



Law Society  
of Scotland

# Consultation Response

Adults with Incapacity Position Paper  
Matters for Inclusion

May 2021



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Scottish Mental Health Law Review consultation: *Adults with Incapacity Position Paper Matters for Inclusion*. The sub-committee has the following comments to put forward for consideration.

## General Comments

We have had the benefit of ongoing engagement with the Scottish Government (and prior to that Scottish Executive) and with UK Government on issues relating to mental health, adult incapacity and related areas of law in Scotland over the course of more than the last three decades. More recently, we have had the benefit of engagement with the Scottish Mental Health Law Review on matters within the remit of the Review. We welcome this further opportunity to provide our views on the matters currently under the auspices of the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”) which the Review are proposing to include as part of its review of AWI.

In April 2018, we responded to the Scottish Government’s consultation on Adults with Incapacity Reform. That response includes our response to the 2016 consultation on the Scottish Law Commission’s Report on Adults with Incapacity and is available on our website.<sup>1</sup> We confirm that it continues to represent our views on Adults with Incapacity Reform. We would emphasise the need to continue to carry forward all aspects of the existing work on AWI reform which commenced as a review of the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”), including those addressed in the 2018 and preceding consultations, and in our response of April 2018. We would also highlight the recommendations of the Essex Autonomy Project’s Three Jurisdictions Report.<sup>2</sup> Current members of Mental Health and Disability Sub-Committee formed one half of the core research group of the Three Jurisdictions Project, and of the authorship of the Three Jurisdictions Report.

More recently, we have been made aware of work being undertaken by the Scottish Government’s Adults with Incapacity Legislation and Practice Team to consider early amending legislation in response to

<sup>1</sup> <https://www.lawscot.org.uk/media/360115/18-04-30-mhd-consultation-awi-reform.pdf>

<sup>2</sup> Essex Autonomy Project, Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK, 6 June 2016, available at: <https://autonomy.essex.ac.uk/wp-content/uploads/2017/01/EAP-3J-Final-Report-2016.pdf>

increasing pressure recently from a range of interests, including health and social care services. We have provided the Scottish Government with our comments on reform of the 2000 Act, including our suggested priorities for any such early amending legislation. That response represents an updated and augmented version of some of the recommendations first set out in our response to the 2016 consultation on the Scottish Law Commission's Report on Adults with Incapacity, and annexed to our response to the 2018 consultation on Adults with Incapacity Reform. It is also available on our website.<sup>3</sup>

The sub-committee is firmly of the view that early amending legislation should provide for all matters addressed in the law reform process up to and including the 2018 consultation and responses thereto, except only matters allocated to the Review as per the remit of the Review. Under reservation of that position, we recognise that limited parliamentary time may limit the scope of any early amending legislation. Accordingly, we recommend that the Review should nevertheless be encouraged to review the total range of provision in adult incapacity, mental health, and adult support and protection law (within and outwith the principal Acts on those topics) as it will stand following implementation of any reforms to the 2000 Act. It is imperative that no aspects of Adults with Incapacity reform are overlooked and no gaps are created as a result of the twin-track law reform process resulting from the establishment of the Review. It is our understanding that it was intended that both elements of the twin-track approach, and in particular the work by the Scottish Government's Adults with Incapacity Legislation and Practice Team on the urgent requirement for a deprivation of liberty regime, would have proceeded more quickly than has in fact occurred. It would be helpful to have clarification as to whether there is any intention that the Review should, by further Interim Report, recommend that this and any other particular matters should receive priority for legislation in advance of conclusion of the Review, thus allowing the Review to assess experience of such amended legislation in the context of the broader remit of the Review.

We would welcome the opportunity to participate further in the work of the Review, including by way of any AWI Advisory Group.

Comments below relate to specific sections of the consultation document.

## Section 1

We have no comments to make.

## Section 2

The numbering below refers to the numbered list in the consultation document:

<sup>3</sup> <https://www.lawscot.org.uk/media/370987/21-04-01-mhd-awi-reform.pdf>

2. The United Nations does not have any views on this subject. The reference should be to the views expressed by the United Nations Committee on the Rights of Persons with Disabilities, acknowledging that the UK is bound by the Convention, and not by any views expressed by the Committee.

It is critically important that the Scottish approach remains a broad approach towards acting and deciding (i.e. any juridical acts) rather than the narrower Anglo-centric concentration on decision-making only. In order to accord with the requirements of the UN Convention, as well as according with the existing scope of Scots law, references to “decision-making support” should be amended to “support for the exercise of legal capacity”.

Debates about so-called “substitute decision-making” are not relevant to the existing Scottish concept of guardianship. The Scottish guardianship system grew from the re-introduction of tutors-dative to adults from 1986 onwards. Those tutory applications, commencing with the initial *Morris* case in 1986, were pled by reference to the adults’ needs for support and guidance. Relevant provisions of the 2000 Act, read in conjunction with the section 1 principles of that Act, require (in the case of decisions) a constructing decisions approach, and an acknowledgement that on occasions support for the exercise of the adult’s legal capacity may require that initiatives and decisions be constructed for the adult. The scope of the work to be carried out by the Review in this regard should therefore be based upon strengthening the principles of the 2000 Act, and ensuring human rights compliance in their operation by means such as creating attributable duties, as recommended in the Three Jurisdictions Report. A revised model of guardianship should include a presumption in favour of incorporating support and co-decision-making provisions in guardianship orders.

3. The model should also include co-decision-making.

6. and 7. As a separate matter, or alternatively in conjunction with 6 and/or 7, there should be consideration of achieving clarity, and full legal protection for practitioners acting properly and ethically, in (a) intensive and critical care situations, and other situations of urgency and (b) the withdrawal or withholding of life-sustaining treatment.

9. These recommendations should include a focus on matters where (under the two alternative types of intervention order) the court itself deals with a matter, rather than appointing someone else to do so. The Review should consider the procedures required for deciding the terms of a Will to be made for the adult and authorising execution of it; and making decisions about marriage and other personal matters (acknowledging the anomaly that the 2000 Act contains explicit provisions for divorce but not for marriage). These references to marriage should include civil partnerships, and any analogous arrangements.

### Section 3

Consideration of the definition of “adult” should include in particular consideration (building upon the Review’s work already) on the situation of 16 and 17 year-olds, including the overlap of jurisdictions, and

the consequences of adulthood commencing in Scotland at age 16 in terms of age of legal capacity and adult incapacity legislation, effectively at 18 for some other purposes, and 18 for some international purposes, in particular Hague Convention 35 on the International Protection of Adults (notwithstanding that the AWI definition of adult is retained in Schedule 3 to the 2000 Act, which in other matters reflects the terms of Hague Convention 35).

Fusion should cover all statutory law in mental health, adult incapacity, and adult support and protection matters, not limited to relevant law at present contained within the Acts of 2000, 2003 and 2007.

## **Section 4**

We are grateful to be represented on the Review's Practitioners Reference Group. As above, we would welcome the opportunity to participate further in the work of the Review, including by way of any AWI Advisory Group.



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