funds in bank accounts, than in relation to assets which are more difficult to realise.

Intervention orders and other procedures

- 14 In many cases, there is a clear need for intervention orders as an alternative to guardianship. This author adheres to his original suggestion that intervention orders are appropriate for acts and decisions, or a series of linked acts and decisions, of self-limiting duration.
- 15 However, it is unhelpful that with one exception, if any outcome sought under the Incapacity Act is held to be inappropriate, the applicant is “sent back to square one”. The exception is that under section 58(3) an intervention order may be granted where a guardianship order has been sought. The courts have on occasions granted both a guardianship order and an intervention order upon the same application. It should be possible to grant a guardianship order where an intervention order has been sought; and more generally, upon any application under the Act to transfer from one procedure to another with the benefit of preparatory work (such as reports) already done. Thus if a sheriff concluded that needs addressed by a Part 6 application could at least in part be met under Part 3, the evidence of incapacity and suitability of the proposed appointee – if accepted by the sheriff – and the intimations already given should suffice for Part 3 procedure. In the converse situation, OPG should be able to pass a Part 3 application with its medical certificate and certificate of suitability to a sheriff for the purposes of a Part 6 application (so that the applicant would only need to meet the additional requirements for Part 6 procedure).
- 16 Likewise, transitions from one method to another should be facilitated. At present, that is possible only for transition from guardianship to Part 3 management. It is difficult to see any justification for that not to apply also to intervention orders, and indeed for the apparent exclusion of Part 3 when an intervention order “has been granted” whether still in force or not (see section 24B(2)(c)). Generally, all transitions should be facilitated so far as that is reasonably practicable.

A SUGGESTED APPROACH TO REVIEW

- 17 In the view of the author and the Committee, it is essential to separate out issues of (a) the requirements for a competent Part 6 application, (b) the forum competent to grant (or refuse) such applications, (c) interim orders, (d) powers conferred, (e) duration of appointments, (f) subsequent supervision, and (g) requirements for renewal. Of course, the list could be extended: it may need to be.

(a) Requisites

Reports generally, and timetable

- 18 Paragraph 8 of the Paper is incorrect in referring to a requirement for a “fourth report”. Two medical reports are always required. A third report is required from various sources, depending upon the type of application, but there is no statutory requirement for any fourth report in order for an application to be competent. Of course, if need be, the sheriff may in a particular case seek further reports.
- 19 “Managing the timetable” has been substantially assisted by the 2007 reforms. Even before that, the courts afforded flexibility where it was reasonable to do so (*Stork*, 2004 SCLR 513, *Cooke v Telford*, 2005 SCLR 367).

Medical reports

20 The workload and access issues regarding “section 22 doctors” are acknowledged but should not be overstated, and on the other hand there must be very significant reservations about any proposal to rely only on a certificate from a “non-section 22” doctor. The general experience of any solicitor is that reports from non-section 22 doctors range from excellent to unacceptably poor. Many such certificates, when first submitted, fail to distinguish between the mental disorder and any resulting incapacity; and often fail to certify any incapacity at all. In others, there are vague indications of evidence of some incapacity but nothing to link that clearly to an assessment of capacity or lack of capacity in relation to matters in respect of which powers are sought. The following reforms are tentatively suggested:

- (1) While for the reasons stated it would be unsafe to rely on a single certificate by “any medical practitioner”, it could be helpful to create a new category of “accredited practitioners”, being medical practitioners who have undergone training expressly for the purpose of assessing and reporting under the Incapacity Act, and certified as having done so, and – as appropriate – as having refreshed and updated that training.
- (2) A single certificate should be sufficient where provided by such an accredited practitioner in cases where that practitioner is able to certify mental disorder; familiarity with the adult as an existing patient of that doctor or that doctor’s practice; complete incapacity in relation to all matters in respect of which powers are sought; no realistic prospect of any relevant capacity being to any extent regained; and explicit willingness on the part of that accredited practitioner to take sole responsibility to the court for each of the foregoing without need of further or more expert certification.
- (3) A single report from a section 22 doctor should suffice in the same circumstances as (2) above. Should it suffice in all unopposed cases?
- (4) Where there are no doubts about mental disorder, but a sole doctor is not confident about resulting incapacities, one medical report certifying mental disorder, with doctor’s views as to capacity, plus a report from clinical psychologist as to incapacity, could be sufficient.
- (5) Existing requirements.

Mental health officer reports

21 MHO reports should continue to be required as at present, i.e. when welfare powers are sought, including cases where both welfare and financial powers are sought. In my experience, in some difficult and/or complex cases the MHO report has been outstandingly helpful; but there has been increasing variability in quality, and on some occasions MHO reports have disclosed worrying lack of understanding of fundamental issues.

22 The 21-day limit was introduced for the very good reason of avoiding inappropriate delays in a matter of this importance. There should be scope to agree a longer time limit, which should then be adhered to. In absence of such agreement, once the 21 days have expired it should be competent to lodge the application in court without the MHO report, and on cause shown to obtain an order requiring production of the report (the author has had one case where he commenced a separate section 3(3) application before an MHO report eventually appeared, many months late).

23 The extent of interviewing should be at the discretion of the MHO, having regard to the outcome of pre-intimation (see below).

Pre-intimation

24 There should be a procedure for pre-intimation of intention to apply, with a draft of the proposed application, to individuals believed to have an interest. Such pre-intimation should be given no later than the intimation to the local authority (where required) under section 57(4). Responses should include the options to agree or disagree with the application and to require or dispense with formal intimation. The responses should be produced to the MHO (or other certifier of suitability) and should accompany the application when lodged. In most cases this will identify at the outset whether there is likely to be opposition, and will often reduce the volume of intimations (and thus the need for continuations because intimation has failed). Intimation to the adult and to OPG, local authority and MWC in accordance with current requirements should remain mandatory.

(b) Choice of forum

25 Article 6 of ECHR reads: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Choice of forum was a major topic in the consultation and discussion leading to the Incapacity Act, as reflected in the SLC Report. There was no suggestion for such important decisions to be taken by a bureaucratic process rather than by a court or quasi-judicial body. In this author’s view, many of the difficulties now encountered are the result of the unexplained, and in this author’s view inexplicable, failure of the legislature to incorporate the recommendations in the SLC Report, which commanded broad if not unanimous support, and which drew largely on a careful analysis and resulting proposal from the Law Society of Scotland.

26 The proposal in the SLC Report was that the appropriate forum should be the sheriff court, but with cases there heard by designated sheriffs. It is the failure to apply this provision which has led to the difficulties of unduly protracted proceedings with related undue demands on court time; inconsistencies in procedures and outcomes; failure by some sheriffs to demonstrate expertise in applying the provisions and in particular the principles of the Incapacity Act; and many of the other difficulties identified in the OPG Paper. Experienced sheriffs generally “front-load” their consideration of Part 6 applications, identifying and addressing at the stage of warranting issues likely to lead to continued hearings elsewhere: it is this author’s clear impression that they deliver better outcomes much more efficiently in terms of both court resources and the time and trouble taken to have appropriate and effective orders in place.

27 In my view the original intention should be reinstated. Fundamentally, such an important jurisdiction, where the safeguards are dependent upon the proper proactive role of the judge, should only be exercised by judges with the expertise to do so. To say that this could give rise to difficulties in some smaller and more remote courts is no justification for having such matters determined by judges lacking the necessary expertise. Designated sheriffs could where necessary cross boundaries, and could if necessary be supplemented by a few part-time “floating” designated sheriffs. One sheriff principal in Scotland should be designated for adult incapacity work, promulgating consistent rules and hearing all appeals.

28 Scottish Law Commission Discussion Paper No 94 (September 1991) included as Question 84 the following: *“Should all applications relating to the personal welfare and financial affairs of mentally disabled people be heard by the courts, new Mental Health Tribunals or new Mental Health Hearings?”*

29 The following is a brief summary of the Law Society of Scotland Response (March 1992) to Question 84:

The selected forum should have comprehensive jurisdiction; adequate and appropriate for all, not merely the majority, of matters likely to be referred to it; user-friendly, sensitive and approachable, but also capable of balancing conflicts between and among professionals, relatives and carers, and able to take account of the views and contribution of each without being unduly swayed by any; capable of adjudicating effectively in situations of conflict which may involve questions of law as well as of fact; clearly seen to have sufficient judicial competence, authority and independence “bearing in mind that most persons subject to its jurisdiction will have impaired ability to safeguard their own interests, and that the forum will accordingly require to be vigilant in protecting them”; sufficient authority to ensure that its requirements are met and that professional input is comprehensible to lay participants; seen to be clearly independent of social work authorities, health boards, etc; able to respond quickly in cases of urgency; locally available; have or develop knowledge and expertise in relation to all categories of mental disability; ensure that parties are not deprived of appropriate assistance and representation where necessary (including availability of ABWOR); capable of issuing clear and comprehensible written decisions, with adequate explanation of reasons, speedily; have the competency to produce a fully adequate stated case (or similar document), speedily, in the event of an appeal; and must be able to achieve public acceptability, not only by having all of the above attributes but by being perceived to have them. After full discussion of alternatives, the Law Society submission concluded that if the courts were to be the forum “a new régime for mentally disabled adults could most effectively and efficiently be concentrated upon a small number of sheriffs who would then become “designated sheriffs” for their sheriffdoms in respect of such procedures”. Such sheriffs would specialise and develop expertise. *“..... Of all options available, such a system of designated sheriffs would best meet all of the requirements identified above.”*

30 The general principle of designated sheriffs is supported by the Gill Report in the passage quoted in paragraph 171 of the OPG Paper.

31 Any proposed change, or partial change, away from the sheriff court as forum for all Part 6 applications should be tested against these criteria and should sensibly follow introduction and subsequent evaluation of improvements along the lines suggested in this paper, including introduction of designated sheriffs. Initially, there could be a properly researched study of efficiency and effectiveness of outcomes (including easily measurable points such as average number of continuations) of individual sheriffs correlated with volumes of Part 6 applications dealt with and amount of judicial training received. The impact of section 13ZA should also be researched and evaluated.

32 Without seeking unduly to pre-judge what might be the outcome of any fresh review of the “choice of forum” issue, my impression is that any choice other than the Sheriff Court would require either the creation of a new body or very substantial enhancement of the expertise and resources of any existing body. It seems doubtful whether this could be justified when the resources and expertise already exist in the Sheriff Court system, and the requirement is that they be better and more efficiently focused and

utilised. OPG would certainly fall within the category of requiring very considerable additional expertise and resources. The staff who routinely review intimated applications and submit observations to the relevant Sheriff Clerk perform a useful checking function, but their role appears to be limited to selecting from a short list of standard comments which in cases of any complexity are not adapted to the actual craves and supporting averments and not infrequently disclose a failure to understand them. More generally, the limitations upon the expertise available within OPG are evidenced by various of the issues identified in the “General” section of this paper, above, and in matters such as those arising from paragraphs 80, 104 and 176 of the OPG Paper (see the last paragraph under “Power of Attorney and Terminology” below) and paragraph 103 (see the section on “Young adults” below).

(c) Interim orders and emergency powers

33 The OPG Paper is right to highlight concerns about the use of interim orders. There is occasionally a need for them, but in practice they have in my experience been sought to evade the requirements of section 11, and/or to “steal a march” over potential opponents. Sadly, this author is aware of one case where that appears to have been attempted by a local authority. Inexperienced sheriffs considering applications for interim orders seem sometimes to overlook the mandatory requirement of section 1(4)(a) to ascertain the views of the adult before effecting any intervention: interim orders are not excepted. The “front loading” adopted by expert sheriffs, supplemented by the reforms suggested above, would largely eliminate the need for interim orders as a consequence of procedural delays.

34 This author is aware of no case where neither the provisions of the Incapacity Act, nor those of the 2007 Act, nor any other relevant and available procedures, would – if properly operated – have been insufficient to address an emergency.

(d) Powers conferred

35 It is wrong to suggest (as in paragraph 24) that current guardianship cannot be “proportional and tailored to the person’s circumstances”. If “other means” suffice, there should be no guardianship. One of the fundamental purposes of the reforms enshrined in the Incapacity Act was to supersede the “black and white” world of curatory or no curatory, and the fixed provisions of former Mental Health Act guardianship. Section 64 offers a wide range of powers, which combined with the section 1 principles should always produce powers tailored to need. Any failure to achieve that is in my view a result of failure to adopt the “designated sheriff” provisions.

(e) Duration of appointments

36 This topic merits further debate. This author observes only that he has seen appointments ranging from the absurdly lengthy to the unnecessarily short, with a complete lack of consistency of approach across the country.

(f) Subsequent supervision

37 This is where the experience and initiatives of OPG have the greatest amount to contribute, in relation to property and financial matters. There is certainly a much stronger case for “grading” at the level of supervision, rather than the procedure up to granting of the relevant order, but financial and welfare supervision should be determined quite separately, by OPG and the local authority respectively, and in

both cases should be subject to any directions by the sheriff in the relevant order. As opposed to the procedure up to the granting of the order, the Committee would favour giving the OPG and the local authority maximum scope to determine all aspects of supervision, including in the case of OPG requirements for caution and variations in those requirements (see paragraphs 126-128) subject to express terms of the relevant order and any subsequent directions by the sheriff.

(g) Renewal

38 There is scope for greater flexibility in renewal procedure depending upon the evidence before the court at time of initial grant (or last previous renewal) and any express terms of the last order. If previous certificates stated that the mental disorder was incurable and would permit no improvement in capacity, need there be further medical certification beyond a one-sentence letter confirming that there has been no improvement in the mental disorder or resulting incapacity (or indeed any further certification at all, unless requested by the court)? The emphasis in such cases should be upon identifying and considering any changes in circumstances and needs. Could the form and content of any further MHO report be at the discretion of the MHO, particularly if the pre-intimation suggested above is applied also to renewals?

POWERS OF ATTORNEY AND TERMINOLOGY

39 There was a substantial increase in registrations of continuing and welfare Powers of Attorney in each of the first nine successive years following their introduction on 2nd April 2001, from 5,592 in 2001/2002 to 38,707 in 2009/2010 (figures from OPG website). Deferred registration is rare. Almost all of these are registered promptly following execution. Some granters are already aware that they have conditions which are likely to cause loss of capacity. Others may be elderly, at risk of impairment of capacity, but may or may not in fact lose capacity. Others are granters of any age who choose to grant such Powers of Attorney on an entirely precautionary basis. Some, of any age, have sufficient capacity to grant a Power of Attorney but are not capable themselves of validly carrying out all of the acts authorised by the Power of Attorney.

40 Only in a very small minority of cases does anyone ever opt for guardianship as preferable to granting a Power of Attorney. Occasionally someone with a mental disorder which can cause them to make decisions which are irrational and unsuitable to the extent of being incapable will opt for guardianship because of the protection - not available under a Power of Attorney - that purported acts within the powers of a guardian but not authorised by the guardian are automatically invalid. Such cases are so rare that their only significance for the present discussion is that they are "the exception which proves the rule" that overwhelmingly people who contemplate the choice will prefer an attorney to a guardian. This strong preference, reflected in the increasing numbers of continuing and welfare Powers of Attorney registered, should in time reduce the number of guardianships and guardianship applications. The research has not been done to be able to predict the likely timing and extent of the impact of rising numbers of Powers of Attorney upon requirements for guardianship. However, anything which can encourage as many people as possible to grant Powers of Attorney will have the primary benefit of ensuring that in the event of incapacity they will be served by arrangements which they themselves have chosen to establish, usually at a fraction of the initial and ongoing cost of guardianship, and free from the supervisory burdens of guardianship; and the secondary benefit of reducing the number of guardianships required, and thus the burden on professional and other services of supporting the guardianship régime.

- 41 The difference between Powers of Attorney and guardianship are clear and significant. No-one to whom the differences are properly explained has any difficulty in quickly understanding them. Continuing and welfare Powers of Attorney are a specialised form of Power of Attorney, a well-established and well-understood concept in Scots law and internationally. Likewise modern Scots law of adult guardianship is a form of guardianship, a concept universally understood and already well-developed in Roman law. A Power of Attorney, once the attorney has accepted appointment, is a contract. Guardianship is an appointment. To obfuscate this clear terminology would be as absurd as re-defining “owners” as “tenants” because a few people do not understand the difference between ownership and tenancy.
- 42 The difficulty with banks and other financial institutions mentioned in paragraphs 80, 104 and 176 of the OPG Paper does not relate to terminology. People operating all of the financial management techniques under the Incapacity Act encounter unacceptable problems with banks and other institutions. Changing terminology will not help. The problems are the result of lack of basic explanation and training to staff, which could be delivered quickly and easily to staff of basic competence. The difficulties are also the consequences of clear disability discrimination towards people with intellectual disabilities. For them, techniques to enable their affairs to be managed are as much aids towards overcoming their disabilities as is a wheelchair for a person with mobility difficulties. To create unnecessary problems and obstructions, often amounting to a refusal to provide a service, to people reliant upon either category of aid is equally discriminatory. These issues are being suitably addressed by the Law Society of Scotland, the Equality and Human Rights Commission and the Joint Committee of Scottish Clearing Banks, in co-operation with each other.

FURTHER COMMENTS ON THE OPG PAPER

Self-directed support (paragraphs 95-100)

- 43 Current proposals before the Parliament rightly emphasise the importance of supported decision-making. That means, with appropriate safeguards, helping people to make valid decisions for themselves. That can apply only to people who can, albeit with help, make valid decisions; and is thus irrelevant to issues of incapacity. To have control of the provision of support and services to an incapable adult often amounts to total control of a very major part of that adult’s life, warranting the full protections of the guardianship régime.

Young adults (paragraph 103)

- 44 The uncritical reporting of the ill-informed reactions of a few parents of young adults is surprising. It is precisely the parents of young people with learning disabilities, who had recently attained adulthood, who initiated and drove forward the development of modern personal welfare guardianship in Scotland, specifically with the revival in 1986 and subsequent development of tutors to adults. They – as do all parents to whom the point is explained – readily understand the difference between children, whose legal incapacities are automatically ascertained by reference to age, and adults, any legal incapacities of whom can never be automatically determined by any equivalent measure. As this author wrote about 30 years ago in *Scots Law and the Mentally Handicapped* there is no place for a “voluntary arrangement” in relation to a person with incapacity. “The person whose interests require to be carefully safeguarded is the mentally handicapped adult, who will not be capable, either factually or

legally, of consenting to the arrangement. The arrangement cannot be 'voluntary'. Most such arrangements are in fact probably in the best interests of the mentally handicapped person, but they have no legal basis and do not justify or permit any interference with the rights of the handicapped person as an independent adult. Of course, just as they cannot consent, the mentally handicapped also cannot in most cases effectively object, but that is hardly a satisfactory basis for any arrangement."

45 In comparing children, and adults with impairments of capacity, this author wrote: "It is a very different thing to put an adult, albeit mentally handicapped, under similar power and control of another adult. Such an arrangement impinges on the basic legal and human rights of the handicapped adult. In a caring and responsible society the law must carefully control the circumstances in which such an arrangement is permitted. In each individual case, is the arrangement necessary? Are these unusual rights and duties being conferred upon a suitable person? It is also reasonable that if the law should permit such an arrangement, it should also require the arrangement to be periodically reviewed, and to be monitored."

46 In almost three decades since the above explanations were published, and indeed prior to that when given to parents of young adults, this author has never known any failure to understand and accept them. They were published by the Scottish Society for the Mentally Handicapped, now Enable. They are consistent with the principles and provisions now to be found in the Incapacity Act.

Need for legal assistance (paragraph 154)

47 The German Betreuungsgesetz régime probably handles a greater volume of guardianships than any other European jurisdiction. The majority of applications are handled by applicants themselves with support from voluntary organisations, with legal assistance reserved for complex and difficult cases. An investment in establishing similar support services in Scotland could well achieve significant savings in overall costs in the long run.

Costs of medical reports (paragraph 156)

48 It is an oddity of current practice that the highest standard and most helpful medical reports are often those produced by consultants without charge on the basis that the adult is an existing patient and the consultant views the completion of the report as part of the consultant's normal professional duties to the adult as patient. Conversely, quite large fees can be sought for reports of poor, and not infrequently unacceptable, quality. Standardisation of charging, perhaps with exceptions for cases of genuine difficulty or urgency, would be helpful.

Means-testing for legal aid (paragraph 158)

49 The background to automatic legal aid without means-testing for guardianship applications where welfare powers are sought is as follows. At one time automatic assistance by way of representation (ABWOR) was available in relation to former Mental Health Act guardianship proceedings in England, but not those in Scotland, even though the fixed statutory powers of Mental Health Act guardians were the same in both countries. Following representations from the Law Society of Scotland that inequality was eliminated and automatic ABWOR became available in relation to Scottish Mental Health Act guardianship applications. It does seem correct in principle that persons for whom guardianship is

required in relation to personal welfare matters, where both the need and any procedure is beyond their capable control, should not be burdened with the costs.

COMMENTS

50 The Committee would be pleased to receive comments on this paper. They may be sent to Brian Simpson, Secretary, Mental Health and Disability Committee, Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh EH3 7YR, email: BrianSimpson@lawscot.org.uk.

Annex D – The 2016 response

Scottish Government Consultation on the Scottish Law Commission’s Report on Adults with Incapacity

The Law Society of Scotland’s response

March 2016

1. Introduction

- 1.1 The Law Society of Scotland (“the Society”) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.
- 1.2 This response has been prepared on behalf of the Society by members of the Mental Health and Disability sub-committee (“MHDC”).
- 1.3 The members of MHDC thank all those who provided information to assist them in identifying matters for consideration, and in researching the factual background, prior to formulating the views expressed in this response. In particular they thank the Public Guardian, Scottish Government officials and the President of the Additional Support Needs Tribunal for Scotland (who is also an in-house convener at the Mental Health Tribunals for Scotland) in each case for helpful information provided and for the benefit of helpful consultation, and Professor W M Martin (lead investigator for the Essex Autonomy Project) for information and comment which he has provided. However, MHDC is solely responsible for the formulation of this response and the views expressed in it. Alex Ruck Keene, Barrister, who is the common member of MHDC and the equivalent committee of the Law Society (England & Wales) provided helpful comparative information regarding law and practice in England & Wales, but in view of his current position with the Law Commission (England & Wales) did not contribute to the formulation of this response or the views expressed in it.
- 1.4 We address the Consultation in the following way:-
 1. Introduction
 2. General Comments
 3. Response to Consultation questions
 4. Next Steps/Wider Review

- 4.1 A “one door jurisdiction
- 4.2 Under-provision of Mental Health Officers
- 4.3 Compliance with the CRPD
- 4.4 Other areas for review in the 2000 Act
- 4.5 Matters omitted from the 2000 Act
- 4.6 Areas for review of the 2003 Act
- 4.7 Areas for review of the 2007 Act
- 4.8 Matters requiring action by both the UK and Scottish Parliaments

2. General comments

- 2.1 The Society welcomes the opportunity provided by Scottish Government not only to comment upon the Scottish Law Commission Report No 240 on Adults with Incapacity, but also the invitation at the end of the Scottish Government Consultation Document “Consultation on The Scottish Law Commission Report on Adults with Incapacity” (“the Consultation Document”) to suggest areas for wider review. The Society also welcomes the encouragement which it has received, in informal discussions, to suggest ways in which the combined jurisdictions in relation to adults with incapacity, adults in need of compulsory mental health care and treatment, and adults who are vulnerable and at risk, are addressed in terms of the commendable and pioneering body of legislation introduced by the Scottish Parliament in 2000, 2003 and 2007 (and in amending legislation); and how what are at present separate jurisdictions are being operated in practice.
- 2.2 As a matter of urgency Scotland must improve the efficiency and effectiveness of the operation of the combined jurisdictions. In particular, the current position under the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”) is inefficient and ineffective. The fragmented operation of the three jurisdictions is inefficient because of the waste of public resources in terms of the current operation, in particular of the AWI jurisdiction by the courts and the drain on Legal Aid funds. The operation of the AWI jurisdiction is also expensive for litigants meeting their own costs, and time consuming and stressful for many of those involved in its procedures. This situation does not use the available resources of the Office of the Public Guardian and others with statutory roles to best effect. Most seriously of all, from the perspective of the Society in relation to its responsibility for the public interest, the current fragmented operation of the three jurisdictions and the current

operation of the AWI jurisdiction in particular, frequently and seriously lets down vulnerable people, their families and carers.

- 2.3 In consequence of these concerns, we urge that early steps be taken to move to implementation of the “one door” approach unanimously favoured by all stakeholders and interest-groups in the 1990s during the processes of consultation and discussion which led to the 2000 Act. We address these matters further in section 4.1 of this paper. Section 4.2 addresses a particular deficiency in provision, namely the serious shortage of qualified mental health officers, which is currently preventing operation of many relevant procedures as required by the legislation, to the detriment and disadvantage of vulnerable persons and, yet again, further inefficiencies and frustrations. Sections 4.3 – 4.8 address other areas in which law reform is necessary. While the manner in which such work is undertaken is a matter of policy for Scottish Government, we would urge that while the overall task may seem to be major, it is necessary, and it would be best and most efficiently addressed in a co-ordinated manner, rather than piecemeal.
- 2.4 Following passing of the 2000 Act, an implementation steering group was established. This proved to be invaluable in ensuring that appropriate training programmes took place for social work and other local authority staff, medical professionals, lawyers and others; overseeing and co-ordinating the making of regulations and issue of codes of practice; overseeing public information; and co-ordinating these and other relevant functions. The implementation of the changes to the 2000 Act introduced by the 2007 Act was hampered by lack of a similar process. The original steering group delivered high value for little cost: many of the participants provided their time and expertise without cost to the public purse, and those in public employment simply devoted their time. There were limited costs for travel expenses and secretarial support. The reintroduction of such a group, as a permanent co-ordinating group, would yield high value for money. It would be essential upon any law reform, however limited or comprehensive, following upon the current consultation, so that the group would in that regard have an implementation function; but because of the specialist nature of the jurisdiction, permanent monitoring of issues, training needs, and needs for adjustment to guidance or codes of practice, is essential; and in particular will be valuable whether or not our proposal for a unified tribunal is implemented. In particular, there is now a serious need for appropriate, extensive and co-ordinated training.
- 2.5 For convenience, we use the following abbreviations in this paper:

“the Consultation Document”: The Scottish Government Consultation Document
“Consultation on The Scottish Law Commission Report on Adults with
Incapacity”

“2000 Act”: Adults with Incapacity (Scotland) Act 2000 (asp 4)

“AWI”:	The matters within the scope of the 2000 Act
“2003 Act”:	Mental Health (Care and Treatment) (Scotland) Act 2003
“MHA”:	The matters within the scope of the 2003 Act
“2007 Act”:	Adult Support and Protection (Scotland) Act 2007 (asp 10)
“ASP”:	The matters within the scope of the 2007 Act
“2014 Act”:	Tribunals (Scotland) Act 2014
“the three jurisdictions”:	All matters within the scope of the 2000 Act, the 2003 Act and the 2007 Act
“MCA”:	Mental Capacity Act 2005 (c9) (England & Wales)
“SLC”	The Scottish Law Commission
“SLC 1995 Report”:	Scottish Law Commission Report No 151 on Incapable Adults (September 1995)
“SLC 2014 Report”:	Scottish Law Commission Report No 240 on Adults with Incapacity (October 2014)
“ECHR”:	European Convention on Human Rights
“ECtHR”	ECtHR
“CRPD”:	UN Convention on the Rights of Persons with Disabilities
“General Comment”:	General Comment No 1 (2014) “Article 12: Equal Recognition before the Law” issued by the United Nations Committee on the Rights of Persons with Disabilities
“the Society”:	The Law Society of Scotland
“MHTS”:	Mental Health Tribunal for Scotland
“January 2016 response”:	The response of the Law Society of Scotland, dated January 2016, to the Scottish Government Consultation on the UN CRPD Draft Delivery Plan 2016 – 2020

3. Deprivation of liberty – Response to the numbered questions in the Consultation Document

3.1 Questions Relating to the Draft Bill Provisions on Hospital Settings

Q1. 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?

3.1.1 As stated in para 6 of the Consultation Document, the 2014 Supreme Court *Cheshire West*¹⁹ ruling although not binding on Scotland, and despite views such as those expressed by Mostyn J²⁰, is nevertheless influential. The Supreme Court in *Cheshire West* determined that a person who lacks the capacity to consent to their living arrangements will be deprived of their liberty and therefore fall within the ambit of Article 5 ECHR where they are under continuous supervision and control and are not free to leave²¹. Moreover, whilst the ECtHR has suggested that it *might* be possible for a substitute decision-maker (such as, for example, under a guardianship or an intervention order) to consent to a deprivation of liberty on behalf of a person who lacks capacity to consent to their living arrangements²² this has, as the SLC 2014 report notes, been insufficiently developed to rely on and thus additional safeguards are required. It should also be noted that the Court of Protection for England and Wales recently ruled²³ that parents cannot consent to a deprivation of liberty on behalf of their 16 or 17 year old children.

Q2. Section 1 of the Commission's draft Adults with Incapacity Bill provides for new sections 50A to 50C within the 2000 Act, creating measures to prevent an adult patient from going out of hospital. Is the proposed approach comprehensive?

3.1.2 It is respectfully suggested that the following matters are taken into consideration:-

3.1.3 The SLC 2014 Report envisages that this authorisation process will only be required where it is necessary to restrain the patient and that it may in fact be unnecessary in many cases owing to patients' health preventing them from leaving²⁴. It has been suggested by the former European

¹⁹ *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor)(Appellants) v Surrey County Council (Respondent)* [2014] UKSC 19.

²⁰ *Bournemouth Borough Council v PS* [2015] EWCOP 39 at 40 referred to in para 6 of the Consultation Document.

²¹ *Per* Lady Hale's leading judgment at 49.

²² *Stanev v Bulgaria* (2012) 55 EHRR 22, para 130. See also *Shtukaturov v Russia* (2008) (Application No. 44009/05) ECHR 223, para 108 and *Stankov v Bulgaria* (Application No. 25820/07) judgement of 17 March 2015, paras 89-90.

²³ *Birmingham City Council v D(A Child)* [2016] EWCOP 8. It is, however, understood that this decision may be appealed.

²⁴ SLC 2014 Report, para 5.3.

Commission of Human Rights²⁵ and High Court in England and Wales²⁶ that Article 5 ought not to be engaged in the case of an incapacitated person in, respectively, an emergency ward and ICU for a very short time. However, the ECtHR and other English jurisprudence indicates that a deprivation of liberty will occur even where the person does not try to leave where those responsible for them are clear that they will be prevented from leaving²⁷ and, on this basis, it is therefore arguable that there may be situations where incapable and immobile patients receiving medical treatment or undergoing medical assessment are deprived of their liberty. In this connection, careful consideration needs to be given as to when exactly any protections of the nature proposed will be justifiable. For example, one of the objective factors to be taken into account when assessing whether a deprivation of liberty has occurred is whether the person has been confined in a particular place for a not negligible length of time²⁸ and this period of time appears to be assessed on a case by case basis²⁹. Moreover, in light of the fact that Article 5(1)(e) permits detention for persons of 'unsound mind' (for the purpose of care and treatment thereof), the appropriateness of depriving a person of their liberty when the treatment or assessment relates to a physical condition and not mental disorder also requires further consideration.

3.1.4 In considering whether or not to grant an order setting an end date the sheriff is required to be satisfied, amongst other things, that the patient is ready to return home or that suitable accommodation is available elsewhere. Local authorities are under a duty (both statutorily and in the application) to provide full information about the availability of suitable alternative accommodation (which may also be strengthened through the integration of health and social care services pursuant to the Public Bodies (Joint Working) (Scotland) Act 2014). However, notwithstanding this, there remains the danger that if alternative accommodation cannot be found then the adult will remain in hospital for an extended period of time where this is not therapeutically justified. This would be contrary to the 2000 Act's principles of respect for the adult's present and past wishes and feelings, benefit and least restrictive option, Article 5(1) ECHR and potentially even Article 8 ECHR (both reflected in the CRPD).

²⁵ *Järvinen v Finland* (Admissibility case) (Application No 30408/96) European Commission of Human Rights, 15 January 1998.

²⁶ *R(LF) v HM Senior Coroner for Inner London* [2015] EWHC 2990(Admin), per Gross LJ at 66-88 and Charles LJ per 119-154.

²⁷ *HL v UK* (2005) 40 EHRR 32, para 91, *JE v DE* [2006] EWHC 3459(Fam), per Munby J at 77 and *Cheshire West*, per Lady Hale at 48-49.

²⁸ *Storck v Germany* (2005) 43 EHRR 96 at para 74.

²⁹ For example, *X v Austria* (1979) 18 DR 154, *Gillan and Quinton v UK* (2010) 50 EHRR 45 and *Austin v UK* (2012) 55 EHRR 14.

- 3.1.5 There is provision for interested persons to apply to the sheriff court to challenge the authorisation but this is not an automatic review by the courts. The ECtHR has stated that automatic judicial review is not essential in order to meet the requirements of Article 5(4) in terms of the original authorisation of the detention or subsequent reviews of its lawfulness³⁰. Its jurisprudence states, however, that where persons with mental disorder are concerned they are entitled to have the lawfulness of their detention periodically reviewed by a 'court' and that the related procedural safeguards must be real and effective³¹, such procedures must be of a judicial nature as opposed to being advisory only³² and guarantee the right to review on the same basis as others³³. There must be equality of access to the court and this includes not requiring the individual to initiate proceedings³⁴ or being reliant on those who authorised the deprivation of liberty to initiate the challenge³⁵. An arrangement whereby a third party is under a mandatory duty to apply for such review appears to be compatible with Article 5(4)³⁶. On the face of it, it could therefore be argued that only automatic referral to a court or tribunal seems to meet Article 5 compliance particularly given the importance that the ECtHR has placed on the right to liberty and autonomy. This importance is reinforced by the rights to equal recognition before the law (Article 12), access to justice (Article 13), liberty (Article 14), and personal integrity (Article 17) in the CRPD.
- 3.1.6 It is acknowledged that there are resourcing implications in providing automatic judicial review of every deprivation of liberty in health, social care and community settings. In terms of reducing the impact on sheriff courts the Mental Health Tribunal for Scotland could be empowered to review the lawfulness of deprivations of liberty given the requirement that the review procedures must be of a judicial nature. The right to liberty should be viewed in conjunction with not only the more positive protective duties of Articles 2 (the right to life) and 3 (prohibition of torture an inhuman or degrading treatment) but also the right to respect for private and family life, or autonomy, in Article 8. Individual autonomy in health and care settings is an issue that the ECtHR is increasingly likely to

³⁰ *MH v UK* (Application No. 11577/06) (2013) ECHR 1008, para 82.

³¹ *Stanev*, para 170, *DD v Lithuania* (Application No. 13469/06) ECHR 254, para 165 and *MH*, paras 82-86.

³² *Stanev*, para 169-171.

³³ *MH*, para 82. See also *Stankov*, para 113.

³⁴ *MS v Croatia (No.2)* (2015) ECHR 196, paras 152-160.

³⁵ *DD* at para 166, *Stanev* at paras 174-177 and *Stankov* at para 114.

³⁶ *Stanev* at para 174, *Shtukurov* at para 124 and *MH* at paras 92 and 94. The English Court of Appeal ruling in *Re x (Court of Protection Practice)* [2015] EWCA Civ 599, per Lady Justice Black at 104, also indicated that the individual with incapacity must also be a party to the proceedings to ensure Article 5 compliance.

address as it links Article 5 ECHR issues with those of Articles 8 and 3³⁷. Individuals must be protected from unlawful deprivation of liberty. Their autonomy in healthcare settings must be respected whilst at the same time medical staff should not be deterred from treating people in emergencies owing to fear of depriving those people of their liberty. Compliance with Article 5 ECHR is crucial but it is suggested that consideration should be given to what is predominantly being sought to be achieved in health and care settings. How can treatment be delivered in the least intrusive way that is respectful of an individual's autonomy and dignity whilst providing protective safeguards for those situations when it becomes overly intrusive?

3.1.7 The requirements of Article 12 CRPD (the right to equal recognition before the law) are relevant and, in particular, the extent to which the requirement to support the adult in the exercise of their legal capacity (Article 12(3)) to consent to the arrangements may apply, before making an assessment of incapacity which might obviate the need for formal procedures to be adopted. However, at the same time, safeguards will have to be in place to ensure that any consent obtained is full and informed consent and that the adult is not subjected to undue influence (Article 12(4)), is free from exploitation (Article 16(1)) and his or her privacy is respected (Article 22).

Q3. 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).

3.1.8 In any decisions leading to and during the implementation of an intervention under s 47 the principles of the 2000 Act must be applied, particularly those of benefit³⁸, least restrictive option³⁹ and taking account of the adult's present and past wishes and feelings⁴⁰ as well as those things that are not authorised by the power conferred under s 47⁴¹ and proportionality. However, there may be situations where the nature of the treatment is such that the adult is under continuous supervision and control and is not free to leave and then they will be deprived of their liberty in terms of Article 5

³⁷ See, for example, *YF v Turkey* (2004) 39 EHRR 34, para 33; *X v Finland* ((Application No. 34806/04), Judgment of 3 July 2012; *MS v UK* (2012) 55 EHRR 23.

³⁸ s 1(2).

³⁹ s 1(3).

⁴⁰ s 1(4)(a).

⁴¹ s 47(7).

ECHR. However, for the reasons provided above, it is not clear that the draft provisions will necessarily fully achieve this.

3.2 Questions Relating to the Draft Bill Provisions on Community Settings

Q1. 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?

3.2.1 Please see below.

Q2. The proposed legal authorisation process will not be required for a person who is living in a care home where the front door is ordinarily locked, who might require seclusion or restraint from time to time. Do you agree that the authorisation process suggested by the Commission should not apply here?

3.2.2 In relation to questions 1 and 2, as already stated in relation to hospital settings, case law states that a person will be deprived of their liberty so as to engage Article 5 ECHR where the factual situation is that they are subject to continuous supervision and control and are not free to leave. Safeguards are therefore required to protect individuals who are deprived of their liberty as at present these are not provided for under the 2000 Act.

3.2.3 At the same time there is a need to also consider the right to liberty in conjunction with not only the more positive protective duties of Articles 2 and 3 but also in Article 8. The primary justification for depriving a person without mental capacity of their liberty in health, social care and community settings ought to be one of protection. A greater emphasis on providing environments where more individuals can exercise their autonomy without the need for protective measures that result in deprivation of liberty may therefore achieve an effective and workable balance of these rights and at the same time meet the requirements of the CRPD.

Q3. 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.

- 3.2.4 It is not immediately apparent how a ‘significant restriction of liberty’ will be any easier to discern than a deprivation of liberty as defined by case law interpreting Article 5 ECHR. Moreover, although the Supplementary Code of Practice on the Mental Capacity Act 2005 for England and Wales⁴² and ECtHR jurisprudence appear to feature this⁴³, the draft Bill does not include a lack of social contact as a factor when assessing what will constitute a ‘significant restriction of liberty’. The SLC 2014 report stated that to include such a factor would effectively create a formal process for restriction of contact and communication⁴⁴ whilst at the same time noting the Article 8 ECHR implications of restricting contact with others and the possibility of legitimately being able to limit contact where it is for the adult’s protection⁴⁵. However, the absence of specific inclusion of this in the amendments would render the individual vulnerable to arbitrary decisions being taken to inappropriately limit their social contact without formal oversight. A lack of social contact should therefore be included as a factor that must be taken into account when assessing whether or not there has been a deprivation of liberty/significant restriction of liberty.
- 3.2.5 Where welfare attorneys or guardians give consent to the significant restriction of liberty on behalf of the adult there is no provision for automatic judicial review of the lawfulness of a restriction of liberty. It is also a concern that the Bill’s provisions allow for what is effectively indefinite restrictive arrangements in the absence of automatic review where welfare attorney or guardianship consent has been obtained to such restrictions. Moreover, the “relevant person” may vary the significant restriction of liberty and implement such variation pending the outcome of any appeal against this. It is, of course, possible that the level of restriction may be increased by these means and, again, there is no automatic judicial authorisation or review of this. The observations made in 3.2.3 above are therefore repeated.

Q4. 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?

- 3.2.6 As already mentioned, the ECtHR has suggested that it *might* be possible for a substitute decision-maker to consent to a deprivation of liberty on behalf of a person who lacks capacity to consent to

⁴² SLC 2014 Report, paras 6.17-6.20.

⁴³ *HL v UK*, para 91, and *HM v Switzerland* (2004) 38 EHRR 17, para 45.

⁴⁴ SLC 2014 Report, para 6.21.

⁴⁵ SLC 2014 Report, paras 6.22-6.24.

their living arrangements⁴⁶ but this jurisprudence is currently unclear and additional safeguards are required. Consideration should be given to the inclusion in welfare powers of attorney – on the basis that if implemented in accordance with the principles of the 2000 Act and its Code of Practice for Continuing and Welfare Attorneys these are granted and should operate as an expression of the granter’s autonomous wishes and feelings – of a power allowing the attorney to consent to a deprivation of liberty of the granter in specified circumstances and whether this will meet Article 5(4) ECHR requirements.

Q5. The Bill is currently silent on whether it should be open to a relevant person to seek a statement of significant restriction in relation to a person subject to an order under the 1995 or 2003 Acts which currently do not expressly authorise measures which amount to deprivation of liberty. Please give your views on whether these persons should be expressly included or not within the provisions, and reasons for this.

3.2.7 As already stated, the *Cheshire West* ruling indicates that a person will be deprived of their liberty engaging article 5 ECHR where they are subject to continuous supervision and control and are not free to leave. If these criteria apply to persons subject to orders under the 1995 and 2003 Acts which do not authorise deprivation of liberty then it is logical that the same protections are extended to them as for those who fall within the remit of the 2000 Act. However, the reservations mentioned above concerning use of ‘significant restriction of liberty’ and proposed safeguards are repeated here.

Q6. The process to obtain a statement of significant restriction would, as the bill is currently drafted, sit alongside existing provisions safeguarding the welfare of incapable adults, and require the input of professionals already engaged in many aspects of work under the 2000 Act, such as mental health officers and medical practitioners. Please give your views on the impact this process would have on the way the Act currently operates.

3.2.8 The implementation of the proposals in the draft Bill would result in a substantial increased burden on an already strained resource. There is a recognised national shortage of Mental Health Officers (MHOs) and an increasing burden on their time and responsibilities in terms of both the 2000 Act and the 2003 Act. Implementation of the proposals in the draft Bill and/or any increase in applications for guardianship as a result would exacerbate an already difficult situation leading

⁴⁶ *Stanev v Bulgaria* (2012) 55 EHRR 22, para 130. See also *Shtukaturov v Russia* (2008) (Application No. 44009/05) ECHR 223, para 108 and *Stankov v Bulgaria* (Application No. 25820/07) judgement of 17 March 2015, paras 89-90.

potentially to more delays for other applications especially if they are seen as a lesser priority. Any provision that tries to address the human rights implications of deprivation of liberty and which necessarily calls on the resources of MHOs will require additional funding and support to hire, train and retain suitably qualified personnel. This needs to be taken account of in any proposals.

3.3 Power to Make Order for Cessation of Unlawful Detention

Q1. Is a process required to allow adults to appeal to the Sheriff against unlawful detention in a care home or adult care placement?

3.3.1 Please see 3.3.3 below.

Q2. Is the proposed approach comprehensive?

3.3.2 Please see 3.3.3 below.

Q3. Are there any changes you would suggest?

3.3.3 The fact that this proposed provision again requires either action on the part of the adult (which may not be feasible) or is left to the discretion of someone else would suggest that this may not be compatible with the special procedural safeguards required by the ECtHR in relation to Article 5(4) for adults with incapacity (see 3.1.5 above).

4. Next Steps/Wider Review

As discussed in paragraph 2 above, the Society welcomes the opportunity to suggest areas for wider review.

4.1 A “one door” jurisdiction

The sheriff court as forum – the background

4.1.1 See the general comments on this topic in paragraphs 2.2 – 2.3 above.

4.1.2 In its Discussion Paper No 94 (September 1991) entitled *Mentally Disabled Adults: Legal Arrangements for Managing their Welfare and Finances*, the SLC asked the following question: “Should all applications relating to the personal welfare and financial affairs of mentally disabled people ... be heard by the courts, new Mental Health Tribunals or new Mental Health Hearings?” This became known as the “choice of forum” question. As a first stage in addressing that question, the Society sought to define what should be the characteristics of the forum. The following is a brief summary of the Society’s response (March 1992) to this question. The selected forum should have

comprehensive jurisdiction; adequate and appropriate for all, not merely the majority, of matters likely to be referred to it; be user-friendly, sensitive and approachable, but also capable of balancing conflicts between and among professionals, relatives and carers, and able to take account of the views and contribution of each without being unduly swayed by any; be capable of adjudicating effectively in situations of conflict which may involve questions of law as well as of fact; be clearly seen to have sufficient judicial competence, authority and independence “bearing in mind that most persons subject to its jurisdiction will have impaired ability to safeguard their own interests, and that the forum will accordingly require to be vigilant in protecting them”; have sufficient authority to ensure that its requirements are met and that professional input is comprehensible to lay participants; be seen to be clearly independent of social work authorities, health boards, etc; be able to respond quickly in cases of urgency; be locally available; have or develop knowledge and expertise in relation to all categories of mental disability; ensure that parties are not deprived of appropriate assistance and representation where necessary (including availability of Legal Aid); be capable of issuing clear and comprehensible written decisions, with adequate explanation of reasons, speedily; have the competency to produce a fully adequate stated case (or similar document) speedily, in the event of an appeal; and must be able to achieve public acceptability, not only by having all of the above attributes but by being perceived to have them.

4.1.3 The above reference to “comprehensive jurisdiction” should be read against the situation at that time that MHA matters were dealt with by the sheriff court, provisions dealing with vulnerable adults at risk in the community (which were replaced by the ASP jurisdiction) under National Assistance legislation were also dealt with by the sheriff court, *curators bonis* were appointed in both the sheriff court and the Court of Session, and appointments of tutors-dative and tutors-at-law (replaced by guardianship and intervention orders under the 2000 Act) were made in the Court of Session. At that time, accordingly, a “comprehensive jurisdiction” would best be achieved by selecting the sheriff court as the principal jurisdiction for AWI matters. The Society was however aware of substantial criticisms of the operation of the (then) MHA jurisdiction by the sheriff courts: see 4.1.6 below. After full discussion of alternatives, the Law Society submission concluded that if the courts were to be the forum “a new regime for mentally disabled adults could most effectively and efficiently be concentrated upon a small number of sheriffs who would then become ‘designated sheriffs’ for their sheriffdoms in respect of such procedures”. Such sheriffs would specialise and develop expertise. “... Of all options available, such a system of designated sheriffs would best meet all of the requirements identified above.”

4.1.4 The SLC wrote in the 1995 report: “In our discussion paper we put forward these three options – court, tribunal, or hearing – outlined their perceived advantages and disadvantages and asked for views as to which would be the most appropriate forum. We were of the view that, whatever forum

was adopted, that body should have exclusive jurisdiction over the entire range of matters dealt with in this report and also in relation to applications for detention under the 1984 Act and compulsory removal from home under section 47 of the National Assistance Act 1948 as amended by the National Assistance (Amendment) Act 1951.” (para 2.20) And “The ‘one door’ approach we advocated in our discussion paper was welcomed on consultation. The current need for separate applications (sometimes in different courts) to deal with a mentally incapable adult’s personal welfare and financial affairs was deprecated. Tribunals and hearings along the lines proposed were favoured by many respondents, particularly those in the medical and social work field, but the option of using the courts enjoyed majority support. Although, as might be expected, the legal respondents were in favour of courts, support for this option was by no means confined to this category of respondents.” (para 2.21)

4.1.5 The SLC 1995 Report should be referred to for its ensuing evaluation of the alternative choices of forum. Advantages of the courts were described as follows: “Courts were seen to be impartial, respected and authoritative and experienced in conducting hearings properly and producing reasoned written decisions. The other major factor that weighed with their supporters was that some of the matters would involve property and rights of considerable value, as distinct from considerations of the adult’s welfare. This demanded a forum capable of adjudicating such matters properly and this in turn pointed to the courts. Finally, the courts have the benefit of continuity; they are already dealing with many of the matters covered by our recommendations so that one would not need to set up new and untried tribunals or hearings.” (para 2.26)

4.1.6 The SLC 1995 Report also referred to “... the perceived disadvantages of the courts. The courts were regarded by many respondents as intimidating, legalistic, adversarial and only willing to look at the issues put in front of them, lacking in understanding of the needs of the mentally incapable, slow, expensive and associated with criminal proceedings” (para 2.28). The Scottish Law Commission commented that it believed that some of the criticisms were unfounded but acknowledged the need to address them. “The Law Society suggested that if the courts were to be the forum then proceedings should be conducted by specially selected ‘designated sheriffs’. These designated sheriffs should receive training about various aspects of mental incapacity and the needs of the mentally incapable and would specialise in such cases and so develop their expertise further. The concept of nominated or designated judges is not a new one. They exist in the Court of Session in relation to judicial review and in England and Wales for cases under the Children Act 1989. We think the Law Society’s suggestion is an excellent one that would go a long way to address the concerns expressed by those opposed to the use of the courts.” (also para 2.28)

- 4.1.7 The SLC 1995 Report further suggested that: “The way the courts deal with the mentally incapable could also be improved by requiring all hearings to be held in chambers. The normal public court rooms should not be used as they are unsuitable for small informal hearings. Indeed, we think it should be made competent for the sheriff to conduct a hearing outwith the court if that would be more convenient for those involved. There seems to us no reason why a hearing should not take place in a small private room in the hospital or other place where the adult is living. The sheriff should be directed to encourage discussion and be prepared in appropriate cases to take a proactive role in the process, by calling for further information, reports or assessments, for example. Some formality is necessary in legal proceedings. In relation to small claims in the sheriff court, hearings are directed to be conducted so far as practicable in an informal manner. We would adopt this standard for hearing applications recommended in this report.” (para 2.29)
- 4.1.8 Scottish Law Commission concluded this discussion as follows: “In our discussion paper we proposed that if the courts were to be considered the appropriate forum then the sheriff courts should have exclusive jurisdiction, apart from appeals. All those responding agreed with the exception of the Faculty of Advocates. The Faculty were of the opinion that the Court of Session should have concurrent jurisdiction so as to be available to decide cases where large sums of money were at stake or the issues were unusually complex. We would adhere to our original proposal with cases being heard only by specially trained ‘nominated’ sheriffs, who would be experienced in dealing with cases involving mental disability.” (para 2.30) The one exception to this in the SLC 1995 Report and appended draft Bill was that applications in relation to withholding or withdrawing of medical treatment from incapable patients should be heard by the Court of Session. However, those provisions were not included in the 2000 Act as enacted. The role ascribed to the Court of Session in Part 5 of the 2000 Act was not included in the equivalent Part 5 of the draft Bill annexed to the SLC 1995 Report. Accordingly, viewing the landscape of the three jurisdictions as it was, and was envisaged, at the time of the SLC 1995 Report, a “one door” approach (as unanimously and strongly favoured by the vast majority of consultees and respondents) would have been achieved across the three jurisdictions upon enactment of the 2000 Act in the form annexed to the SLC 1995 Report.

The sheriff court as forum – the current position

- 4.1.9 The achievement of a “one door” approach was short-lived. Part 6 of the 2000 Act, *inter alia* transferring welfare guardianship jurisdiction from the Court of Session to the sheriff court, was brought into force on 1st April 2002, and final and full commencement of the 2000 Act was achieved on 4th November 2004. However, the 2003 Act transferred MHA jurisdiction from the sheriff court to the Mental Health Tribunal for Scotland – see in particular Part 3 of, and Schedule 2 to, the 2003

Act, the provisions of which came into force in October 2005. The implications of abandoning the “one door” approach do not appear to have been fully considered at the time. In any event, the sheriff court AWI jurisdiction had not yet “bedded in”, and there were strong arguments in favour of the tribunal route for the MHA jurisdiction.

4.1.10 Moreover, the “one door” approach was somewhat diluted in the 2000 Act with the introduction of a role for a Court of Session under Part 5 of that Act. More significantly, section 2(5) of the draft Bill annexed to the SLC 1995 Report was omitted from the Bill as introduced to the Parliament, and from the 2000 Act as enacted. Section 2(5) read: “All applications and proceedings under this Act shall be disposed of by a sheriff nominated for the time being for that purpose by the sheriff principal, unless no such sheriff is available to do so”. Accordingly, an essential element of the choice of the sheriff court as forum was omitted. The Society has repeatedly urged that this deficiency be made good. The Society’s representations included that the proposal to create a specialist personal injury court in what became the Courts Reform (Scotland) Act 2014 should be widened to a general enabling power to introduce judicial specialisation in the sheriff court. That representation was successful, and the Courts Reform (Scotland) Act 2014 does contain such provisions, but despite further representations by the Society they have not yet been utilised to remedy the omission in that regard from the 2000 Act as enacted. To a limited degree, there has been some specialisation in some larger courts, but across Scotland the advantages of specialisation among the judiciary have not yet been realised. To a large extent, the courts remain adversarial in nature, rather than inquisitorial (at least to the minimum extent of ensuring compliance with the section 1 principles of the 2000 Act). There is a need for proactive and informed case management in the AWI jurisdiction, often cases which should have been disposed of at first hearing are continued, often to several subsequent hearings, delaying an appropriate outcome and generating significant and avoidable cost to the public purse, as well as inconvenience to all concerned; and risking a deterioration in relationships, within families and between families and authorities and carers, notwithstanding that such relationships will continue to have to be made to work for the benefit of the adult after resolution of the proceedings in question. Variations in practice and outcomes are huge. Despite the clear and widely accepted wisdom of the comments in para 2.29 of the SLC 1995 Report (see 4.1.7 above), at least one court continues to address the sensitive, personal and confidential matters which arise under the AWI jurisdiction in open court. In one case shortly before this response was drafted, a court insisted upon imposing a five-year time limit in a guardianship order relating to a 91-year old adult with deteriorating and irremediable dementia; and another court granted a lifelong guardianship order for a 17-year old with a learning disability, in complete disregard of one of the fundamental reforms in the 2000 Act (presaged by the approach of the Court of Session under the tutory jurisdiction) to ensure periodic

review of such appointments. Many cases under the AWI jurisdiction continue to be approached by the courts in the manner of child law cases, without apparent regard to the fundamental difference in such matters between children and adults. For example, this is reflected in the prevalence of “best interests” decisions despite the explicit rejection of that approach for AWI purposes (see para 2.50 of the SLC 1995 Report) and the rejection of such an approach for the purposes of CRPD (see para 7 of the General Comment). In relation to these concerns, see further section 6 of this response.

4.1.11 Regrettably, the disadvantages of the courts reflected in para 2.28 of the SLC 1995 Report (see 4.1.6 above) are still experienced in the AWI jurisdiction, and in the experience of practising members of the Society, continue to give rise to disadvantage to vulnerable people and distress to those closest to them. In short, the AWI jurisdiction as currently operated is seriously inefficient and wasteful of resources and, in the experience of many of those who have to engage with it, it is not fit for purpose.

The Mental Health Tribunal for Scotland

4.1.12 The Mental Health Tribunal for Scotland (“MHTS”) was established in October 2005 and has thus now been operating for just over a decade. It encountered early procedural difficulties and inefficiencies. These gave rise to widespread dissatisfaction, and complaints. It is to the credit of the leadership of MHTS these early difficulties and inefficiencies were addressed positively and effectively. The MHTS now operates with a budget in the area of £7.5 million, which is considerably less than earlier year allocations.

4.1.13 The operation of MHTS benefits not only from effective dedicated administrative and judicial management, but from the continuing attention given to the process of tribunal reform in Scotland, which continues to gather pace. The Tribunals (Scotland) Act 2014 (“the 2014 Act”) established the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland. The First-tier Tribunal is to be organised into a number of chambers having regard to the different subject matters, two of which include a Mental Health chamber and a Health and Education chamber. A decision of the First-tier Tribunal may be appealed to the Upper Tribunal, which will introduce a significant change for tribunals whose first route of appeal is currently to the courts. The Lord President is Head of the Scottish Tribunals. The main emphasis of tribunal reform is to introduce consistency in proceedings, to improve the quality of the experience for those who use tribunals and to improve access to justice.

4.1.14 The MHTS has a well embedded training model, which retains its specialist function. The MHTS has also carefully addressed matters such as the fundamental differences between children and

adults (in that respect, having introduced a further refined process for hearings in respect of children, and of adolescents up to the age of 18 years).

- 4.1.15 The MHTS receives around 4000 applications etc. a year and around 50% of cases remain as single sittings (as opposed to double or triple hearings where two or three cases are allocated to one sitting). This provides potential spare judicial capacity for around 2000 cases. The tribunal model has been well received by patients and their relatives, the majority of whom continue to attend hearings. This contrasts with experience of the former MHA jurisdiction before the sheriff courts, and much experience of the current sheriff court jurisdiction under the 2000 Act.
- 4.1.16 The MHTS has in place an established judicial in-house convener system, which allows procedural and interim decisions to be taken, before the hearing. This has significantly reduced the number of multiple hearings, and leaves the three-member system to determine the application, including where the application is of a complex nature. Moreover, the MHTS process allows a three-member tribunal to reach a decision on the written evidence without the need for an oral hearing, where the provisions of the Tribunal's Rules are complied with (Rule 58, as amended). The added value of an experienced medical and general member contributes to the quality of decision-making.
- 4.1.17 The MHTS has a significantly superior system to that of the courts for addressing issues of assessment of capacity, direct engagement with the affected adult, and representation. As we note in section 7 (under reference to section 3(4), (5) and (5A) of the 2000 Act, the 2000 Act is not particularly clear as to the respective roles of safeguarders, persons appointed to convey the views of the adult, advocates and – where appointed – curators ad litem; there being further issues about the role and responsibilities of solicitors engaged by any of these, or by another party who may have received intimation such as the adult's named person. There is also lack of clarity about how each should approach their task. In court proceedings generally, there is a tendency for curators ad litem to act on the basis of their perception of the best interests of the adult, as if the adult were a child, rather than to concentrate upon what the adult actually wants. There is significantly better clarity and control of these matters under MHTS. The role of curators ad litem is more focused upon the adult, and subject to more careful control on a case-by-case basis. In practical terms, appointments are often made by an in-house convener when an application is first submitted.
- 4.1.18 The MHTS has regular forums and consultations with stakeholders, to enhance information exchange and to inform developing practice. The MHTS has maintained a local presence, which improves access to justice and is more likely to facilitate attendance and participation in the hearing by the patient (and their named person). This assists compliance with CRPD. The MHTS has access to a wide range of community and hospital venues for hearings, which take place across Scotland. The use of video linking is also available.

4.1.19 The MHTS has succeeded in reducing the number of multiple hearings and delays before a decision is issued. The majority of decisions are delivered orally at the end of the hearing, with the written decision following promptly thereafter.

4.1.20 Despite the rising volume of business the MHTS has a relatively low number of appeals to the sheriff Principal and the higher courts. Following the transfer of the MHTS to the Scottish Tribunals, appeals will be made to the Upper Tribunal. The Society, in its response on the Tribunals (Scotland) Bill, commented positively on the benefits of the Upper Tribunal, which will introduce time and cost efficiencies and the advantage of specialist judges.⁴⁷

A consolidated tribunal jurisdiction

4.1.21 It flows from the foregoing narrative and analysis that, in the Society's view, both in terms of adequately meeting the needs of vulnerable people and of the compelling requirement, particularly in the current climate, to eliminate inefficient use of resources and achieve maximum value for money, there is a need to consolidate the three jurisdictions within a single tribunal, formed by expanding MHTS to encompass the AWI and ASP jurisdictions.

4.1.22 The experience of those with whom the jurisdictions engage would be much improved by all of the advantages of the MHTS system. Importantly, the needs of any one vulnerable adult will often engage two of the three jurisdictions, or all of them. That is particularly so in the case of elderly adults, over 65. The main growth in applications to the MHTS in recent years has related to such elderly adults. Efforts to involve the AWI and/or ASP jurisdictions, when such needs are identified before MHTS, where the MHTS can do no more than make requests or references (and sometimes attempt to back these up with making recorded matters) are inherently inefficient. Having one forum to decide the appropriate intervention whether compulsory treatment, an ASP intervention, welfare, property or financial guardianship, would reduce duplication in pre-hearing resources and in judicial time and, most significantly, reduce the number of proceedings to which the vulnerable adult is exposed. Taking this combined approach may also better determine questions of deprivation of liberty. Such needs for cross-referral arise within the AWI and ASP jurisdictions, giving rise to similar inefficiencies, where they are addressed at all.

4.1.23 The in-house convener system of MHTS and its process such as allowing a three member tribunal to reach a decision on written evidence alone, would work well in some AWI and ASP

⁴⁷ The Tribunals (Scotland) Bill, The Law Society of Scotland's Response (August 2013)

cases. To the extent that sheriffs have developed relevant expertise, the MHTS already has sheriff conveners, who could sit on particularly complex cases. The MHTS system of regular forums and consultations could be developed, to include in particular the Office of the Public Guardian. The added value of experienced medical and general members of MHTS could well improve the quality of AWI and ASP determination. Particular efficiencies would flow from allowing some relatively minor applications and appeals to the sheriff under the 2000 Act to be determined speedily and efficiently, and where appropriate without an oral hearing, by an in-house convener. The other features of MHTS described in paragraphs 4.1.13 – 4.1.20 above would improve both the quality and efficiency of determination of many AWI and some ASP matters.

4.1.24 In addition to the other advantages, the Society considers the tribunal model, as it has now developed, to be culturally more suited to the determination of matters involving vulnerable adults, whichever of the relevant jurisdictions are engaged by their needs.

4.2 Under-provision of Mental Health Officers

4.2.1 Applications in terms of Part 6 of the 2000 Act require to be supported by reports in prescribed form. Where the application relates to the personal welfare of the adult, a report in prescribed form must be obtained from a mental health officer (or from the chief social work officer, but only where the adult is unable to communicate). The report from the mental health officer must contain his or her opinion as to the appropriateness of the orders sought and the suitability of the individual or individuals nominated in the application. The report must be dated no more than 30 days prior to the lodging of the application. The relevant provisions in relation to the requirement for such a report are contained within Section 57(3)(b) and Section 60(3)(b) of the 2000 Act. The requirement for a report in prescribed form from a mental health officer is also extended to Intervention Orders in terms of Section 53(4) of the 2000 Act.

4.2.2 In terms of Section 57(4) of the 2000 Act, applicants must give notice to the chief social work officer of their intention to make an application under the relevant section and the report in prescribed form **shall** be prepared by the chief social work officer or the mental health officer **within 21 days of the date of the notice**. It is widely acknowledged among practising solicitors that this statutory time limit is very rarely, if ever, complied with by the local authority.

4.2.3 We are aware of solicitors regularly having to wait a number of months for such reports with timescales varying between local authorities. Timescales for completion of such reports can also vary widely within the same local authority area, often depending on the degree of urgency attributed to the application by the individual within the local authority responsible for allocating the

mental health officer. Delays can extend from 2 - 3 months, up to 6 - 9 months in some of the worst delays we are aware of. The explanation for the delays appears to be a lack of mental health officers available to complete such reports and pressures on mental health officers in terms of other duties imposed by the 2003 Act and the 2007 Act.

- 4.2.4 We are also aware that some local authorities take the view that their obligation is to allocate the matter to a mental health officer within 21 days of intimation, rather than to produce the report within the 21 day period. Other local authorities have introduced an additional step to the process by responding to intimations advising of the individual who will be responsible for allocating the mental health officer. Others advise that allocations will be made on the first Friday of each month. Another local authority appears to have standardised and institutionalised the breaches of statutory duty in terms of Section 57(4) of the 2000 Act by issuing a standard response to all intimations including wording advising that due to pressures of requests for such reports and limited availability of mental health officers available to take on the work, it is not possible to allocate the report requested at present. The standard letter goes on to advise that the local authority is operating a waiting list for allocation and that they are unable to advise when it will be possible for the report to be allocated, although this is likely to be 10 - 12 weeks from the date of the request.
- 4.2.5 The terms of Section 57(3)(b) of the 2000 Act are generally interpreted as meaning that an application cannot be lodged with the court until such time as the report in prescribed form from the mental health officer is available. The delay in obtaining such reports therefore results in a subsequent delay in lodging such applications with the court and is a serious deficiency in the current system, proving detrimental to vulnerable persons. Such delays can lead to adults remaining on hospital wards for very long periods of time after they have been assessed as being suitable for discharge. It can also lead to delays in vulnerable adults accessing support packages, for example through self-directed support arrangements.
- 4.2.6 The draft Bill annexed to the SLC 1995 Report simply provided that relevant applications be accompanied by a mental health officer's report, without any equivalent of section 57(4) of the 2000 Act. However, during the legislative process leading to the introduction of the 2000 Act, concerns were expressed that it would be unacceptable for applicants to encounter delays in proceeding with applications under Part 6 of the 2000 Act as a result of the requirement in terms of Section 57(3)(b) of the 2000 Act. There was recognition of the workload and resource implications for mental health officers. There was consensus that it would be essential either to impose a time limit for completion of reports or to permit an alternative source of reports. In the course of discussion as to how provision for an alternative source might be implemented, the convener of MHDC proposed (by

paper dated 1st June 1998) the following paragraph to follow immediately after what is now section 57(3)(b) of the 2000 Act:

“(c) Where the application relates to the personal welfare of the incapable adult, the report as to the matters referred to in paragraph (b) above shall be provided either –

“(i) by the mental health officer within the meaning of the 1984 Act of the local authority; or

“(ii) by a person of such a category as may have been prescribed for the purpose; or

“(iii) by such other person as the sheriff may in the circumstances consider to be appropriate to provide such report; and [what is now section 57(3)(c) to be re-designated (d)]”

4.2.7 The Parliament opted for the time limit approach which appears in section 57(4). The delays which have gradually crept into supplying such reports in the intervening years have proved the time limit approach to be unsuccessful. There has been an increasing disregard by local authorities of the statutory time limit, but the obligation in terms of Section 57(4) of the 2000 Act is absolute and is an essential safeguard for vulnerable adults who may otherwise be left unnecessarily in appropriate accommodation (including bed blocking in hospital) or “in limbo” while decisions in relation to personal welfare and/or property and financial affairs cannot be made. As stated above, it is generally considered that the report must be obtained prior to the application being submitted to the court and therefore not even an interim order can be obtained until such time as the report in prescribed form has been submitted to the court.

4.2.8 Such lengthy delays are also potentially a breach of the right to a fair hearing within a reasonable time in terms of Article 6(1) of the ECHR. In addition, such delays could compound potential deprivation of liberty issues in terms of Article 5 of the ECHR.

4.2.9 The most recent figures available from the Mental Welfare Commission for Scotland indicate a 109% increase in guardianship applications that require a mental health officer’s report in the five years to 31st March 2015. This appears to have coincided with a reduction in the number of available mental health officers and increasing roles imposed on them in terms of the 2003 and 2007 Acts, and has no doubt led to the very lengthy delays in obtaining reports from mental health officers experienced by most practising solicitors. While we have sympathy with the resourcing issues and competing pressures faced by mental health officers, the current situation is unsustainable and is unlawful given the terms of Section 57(4) of the 2000 Act.

4.2.10 We are aware that, notwithstanding the general view indicated above, in one recent case a guardianship application was submitted without a mental health officer’s report (although it was in the category requiring one) and including a crave under sections 3(1) and (2) of the 2000 Act that

the local authority be ordained to produce a mental health officer's report within 14 days. An order in accordance with that crave was granted. However, in a subsequent similar case such an order was refused. We are also aware that some solicitors have submitted separate applications under Section 3(3) of the 2000 Act for a direction from the sheriff requiring a local authority to produce a mental health officer's report within a specified timescale. Such applications have had varying success and add additional steps to the process, which should not be necessary given the absolute duty on local authorities in terms of Section 57(4) of the 2000 Act. In any event, such procedures cannot resolve the underlying problem of a severe shortage of mental health officers: they will only, at best, cause some individual applications to "jump the queue".

4.2.11 There is an urgent need to facilitate and resource the recruitment and training of substantially more mental health officers, or alternatively – and in any event as an interim measure - to consider the possibility of obtaining reports in such prescribed form from an alternative source. Given that the statutory time limit imposed by Section 57(4) of the 2000 Act is regularly not met by local authorities, allowing for reports to be obtained from an alternative source may provide a workable solution to the present problem and the lengthy delays in submitting applications in terms of Part 6 of the 2000 Act to court. A provision worded along the lines of the 1998 proposal quoted in paragraph 5.6 above could meet that urgent requirement.

4.3 Compliance with the UN Convention on the Rights of Persons with Disabilities ("CRPD")

4.3.1 The reforms to the 2000 Act which are required to achieve compliance with CRPD were outlined in the Society's response of January 2016 to the Scottish Government Consultation on the UN CRPD Draft Delivery Plan 2016 – 2020. As we pointed out in that response, the UK Government has ratified CRPD without any of the reservations which some states introduced with a view to permitting continuation of so-called "substitute decision-making" procedures. The General Comment is clear that all substitute decision-making must be replaced with supported decision-making. The work of the Essex Autonomy Three Jurisdictions Project, referred to in the Society's "General Comments" at the beginning of that January 2016 response, continues. As there noted, one half of the core research group for the Project comprise members of MHDC. It is now intended that a draft final report by the Project will be presented at an event at the Institute of Government in London on 12th May 2016. Until such conclusions have been reached, the Society's responses regarding compliance with CRPD remain provisional. What remains clear is that a "best interests" approach to decision-making for adults with impairments of capacity remains unacceptable, however couched, for example if couched in terms of giving precedence to the "benefit principle" in section 1(2) of the 2000 Act. As noted in the Society's 2016 response, a "best interests" approach was explicitly rejected for AWI purposes. It is particularly disappointing that, half of the sheriffs who

have issued written decisions under the AWI regime have explicitly applied a “best interests” approach, and a recent appeal decision has effectively applied that approach by giving precedence to the “benefit principle”.⁴⁸

- 4.3.2 Researches by the Essex Autonomy Three Jurisdictions Project into the travaux préparatoires for CRPD cast doubt on claim that it was intended to require the abolition of all substitute decision-making. On the contrary, many of the states parties representatives who drafted the text of Art. 12 specifically called for the *retention* of substitute decision-making, together with appropriate safeguards as required under Art. 12(4). Details of this analysis will be included in the “Three Jurisdictions” CRPD Report, publication of which is expected in June, 2016. In the case of people with significant impairments of capacity (however much direct support they receive) the General Comment urges a “best interpretation of will and preferences”, which can reasonably be equated to the “constructing decisions” methodology referred to in the January 2016 response and in the article mentioned. Recent scholarship examines the requirement to move towards a regime of maximum support for those capable of acting and deciding if given such support, together with a “best interpretation” (or “constructing decisions”) approach for those whose relevant capabilities are significantly impaired.⁴⁹
- 4.3.3 In terms of necessary amendments to AWI, the general requirements are for a strengthening of supported decision-making, a strengthening of the “constructing decisions” methodology which already represents best practice under the 2000 Act, and robust provisions to prevent “best interests” decision-making. To achieve such outcomes both upon the face of legislation and delivered in practice requires both amendment to the Act and true informed specialisation on the part of whatever forum in future deals with the AWI jurisdiction.
- 4.3.4 Necessary statutory amendments remain as outlined in the January 2016 response, except for item j) which is superseded by 4.1 above. For convenience, those requirements are re-stated here, as follows:
- “a) The requirements to give all reasonable assistance in communicating (in s1(4)(a) and s1(6) of the 2000 Act) should become a robust obligation upon specified persons, and should be extended to an obligation upon specified persons to provide all support necessary to enable

⁴⁸ Ward “Abolition of Guardianship? ‘Best interests’ versus ‘best interpretation, 2015 SLT (News) 150

⁴⁹ Ward “Resolving Dissonance: Comments on themes from an American in Paris”, 2016, 6 Eld LJ, 54

an adult to exercise such capacity as may – with such support – be within the adult’s capabilities.

- “b) There should be an explicit rebuttable presumption in favour of capacity in relation to any adult for the purposes of any particular act or decision.
- “c) In statute, it should be declared that the starting-point for decision-making should be a requirement to ascertain the adult’s past and present ‘wishes and feelings’, as the primary element in achieving respect for the adult’s ‘rights, will and preferences’.
- “d) In statute, there should be a rebuttable presumption in favour of implementing consistent (and not mutually conflicting) will and preferences.
- “e) In practice, items c) and d) should be implemented from now on by adopting the ‘constructing decisions’ approach.
- “f) A range of techniques (DWP appointeeships, management of damages payments, and so forth) are not CRPD-compliant. Part 1 of the 2000 Act should apply to all situations where someone acts, manages or decides on behalf of an adult.
- “g) Under private ‘third party measures’, where trustees are in effect exercising management functions in respect of funds allocated to, or which they have discretion to allocate to, a person with some degree of relevant disability (or under arrangements predicated upon such relevant disability) the s1 principles of the 2000 Act, and perhaps some other provisions, should apply.
- “h) Under s67(5) of the 2000 Act, deemed validity is conferred upon transactions authorised by a guardian. This could be extended to transactions authorised by an attorney.
- “i) Either in the 2000 Act or in relevant rules of court, there should be a clear requirement to facilitate the personal participation of the adult, to supplement this where necessary, to record how this has been done, and in the absence of participation to record the reasons and to record the steps nevertheless taken to ascertain the ‘will and preferences’ of the adult. (Recently introduced rules of court in England & Wales are designed to ensure that this is done and recorded.)
- “j) [See section 4.1 above]
- “k) Consideration should be given to introducing concepts of ‘assisting’ and ‘acting with’ the granter in Powers of Attorney; and the introduction of the role of supervising attorney. As

Scotland does not have prescribed forms of Powers of Attorney, these features could initially be introduced as a matter of good practice where desired by granters.

“I) For full compliance, the principle of reversed jurisprudence will probably be required.”

4.3.5 We also stressed the importance, to achieve CRPD compliance, of remedying the serious shortage of mental health officers. That matter is addressed in section 5 of this response.

4.4 Other areas for review in the 2000 Act

4.4.1 For convenience, paragraphs in this section are identified by reference to Parts, sections, Schedules or their paragraphs, of the 2000 Act. This section does not replicate the identification of areas for review in other sections of this response, but does contain some selective cross-references to them.

4.4.2 A general concern relates to unnecessary differences in provisions as between different Parts of the Act (and indeed as between the 2000 Act and the 2003 Act, or the 2000 Act and the 2007 Act). As a matter of strict interpretation, this could mean that a provision applicable only in one context was expressly intended not to be applicable in other contexts. In each case, that was not necessarily in fact the intention of the Parliament. We raise general points under the provision of the 2000 Act where they at present arise, or first arise, but they should be understood as each having more widespread application.

Section 1(1) – We are aware that it has been questioned whether here and elsewhere references to “an adult” should be limited to adults with some relevant impairment of capacity. In our understanding the use of “adult” was deliberate, and in our view it should be retained. The view that such provisions should be limited to adults with identified impairments of relevant capacity would contravene the requirements of CRPD to avoid discrimination on grounds of disability, and in any event would be impractical in many cases as it would give rise to a need to try to assess capabilities in relation to a particular purpose and in the particular circumstances, which in relation to general provisions such as section 1(1) would create an impossible circularity.

Section 1(5) –

a) The term “continuing attorney” causes confusion. It requires countless repeated explanation to members of the public. In a wider context, it is inconsistent with the more logical use of “continuing power of attorney” in Council of Europe Recommendation (2009)¹¹ as meaning any power of attorney (whether covering property and financial matters, or welfare matters, or both) intended to enter into force or continue into force following relevant incapacity of the granter. It

is a further difficulty and cause of confusion that the terminology “continuing attorney” and “welfare attorney” is not replicated in relation to guardians. One of the basic distinctions throughout the 2000 Act is between an adult’s property and financial affairs, on the one hand, and an adult’s personal welfare (including healthcare matters) on the other. We would recommend careful consideration of the introduction for all purposes, including in the primary legislation itself, of terminology such as “financial/property attorney” (or “financial attorney”), “financial/property guardian” (or “financial guardian”), “welfare attorney”, and “welfare guardian”. Similarly, there should be introduced descriptions such as “financial/property powers” (or “financial powers”), and “welfare powers”.

- b) Other provisions of the 2000 Act can unduly restrict the performance of the obligation in section 1(5). For example, it may be appropriate to allow and encourage an adult to have access to, and operate, an account held by a guardian or subject to Part 3 administration. Such an arrangement would present issues of control and accountability, but these are issues which should be addressed.

Section 2 –

- a) See section 4 of this response.
- b) Current exploration of the potential for mediation in contested AWI proceedings should be encouraged and provisions added to the 2000 Act to ensure that mediation is attempted in contested situations except where there is self-evidently no prospect of mediation succeeding even in narrowing the areas of dispute.

Section 3(2)(d) – It is a matter of significant concern that the requirements of section 11, providing for strict criteria and procedures for an application or other proceedings not to be intimated to the adult, can be circumvented – and sometimes have been circumvented – by seeking an interim order in terms of this section. Compliance with section 1(4)(a) should be a strict condition before a sheriff makes an interim order. Even in matters of immediate urgency, there should be a requirement for what is proposed to be effectively communicated to the adult, and for the court to be satisfied that this has been done.

Section 3(3) –

- a) The power to give directions to people exercising functions under the 2000 Act (or foreign equivalents of functions under the Act) should be widened to include persons formerly exercising such functions, so that (for example) a former attorney or guardian could be ordered

to provide information, deliver items held, execute documents, and so forth, where reasonably required by an attorney or guardian currently acting, or by executors.

- b) The power under section 3(3) should be extended to a discretionary power to give directions to anyone where that is appropriate for the proper operation of provisions of the 2000 Act. An example would be to instruct and authorise a pension provider to transfer payments into an account which could be operated under Part 3.

Section 3(4), (5) and (5A) – See comments at section 4.16 of this response. There is insufficient clarity as to the respective roles of safeguarders, persons appointed to convey the views of the adult and advocates, and what are the criteria by which they should discharge their functions: particularly as to the extent to which they should act in accordance with the wishes, will and preferences of the adult, rather than any views which they themselves form and which might be contrary to what the adult wants. There is also at present insufficient requirement to involve the adult directly in proceedings – see item i) of paragraph 6.4 of this response. The actual participation of adults themselves also requires to be strengthened in accordance with the “rule of personal presence” developed by the ECtHR in cases such as *Shtukaturov v Russia* (App No 4409/05) (2008) 11 CCL Rep 440.

Section 3(5A) and (5B) – These provisions should be transferred to section 1, so as to form part of the principles, and should be of general application.

Section 6(1) – The principal post is now that of Public Guardian. The functions of the Accountant of Court are still required, but are of minor relevance in comparison. Section 6(1) should now read “There shall be a Public Guardian”. There should be a further provision that “the Accountant of Court shall be either the Public Guardian, or such person responsible to the Public Guardian as may from time to time be appointed as Accountant of Court by the Public Guardian”.

Section 6(2)(b) – It is clear from the SLC 1995 Report that it was intended that the full text of any relevant order or document (including, for example, a power of attorney document) should be held on a public register and made available to anyone upon payment of a prescribed fee. It was further intended that prescribed relevant matters occurring subsequently to initial registration should be registered and should similarly be made publicly available. These provisions were conceived before cyber crime, identity theft, and other risks became significant threats, particularly to vulnerable adults. They probably take insufficient account of rights to data protection, and to protection of privacy under ECHR Article 8. The Public Guardian in fact currently seeks to exercise control over disclosure of information on the registers established under this section. On the one hand, she is at risk of being forced to disclose (for example by an application under section 3(3)).

On the other, there are frequent complaints that information is not disclosed where reasonably required, for example where an adviser whose client complains about the actions of an attorney requires to see the terms of the power of attorney document in order to advise whether the attorney is acting in accordance with them. The envisaged regulations have in any event never been promulgated (raising *inter alia* a question as to whether it is a breach of ECHR for responsible ministers to fail to prescribe matters by regulation where that is provided for in the primary legislation). It should be noted by contrast that the Rules of Court in relation to registration of international deeds are precise and specific as to what should be registered (though the extent of that requirement may give rise to the risks identified above: there should be a clear review of the position, then consistency across all provisions regarding registration and release of information).⁵⁰ Under the tribunal model suggested in section 4.1 above, issues about disclosure of registered information could often be resolved on a “desktop” basis by an in-house tribunal convener, without requiring a cumbersome court application under section 3(3).

Section 6(2)(c) and (d) – It appears to be necessary to specify that these powers are not exercisable following the death of the adult in question, though it should also expressly be provided that an investigation in relation to a deceased adult is competent where another adult could be at risk (for example, where the same person is attorney or guardian both to an adult now deceased and an adult still alive). There should also be review of the position where (for example) the executor who would normally be expected to challenge the actings of an attorney is the same person as the former attorney. It would be appropriate to review the respective positions of beneficiaries, executors, and former appointees under the 2000 Act, including where the same person occupies more than one of those roles.

Section 6 generally – Consideration should be given to creating a register of persons found to have acted wrongfully, or wilfully to have acted inappropriately, in roles under the 2000 Act. Such entry on the register would be grounds, or at least *prima facie* grounds, for refusing any future such appointment, removal from any other such appointment held, and disqualification to act as an executor (and perhaps in other fiduciary categories). Rules on disqualification from acting as a company director could be considered as a comparator. Such disqualification might be one of additional grounds for inclusion in the proposed register.

Section 7(1) – See previous comments regarding section 6(2)(b).

⁵⁰ Act Of Sederunt (Summary Applications, Statutory Applications And Appeals Etc. Rules) 1999

Section 9 – The investigatory powers of the Mental Welfare Commission have been transferred to the 2003 Act, but issues such as those raised in relation to section 6(2)(c) apply to those powers.

Section 10(1)(c) and (d) – See comments on section 6(2)(c) and (d).

Section 11 – See comments on section 3(2)(d).

Section 12 – There should be full co-ordination of investigations under the 2000 Act, the 2003 Act and the 2007 Act, and better correlation of criteria.

Section 13 – Existing codes of practice require review for accuracy, and there should in future be requirements for consultation prior to amendment to codes of practice, as well as prior to original issue. In consequence of inadequate consultation, an amendment to the code of practice for guardians and appointees under intervention orders erroneously suggests that administration of a direct payment is competent under a welfare guardianship order, when this is clearly a financial matter.

Section 15(3)(ba), and also section 16(3)(ba) – The outcome of the granter’s consideration (and not just the fact that the granter has considered) must be included in the document.

Sections 15 and 16 – Scottish provisions are relatively unusual in that registers disclose powers of attorney which have been granted and registered, but will not necessarily indicate which are in fact being operated. Consideration should be given to a simple form of notification to the Public Guardian where an attorney (who may have been appointed very many years previously) has commenced acting.

Section 15(5) – It is inappropriate that bankruptcy of the granter should bring a power of attorney to an end. It would be obviously inappropriate for the attorney to act in circumstances where it would no longer be competent for the adult to act, but beyond that the protections of having an attorney are likely to be more necessary in such situation. “Bankruptcy” for the purposes of this provision should be more clearly defined. Similar provisions should apply to guardians, appointees under intervention orders, and also withdrawers acting under Part 3, as regards property and financial powers. In principle, there should be provisions for reinstatement of an attorney (or guardian or appointee under an intervention order or withdrawer), by application, when the bankruptcy is “spent”.

Sections 15 and 16 generally – It should be explicit that only a person who has attained the age of 16 may act as an attorney (there may be circumstances in which it might be appropriate to appoint

them at a younger age, but the appointment could only be accepted and acted upon once the person appointed has reached the age of 16).

Section 16(6) – See comments on section 64(2).

Section 17 – Upon a strict interpretation, it would appear that guardians, withdrawers and appointees under intervention orders are required to act even in circumstances where, under section 17, an attorney is not obliged to act. This provision should be translated into a provision requiring proportionality, and included in section 1.

Section 19(2) – The Public Guardian should be authorised to defer registration on cause shown, pending a decision under section 3(3) whether to register or not. The Public Guardian should be able to call for additional reports or information on cause shown and make a decision whether to register or not (subject to application to the court). The same should apply to registration of a revocation notice under section 22A.

Section 19(2)(b) – The meaning of “send” should be reviewed, throughout the 2000 Act, and likewise “receive” should be defined. The new definition should include electronic transmission and provision for e-signatures.

Section 19(2)(c) – “give notice” should be similarly reviewed.

Section 19(4) – There appears to be widespread confusion about the requirement for authentication by the Public Guardian. Many banks and financial institutions appear to have procedural requirements to see a certificate “with a red seal”. This section should be expanded to cover all competent methods of authentication of copies, including by the granter or others in accordance with the Powers of Attorney Act 1971

Section 19(5)(b) – This should be replaced by a provision entitling the person who has submitted the document for registration to be provided, upon request, with up to a stated maximum number of authenticated copies (or alternatively for these to be provided to the granter). It would then be for the recipients of those copies to do with them as they wished.

Section 20 – Upon cause shown following investigation, the Public Guardian should be entitled (subject to appeal to the sheriff) to put an attorney under supervision, to give directions to an attorney, and to suspend an attorney from acting pending a decision by the sheriff under section 20.

Section 20(2) – It should be clear that where there are joint attorneys the various powers of the court may be exercised in respect of one only, or in respect of both, or differently in respect of each.

Section 22 – There is reference in the fees order to a “Deed of Amendment” but no provision in the Act for notification of more than the matters set forth in section 22. Consideration should be given to explicitly prohibiting any amendment to any of the effective provisions of a power of attorney document, the appropriate procedure in such an event being to grant and register a fresh document. On the other hand, it should be possible to notify some events and obtain a fresh certificate. Examples would be changes in the name or other particulars of granter or attorney.

Section 22A – There should be provisions similar to those in relation to section 19(2) noted above relevant to revocation notices, and a further provision permitting removal of a revocation notice from the register, and reinstatement of the power of attorney, where a purported revocation notice is shown to be vitiated by lack of capacity, undue influence or other factors.

Section 22A(2)(b) – A power of attorney is a contract between granter and attorney. It should not be competent effectively to end such a contract by notice only to a third party (the Public Guardian) and subsequent intimation to the attorney. The certificate should require inclusion of confirmation that the contract has been ended by notification in writing to the attorney, with particulars of the date and method of intimation of that notification.

Section 24 – There should be provisions for the termination of a power of attorney upon the incapacity of the attorney.

Part 2 generally

- a) There should be provisions equivalent to section 64(6) permitting an attorney to delegate, but remaining accountable.
- b) There should be better provision in relation to joint attorneys, including a presumption that provisions equivalent to those of section 62(6) (in respect of joint guardians) shall apply if and to the extent that the power of attorney document does not stipulate otherwise.
- c) There should be better provision in relation to substitute attorneys, including a requirement for the substitute to submit notice to the Public Guardian, including notice of acceptance of substitute appointment, upon the substitution being triggered.
- d) There should be provision expressly permitting the appointment of a supervising attorney (as under some other jurisdictions) particularly having regard to the requirement for effective safeguards in Article 12 of CRPD.

- e) Also having regard to the requirements of CRPD and the terms of the General Comment, there should be express provision for incorporation of supported decision-making and co-decision-making clauses in power of attorney documents.

Section 24B(2)(c) – This provision as worded is illogical and could be interpreted as preventing one of the very situations in which an intervention order can properly be used, namely to transfer funds (perhaps from the sale of a house or other asset) into an account that in accordance with the least restrictive intervention provisions of section 1(3) ought thereafter to be administered under Part 3. The words “has been granted” should be amended to “is in force”.

Section 25(5) – It is unclear whether “already authorised to intromit” means authorised under Part 3, or authorised under any other provisions as well. The latter interpretation can inhibit appropriate use of Part 3 where there is already some other source of authority, such as a DWP appointment. That can cause disadvantageous inflexibility.

Section 26(1)(b) – The requirement for the account to be “in the adult’s sole name” can be cumbersome, where proper organisational use of a single account, coupled with appropriate technology, can still be operated with adequate protection for each individual adult.

Section 26A(1)(b) – There can be consideration of allowing wider powers to the withdrawer, for example to vary the terms of an existing standing order without having to proceed under section 26F.

Section 28(3) – The word “may” is potentially ambiguous. Does it protect the fundholder from criticism that the fundholder ought to preserve confidentiality, or does it give the fundholder discretion to refuse? The fundholder should be obliged to provide information upon request, and should be protected in doing so.

Section 31E – It is a major defect of Part 3 that equivalent transfer from an intervention order is not permitted. This can result in an unnecessary guardianship, rather than the lesser intervention of an intervention order, where the expectation is that funds released can ultimately be administered under Part 3.

Part 4 – We have no separate comments on Part 4, but comments upon provisions of Part 3 apply where those provisions of Part 3 are reflected in similar provisions in Part 4.

Part 5 –

- a) The procedure for authorisation under section 47 is the only procedure under the Act under which there are no provisions for notifying the adult or anyone else that a certificate has been issued, or for registration of issued certificates anywhere. The lack of any requirement to notify, particularly even to the adult, may be in breach of ECHR. In any event, these characteristics should be reviewed.
- b) In relation to Part 5, the lack of adequate training, such as followed the original passing of the 2000 Act, is particularly obvious. The membership of MHDC has had direct experience of situations where section 47 certificates have been issued in respect of a large number of residents in a nursing home, every one of them certifying dementia, even in relation to people who have other intellectual disabilities but certainly not dementia.

Section 53 – There is no provision in relation to intervention orders equivalent to the power of Scottish Ministers under section 64(11) to define the scope of the powers which may be conferred on a guardian. Any better definition, and thus potentially limitation, on powers under an intervention order should not be other than by primary legislation, as it should not be open to government by executive act to remove altogether a potential solution under the 2000 Act, and the role of intervention orders as a “safety net” where other provisions of the 2000 Act are not available is important. On the other hand, there appears in some quarters to be a growing practice of using intervention orders as a form of quasi guardianship, avoiding the supervision of guardianship, and also the controls available under guardianship upon the amount of remuneration paid to appointees. There should be provision to prevent granting of intervention orders where a guardianship would be more appropriate. A common definition adopted by commentators has been that intervention orders are appropriate for a single act or a linked series of acts of self-limiting duration. However, that concept could be extended to cover a series of separate acts in relation to the same purpose over an indefinite period. An example would be powers to enter a lease, which could properly under the same order be exercised at intervals into the future to deal with matters concerning the lease, such as agreed arrangements to vary the terms, rent reviews, extensions, and the like. See also comments on section 64(2).

Section 53(6) – This and the equivalent provisions in relation to guardianship in Schedule 2 paragraph 6(1) require better clarification. For example, the full requirements of these provisions should apply in relation to the adult’s last principal private residence, unless evidence is produced that there is no prospect of the adult returning to live there. Moreover, there should be at least

some lesser requirements in relation to any sale or disposal of heritable property, such as at least a requirement to give to the Public Guardian a specified period of notice of intention to do so.

Section 57 – In view of the acute shortage of mental health officers (see section 4.2 of this response) the limitation to mental health officers as defined in the legislation for reports under section 57(3)(b) should be widened to permit “private” reports and to specify the required qualifications for persons to be able to do so. There should be a time limit for local authorities to increase numbers of mental health officers to enable them to meet their statutory obligations, and beyond that time limit local authorities should be responsible for reimbursing the costs of obtaining a “private” report if a report by a local authority mental health officer has not been provided within the period of 21 days required by section 57(4), or in the event of the local authority intimating that it will not be able to comply with that time limit.

Section 57(3)(a) – Given that the principal issue under the jurisdiction is the existence of incapacity, not diagnosis of a mental disorder causing incapacity, and given the importance of not presuming incapacity where the ability to act or decide can be enhanced by provision of skilled support, the quality of evidence provided by a clinical psychologist is likely to be at least as valuable as that of a “relevant medical practitioner” (as defined). The evidence of a clinical psychologist was generally acceptable to the Court of Session for purposes of appointment of tutors. They should be included in section 57(3)(a) as alternatives to both medical practitioners and relevant medical practitioners.

Section 57(4) – Preliminary notice of intention to apply should also be given to the Public Guardian in relation to all Part 6 applications, in a form to be prescribed. It is understood that it is at present the practice of the Office of the Public Guardian to contact proposed guardians and appointees once the application has been intimated. In a proportion of these, when the requirements and duties are explained, the proposed guardian or appointee regrets having agreed to that role. By then, however, significant expense will have been incurred and the application will already be underway. It is better that such action by the Office of the Public Guardian take place at a much earlier stage.

Section 58(3) – It is essential that there be greater flexibility. The sheriff should be able to make a guardianship order where an intervention order has been sought, or put in place provisions for access to funds under Part 3 where either an intervention order or a guardianship order has been sought, and the sheriff should be able to make alternative disposals of different parts of the same application. In practice, from time to time the courts have granted an intervention order to deal with part of a guardianship application, and a guardianship order to deal with the rest. The reassurance of statutory authorisation of such dual or multiple outcomes should be provided in statute.

Section 58(7) – All interlocutors in all court proceedings under the 2000 Act should be notified to the Public Guardian and to other relevant parties, so that they are aware of the progress of the application and any issues arising. This will also facilitate supervision and control of failure to dispose of applications at first hearing except for good and necessary reasons. Equivalent procedures are already in place under MHTS, and their application to proceedings under the 2000 Act would be a welcome consequence of implementation of the recommendations in section 4 of this response.

Section 59 – It would appear that some guardians do not realise the nature and implications of their appointment until after they have been appointed. In some jurisdictions guardians require to produce evidence that they have undertaken a specified course of instruction, before the appointment is finalised. This principle should be considered with a view to application to Scottish conditions. Conscientious and competent candidates for guardianship are usually pleased to be offered opportunity to inform and educate themselves. Appropriate educational institutions could be encouraged to provide suitable modular courses, and candidates for appointment could be required to produce evidence of having completed such a course, preferably at time of application, or alternatively as a prerequisite for issue of the certificate of appointment,

Section 60 – There have been suggestions that if an appointment has been allowed to expire without a renewal application having been lodged, the guardian could continue acting as such under the principle of necessity. Alternatively, they might claim to be continuing to act as *negotiorum gestor*. Such arrangements should be either prohibited, or regularised.

Section 61(7) – It is understood that the Office of the Public Guardian quite frequently have to “chase” guardians for the updated Land Certificate (or endorsed interlocutor), and are often uncertain whether section 61 has been complied with or not. A simple administrative solution would be for the updated Land Certificate or endorsed interlocutor to be sent by the Keeper to the Office of the Public Guardian, who would then be able to note their records and pass the certificate of interlocutor on to the guardian.

Section 62 – Similar provisions should apply to the appointment of joint appointees under intervention orders.

Section 63 – Substitute appointments should also be competent under intervention orders. There should be consideration of greater clarity and flexibility, such as specifying the order of substitution where there are joint guardians, or where there is more than one substitute; and allowing for temporary substitution followed by reinstatement of an original guardian.

Section 64(1) – Each guardianship order should be required to specify to which of the categories (a) – (e) the powers, or groups of powers, conferred belong.

Section 64(1)(e) – This power should be automatic in all appointments in respect of financial and property affairs. If the guardian does not have such powers, the guardian cannot authorise transactions in accordance with section 67(1), and would thus be unable to comply with the mandatory requirement of section 1(5) to encourage the adult to exercise and develop skills insofar as it might be reasonable and practicable to do so. Where this combination of provisions prevents an adult from acting in any “transaction” of which the adult is in fact – or has become – capable, that would amount to a form of “incapacitation”, contrary to the principles of the 2000 Act, demonstrably unjustly, and contrary to CRPD.

Section 64(2) (and equivalents in relation to attorneys and appointees under intervention orders) – There is uncertainty as to whether the stated exclusions are the only required exclusions. Council of Europe Recommendation R(99)4 on Principles Concerning The Legal Protection Of Incapable Adults (23 February 1999) recommends that states should explicitly specify acts and decisions which cannot be taken by anyone else on behalf of an incapable adult. Thus, MCA specifies that an appointee cannot vote in an election on behalf of the adult, but the 2000 Act contains no such prohibition. In matters such as voting, marriage, and even granting consent under the 2003 Act, there is uncertainty as to the inter-relationship between the 2000 Act and other legislation. For example, there has been litigation as to whether guardians under the 2000 Act can act or decide on behalf of the adult for the purposes of the 2003 Act. These uncertainties should be resolved by including a comprehensive list of matters excluded from provisions of the 2000 Act. Beyond that, there are matters which should perhaps be permissible only under an intervention order, and which should have additional requirements. An example is Will-making and similar acts. There seems at present to be a considerable range of practice. Only one such case has gone to appeal, so far as we are aware. In *Application by Adrian Douglas Ward*, decided by Sheriff Principal B A Kerr on 17th December 2013, the Sheriff Principal set stringent and limiting requirements for proof before execution of a Will could be authorised. On the other hand, in at least some sheriffdoms it appears that simple powers to execute a Will, without specification of the terms of the Will or enquiry into the appropriateness of it, appear to be routinely included among guardianship powers. We would suggest that execution of a Will, and other documents with testamentary effect, should be possible only by specific intervention order and that there should be provisions and requirements broadly equivalent to those under MCA for execution of “statutory Wills” in England & Wales.

Section 64(7) – This requirement should apply to all appointees acting in financial or property matters under provisions of the 2000 Act.

Sections 68 and 69 – Consideration should be given to allowing greater control by the Public Guardian, including to modify or withhold remuneration, subject to application to the court or (preferably, in the event of implementation of the proposals in section 4 of this response) determination of objections by an in-house convener.

Section 70 – These powers should also be available to attorneys and to appointees under intervention orders.

Sections 72 and 73 – It should be competent for a guardian to apply for discharge where powers have been recalled by the Public Guardian.

Section 74 –

- a) Variation procedure should be available to vary any of the terms of a guardianship order.
- b) The Public Guardian should be able to vary caution in all cases.

Section 74(4) – Something less than the full requirements of section 57 will often suffice in this situation. This provision should perhaps be replaced with a specific requirement upon the court to consider, immediately upon presentation of an application for variation, whether to exercise powers under section 3 to call for any reports (or further reports).

Section 76 – For the purposes of this section and elsewhere, including in particular Schedule 3, it is unacceptable that when an adult moves, habitual residence and ordinary residence may diverge, and that current government guidance as to change of ordinary residence differs as between England & Wales on the one hand and Scotland on the other. This position should be reviewed and if possible resolved.

Section 78 – There would be advantages of consistency and administrative efficiency if the obligation under section 78 rested with the guardian rather than the Public Guardian, as with the obligation under section 61(7), and that such provisions should also apply to triggering of a substitution under section 63 and the death of a guardian under section 65A.

Section 85 – The definition of adults for the purpose of section 85, and thus for Schedule 3, differs significantly from the definition in Hague Convention 35 on the International Protection of Adults. It has been suggested that this discrepancy means that Hague Convention 35 has not been effectively ratified in respect of Scotland. The discrepancy requires to be addressed and resolved.

Schedule 2: 1(1) – It is inconsistent that the Public Guardian may dispense with an inventory but not with a management plan. The Public Guardian should be able to dispense with both.

Schedule 2: 6(3) – Remit to the court should not be automatic. The Public Guardian should be authorised to hear objections, the Public Guardian's decision being appealable to the court.

Schedule 3 – There requires to be clarification as to the extent of the Public Guardian's responsibilities where a guardian appointed in Scotland acts in another country; there should be provision for transfer of supervisory responsibilities to the other state where supervision by the Public Guardian is impractical.

Schedule 3: 1(1)(b) and (c) – Paragraph (c) suggests that if an adult is not habitually resident in Scotland the Scottish courts have jurisdiction in relation to property belonging to the adult situated in Scotland only as a matter of urgency, whereas paragraph (b) renders situation of property in Scotland a separate ground of jurisdiction without the need for urgency. This inconsistency requires to be resolved, though it is acknowledged that it is an inconsistency deriving from Hague Convention 35.

Schedule 3: 7(2) – This does not properly address the situation in which the United Kingdom has ratified in respect of Scotland but not in respect of England & Wales.

4.5 Matters omitted from the 2000 Act

4.5.1 In addition to dropping the proposal for specialist designated sheriffs, the 2000 Act as enacted omitted two topics covered by the SLC 1995 Report and provided for in the draft Bill annexed to that Report. The SLC 1995 Report recommended legislation on the withholding and withdrawal of life-preserving treatment, and on advance directives. Both topics were dropped from the 2000 Act as enacted.

Withholding and withdrawal of life-preserving treatment

4.5.2 The SLC 1995 Report was published prior to the decision in *Law Hospital NHS Trust v Lord Advocate*, 1996 SLT 848. The Scottish Executive decided to exclude that topic from the 2000 Act, on the basis that it was preferable that the courts should continue to develop the law, rather than it should then be fixed in statute. That did not prevent considerable debate on this topic during the parliamentary proceedings. Accordingly, the current law on withholding and withdrawal of treatment may be found in the *Law Hospital* case. However, in recent years there have not been significant case law developments in relation to that topic. The view of the then Scottish Executive that it would be premature to enshrine the law in statute no longer applies. There would be the

benefit of clarity in now reviewing and implementing that part of the proposals in the SLC 1995 Report and the draft Bill annexed to that Report. To have the position clearly defined in statute, rather than letting it rest upon case law, would achieve better compliance with ECHR and CRPD, and would provide greater clarity and reassurance for citizens and professionals who unfortunately find it necessary to confront situations to which such provisions might be applicable.

Advance directives

4.5.3 The position of the Scottish Executive on advance directives was similar to that in relation to withholding and withdrawal of life-preserving treatment. There is however a difference in that this topic benefits from no equivalent clear and authoritative statement of the current law such as is to be found in the *Law Hospital* case. It is moreover a subject of increasing relevance. Council of Europe Recommendation CM/Rec (2009)11 of the Committee of Ministers to Member States on principles concerning continuing powers of attorney and advance directives for incapacity recommends that: “States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives” (Principle 1.1) and that: “In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other methods of protection” (Principle 1.2). Compliance with the Recommendation, and with the human rights principles underpinning it, requires that Scotland should now have clear legislative provision for advance directives generally, beyond the limited scope of provision for them in the 2003 Act.

4.6 Areas for review of the 2003 Act

4.6.1 As a starting point, it is desirable to revisit matters previously raised in response to the Government’s Consultation on the 2015 Act which were ultimately not included in the Act. These include (a) giving Curators ad Litem rights of appeal against decisions of the Mental Health Tribunal, (b) allowing recorded matters to be made for patients on Compulsion Orders, and (c) extending the right to challenge detention in conditions of excessive security for patients in low secure settings.

4.6.2 The inclusion of both low secure settings and IPCUs into “qualifying hospitals” as the current provision of low security within Scotland is extremely variable across different Health Board areas. In a number of HBs IPCU is the only low secure provision. For example- NHS Lothian has a medium secure provision and two IPCUs but no low secure facilities. Almost all Health Boards (with an exception of NHS Lothian where all remand prisoners get admitted to medium security) use IPCUs as a ‘low secure’ provision for remand prisoners and more frequently for transferred prisoners. There are no low secure NHS facilities for female patients in Scotland and the only

dedicated services (female low secure) are being provided by independent sector. IPCUs are primarily being used as a 'low secure' service for female patients.

- 4.6.3 Some patients living in the community on community based Orders under the 2003 Act live in circumstances which are likely to constitute a deprivation of liberty. Some of these patients live in care homes or other types of supported accommodation. The measures attach to community based Orders do not specifically authorise deprivation of liberty. The Mental Health Tribunal could be given powers to authorise a deprivation of liberty where this was necessary and appropriate in community based cases. The CTO application and the MHO's proposed care plan could be used to identify when a deprivation of liberty is likely to occur and where authority is required. The Tribunal could then authorise the deprivation of liberty either separately or as an additional measure attached to the community based Order. At 2 yearly reviews the necessity for deprivation of liberty authorisation could be considered. As part of the RMO's duty to review the Order, the RMO could be required to bring the matter to the Tribunal in the event of deprivation of liberty authorisation being required. Deprivation of liberty authorisation could also be considered by the Tribunal when the Tribunal is being asked to extend and/or vary an Order.
- 4.6.4 Some patients in the community on suspension of detention may live in circumstances which are likely to constitute a deprivation of liberty. A process for deprivation of liberty authorisation could be developed for these patients as part of the suspension authorisation process.
- 4.6.5 Patients on community based Orders who become subject to Cross Border Transfer may be transferred to living/care arrangements which are likely to constitute a deprivation of liberty. A process for identifying this and obtaining authorisation for deprivation of liberty could be developed and incorporated into the transfer process.
- 4.6.6 Section 291 of the 2003 Act allows informal hospital patients to apply for a declaration of unlawful detention. Such a right should also be extended to informal patients, and those on community based Orders, living in the community.
- 4.6.7 Recorded matters are not particularly well understood and the 2003 Act contains limited information about them. Additional information or explanation is likely to be beneficial and lead to a better understanding, and possibly increased use, of recorded matters. Where a recorded matter is not being provided the matter requires to be remitted back to the Tribunal. There is however, no specific mechanism to enforce the provision of a recorded matter.

4.7 Areas for review of the 2007 Act

4.7.1 The Adult Support and Protection (Scotland) Act 2007 is often considered alongside the 2000 Act in cases involving adults who are considered vulnerable and who are at risk of, or experiencing, harm and abuse. This has been an important piece of legislation in terms of the duties placed on local authorities and the power available to them. The review of the AWI represents an excellent opportunity to review the 2007 Act and make sure the Act operates to protect those experiencing harm. Some proposed changes and areas for review are set out in this section.

Definition of 'adult at risk'

4.7.2 The definition of an 'adult at risk' in section 3(1) is wide. In particular there is no definition of 'disability, mental disorder etc'. This differs from the 2000 Act and the 2003 Act where the terms 'mental disorder' specifically excludes dependence on drugs or alcohol. It is not clear why this exclusion was not repeated in the 2007 Act.

4.7.3 We know that many local authorities receive a large number of adult protection referrals in relation to people who are at risk only due, or primarily due, to drug and alcohol dependence. This means significant resources are used to inquire into such cases. When the legislation was passed this was not anticipated and there was little or no discussion about how suitable it was to deal with this particular group. The experience of many mental health officers is that without this legislation there would be no authority or duty to investigate a large number of cases involving vulnerable adults. However, there are different practices about how these cases are dealt with in different authorities. Of course, in some cases drug or alcohol misuse will be seen as a lifestyle choice. However, we would not like to see local authorities in a situation where they are unable to inquire formally into individual cases. Overall it would be helpful if the definition was reviewed to make it clear whether or not drug and alcohol abuse in itself will make an individual an 'adult at risk'.

Consent to Orders

4.7.4 A protection order (removal, banning or assessment) can only be granted or implemented where the adult at risk has not refused to consent. This condition has led to some difficulties and it would be helpful if the legislation was clear as to what should happen in the following circumstances:-

Where an adult is clearly refusing to consent to an order but is believed not to have the capacity to make that decision. The code of practice appears to suggest the adult's refusal can be ignored if it is not clear from the Act that this can happen. Or that in applying the law generally we can simply

disregard an adult's views because they lack capacity without the appointment of a substitute decision maker.

How do we interpret a situation where an adult is unable to express an opinion or physically resist? Can it be assumed that the adult has not refused to consent?

What happens where a guardian or attorney has been appointed with relevant powers? Can a sheriff or person acting under an order proceed provided the guardian or attorney does not refuse to consent? Does such a power need to be specifically contained in a power of attorney or guardianship order?

What is the position where the guardian or attorney actively refuses consent? Where a guardian or attorney has powers to convey the adult to medical appointments, decide who they consort and decide where they reside may allow the guardian or attorney to refuse consent to a protection order. As the legislation stands it appears that this refusal of consent would need to be respected (and other legislation used) even if the guardian or attorney is the suspected abuser. Such a refusal is unlikely to amount to undue pressure as there is no pressure on the adult but instead a formally granted power is being exercised. We believe the legislation should be amended so that the consent requirement can be dispensed with where a guardian or attorney is the alleged abuser.

Criteria for an Assessment Order

4.7.5 The criteria for granting an assessment order under Section 12 require to be reviewed. At the moment these are that:

- There are reasonable grounds to suspect that the person is an adult at risk who is being, or is likely to be, seriously harmed
- The order is necessary to establish this
- The place to which the adult will be moved is suitable and available

4.7.6 The phrase 'necessary to establish' is problematic as it limits the use of the order. It implies there must remain some doubt that the adult has suffered or is likely to suffer harm before an order can be granted. Where there are already reasonable grounds to believe there is harm (so point one is met) it is not clear why you would need an order to establish this. Surely in such circumstances the legislation should allow the local authority to take action. It would be useful if this was amended so that an assessment order could be granted in circumstances where it is established or reasonably believed that the adult is suffering harm but an order is needed to assess whether or not the local authority can and should take any action.

Enforcement of Assessment and Removal Orders

4.7.7 Both Orders can only be used to move the adult to another place where the adult is not refusing to go with the Council Officer. However, under Section 13 a refusal can be ignored if the adult is under undue pressure from a third party. It is not clear what this actually means for Council Officers. Where they believe an adult is under undue pressure and is refusing to go with them then what can they actually do. What if, if any, amount of force can be used? Given the provision of Article 5 of the ECHR it seems unlikely that the order could be enforced against the individuals will. It would benefit local authorities if the limit of the power to enforce and remove a person was explicit in the legislation. Most Council Officers will be extremely reluctant to use force but this could lead to adults being left in harmful situations.

Enforcement of Banning Orders

4.7.8 Banning Orders are often seen as having very limited effectiveness due to the apparent lack of enforcement powers. If these are to be used with any level of success then there need to be clearer powers of enforcement and appropriate penalties for breaches. For example, consideration should be given to whether or not breach of a Banning Order amounts to contempt of court and powers of detention being available.

Duty to safeguard adult's property

4.7.9 There is an anomaly in the legislation in terms of a duty to protect the adult's property. When an adult is removed under a Removal Order the local authority is under an obligation to protect his property. However, where an adult is removed under an assessment order there is no such obligation. It is suggested this be amended so the local authority must take steps to protect the adult's property when they are removed under either Order.

4.8 Matters requiring action by both the United Kingdom and Scottish Parliaments

Powers of attorney – the cross-border problems

4.8.1 Serious difficulties, on a substantial scale, are experienced by people trying to operate in one part of the United Kingdom a power of attorney properly granted and registered in another. Many legal firms now, as a matter of routine, advise their clients to grant both a Scottish continuing and/or welfare power of attorney and an English & Welsh lasting power of attorney for adults with assets or interests both sides of the border. This is unduly burdensome, and does not cover the situation of many more people who have powers of attorney granted and registered only in one jurisdiction, but

who then encounter major difficulties in the other, including in dealings with banks and other financial institutions, social work and health authorities, and others.

- 4.8.2 As regards the status of English & Welsh powers of attorney in Scotland, it was held in *Application by C re R*, Airdrie Sh. Ct., April 02, 2013 (unreported) that an English enduring power of attorney “has like effect to a continuing power of attorney granted under section 15(1)” of the 2000 Act. As regards all non-Scottish powers of attorney, the Public Guardian offers a non-statutory certificate on her website setting out one possible interpretation of Schedule 3 of the 2000 Act. Whilst helpful, is not sufficient certainty or protection for many financial institutions. In practice, however, significant problems persist, including in relation to operation of English powers of attorney in Scotland.
- 4.8.3 If anything, greater problems are experienced when Scottish powers of attorney are presented in England. The House of Lords Select Committee which conducted a post-legislative scrutiny of MCA recommended that the current arrangements regarding powers of attorney in England & Wales be reviewed and that, as part of this review, consideration be given to the apparent anomalies regarding the status of Scottish powers in England. The UK Government response to the House of Lords Select Committee Report included the following:

“The status of foreign Powers of Attorney

8.19

Government accepts that the Mental Capacity Act appears to offer two routes to provide recognition of foreign powers. Firstly if the power is classified as a ‘protective measure’ in line with paragraph 5 of Schedule 3 of the Act this would have the result of triggering mandatory recognition under paragraph 19(1) of Schedule 3 if the relevant conditions are satisfied. The second route is by operation of paragraph 13 of Schedule 3 of the Act regarding residency.

8.20

Our initial view is that ‘foreign powers’ can be recognised under that Act but that this is not mandatory and that financial institutions and other bodies in England & Wales may insist on sight of an Order made by the court in the UK confirming that Attorneys are authorised to act under the foreign power. There is the potential for Scottish powers of attorney not to be recognised in England.

8.21

We accept that clarity should be provided on both the route to be taken for the recognition of a foreign power and the formal requirements to be complied with for the power to be accepted. The Government recognises the importance of ratifying Hague 35 2000 as this will bring about international co-operation to deal with the affairs of individuals across member states and intends to take steps to commence this work with a view to achieving ratification.”

- 4.8.4 The “initial view” at the beginning of paragraph 8.20 above is open to debate, and certainly does not reflect what occurs in practice.
- 4.8.5 Section 4 of the Evidence and Powers of Attorney Act 1940 is still in force. It provides that an extract from the Books of Council and Session of a Scottish power of attorney “shall, in any part of the United Kingdom, without further proof be sufficient evidence of the contents of the instrument and of the fact that it has been so deposited or registered.” This however is rarely used, also not well recognised, and in any event involves a cumbersome dual process of registration, whereas the legislative intent of the 2000 Act was clearly to replace the former practice of registration of powers of attorney in the Books of Council and Session with registration in the registers established by the 2000 Act, to be maintained by the Public Guardian. It would appear that the need to update the 1940 Act (only section 4 of which remains in force) was overlooked when the 2000 Act was passed. Co-ordinated action is urgently required by the UK and Scottish Parliaments, and the Northern Ireland Assembly, to provide that a power of attorney registered under current provisions in any part of the United Kingdom (meaning, in the case of Scotland, a continuing and/or welfare power of attorney registered with the Public Guardian in accordance with Part 2 of the 2000 Act) should be automatically recognised and enforceable in any part of the United Kingdom.
- 4.8.6 The Legal Affairs Committee of the European Parliament is considering the possibility of a European regulation to address these same difficulties across the European Union. The issues within the United Kingdom nevertheless require urgently to be addressed, regardless of whether the United Kingdom remains with the European Union, and within a faster timescale than is likely to be possible within the European Union.
- 4.8.7 Cross-border issues within the UK would be helped if the United Kingdom Government were to ratify the Hague Convention on the International Protection of Adults (The Hague, 13 January 2000, 2600 UNTS 3) in respect of England & Wales. So far, it has ratified only in respect of Scotland. However, this would not greatly improve matters as regards powers of attorney because the current view is that powers of attorney are not “measures of protection” in terms of that Hague Convention, and accordingly are not automatically recognised and enforceable as between states which have

ratified. It is understood that the Permanent Bureau of the Hague Conference is reviewing that position, but it is anticipated that such review will not necessarily improve the immediate issues substantially. In that respect also, the only truly effective solution will be prompt co-ordinated legislation in each of the UK jurisdictions, as recommended above.

The Legal Entity Identifier

- 4.8.8 A matter which is also of significant concern to the Society, as well as other professionals and professional bodies, is the serious impact of the Legal Entity Identifier (LEI) system upon legal entities created for the protection of vulnerable adults.
- 4.8.9 The system was created to support authorities and market participants to identify and manage financial risks, In addition to the use of the LEI for derivatives reporting, which is now in force in major markets, authorities are extending reporting requirements for the LEI, where appropriate, to the banking sector, securities issuance, investment holdings for insurance and funds, and other uses such as identification of firms in credit registers. The wider context is that regulators and tax authorities across the world are seeking additional information about a range of financial institutions and this is drawing in “smaller” entities such as family trusts and charities. Rather than each entity being a stand-alone, there is a wider direction of travel towards increasing reporting and transparency for all entities that invest.
- 4.8.10 The new regulations will come into effect in January 2017, and after that date an LEI will be required by all those investing in financial markets. The Global Legal Entity Identifier Foundation (GLEIF) website provides a centralised database of LEIs and corresponding reference data. A search function allows users to check if an entity has an LEI, or access the reference data associated with an LEI, including verifying whether the LEI is current and can be used in regulatory reporting.
- 4.8.11 The system developed by the GLEIF is one which requires every legal entity to register and acquire an LEI before it can trade on financial markets. The MHDC accepts that this will generally work for corporate entities, however, in the main, private trusts will not have publicly available information with which their application can be validated against.
- 4.8.12 This is particularly troublesome as many family trusts hold quoted investments and trade on capital markets and are therefore considered to be legal entities. If the Local Operating Units cannot validate the details of the trust, then it will not issue an LEI, and the entity cannot trade in financial markets. This applies even when acting through a third party, for example, a fund manager or broker.

4.8.13 Research carried out by HMRC suggests that around 25 percent of beneficiaries of trusts are considered to be vulnerable in some way.⁵¹ The current requirements would make their personal details public. This is a point which appears to have been given significant consideration during the various stages prior to finalisation of Foreign Account Tax Compliance Act (FACTA) and the 4th Anti-Money Laundering Directive.

For the estimated 25% of beneficiaries of private trusts who are "vulnerable", there are significant human rights issues here. For them, such trusts are often a form of "reasonable accommodation", denial of which is explicitly within the definition of "discrimination on the basis of disability" in UN CRPD. As well as the general prohibition of such discrimination, several specific articles of CRPD are relevant, such as the requirement for safeguards (art 12.4), freedom from exploitation (art 16.1) and respect for privacy (art 22).

Within Europe, we also have relevant well-known ECHR obligations – starting with respect for private and family life, which is what such trusts are usually all about (art 8), and the art 14 prohibition of discrimination in relation to any Convention rights.

4.8.14 Perhaps by error, private family trusts, one of the most common ways of holding family wealth and/or protecting vulnerable adults in the common-law world, will be prevented from participating in financial markets and therefore we respectfully suggest urgent, co-ordinated action by the UK and Scottish Parliaments prior to the regulations becoming mandatory in January 2017.

⁵¹ HM Revenue & Customs, Research Report 25 Research on Trusts: Experience of Setting up and Running Trusts (2006)



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