



Law Society
of Scotland

Consultation Response

Proposals for limited 'technical' amendments to the
Adults with Incapacity (Scotland) Act 2000

May 2021



Introduction

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 Government proposals for limited ‘technical’ amendments to the Adults with Incapacity (Scotland) Act 2000 (“the proposal document”) shared under cover of email from the Team Leader Adults with Incapacity Legislation and Practice, Directorate for Mental Health and Social Care, dated 16 April 2021. 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 on issues relating to mental health, adult incapacity and related law in Scotland over the course of many years. 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 proposals for limited ‘technical’ amendments to the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”).

In April 2018, we responded to the Scottish Government’s consultation on Adults with Incapacity Reform. That response is available on our website.¹ 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.²

More recently, 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

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

² 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>

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.³

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, in accordance with the arrangements stated in the announcement of the establishment of the Review on 19th March 2019, which stated that:

“At the same time as the review takes place, we will complete the work we have started on reforms to guardianships, including work on restrictions to a person’s liberty, creation of a short term placement and amendments to power of attorney legislation so that these are ready when the review is complete.”⁴

Under reservation of that position, we recognise that limited parliamentary time may limit the scope of any early amending legislation and that in the current proposal document the Scottish Government have sought to prioritise those items to take forward based on OPG experience on the operation of the legislation. Our comments below should be read in that context.

We are broadly in agreement that the items proposed in the proposal document should be taken forward in early amending legislation.

In addition to the items set out in the proposal document, and subject to our comments above, we would suggest that the following further items should be taken forward in early amending legislation:

Investigatory powers of the OPG (sections 6(2)(c) and (d) of the 2000 Act)

Where an investigation has commenced prior to the death of the adult, it should be provided that the investigation can continue to its conclusion, at the discretion of the Public Guardian. This would address current difficulties which may arise where, for example, the Attorney is suspected of misappropriation, and has potentially already benefitted financially, as the OPG has no legal mechanism to ensure that the adult's estate is reimbursed, to advise the other interested parties, find out who the Executor is (unless that information is volunteered) or continue with the investigation and potentially make a police referral. In respect that difficulties in such situations are commonly encountered where the Executor is the same person as the attorney, and refuses to pursue the matter as Executor against himself/herself as former attorney, section 81 of the 2000 Act should be amended to confer an express power upon persons having or claiming an interest in the adult's estate to take proceedings to have the estate reimbursed by the (former) attorney.

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

⁴ Scottish Government, Future Direction of Mental Health and Incapacity Law, 19 March 2019, available at <https://www.glasgowchildprotection.org.uk/CHttpHandler.ashx?id=44895&p=0>

Bringing appointees under social security legislation within the scope of the 2000 Act

Part 1 of the 2000 Act should apply to all situations where someone acts, manages or decides on behalf of an adult. Reserved and devolved social security legislation makes provision for appointees to manage social security benefits on behalf of adults with incapacity, but such appointments are not subject to Part 1 of the 2000 Act. Such appointments are not therefore subject to the section 1 principles, or to the remedies available under section 3. This creates a lacuna in measures to safeguard the financial affairs of incapable adult, and this lacuna should be removed as a matter of priority.

The following comments relate to the specific items set out in the proposal document.

Background

We have no further comments.

Allowing Deputy Public Guardian to fulfil the functions of the Public Guardian when they are not available

We have no further comments.

Allowing for wider electronic communication

We have no further comments.

Clear instructions on how the granter of a power of attorney wishes their incapacity to be determined

Powers of attorney are binding documents. References to “wishes their incapacity to be determined” should be replaced with “instructs that their incapacity should be determined for the purpose of bringing the powers conferred into operation”.

OPG Returning original powers of attorney to the sender

Agreed, but in view of difficulties commonly experienced in dealings with banks, fundholders and other parties, there should be a requirement for an original certificate of registration to be sent attached to the

original document, and also specification as to the form of copy document that must be accepted by third parties.

Removal of OPG notification of power of attorney registration to local authorities and Mental Welfare Commission

This submission would justify ceasing notification to the Mental Welfare Commission. We accept that proposal. It does not justify ceasing notification to local authorities. It is essential that such notification continue. The existence of a power of attorney is as important as the existence of guardianship and intervention orders, both in relation to obligations to provide services and to consult, and also because of the obligation of local authorities to apply for a Part 6 order where one is needed and no-one else is taking action: that obligation exists in relation to the adult's property and financial affairs, as well as in relation to the adult's personal welfare.

Removal of OPG requirement to send copies of power of attorney to people specified in the document

This proposal would be inappropriate where the granter is no longer capable of sending copies. That would include, but would not be limited to, situations where the granter has exercised the option provided in statute to defer registration until a condition such as establishment of relevant incapacity has been met.

Sheriffs' discretion to consider mental health officer reports in guardianship and intervention order applications

We have no further comments.

Registration of guardianships and intervention orders in relation to heritable property at the Registers of Scotland

The Sasine Register most certainly continues to exist. Title to many properties, including but not limited to residual properties from which there may have been one or more split-offs, remain in the Sasine Register and may continue to do so indefinitely.

Variation of caution by OPG

This in particular is an essential reform.

Consent from Public Guardian to dispose of adult's heritable property

We agree with the difficulty identified. It should be clarified that the proposal relates only to heritable property, not moveable property, but also that it relates to any dealing with a heritable property, such as granting or discharging a security, and any transaction in relation to a residential lease. It should also include any action in relation to a heritable property such as granting matrimonial consent to a disposal. Given the significance of transactions with heritable property, this should possibly relate to any heritable property, not limited to residential property. Property situated abroad should be expressly included. It is assumed that the reference to moveable property is by way of explanation, and that moveable property is not included in the proposal.



For further information, please contact:

Jennifer Paton
External Relations
Law Society of Scotland
DD: 0131 476 8136
JenniferPaton@lawscot.org.uk