ADULTS WITH INCAPACITY (AWI) BILL: Consultation

Scottish Government
Riaghaltas na h-Alba

Consultation Questions

The questions in this document refer to information contained in our main consultation document here

You need only answer the sections most relevant to you and all answers in the Bill proposal sections should be provided voluntarily. The questions are mostly consistent throughout the sections and space is provided for your response – if you need more space, additional pages can be added.

INTRODUCTION

This consultation is asking for your thoughts on proposals for reform to the Adults with Incapacity (Scotland) Act 2000. (The AWI Act) .

This builds on earlier work, but recognises that this is the first step in a wider programme of work to reform mental health and incapacity law in Scotland over the next ten years, following the recommendations of the Scottish Mental Health Law Review.

The consultation is seeking views on suggestions for change to the AWI Act that aim to

- Improve access to justice for adults affected by the AWI Act
- Shift the focus of the AWI Act to one that truly centres on the adult
- Enable adults to access rights more easily
- Ensure adults are supported to make and act upon their own decisions for as long as possible
- When an adult cannot make their own decisions despite support, ensure that their will and preferences are followed unless doing so would be to the overall detriment of the adult.

In addition part 8 of the consultation, which can be considered in isolation, sets out proposals for reform to section 51 of the AWI Act and associated regulations, concerning authority for research.
The consultation focuses on changes to the law. But for changes to the law to be truly effective, a change in practice and in particular the need to embed supported decision making across the health and social care sector needs to be acknowledged.

A key part of Mental health and capacity reform is improving support to further embed a human rights based approach within services and wider systems of support. The Initial Delivery plan for the Mental Health and Capacity Reform Programme was published on 4th June. This outlines the early work being taken forward which will review and assess current approaches to supported decision making being taken forward across government, including work being taken forward around the National Care Service Bill to enhance independent advocacy as a means of empowering people to have their voices heard and realise their rights.

Alongside this, emerging policies such as Getting it Right for Everyone, and the work following the consultation on the proposed Human Rights Bill will strengthen person centred and rights based practice.

We will be assessing the progress of this work and over the coming months will be considering what else needs to be done to put in place a comprehensive supported decision making regime that will be required to underpin proposed changes in AWI law.

Mental Disorder

Another early priority for work following the response to the Scottish Mental Health Law Review (SMHLR) is consideration of the term 'mental disorder'. This is the term used in both the AWI Act and the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act), to describe a person who could come within the remit of these Acts. It is considered by many to be outdated and offensive. Work has begun with partners alongside the consultation on a proposed Learning Disabilities, Autism and Neurodivergence Bill, to look at options for change. This topic is not part of this consultation but any recommendations for change emerging from the ongoing work will be considered in due course.

Contents

The consultation broadly follows the order of the AWI Act. Part 7 includes consideration of deprivation of liberty of an adult lacking in capacity.

1. Part 1 - Principles of the legislation – changes to reflect the need to ensure that the wishes and feelings of the adult are front and centre at all times, changes in terminology … (and other areas of Part 1 we are consulting on)

2. Part 2 - Powers of attorney – summary of changes previously consulted on that we are taking forward, other issues

3. Part 3 – access to funds – changes to make it more accessible

4. Part 4 - management of residents' finances - removal of sections

5. Part 5 – changes to s 47 certificates and associated matters

6. Part 6 – changes to guardianship, interim guardianship and intervention orders.

7. Part 7 – deprivation of liberty proposals, stand-alone right of appeal, limitation of liability, appointment of safeguarders.

8. Part 8 – Authority for Research

Part One

The AWI Act is governed by principles set out in section 1 of the Act. Anyone taking action under the AWI Act has a legal duty to follow the principles.

The principles can be summarised as follows

- No one should intervene under the AWI Act unless they are satisfied that the action will benefit the adult. They should also be satisfied that this benefit cannot reasonably be achieved without the
- Any action taken should be the minimum necessary to achieve that purpose.
- Anyone determining whether to intervene, and what intervention to make, should take account of the past and present wishes and feelings of the adult.
- The views of certain significant others in the adult's life need to be take into account
- Any guardian, attorney or manager of an establishment should encourage the adult to exercise whatever skills they have and to develop new skills, as far as this is reasonable and practicable.

These principles all have parity. No single principle is more important than another and together they should ensure that all actions taken under the AWI Act stem from the needs of the adult. Everyone acting under the AWI Act must be able to justify their actions in accordance with the principles of the Act.

However the requirements of article 12 of the United Nations Convention on the Rights of Persons with Disability (UNCRPD) mean that respect for the full range of the rights, will and preferences of everyone should lie at the heart of legal regimes. To move towards this, we think the principles of the AWI Act should be amended to give greater priority to the will and preferences of the adult. We think that to ensure priority is given to an adult's will and preferences, before any steps are taken to intervene in an adult's life, all practicable steps should be taken to ascertain their will and preferences, and, thereafter, any intervention under the AWI Act must be in accordance with the adult's rights, will and preferences.

The exception to this would be if it can be shown that not to follow an adult's will and preferences would be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests, then steps can be taken.

There will also be circumstances where it is simply not possible to give effect to a person's will and preferences, such as for example an adult wishing to live with their sibling , but the sibling's accommodation is not viable or safe for the adult to live there. In such cases, the expectation would be for time to be spent with the adult to devise an acceptable alternative.

Support for decision making

We also think that there needs to be a greater emphasis on support given to an adult to enable them to make their own decisions, before any steps are taken to intervene in the adult's life.

A priority of the Scottish Government Mental Health and Capacity Reform Programme is to help people voice their opinions through supported decision-making practices. The programme is committed to reviewing existing practices, working with partners to assess effective Supported Decision Making practices. From this baseline decisions will be made on the necessary next steps.

We consider that this shift in approach needs to be fully embedded in the AWI Act. We have been looking at other jurisdictions for examples of good practice.

The Mental Capacity Act (Northern Ireland) 2016 has been praised for its approach. It provides in its principles that:

'the person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make decision about the matter have been given without success.'[1]

We think that a similar condition should be applied to actions under the AWI Act to ensure that interventions only take place when options for supported decision making have been exhausted.

We suggest that the principles should be amended to provide that prior to any intervention in the affairs of an adult, all practicable help and support to enable the adult to make their own decisions about matters should have been given and shown to have been given without success.

[1] Section 1 (4) of the Mental Capacity Act (Northern Ireland) 2016.)

These principles should have priority over all other principles of the AWI Act to ensure that supporting the adult to make decisions, and ascertaining the will and preference of the adult and following those is the priority in considering any intervention in an adult's life. And that not respecting the will and preference is only possible in specified circumstances.

These changes should ensure that the wishes and feelings of the adult, now referred to as will and preferences, are always front and centre of actions under the AWI Act.

How can we ensure the principles are followed?

The principles will only have effect if they are followed by everyone who uses the AWI Act.

At present, training for practitioners points out the need to follow the principles, as does the codes of practice[2]. Sheriffs are expected to consider how the principles have been followed when considering what decisions should be made in respect of the adult. The Office of the Public Guardian (OPG) will ask financial guardians if they have been following the principles and practitioners are expected to reflect in their reports how the principles have been adhered to.

Going forward, with the proposed change in the principles, the requirement to provide support for the adult to make their own decisions before considering an intervention, and the requirement to ascertain and follow an adult's will and preferences will mean that there will be an obligation on anyone seeking an intervention under the AWI Act to show how they have adhered to these, as well as the existing principles.

We intend for this to be set out in training. In addition, reports that may require to be prepared for interventions such as guardianship, will require to set out the steps the writer of the report has taken to ensure the principles have been followed. More detail on this is provided in later chapters in this consultation.

It may be considered however that more steps are needed to ensure the principles are followed, and we would be grateful for views as to what additional steps could be put in place to make certain the principles of the AWI Act are followed by any person acting under legislation in accordance with section 1 of the AWI Act.

[2] https://www.gov.scot/publications/adults-incapacity-scotland-act-2000-code-practice-local-authorities-exercising-functions-under-2000

Questions

1. Do you agree that the principles of the AWI Act should be updated to require all practicable steps to be taken to ascertain the will and preferences of the adult before any action is taken under the AWI Act?
   ☒ Yes
   ☐ No

Please give the reason(s) for your answer

We agree with the view that requires 'all practicable steps to be taken to ascertain the will and preferences of the adult' before any intervention under AWIA processes is begun. We also agree that adding this stipulation to the list of principles would be useful in ensuring that practitioners really do consider and document these steps.

While we support the sentiment behind this term – establishing the needs and wants of individuals in order to provide treatment and care – we believe that the term 'all practicable steps' has a number of potential problems in practice which would need to be considered and addressed. Firstly, we are concerned that, if misapplied, this stipulation could be used to delay necessary intervention, on the basis that further 'practicable steps' remained to be taken. Secondly, we are concerned that 'practicable' could in practice mean 'available', and that the range of steps might be limited by staffing and resources, with unacceptable variations around the country.

We believe that the practical meaning of this proposed principle would require further elaboration and clarification in the text of the statute, or in the code of practice, with consideration of reasonable timescales in various situations of clinical urgency, and consideration of the range and type of practicable steps which could/should be considered.

2. Do you agree that in the AWI Act we should talk about finding out what that adult's will and preferences are instead of their wishes and feelings?
   ☒ Yes
   ☐ No

We are in broad agreement with this change, which seems more generally understandable, and clinically useful. As above, this change will likely require further elaboration in the statute, or in the code of practice, in order to ensure that nomenclature changes are followed by meaningful changes in practice. In particular, there must be discussion as to how a person's consistently expressed will and preferences when full capacity exists are to be weighed against any differently expressed will and preferences when capacity has begun to be impaired.

3. Do you agree that any intervention under the AWI Act should be in accordance with the adult's rights, will and preferences unless not to do so would be impossible in reality?

☐ Yes
☒ No

Please give the reason(s) for your answer

We do not agree with this stipulation as worded. There are multiple potential interventions which are not completely 'impossible in reality', but are completely practically unachievable. Other potential interventions are possible but unlawful or unethical. We agree with a strong steer within the Act to adhere to the adult's will and preferences but believe this wording is 'too high a bar'

4. Do you agree that the principles should be amended to provide that all support to enable a person to make their own decisions should be given, and shown to have been unsuccessful, before interventions can be made under the AWI Act?

☒ Yes
☐ No

Please give the reason(s) for your answer

We are supportive of the thrust of this suggestion – that supported decision making should be used in preference to interventions under the Act if at all possible. Once again, further clarification is required to ensure this suggestion is clinically and practically useful, and is consistently applied.

Firstly, it would be helpful to clarify if this amendment is proposed as a seventh AWIA principle – joining the five current principles, and that suggested in Q1 above, or whether it is to be combined with that other new one. Secondly, the practical meaning of 'all support' and 'unsuccessful' require elaboration. The range of interventions which could be considered as 'all support' might well vary considerably depending on the urgency of the situation, the complexity of the decision, and the supports which are practically available, and, crucially, acceptable to the person. 'Unsuccessful' might also prove problematic in practice. On occasions the person can *come to* a decision, but one which appears incapacious and unwise and possibly harmful. Currently one would consider AWIA intervention at this point, but could this be viewed as proceeding with an intervention when support has not been shown to be unsuccessful?

Again, we are supportive of this proposal in principle and outline, but note that most of the really problematic and contentious uses of the Act are where the adult *can* express their decision, and maintains that decision after having received all available support, but where their capacity is in question, and where the decision appears likely to lead to risks to their life, health, dignity, or interests. Clarification on the legitimate uses of interventions in these circumstances would be valuable.

5. Do you agree that these principles should have precedence over the rest of the principles in the AWI Act?

☐ Yes
☒ No

Please give the reason(s) for your answer

No. We have noted above our support for adding to the specific principles within the Act. However, we do not support the idea of 'precedence' in the sense of 'importance over'. It might well be that taking steps to ascertain will and preferences and providing support for decision making will be the *first* principles applied as a case is managed. However, *all* the principles must be viewed as important and their relative importance and direct applicability might well vary with the specific factors of the case. In particular, we believe the principle that intervention must 'benefit the adult and that such benefit cannot reasonably be achieved without the intervention' is almost always of central importance.

6. Do you have any suggestions for additional steps that could be put in place to ensure the principles of the AWI Act are followed in relation to any intervention under the Act?

☒ Yes
☐ No

Please give the reason(s) for your answer

> We believe that it should be specified that supported decision making should, in general, include the input of family members and other persons important to the adult and previously involved with their life and care. We also believe that it would be useful to clarify that there should be consideration to the will and preferences as expressed across the adult's lifespan, as well as their currently held views.
>
> The Act or code of practice should be clear that an adult should not be disadvantaged in receiving health or social care by virtue solely of lacking capacity. This would act as a safeguard against discrimination and of "minimum necessary" actions being interpreted as lesser than would be provided to adults with capacity. This is in keeping with human rights principles and UNCRPD.

Proposed Terminology changes

Throughout the AWI Act distinction is made between an adult's property and financial affairs and an adult's personal welfare (including healthcare matters). However, the way this distinction is made is different for powers of attorney and guardianship orders.

Under Part 2 of the AWI Act, a power of attorney that relates only to financial matters is known as a "continuing attorney". This causes confusion and requires repeated explanation to members of the public.

Under Part 6 of the AWI Act a guardianship order can be granted for the protection of the property, financial affairs or personal welfare of the adult.

We consider that there should be easily understood descriptors of the role an attorney or guardian holds. We think these should be the same for both roles.

We recommend changing the term 'continuing attorney' to 'financial attorney'.

A guardian should continue to be known as a guardian with financial, property and / or welfare powers depending on the authority granted to them by the sheriff.

Question

7. Do you agree with the change of name for attorneys with financial authority only?

☒ Yes
☐ No

Please give the reason(s) for your answer

This will align the statute with what they are generally called in practice.

Sheriff's power of directions

Section 3(3) of the AWI Act currently provides for the sheriff, on application by any person claiming an interest in the property, financial affairs or personal welfare of an adult to give directions to any person exercising functions conferred by the AWI Act or functions of a like nature conferred by the law of any country.

This is an incredibly useful power, but we consider it needs expanding in two ways.

First we think that the sheriff should be able to give directions to people formerly exercising functions, so that a former attorney or guardian for example could be ordered to provide information. This will ensure greater transparency between individuals currently and formerly exercising functions under the AWI Act and will provide further protection for the adult.

Second, we think that 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 AWI Act.

This would provide a route for attorneys and guardians to, for example, request the sheriff to direct a pension provider to transfer payments into an appropriate account. The inability to do something like this at present can cause a great deal of distress for persons acting under the AWI Act and can often mean the adult is not receiving the funds they should.

Question

8. Do you agree with our proposals to extend the power of direction of the sheriff?
   ☒ Yes
   ☐ No

   Please give the reason(s) for your answer

Authority of the Public Guardian

Section 6(2)(c) of the AWI Act gives the OPG the authority to receive and investigate any complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to continuing (financial) attorneys, intromissions with funds, guardians or persons authorised under intervention orders.

However, the OPG is not allowed to investigate any matters or concerns in relation to a deceased adult. The AWI Act currently only provides official status for the OPG to ensure the estate of an adult with incapacity is protected for the benefit of the adult. The OPG has said that a discretionary power to continue investigations after the adult has died would be very useful. This would minimise the risk of misappropriation of funds in an adult's estate. There is also the consideration of other adults who may be at risk if the OPG is not permitted to continue an investigation after the death of the adult.

We agree with the views of the OPG and propose that section 6(2)(c) be amended to enable an investigation carried out by the OPG, if appropriate, to be continued after the death of the adult, so long as the investigation has started before the adult died.

Question

9. Do you agree with our proposal to amend the powers of investigation of the OPG to enable, where appropriate , an investigation to be continued after the death of the adult?

☒ Yes
☐ No

Please give the reason(s) for your answer

Investigations into cases under the AWI Act

Presently OPG investigate financial concerns where the adult lacks capacity. This can be where the adult is subject to provisions of the AWI Act, such as where a continuing (financial) power of attorney, a guardianship or intervention order with property and/or financial powers, or authorisation to access funds under Part 3 are in place. OPG can also investigate where the adult lacks capacity and there are no provisions under the AWI Act in place.

The local authority has a duty to investigate cases under the AWI Act if there is a risk to the personal welfare of an adult. The local authority also has a duty in the AWI Act to consult the OPG and the Mental Welfare Commission (MWC) on cases where there appears to be a common interest .

The local authority also has a duty to make inquiries under the Adult Support and Protection (Scotland) Act 2007 (ASP Act). This is if it knows or believes that the person is an adult at risk, and that it might need to intervene in order to protect the person's well-being, property or financial affairs. An adult at risk in this case can include an adult lacking capacity as well as an adult with capacity but who is otherwise vulnerable as described in section 3 of the ASP Act.

The recent SMHLR set out a recommendation on improving the investigation framework within the AWI Act. It stated that at present there was no clear investigation structure with local authorities carrying out social work functions, Police, the MWC and OPG who are all working independently. It recommended that a comprehensive investigatory framework should be developed with OPG, local authorities, the MWC and Police Scotland and full and equal participation with persons with lived experience including unpaid carers.

We agree with the SMHLR and are proposing that we split the investigatory responsibilities between the OPG and local authority. OPG would retain the investigatory function for the areas it actively supervises and where the adult already lacks capacity. This will cover financial guardianship orders, financial intervention orders and ATF (Part 3).

The local authority as part of its adult support and protection functions would take responsibility for cases where there is a power of attorney in place or where the adult lacks capacity and there is no order in place under the AWI Act. These are the cases where incapacity has to be determined and there is most chance of duplication of effort between OPG and local authorities.

The investigatory powers would be clearer because we are proposing that OPG investigate financial guardianships, ATF and financial intervention orders. We anticipate that OPG will require to make an adult support and protection referral to the local authority under section 5 of the ASP Act (noting that the OPG have duties of cooperation under section 5) confirming that it is taking forward a property and finance investigation under guardianships, ATF and intervention orders so that the local authority can check the welfare aspects in relation to the adult concerned. Please see flow chart in consultation document for the proposed structure.

The reason for the proposed structural changes is to provide greater clarity for those reporting concerns so they are clear on the most appropriate agency to contact in the first instance. There would be clearly defined responsibilities and there is the opportunity to reduce duplication of effort and for the respective agencies to develop their expertise.

Question

10. Do you agree that the investigatory responsibility between OPG and local authority should be split in the manner outlined above?

☒ Yes
☐ No

Please give the reason(s) for your answer

While we agree in general terms with the thrust of this proposal we are concerned about the risk that ‘split responsibility becomes nobody’s responsibility’. There must be clear and unambiguous guidance on the responsibilities of each party.

11. Will these changes provide greater clarity on the investigatory functions of OPG and local authority?

☒ Yes
☐ No

Please give the reason(s) for your answer

12. Will this new structure improve the reporting of concerns?

☒ Yes
☐ No

Please give the reason(s) for your answer

It is possible that this new structure would improve reporting in some cases. It is not always clear what the barriers are to reporting concerns. There should be ongoing work within the OPG to establish the reasons behind delays in such reporting.

Part 2 - Power of attorney

Training for attorneys

Powers of attorney are powerful, and useful instruments that allow a granter to retain control over aspects of their lives, in circumstances where they might not otherwise be able to make decisions or take actions. This ensures that the granter has the opportunity to make provision for a future where they may no longer have the mental capacity to understand what is happening to them. If they have fluctuating capacity a power of attorney allows them to still make autonomous decisions about the things they care about.

We want to ensure that attorneys are aware of the obligations under the AWI Act and understand the requirements in fulfilling the role. We propose introducing mandatory training for attorneys so that they understand the requirements of the role and where they can get support in carrying out the role. This is in line with recommendation 13.4 of the SMHLR.

We are envisaging a short, web based presentation easily accessible to attorneys , with clear information on the role of an attorney and where additional help can be found. In checking the attorney's willingness to act as such, the OPG will check if the prospective attorney has seen this presentation prior to agreeing to take on the role, and if not, will require the attorney to do so prior to registering a power of attorney.

Enhancing the Safeguards around power of attorney

The Office of the Public Guardian (OPG) has a range of functions under the AWI Act. It is responsible for registering powers of attorney and maintaining a Public register of all continuing and welfare continuing and welfare power of attorneys. It also supervises the actions of those appointed in terms of the AWI Act to manage the property and financial affairs of adults who lack the capacity to carry out these functions for themselves and provide advice and support.

We propose giving OPG additional powers to increase the safeguards when registering a power of attorney. We propose that there should be provision for the OPG to refuse to register a power of attorney if there is a dispute about capacity. OPG should be able to call for additional capacity reports if there is a reasonable cause. This would allow OPG to pause registration and resolve

the issue of capacity/incapacity administratively. If OPG refuse to register the power of attorney, then either party will be able to seek directions from the Sheriff themselves for the matter to be determined by the court.

The same should apply to registration of a revocation notice under section 22A. Revocation means that the granter of the power of attorney can cancel the power of attorney if certain conditions are met and the OPG has to update the register with that information. This shows if power of attorney is active or not.

Section 22A of the AWI Act sets out the process of revocation of a continuing or welfare power of attorney. This needs to be in writing and must include evidence that the granter was not acting under undue influence and understood the purpose and effect of power of attorney. We propose that the same changes should apply to a revocation notice as above.

Increasing accessibility of powers of attorney.

We know from the SMHLR that widening accessibility of power of attorney is important to increase the uptake of power of attorney documents. We propose to increase the class of persons that are allowed to certify a granter's capacity in a power of attorney document**.**

It is proposed that the class of persons that can certify a granter's capacity in a power of attorney is extended. First we propose that clinical psychologists are considered for this purpose. Clinical Psychologists are mental health professionals who have extensive training in the field of mental disorders and have the knowledge and expertise to undertake this role.

Second we have considered the approach in England and Wales where Chartered Legal Executives (CLE's) carry out many of the same functions as solicitors.They can also facilitate the creation of an original power of attorney, but were not able to certify capacity. It's important to note that the certification process is different in England and Wales to Scotland. Scottish certification requirements are substantially tighter than those in England and Wales

Accredited paralegals in Scotland carry out many of the same functions as solicitors .We suggest that the training they undergo would give them the skills to certify a granter's capacity for powers of attorney as they work closely under the supervision of a Scottish solicitor, either in private practice or in-house.

We therefore propose widening the class of persons who can certify that a granter has capacity in a power of attorney to include a paralegal as well as psychologist. These proposals are aimed at increasing the channels through which consumers can obtain a power of attorney and promote consumer choice. This aligns with our policy of increasing access to justice.

Questions

13. Do you agree with the proposals for training for attorneys ?

☒ Yes
☐ No

Please give the reason(s) for your answer

Those undertaking the role of attorney should know as much as possible about their role and responsibilities. Of particular importance is emphasis on the need to act in line with the Act's principles – especially noting that interventions need to be for the benefit *of the adult.* Care must be taken however, to ensure that additional training needs do not become a barrier of increased cost and time and hence decrease uptake.

14. Do you agree that OPG should be given power to call for capacity evidence and defer registration of a power of attorney where there is dispute about the possible competency of a power of attorney document?

☒ Yes
☐ No

Please give the reason(s) for your answer

While agreeing with this proposal in principle, we have a number of concerns about the application of this power in practice. Firstly, who would bring the capacity evidence into question and on what basis? Secondly, who could be called to give additional capacity evidence and how would this be sourced and resourced?

15. Do you agree that OPG should be able to request further information on capacity evidence to satisfy themselves that the revocation process has been properly met?

☒ Yes

☐ No

Please give the reason(s) for your answer

16. Do you agree that OPG should be given the power to determine whether they need to supervise an attorney, give directions or suspend an attorney on cause shown after an investigation rather than needing a court order?

☒ Yes
☐ No

Please give the reason(s) for your answer

As for our answer to Q14.

17. Should we extend the class of persons that can certify a granter's capacity in a power of attorney?

☒ Yes
☐ No

Please give the reason(s) for your answer

Such persons would clearly be required to have, and to demonstrate, sufficient knowledge, skills, and training to undertake this role.

18. Do you agree that paralegal should be able to certify a granter's capacity in a power of attorney?

☒ Yes
☐ No

Please give the reason(s) for your answer

As for Q17, the individual should be required to have, and to demonstrate, sufficient knowledge, skills, and training. They should also belong to an accredited professional body.

19. Do you agree that a clinical psychologist should be able to certify a granter's capacity in a power of attorney?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, we agree that appropriately trained clinical psychologists should be able to certify a granter's capacity in a power of attorney. We note that undertaking certain functions under the AWIA and the Mental Health (Care & Treatment) (Scotland) Act 2003 requires medical practitioners to have Approved Medical Practitioner (AMP) status. This requires additional training which, under Scottish Governmental direction, must be updated every five years. Consideration must be given to the initial and ongoing training needs of psychologists undertaking this, or any other, new role.

20. Which other professionals can certify a granter's capacity in a power of attorney?

Please give the reason(s) for your answer

We are not aware of additional professional groups able to undertake this task.

21. Do you agree that attorneys, interveners and withdrawers (under Part 3) should have to comply with an order or demand made by OPG in relation to property and financial affairs in the same way as guardians ?

☒ Yes
☐ No

Please give the reason(s) for your answer

Broadly speaking, the scrutiny of proxy roles, whether guardians or attorneys, should be similar.

Broadening powers of Public Guardian to order compliance with demands in relation to property and financial affairs of the adult.

At present section 64(7) of the AWI Act states:

"(7)The guardian shall comply with any order or demand made by the Public Guardian in relation to the property or financial affairs of the adult in so far as so complying would be within the scope of his authority; and where the guardian fails to do so the sheriff may, on the application of the Public Guardian, make an order to the like effect as the order or demand made by the Public Guardian, and the sheriff's decision shall be final."

We think that rather than restrict the Public Guardian's powers in this area to guardians, they should be extended to attorneys under a power of attorney, interveners and withdrawers (under Part 3). This will assist the Public Guardian in her supervisory duties in respect of these areas and provide greater safeguards for the adult.

We also think the Public Guardian should have wider powers to suspend powers granted to a proxy under section 12 of the AWI Act whilst they undertake an investigation. Section 12 already allows the Public Guardian, MWC or local authority to take such steps, including an application to the sheriff, which seem necessary to safeguard the property, financial affairs or personal welfare of the adult. The power to suspend powers would be an additional safeguarding option, where even though the investigation is still on-

going the Public Guardian is satisfied in the interim that the proxy should not be able to intromit with the estate.

For instance, at the moment the Public Guardian can freeze bank accounts and benefits/pension payments in, but that may still leave other powers the proxy can utilise, for example taking out finance, signing legal agreements and cashing in policies. It is likely that the power would not be used often and practically could only be used if the adult was not living in the community and care or emergency costs were covered by the local authority. This would be appealable to the sheriff.

We are also interested in your views on whether the power to suspend powers should also be available to the local authority and the MWC as part of their investigations.

Questions

22. Do you agree that the Public Guardian should have broader powers to suspend powers granted to a proxy under the AWI Act whilst they undertake an investigation into property and financial affairs?

☒ Yes
☐ No

Please give the reason(s) for your answer

While we agree with the principle of extending powers we have concerns about process delays, particularly those which could delay release of assets to fund care for an adult and hence delay their move to a more appropriate placement.

23. Do you agree that the MWC and local authority should have broader powers to suspend powers granted to a proxy under the AWI Act whilst they undertake an investigation into welfare affairs?

☒ Yes
☐ No

Please give the reason(s) for your answer

We agree but with similar concerns to our answer to Q22 above.

Part 3

Access to Funds (ATF)

Introduction

The Access to Funds (ATF) scheme is a simple way of managing an adult's financial affairs and is far less onerous than guardianship. The present scheme is not widely used and is overly bureaucratic. We think there remains a need for an effective scheme and are putting forward proposals for change to the ATF scheme.

How the scheme works at present:

An application is made by the applicant to the OPG to transfer a set amount of funds from the adult's current account to a new 'designated' account. It is the 'designated' account that the withdrawer can use to remove funds to spend on or on behalf of the adult.

A medical certificate and a statement from a person who has known the applicant for at least a year is part of the application and currently a fee of £97 is required. Once authorised the withdrawer has access to the funds in the designated account. The withdrawer uses these funds for direct debits and day to day expenditure of the adult, such as care home fees. This has to be estimated for the month and the amounts required are laid out in the application form.

There are large numbers of rejections by OPG for incorrect documents. OPG intimates the application on persons listed in the Act. If anyone objects to an OPG decision to grant or refuse the application, they can make representations to OPG. An application can be remitted to the Sheriff at the instance of POG, the applicant or any interested party.

OPG produces a certificate that the withdrawer can present to financial institutions with the exact amounts to be withdrawn. Any changes to this require another application. OPG monitors withdrawers, meaning that a random selection of cases is taken from time to time for checking.

Powers available under The ATF Scheme at present

Authority to provide information about funds.

This application is for a certificate authorising any fundholder to provide the person with such information as the person may reasonably require in order to make a further ATF application.

Authority to open account in adult's name

This application can be made at the same time as the application to access funds and is to open an account where there is not already one suitable for an ATF application. This would be used in cases where it is known the adult has funds or payments that could be accessed via this scheme if such an account was opened.

Authority to intromit with funds

As it stands this requires specific amounts of money (as detailed in the application form) to be transferred from the adult's current account to a new 'designated' account. From this withdrawals can be made for the specific amounts and purposes detailed in the application. The withdrawer can also continue and set up standing orders and direct debits from the adult's current account to pay the adults living expenses. The idea is that this transfer from current account to designated account provides some safeguard for the adult's finances.

Suggestions for change

We are suggesting that, rather than monitor withdrawers under the scheme, the Public Guardian should actively supervise withdrawers. This will mean taking an annual view of the actions of every withdrawer with respect to the adult's finances. We think this would look similar to the accounting requirements for guardianships[3], albeit with a lighter touch.

The Public Guardian will have discretion as to the frequency and form of the accounts. The ATF scheme should remain as at present with no remuneration or reimbursement of outlays for a withdrawer.

[3] Schedule2, sections 7 and 8

Our proposal is for the scheme to grant proforma powers at the outset for the same functions it already does, without the necessity for additional applications to OPG for additional authority or to change amounts. Safeguarding will be provided by a requirement to estimate the amounts required for each purpose at the outset. This will then be checked by OPG on an annual basis to see that the withdrawer has acted appropriately. This will provide a deterrent and will allow OPG to make enquiries if anything untoward is found.

In order to make the scheme more usable and flexible our proposal is to remove the requirement for the certificate to reflect the exact finances to be accessed by the withdrawer. These will be to pay for care home fees, holidays, clothing, and other related goods and services for the adult[4] . An estimate of these amounts can be provided to OPG at the time of application, for supervisory purposes, however they will not be reflected in the withdrawal certificate.

At present for instance, if the care home fees went up from £500 to £600 an application for variation of the amount would be required. Under our proposal the withdrawer can amend this amount for withdrawal, or any other amount that corresponds with the powers they have, without a variation application. There will be no specific limits on the amount any sum can be increased. Any transactions will have to be explained when accounting is provided to OPG.

We think access should be provided directly to the adult's current account, the risks associated with which can be offset by Public Guardian supervision. This makes for a clearer, less complicated scheme.

Varying pre-existing arrangements on the adult's account

The AWI Act states[5] that the withdrawal certificate may (amongst other powers[6]) "authorise the continuance or making of arrangements for the regular or occasional payment of funds from the adult's current account for specified purposes (for example: by standing order or direct debit)"

We think this is too restrictive. In order to make any adjustments to any existing arrangements that have been set up on the adult's current account (for instance a standing order or direct debit), the withdrawer would need to apply for a full variation order[7].

[4] S.24A(2)
[5] s.26A(1)(b)
[6] in s.26A(1)
[7] under section 26F

The wording is limiting and additionally, needs to grant the withdrawer, via the withdrawal certificate, power to vary any prearrangements on the adults account.

What we think the withdrawal certificate should allow

Therefore we think the withdrawal certificate should allow:

- Authority to open or close an account in the adult's name
- Transfer of funds between the adult's accounts
- The continuance, variance or making of arrangements for the regular or occasional payment of funds from the adult's current account for specified purposes (for example by standing order or direct debit)
- The termination of regular or occasional payment of funds from the adult's current account for specified purposes (for example by standing order or direct debit)
- The withdrawal of funds from the current account for specified purposes
- Administration and disbursement of funds for Self-Directed Support

Questions:

24. Do you agree that the powers and specific amounts should be decoupled?

☒ Yes
☐ No

Please give the reason(s) for your answer

25. Do you agree that the withdrawal certificate should contain standard, proforma powers for the withdrawer to use?

☒ Yes
☐ No

Please give the reason(s) for your answer

26. Do you agree that access should be given to the adult's current account, rather than setting up a 'designated account'?

☐ Yes
☐ No

Please give the reason(s) for your answer

Applications where there is a guardian, continuing attorney or intervener with powers relating to the funds in question

The AWI Act states[8] that an application cannot be made in the case of an adult in relation to whom there is a guardian, continuing attorney or intervener with powers relating to the funds in question.

There are cases where an application for ATF may be necessary where there is an intervener or guardian in place in relation to the same funds. For instance interveners may have a power to transfer funds (perhaps from the sale of a house or other asset) into an account that in accordance with the least restrictive intervention principle[9] ought thereafter to be administered under Part 3 of the AWI Act. In order to have a seamless transition, it may be preferable for the application to access funds to be made whilst the intervention order is still operative. The intervention order will fall once the powers in it have been used.

[8] s.24B(2)
[9] s.1(3)

There is also the possibility that a guardianship order is granted but the estate has reduced so that it would be more appropriate to be managed by ATF. That would require an ATF application whilst there was a guardianship order in place in order to ensure there was no gap in protection. Transition from guardianship order to ATF is already provided for in the AWI Act[10]. However the AWI Act itself states that an application for ATF cannot take place whilst a guardianship order for the same funds is in place, rendering the transition provisions inoperable.

We think that the provisions preventing ATF applications when there are attorneys with powers over the same funds should remain in place.

Question:

27. Do you agree that in certain circumstances, applications where there is a guardian, or intervener with powers relating to the funds in question should be allowed?

☐ Yes
☐ No

Please give the reason(s) for your answer

Application when there is already authorisation to intromit with the same funds

The AWI Act states[11] that an application cannot be made to intromit with an adult's funds if a person is already authorised to intromit with the funds of the adult to whom the application relates.

We think the wording "already authorised to intromit" is confusing and rather than refer to applications under this section, could refer to authorisations under other provisions as well, such as DWP appointments. We intend to clarify that a bar to applying under this section only applies if someone

[10] S.31E
[11] S.25(5)

already is authorised only under Part 3 of the AWI Act to intromit with the same funds.

Question:

28. Do you agree that we should clarify that a bar to applying under this section only applies if someone is already authorised under Part 3 of the Act to intromit with the same funds?

☐ Yes
☐ No

Please give the reason(s) for your answer

Account held by fundholder in adult's sole name

The AWI Act states[12] that an application must specify an account held by a fundholder in the adult's sole name which the applicant wishes to use for the purpose of intromitting with the adult's funds.

We have heard that this may limit organisational use of the scheme. There may be occasions where an organisation, for ease of administration, would want to use a single client or corporate account to hold the funds of a number of people. Although these funds wouldn't be in an account in the sole name of the adult, they would be clearly identified as the adult's funds and belonging to the adult.

Question:

29. Does having an account in the adult's sole name limit organisational use of the scheme?

☐ Yes
☐ No

[12] S.26(1)(b)

Please give the reason(s) for your answer

Transition to ATF from intervention order

The AWI Act refers[13] to transitions to the ATF scheme from guardianships. Currently there is not an equivalent transition available from intervention orders. Instead, people are encouraged to apply for a guardianship order as it involves less paperwork. However this might not be the least restrictive method according with the principles of the AWI Act.

As it stands a transition to ATF from guardianship requires an application, but it doesn't need a counter signatory and the Public Guardian may disapply the requirement for medical certificate. We propose that the same applies to intervention orders. For instance, in accordance with the least restrictive principle, there could be an intervention order to sell a house, but then authority under the ATF scheme to deal with the proceeds.

Question:

30. Should we add the same transition provisions to intervention orders as there are for guardianships?

☐ Yes
☐ No

[13] S.31E

Please give the reason(s) for your answer

Sheriffs to be able to approve ATF if previously a guardianship order has been applied for and ATF is deemed a lesser intervention.

When a guardianship order is applied for through the court, the court rules provide that the application is served on a number of different persons, including the Public Guardian, in order that they can comment on the application or attend a hearing.

The Public Guardian provides comments regularly to the sheriff court on cases. There are often cases where the Public Guardian comments that a financial guardianship is not required and authority via the ATF scheme would be a lesser, more appropriate intervention. Often guardianship orders are granted in these cases.

We think one of the reasons is that if the financial guardianship application was refused, then the applicant would have to begin making an ATF scheme application from the beginning, denying the adult the protection and access to their finances that a financial guardianship could provide at that point.

We think, only in these specific cases, a sheriff should be able to grant authority via the ATF scheme, rather than a financial guardianship order. That would prevent the hiatus in applications creating a lack of protection and access to their finances for the adult. Our proposal, where the powers given in the withdrawal certificate are not bound to specific amounts, would make this possible.

Question:

31. Do you agree that sheriffs, under certain circumstances, should be able to grant powers to access funds under our new proposal?

☐ Yes
☐ No

Please give the reason(s) for your answer

Inclusion of authorised establishments in the ATF scheme

The AWI Act allows ‘a body’ to apply for ATF. For example, local authorities can apply. However, it excludes authorised establishments within the meaning of section 35(2) from applying. Authorised establishments under section.35(2) are:

- A health service hospital
- An independent hospital or private psychiatric hospital
- A state hospital
- A care home service
- A limited registration service

This is because they are specifically catered for by Part 4 of the AWI Act dealing with management of residents’ finances. Part 4 is very little used, as described later and we are proposing that it is removed. On that basis we think that authorised establishments should be allowed to apply under the ATF scheme, along with other organisations.

Question:

32. Do you agree that authorised establishments should be able to apply under the ATF scheme?
☐ Yes
☐ No

Please give the reason(s) for your answer

Intimation of application

As stated previously, the Scottish Law Commission envisaged ATF as being an application where an individual could obtain authority from the Public Guardian to withdraw the adult's money for the adult's benefit.

To reflect this intimation on interested parties is carried out by staff of the OPG. The most recent OPG statistics show that more than twice the number of applications are received from local authorities, or other organisations rather than individuals.

We are therefore suggesting, to share the administrative responsibility for this, that where the applicant is an organisation, they should provide intimation of the application to interested parties. Where the applicant is a lay person, OPG staff will provide intimation of the application as they do at present. This will reflect practice in the sheriff courts[14].

Question:

33. Do you agree we should split intimation of the application between organisations and lay people (OPG)?

☐ Yes
☐ No

[14] Statutory Instrument 1999 No. 929 (S. 65), rule 3.16.4(2)

Please give the reason(s) for your answer

Part 4

Management of Residents' Finances

Part 4 of the AWI Act concerns adults who reside in authorised establishments who lack the capacity to manage their financial affairs. Authorised establishments are defined in the AWI Act as health service hospitals, independent hospitals or private psychiatric hospitals, the state hospital, care home services and limited registration services. Part 4 provides a mechanism for managers of those establishments to manage finances to a limited extent on the adult's behalf.

We propose removing Part 4 from the AWI act due to its low uptake, complexity and the existence of alternative mechanisms such as Access to Funds, Guardianships and intervention orders. This change would simplify decision-making, reduce administrative burdens and provide more accessible support for individuals with incapacity.

Questions

34. Do you support the proposal to remove Part 4 from the AWI Act?

☐ Yes
☐ No

Please give the reason(s) for your answer

35. Do you think alternative mechanisms like the ATF scheme, guardianships and intervention orders adequately address the financial needs of adults with incapacity living in residential care settings and hospitals?

☐ Yes
☐ No

Please give the reason(s) for your answer

Part 5

Authority to medically treat adults with incapacity

Adapted section 47 certificate authorising removal of adult to hospital for the treatment of a physical illness or diagnostic tests where they are unable to consent to admission.

Part 5 of the AWI Act gives authority to treat a person who is incapable of consenting to medical treatment to safeguard or promote their physical or mental health.
Section 47 of the AWI Act allows the medical practitioner (or other specified healthcare professional) who is primarily responsible for the adult's treatment to complete a certificate certifying that in their opinion the adult is incapable of making a decision on the medical treatment in question.

The Commission's report in 2014 on Adults with Incapacity had noted that there were concerns whether there was sufficient authority to transport persons to hospital where they lack capacity to agree to that action (paragraph 4.9). However they concluded that conveying a person to hospital could normally be justified under the common law principle of necessity in an emergency and may otherwise be authorised by the fact that a certificate under section 47 gives "authority to do what is reasonable in the circumstances, in relation to the medical treatment in question, to safeguard or promote the physical or mental health of the adult". This could include taking someone to hospital to receive treatment. But conveying someone to hospital for non-urgent care would require an existing s.47 certificate to be in place.

We therefore propose to introduce a new adapted section 47 certificate that would expressly allow a person to be conveyed to hospital and ensure that this process is authorised in law.

An enhanced section 47 certificate to prevent a person being treated for a physical condition from leaving hospital, whether temporarily or permanently.

Currently Scots law provides no specific process to authorise measures to prevent a person being treated in hospital for a physical condition from leaving. This gap was identified in the Commission's report on Adults with Incapacity in 2014

We agree with SMHLR that there is a significant gap in the law that needs to be remedied given the lack of a specific process to authorise measures to prevent a person being treated for a physical condition from leaving hospital, whether temporarily or permanently.

We are proposing that an additional process is required to enable authorisation of any necessary measures to prevent an adult with incapacity from going out of a hospital unaccompanied and that this process should be connected to the process of authorising medical treatment.

Clarifying the provision of palliative care under Part 5 of the AWI Act where a welfare proxy disagrees with proposed treatment.

There can be circumstances where the giving of medication for the purpose of alleviating serious suffering on the part of the patient could also prevent serious deterioration in their medical condition. However, alleviation of serious suffering is not itself stated in the legislation or code of practice as a purpose for which treatment could be given while section 50 dispute resolution procedures are ongoing.

The Scottish Government believe that in a section 50 dispute resolution, the treating doctor should be able to give medical treatment that is necessary to alleviate serious suffering on the part of the patient (so long as there is no interdict in force). There is no mention of alleviation of serious suffering in the AWI Act Code of Practice for medical practitioners.

These changes would provide clarity for medical practitioners and relatives and medical staff when there is a dispute resolution situation, and they are providing treatment to the patient nearing the end of their life. This would require statutory changes to section 50(7) to reflect new policy intent rather than amending the code of practice for medical practitioners and make the AWI Act clearer on this matter

Questions

36. Do you agree that the existing section 47 certificate should be adapted to allow for the removal of an adult to hospital for the treatment of a physical illness or diagnostic test where they appear to be unable to consent to admission?
    - ☒ Yes
    - ☐ No

Please give the reason(s) for your answer

In principle we are supportive of clarifying the issue of 'authority to transport persons to hospital where they lack capacity to agree to that action'. However, if this authority involves statutory provision, rather than being 'justified under the common law principle of necessity in an emergency', then the test for application of these powers should and must remain that they are *incapable by reason of mental disorder*, not simply that they 'appear to be unable to consent to admission'. We are concerned that failure to apply this test when considering statutory deprivation of liberty risks making the DoL not ECHR Article 5 compliant.

37. Do you consider anyone other than GPs, community nurses and paramedics being able to authorise a person to be conveyed to hospital? If so, who?

☒ Yes
☐ No

Please give the reason(s) for your answer

Medical practitioners other than GPs routinely work in the community and any statuary authority to allow conveyance to hospital should also be available to them.

A POA or WG with the specified powers could authorise non urgent conveyance to hospital if this was specified within the powers granted.

38. Do you agree that if the adult contests their stay after arriving in hospital that they should be assisted to appeal this?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes. Alongside any new statutory powers to convey a patient to hospital consideration must be given to statutory powers to authorise their deprivation of liberty within the hospital (as proposed in Q40 below). Both the authority proposed to convey to, and the authority proposed to retain in, hospital should be challengeable by appeal. Given that this patient group will be, by definition, incapable of medical treatment decisions consideration must be given to assistance with appeals, or even automatic appeals (or other review).

39. Who could be responsible for assisting the adult in appealing this in hospital?

Please give the reason(s) for your answer

1) Properly trained and resourced independent advocacy, as for patients detained under the Mental Health (Care & Treatment) (Scotland) Act 2003.
2) An already existing proxy under the AWIA.
3) Consideration could also be given to establishing a role similar to the Named Person under the 2003 Act for patients under the 2000 Act.

An enhanced section 47 certificate to prevent a person being treated for a physical condition from leaving hospital, whether temporarily or permanently – Page 47

40. Do you agree that the lead medical practitioner responsible for authorising the section 47 certificate can also then authorise measures to prevent the adult from leaving the hospital?

☒ Yes
☐ No

Please give the reason(s) for your answer

As in our response to Q36 above, we are supportive of clarifying the legal basis by which individuals who lack the capacity to consent to their placement in hospital are retained there (whether or not they attempt to leave). Once again, the test authorising this deprivation of liberty must remain that they are incapable by reason of mental disorder, in order for the DoL to be ECHR Article 5 compliant. Also, the seniority and training of the 'lead clinician' should be clarified is these DoL powers are to be available to 'any medical practitioner who is for the time being responsible for the treatment of the adult'.

Just as a guardian/POA can agree to medical treatment, and must be consulted, they should have the same powers to agree and right to be consulted about DoL.

41. 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?

☒ Yes
☐ No

Please give the reason(s) for your answer

We are in agreement that any certificate must have time limits and specified review dates. However, we have concerns about the current wording of this proposal: it implies that it is the end of the physical health treatment that would determine the end of the period of DoL. If the initial DoL is on the basis of incapacity due to mental disorder (which it must be), then the period of detention must end once capacity is regained, and, in those circumstances, the date of the end of the physical treatment would have no relevance.

42. Do you think that there should be a second medical practitioner (i.e. one that has not certified the section 47 certificate treatment) authorising the measures to prevent an adult from leaving the hospital?

☒ Yes
☐ No

Please give the reason(s) for your answer

We are in agreement that any newly introduced DoL powers under the AWIA must include safeguards such as the potential for second opinion. Consideration must be given to whether this second opinion would be in all cases or only a sub-set of cases. The training, seniority, and specialty background of the proposed second opinion doctor must also be considered, alongside the resource implication of this new workload to clinical services.

43. If yes, should they only be involved if relevant others such as family, guardian or attorney dispute the placement in hospital?

☐ Yes
☒ No

Please give the reason(s) for your answer

While this proposal seems reasonable on its face and would potentially limit resource demands it seems to risk an inequitable difference in available scrutiny and safeguards between those with a proxy and those without (who are arguably the more vulnerable).

44. Do you agree that there should be a review process after 28 days to ensure that the patient still needs to be made subject to the restriction measures under the new provisions?

☒ Yes
☐ No

Please give the reason(s) for your answer

We agree that any DoL should be time-limited and any DoL more lengthy than 28 days should proceed to review. Ideally this should be in a judicial or Tribunal forum as for the Mental Health (Care & Treatment) (Scotland) Act 2003.

45. Do you agree that the lead clinician can only authorise renewal after review up to maximum of 3 months before Sheriff Court needs to be involved in review of the detention?

☐ Yes
☒ No

Please give the reason(s) for your answer

No. Patients detained under the Mental Health (Care & Treatment) (Scotland) Act 2003 can expect Tribunal scrutiny within 28+5 days. It is not clear why this proposal suggests a period three times as long.

46. What sort of support should be provided to enable the adult to appeal treatment and restriction measures?

Please give the reason(s) for your answer

Provision of independent advocacy, solicitor, and independent medical report.

Clarifying the provision of palliative care under Part 5 of the AWI Act where a welfare proxy disagrees with proposed treatment – Page 50

47. Do you agree that section 50(7) should be amended to allow treatment to alleviate serious suffering on the part of the patient?

☒ Yes
☐ No

Please give the reason(s) for your answer

We support this proposal to clarify the law in this area.

48. Would this provide clarity in the legislation for medical practitioners?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, this will remove a potential legal concern which might concern practitioners in exercising their duty of care.

Part 6

Guardianships

Our proposals

Medical reports

The present need to obtain two reports from a GP and a psychiatrist for a guardianship order can result in delays in the application. Incapacity reports are not included in the GP contract and GPs are not obliged to carry them out. Where they do so they are entitled to charge for their services. GPs are not experts in incapacity assessments, so may not feel confident, or may refuse because of the volume of their existing work.

There are fewer psychiatrists, but they are experts at assessing incapacity where it results from mental disorder. It is generally part of their contract to complete incapacity reports. Even so, ideally the person completing the report should know the adult and psychiatrists may refuse if they are not familiar with the adult.

Given this difficulty we are considering reducing the number of medical reports required from two to one for guardianship applications, including interim applications. On balance we think that, in considering who should complete a single report where incapacity is by reason of mental disorder, the wider option of either a GP or a psychiatrist would be preferable. This pragmatically recognises the difficulty in getting these reports and also that one of the professionals may not be comfortable in providing a report for a particular patient. Where incapacity is by reason of inability to communicate because of physical disability we suggest that the single report should come from a GP. The vast majority of cases of incapacity under the AWI Act relate to mental disorder.

In reducing the requirement to one report, we are very conscious that this report needs to meet the needs of the case and provide sufficient information to enable the sheriff to make a decision. Clear guidance will set out what is required of the report, including the need to adhere to the principles of the AWI Act. If the sheriff is not happy with a report, there will be the option to request an additional report but we would hope, with appropriate guidance, a single report will provide adequate information in the majority of cases.

We are also proposing that clinical psychologists may be added as a third category of professional who can complete incapacity assessments for guardianship cases where incapacity is by reason of mental disorder. We think, given that the requirement is to assess incapacity, rather than

diagnosing the mental disorder causing the incapacity, the skills and knowledge of a clinical psychologist would be of the appropriate level to assess incapacity by reason of mental disorder for the purposes of a guardianship order

Question:

49. Do you think the requirement for medical reports for guardianship order should change to a single medical report?

☒ Yes
☐ No

Please give the reason(s) for your answer

In general we would be supportive of this change as a way of expediting the Guardianship application process and getting to the point of formal judicial review more quickly.

50. Do you agree with our suggestion that clinical psychologists should be added to the category of professional who can provide these reports (where the incapacity arises by reason of mental disorder)?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, as in our response to Q19 above, we agree that appropriately trained clinical psychologists could potentially undertake this role. However, we again note that undertaking certain functions under the AWIA and the Mental Health (Care & Treatment) (Scotland) Act 2003 requires medical practitioners to have Approved Medical Practitioner (AMP) status which requires additional training which, under Scottish Governmental direction, must be updated every five years. Consideration must be given to the initial and ongoing training needs of psychologists undertaking this new role. We also believe that a clinical psychologists should only undertake these assessments for patients for whom they have an ongoing clinical involvement and knowledge of their previous and ongoing care.

Mental Health Officer Reports

We know that delays in the obtaining of a guardianship result from an accumulation of delays in a number of different areas. One of the areas that has been brought up in the past is the Mental Health Officer report.

The requirements of the Mental Health Officer report for a guardianship application are in regulations[15]. The Mental Health Officer has to consider each principle of the AWI Act which includes taking account the views of the nearest relative and any person who may have an interest in the adult. We have been told that there can be delays where the Mental Health Officer tries to track down the opinions of every possible relative. We are considering whether the Mental Health Officer form for guardianship applications could be improved to make it more concise, whilst retaining the requisite information and would appreciate your views on this.

.

Question:

51. Do you think the Mental Health Officer form for guardianships can be improved, to make it more concise whilst retaining the same information?

☒ Yes
☐ No

Please give the reason(s) for your answer

We are supportive of this proposal as one means to expedite the, often lengthy, guardianship process. We note that delays in this process often lead to poorer patient outcomes and a delay in the realisation of their rights.

[15] See Schedule 2 of SSI 2002/96.

Person with sufficient knowledge reports for guardianship relating to property and financial affairs

This report has a wide qualification criteria for who can complete the report. Any person who has sufficient knowledge to complete the report[16] can do so, although they have to explain why.

The format of this report is the same as the mental health officer report, so we are considering whether the same information can be provide in a more concise manner.

In addition, we have been told that the 'person with sufficient knowledge' report often is seen of little value. This is both because of the lack of detail but also because of the qualifications of the person completing the report. It may be a social worker, or it could be a friend or family member of the adult. We are interested in your views on whether this needs to change.

The second part of the report relates to the proposed guardian's suitability. OPG have in recent times introduced a guardian's declaration form[17] informally into proceedings.

This was introduced following the experience of OPG of the performance and preparedness of guardians once they had been appointed. Often OPG have found that appointed guardians had little or no knowledge of the reporting duties they were required to undertake as supervised by OPG.

Both the OPG form and the 'person with sufficient knowledge' form cover the proposed guardian's suitability. The OPG form requires a lot more detailed financial information than the second part of the 'person with sufficient knowledge' form. We think this information is more appropriately collected by OPG, who then provide a copy of the report to the court, with their own comments on the guardian's suitability attached. This allows the sheriff to consider suitability and the OPG comments before appointment.

We therefore propose that the second part of the 'person with sufficient knowledge' report is no longer required. Instead we propose that in the same way an applicant has to give notice to the chief social work officer of their intention to make an application for guardianship with welfare powers [18]notice should be given to the Public Guardian for an application including financial powers. Following this the applicant will be required to complete and send the guardian declaration form to OPG. OPG will then submit this to court

[16] Form AWI 8 (schedule 8): report to accompany application for guardianship relating to property and financial affairs
[17] Guardian Declaration
[18] S.57(4)

along with any comments on the suitability of both the guardian and the application.

Questions:

52. Do you think the ‘person with sufficient knowledge’ form can be improved, making it more concise whilst retaining the same information?

☒ Yes
☐ No

Please give the reason(s) for your answer

53. Should the person with sufficient interest continue to be the person who prepares the report for financial and property guardianship?

☐ Yes
☐ No

Please give the reason(s) for your answer

54. Do you agree with our proposal to replace the second part of the ‘person with sufficient knowledge’ report with a statutory requirement to complete the OPG guardian declaration form?

☒ Yes
☐ No

Please give the reason(s) for your answer

Sheriff discretion to consider MHO reports outwith 30 days limit

At present the sheriff has discretion to consider an application if the medical reports are out with the 30 day limit. This is only if the sheriff is satisfied there has been no change in circumstance since the examination and assessment was carried out[19].

We think the same discretion should be afforded to the sheriff in the case of mental health officer reports. Presently we know of occasions when a report is just over the 30 day limit, with no change of circumstance. But the rigidity of the legislation requires a whole new report to be compiled, with the accompanying delay.

Question:

55. Should sheriffs be afforded the same discretion with mental health officer report timings as they are with medical reports?

☒ Yes
☐ No

Please give the reason(s) for your answer

We agree a degree of discretion for the sheriff would be desirable in order to avoid a potential failure of an application on timescale technicalities in cases where the timings have no meaningful impact on the assessment.

Amendment of interim guardianship order for urgent cases

Welfare guardianship orders invariably involve social care powers and are therefore ongoing, rather than time limited or one off powers. This makes them more suitable to guardianship orders. That meant that a separate,

[19] S.57(3B)

bespoke, short term placement type of order would always have to be followed up by a guardianship order, bringing potential for a gap in the orders, or a situation where the bespoke order might take longer than the guardianship order (on appeal for instance). Therefore it makes more sense to focus attention on using the interim guardianship system.

At the moment a full guardianship order application is required in order for interim powers to be asked for. We propose that the AWI Act be amended so that an interim guardianship can be applied for separately and used swiftly where an urgent order is required, for instance where there is a need to move someone due to an imminent risk to their welfare.

An application for interim guardianship may be made to the sheriff court. It will require an abbreviated MHO report, that will report only on the appropriateness of interim powers. This report will however still require to demonstrate the principles have been adhered to – in line with Part one proposals. A single medical report will be required. Given the abbreviated nature of the report, we suggest that rather than a requirement to prepare this report within 21 days the requirement should be that it is prepared within seven days of notice being given to the local authority by the applicant. If a full guardianship order is considered necessary, the full report can be submitted to court in the usual timescale, with a hearing be scheduled on receipt of the full report.

We propose there should be a timescale of 5 calendar days, once the application is received by the court , for the sheriff to make a decision on the interim powers. We do not propose any change to length of time the interim powers can be sought for. At present interim powers can be sought for 3 months beginning with the date of appointment, with flexibility allowed to the sheriff to appoint for a longer period not exceeding 6 months. We recommend these timings remain.

Questions:

56. Do you agree that the best approach to cater for urgent situations is to amend the existing interim guardianship orders?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, rapid access to powers in urgent situations is often required and this seems a reasonable way of achieving this aim. However, for this to be usefully rapid, but balanced with adequate protections, there must be statutory timescales for each 'stage' of the process – from DoL orders under s47, to interim guardianship orders, to full guardianship orders. One must follow the other via legally enforced timescales. Current guardianship delays mean that even a three month interim power might lapse before full guardianship was available.

We would like to note here the harm that can be done to individuals via prolonged delays and uncertainties about their placement due to lengthy delays in process, due in part to lack of current statutory timescales. Expediting this process is not about medical convenience – it is about getting around more rapidly to realisation of rights, especially where individuals are currently in inappropriate settings (which could even result in an Article 3 breach).

Also, in further developing this amendment, those situations, timescales and criteria which amount to 'urgent' will need to be considered and delineated.

Continued hospitalisation beyond the point where it is necessary for physical or mental health care constitutes an imminent or immediate risk to patients' health and welfare. This includes significant risks of deterioration and mortality. These situations should therefore be amongst those considered urgent and encompassed under the proposals.

57. Do you agree that an abbreviated mental health officer report together with a single medical report should suffice for a guardianship order to be accepted by the court in the first instance?

☒ Yes
☐ No

Please give the reason(s) for your answer

We support this proposal as another way of ensuring that the process is as focussed and clinically relevant as possible to avoid delays.

58. Do you agree that there should be a short statutory timescale for the court to consider urgent interim applications of this sort?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes, as noted in our response to Q56 above – enforceable statutory timescales are a key requirement to enable realisation of rights and to ensure that restriction or deprivation of liberty is lawful.

Current delays are leading to harm through prolonged hospital stays beyond the point that hospital based care is necessary to provide interventions for the patient's health or welfare.

Variation of guardianship order to add financial or welfare powers

There may be situations where a guardian has been appointed with only financial powers and circumstances change so that welfare powers need to be added or vice versa.

At present the AWI Act requires that in both the above cases, a whole new application is required. That means a new summary application, two new medical reports and either a mental health officer report or a 'person with sufficient knowledge' report. This, as we know, will be very time consuming. Very often it will be well established that the adult lacks capacity by reason of the existing guardianship order, meaning that two new medical reports may not be necessary.

We think a more efficient way would be to require only the additional mental health officer report, or 'person with sufficient knowledge' report together with the OPG guardian declaration form, to be required. The sheriff can ask for more medical reports if required, but they should not be mandatory.

Question:

59. Do you agree that further medical reports are not required when varying a guardianship to add either welfare or financial powers? Please give the reason(s) for your answer

We do not support this proposal. It might seem that, for a case where a guardianship in one modality has already been granted, that the issue of capacity has already been discussed in medical reports and the 'threshold of incapacity has already been crossed'. However capacity is decision-specific and the medical examination will inevitably have focussed on decision-making in the area where powers have been sought.

Length of Guardianship orders

At present, an initial guardianship order can be made for 3 years, which can be increased to 5 years on renewal. However the Sheriff has discretion to appoint a guardian for 'such other period , including an indefinite period as, on cause shown, he may determine..'[20]

ECHR case law makes clear that there is a need for regular review of any restriction of a person's liberty and whilst guardianships do not necessarily restrict a person's liberty in all cases, they do by their very nature significantly impact on the adult who is subject to the guardianship.

Financial guardianships are subject to scrutiny by the OPG and welfare guardianships should be regularly reviewed by the local authority as set out in regulations. [21]So time limited guardianships should be subject to regular review by the Sheriff Court and either the OPG or local authorities, or both, depending on the type of guardianship.

Indefinite guardianships should be subject to regular review by OPG and/or local authorities, again depending on the type of guardianship. The MWC has stated that in certain specific cases, such as an elderly person with advanced dementia, indefinite orders are appropriate but such cases are limited.
In the majority of cases, periodical judicial scrutiny of orders should be the norm, as it removes the onus from the adult or another party to challenge the order if circumstances change. It should be noted however that the frequency of indefinite guardianship orders has reduced substantially in recent years, from 32% of orders in 2013-14 to 3.8% in 2022-23.[22]

However despite these safeguards, the review of guardianship orders has been criticised in a number of cases, in particular Aberdeenshire Council v SF[23] .
This case concerned a guardianship order in respect of an adult living in support accommodation in England but habitually resident in Scotland. The placement constituted a DOL which was ostensibly authorised by the guardianship order. The case was before Poole J, to seek recognition and enforcement of the guardianship order. The Court was required to conduct a limited review of the case.

Due to lack of evidence that the adult in question had been given an opportunity to give views to the court, and the wide powers given the

[20] AWI Act s58(4)
[21] SSI 2002/95 Adults with Incapacity (supervision of welfare guardians etc by local authorities)(Scotland) Regulations
[22] Adults with Incapacity Act monitoring report 2022-23
[23] Aberdeenshire Council v SF (No 2) [2024] EWCOP 10

guardian, namely that the order was proposed to be indefinite and was made for 7 years, the court did not recognise and enforce the particular guardianship order in this case order as it stated to do so would be contrary to a mandatory provision of the law of England and Wales as it would breach article 5(4) of ECHR and therefore the Human Rights Act 1998. In his conclusion Poole J stated :

“

Natural justice required that in a case where SF’s liberty was being put into the hands of others for a period of seven years, she should have had an opportunity to be heard and/or an opportunity to be represented. SF’s access to the court should not have been dependent on her taking the initiative. Effective access should have been secured for her. As it is, there were no measures taken to ensure that her Art 5(1) rights were upheld”

It is of concern that in this case the principles of the AWI Act do not appear to have been followed. We would suggest that the changes proposed to the principles of the Act, set out in part one of this consultation should eliminate the possibility of the adult not being given an opportunity in the future to express their views to the court. However this does not address the question of the length of the guardianship order.

In this case an adult was placed under a guardianship order for 7 years, in circumstances that are quite different to those considered acceptable for indefinite guardianships by the MWC, such as elderly adults with advanced dementia. In light of this we wonder whether therefore we need to revisit the approach to length of guardianships generally.

In the next part of this consultation chapter we set out our approach to DOL and suggest time limits for guardianships which authorise deprivation of an adult’s liberty.

But we would also be grateful for views on whether we need to change the current approach to length of guardianship orders more generally, and in particular if there is a need to remove discretion from the sheriff to grant an indefinite guardianship order.

In doing so, we need to consider the application of the AWI Act principles, namely whether in every case there will be a benefit to the adult in requiring them to go through the renewal procedure. And if we do continue with the sheriff’s discretion to grant an indefinite guardianship, what safeguards would need to be put in place to ensure regular reviews take place and account can be taken of changes in circumstances.

Questions

60. Does the current approach to length of guardianship orders provide sufficient safeguards for the adult?

☐ Yes
☒ No

Please give the reason(s) for your answer

No. This was recently demonstrated in the case Aberdeenshire Council v SF (No 2) [2024] EWCOP 10 where an English judge refused to recognise a Scottish Guardianship on these grounds.

61. Do changes require to be made to ensure an appropriate level of scrutiny for each guardianship order?

☒ Yes
☐ No

Please give the reason(s) for your answer

As for our answer to Q60 we have concerns about the current level of scrutiny for guardianship, in particular the lack of opportunity for the adult's view to be heard. Our preferred solution is a move of the guardianship legal process to the Mental Health Tribunal for Scotland.

62. Is there a need to remove discretion from the sheriff to grant indefinite guardianships?

☒ Yes
☐ No

Please give the reason(s) for your answer

Indefinite guardianships are at risk of Art. 5 ECHR challenge. It seems prudent to remove this discretion.

63. If you consider changes are necessary, what do you suggest they would be?
Please give the reason(s) for your answer

As for our answer to Q63 we support a move of these cases to the Mental Health Tribunal for Scotland. There is a demonstrably greater degree of participation of adults and their carers in an MHTS setting than in courts. This will require sufficient resources however carries significant benefit.

Adding additional exclusions to AWI Act

The AWI Act presently states that there are some things that a guardian or an attorney may not do. They are very limited lists of powers and are identical for guardians and attorneys. There is no equivalent list for interveners.

At the moment the following powers are excluded from guardians and attorneys in the AWI Act:[24]

- Place the adult in a hospital for the treatment of mental disorder against their will;
- Consent on behalf of the adult to any form of treatment in relation to which the authority conferred by section 47(2) does not apply by virtue of regulations made under section 48(2);
- Make, on behalf of the adult, a request under section 4(1) of the Anatomy Act 1984 (c. 14);
- Give, on behalf of the adult, an authorisation under, or by virtue of, section 6(1), 16F(1)(a),17, 29(1) or 42(1) of the Human Tissue)Scotland) Act 2006 (asp 4);

[24] S16(6) and s.64(2)

- Withdraw an authorisation, on behalf of the adult, by virtue of section 6A(1) of that Act;
- Make, on behalf of the adult, an opt-out declaration by virtue of section 6B(1) of that Act;
- Withdraw an opt-out declaration, on behalf of the adult, by virtue of section 6C(1) of that Act; or
- Make, on behalf of the adult, a nomination under section 30(1) of that Act

Over the past 20 years in the operation of the AWI Act, it has become clear that it would be helpful to add to this list of exclusions to clarify the roles and responsibilities of guardians and attorneys.

64. We propose that the following powers should be added to the list of actions that guardians, attorneys and interveners should be expressly excluded from. Do you agree with this proposal?

1. consenting to marriage or a civil partnership

☒ Yes exclude
☐ No

2. consenting to have sexual relations

☒ Yes exclude
☐ No

3. consenting to a decree of divorce

☒ Yes exclude
☐ No

4. consenting to a dissolution order being made in relation to a civil partnership

☒ Yes exclude
☐ No

5. consenting to a child being placed for adoption by an adoption agency

☒ Yes exclude
☐ No

6. consenting to the making of an adoption order

☒ Yes exclude

☐ No

7. voting at an election for any public office, or at a referendum

☒ Yes exclude
☐ No

8. making a will

☒ Yes exclude
☐ No

9. if the adult is a trustee, executor or company director, carrying discretionary functions on behalf of them

☒ Yes exclude
☐ No

10. giving evidence in the form of a sworn affidavit

☒ Yes exclude
☐ No

65. Are there any other powers you think should be added to a list of exclusion?

Please give the reason(s) for your any of your answers to questions 64 and 65 above

We wondered about adding an exclusion to the action of moving the adult out with the UK without at least judicial oversight.

Part 7

Approach to Deprivation of Liberty

Court cases since the AWI Act came into force require us to consider the deprivation of liberty of adults who lack capacity, in social care settings. This was considered by the Scottish Law Commission in their 2014 report .

What do we mean by DOL?

Deprivation of liberty is about how measures are applied rather than where they are applied. The key factor is whether the person is under the continuous supervision and control of those responsible for their care and whether the person is free to leave.

We are not proposing to include a deprivation of liberty in the AWI Act. We consider that a better approach is to set out in the code of practice and guidance, what factors need to be considered in assessing whether an adult will be subject to a DOL, or restrictions on their liberty, or not. This will ensure the factors relevant to each case are properly considered. Guidance and changes to the codes of practice will be fully consulted on in due course. We propose however that the term ‘deprivation of liberty ‘is used in legislation as it is well understood.

We are here concentrating on DOL, but we are aware that there are views that restrictions on liberty short of depriving someone of freedom to come and go as they please from their place of residence, should also be subject to additional safeguards.

We have said in part 5 of this consultation that we will be developing a scheme in regulations, which will be consulted on in due course to address the perceived lack of safeguards around the use of force and restrictions in cases of treatment under section 47 of the AWI Act.

What are we doing about DOL safeguards?

We are proposing to follow the recommendations of the SMHLR. They recommended that where a person , is able to make an autonomous decision to express their consent to their living arrangements, even where these might amount to a DOL, this must be respected. We also felt that where a person cannot make an autonomous decision but can, with support, express a will and preference to remain in their current living arrangements, even if those

arrangements would otherwise constitute a DOL there was no need for further judicial oversight.''

We agree with this. If a person with support can clearly express a will and preference to remain in their living situation, even if that situation is a DOL, no further judicial oversight is required. But we are proposing a stand alone right of appeal similar to that proposed by the SLC report, and this would be available to anyone in these circumstances.

Powers of Attorney

The SMHLR proposed that a power of attorney (POA) with prescribed wording, may grant advance consent for the attorney to deprive the granter of their liberty, where the deprivation is proportionate and will demonstrably lead to more respect, protection and fulfilment of the person's rights overall.

We agree with this, but the proposal needs further detail . In Part 1 of this consultation, we have set out the changes that will be taken forward in any future law amending the AWI Act. One of these changes is to require that in creating a power of attorney, the granter must set out how a determination of their incapacity should be decided.

If the power of attorney is to include advance consent to deprive the granter of their liberty, we propose that this incapacity will require to be determined by independent medical assessment.

Section 16(3) of the AWI Act set outs the terms that need to be met to ensure the validity of a welfare power of attorney. We suggest that this be amended to reflect the wording required for a power of attorney to authorise a DOL of the granter and that if the required wording is not followed, the POA cannot validly authorise a DOL.

The exact wording will be considered. We anticipate that any Bill will contain a power for Ministers to specify the wording by regulations and this will be consulted upon at a later date, but we consider that the following factors will need to be reflected in the wording

- The granter has considered the circumstances in which it might be necessary to restrict their liberty or deprive them of their liberty, in order to safeguard their health or welfare, or that of others.
- The terms of article 5 of the ECHR have been explained to the granter
- Authority is given to the attorney/s alone
- The attorney must be satisfied the action is necessary to safeguard the health or welfare of the granter

- The attorney must act in accordance with the principles of the AWI Act
- The attorney will be subject to any directions of the court following any application under section 3 (3) of the AWI Act.

This last point is particularly important. We propose that where an adult ,having previously granted advance consent for their attorney to deprive them of their liberty , later objects to the consent being acted on, and their being moved to a setting where their liberty is restricted or deprived, the attorney, or any other person with an interest in the adult's welfare must seek a determination from the Sheriff under section 3(3) as to the appropriate way to proceed.

Appeal and Review

As stated above any process to deprive an adult of their liberty must be challengeable in a practical and accessible way. So, we suggest that an appeal may be made to the sheriff court, by any person demonstrating an interest in the welfare of the adult.

The grounds for appeal should be that the placement is not necessary to safeguard the health or welfare of the granter. In keeping with the proposed amended principles of the AWI Act as set out in part 1 of this consultation, there would be a requirement on the person raising the appeal, to demonstrate what steps had been taken to ascertain the views of the adult. The sheriff would also have the option of appointing a safeguarder (the position of safeguarders and curators is set out later in this part.)

It is important that the appeal process be accessible. We would welcome views on what added steps can be taken to improve the accessibility of the appeal process.

Review of the placement

In keeping with the principles of the AWI Act it is important to ensure that an adult is subject to the least restrictive option in relation to the freedom of the adult consistent with the purpose of the intervention. So, an adult deprived of their liberty should only be subject to these restrictions for the minimum time necessary. To that end regular reviews of the placement/ restrictions will be needed. And such regular reviews are also needed to meet ECHR requirements.

We are seeking views on how regular reviews can be carried out. At present the local authority is obliged to review guardianship orders every 12 months[25]. There is no such requirement for powers of attorney. Whilst there is a balance to be struck between ensuring the safety and wellbeing of an adult , and recognising that , in the case of a power of attorney, actions are carried out in accordance with the adult's specific instructions, when it comes to an individual being deprived of their liberty it is essential to ensure this situation is not abused in any way.

We therefore seek views on how DOLs authorised by a power of attorney can be appropriately reviewed, in a way that is accessible to the adult.

Guardianship orders

At present guardianship seems to be accepted as a lawful procedure under ECHR to deprive a person of their liberty.[26]. But concern has been expressed that the voice of the adult is not at the centre of the process.

Section 64 of the AWI Act sets out the functions and duties of a guardian. We think it is important to add to these functions and duties the position around DOL

Our policy proposal is that specific provision is made whereby, on cause shown, the sheriff can authorise a guardian to place an adult in a setting which may form a DOL.

The cause shown would need to meet ECHR requirements, so

- An independent medical assessment of mental disorder would be needed – the current requirements for medical reports for guardianship applications, as amended by our proposed changes would address this we think
- The placement would need to be time limited, and subject to regular reviews. This should be a combination of regular internal reviews and a time limit placed on the authorisation by the sheriff.

[25] The Adults with Incapacity (Supervision of Welfare Guardians etc. by Local Authorities) (Scotland) Regulations 2002 (as amended)

[26] KvArgyll and Bute Council [2021]SAC (civ) 21

- We propose that the initial order should be for a maximum of 12 months, which may on renewal be extended to a maximum of 2 years, in keeping with the requirement for regular reviews of detention [27]
- The placement would need to be a proportionate response to the situation the adult is facing. i.e. that it was necessary to safeguard the welfare or health of the adult.
- The principles of the AWI Act would still need to be followed, so the will and preferences of the adult would need to be ascertained

A right of appeal will be created, in similar terms to that for placements under a power of attorney, by any person demonstrating an interest in the welfare of the adult. The grounds for appeal should be that the placement is not necessary to safeguard the health or welfare of the granter. In keeping with the proposed amended principles of the AWI Act as set out in part 1 of this consultation, there would be a requirement on the person raising the appeal, to demonstrate what steps had been taken to ascertain the views of the adult. The sheriff would also have the option of appointing a safeguarder (the position of safeguarders and curators is set out later in this part.)

And again, we would welcome views on what added steps can be taken to improve the accessibility of the appeal process.

Review of the placement

Welfare guardianship orders are subject to a requirement for an annual review by the relevant local authority. This generally consists of a visit from a social worker or mental health officer. We consider however that a placement where an adult is being deprived of their liberty requires a more regular review and are recommending that a review every six months by the local authority should be undertaken for such placements. The adult, and /or any person demonstrating an interest in the welfare of the adult, may also request a review of the placement at any time.

We would like your views on whether these proposals are sufficient or if more needs to be done to ensure such placements are appropriately reviewed and what format the review should take.

Stand-alone right of Appeal

[27] Stanev. V Bulgaria (App 36760/06)(2012) 55 EHRR 22

In its 2014 report the SLC recommended a stand-alone right of appeal against any detention which could be assessed as being unlawful. We agree with this proposal.

As said earlier in this part, we consider that if a person is able with support to express their will and preferences, and agree to remain in their current living environment, even if such an environment forms a DOL, then no further judicial oversight is required. However, if this situation should change then the adult needs to have a means of addressing this.

We would hope that regular internal reviews, and dialogue with the adult, supporting them to express their will and preferences would ensure steps could be taken quickly should the adult no longer be content with their placement. However that cannot be guaranteed, and we consider a stand-alone right of appeal against a DOL is needed for such scenarios.

As with the appeal proposed against placements under a power of attorney and a guardianship order, an appeal should be able to be raised by any person demonstrating an interest in the adult. And the appellant will have to demonstrate how the will and preference of adult has been obtained.

Role of the Mental Welfare Commission

Section 9 of the AWI Act sets out the specific functions of the Mental Welfare Commission (the MWC) in relation to any adult to whom the AWI Act applies by reason of mental disorder. That is, the MWC has no role in relation to adults whose incapacity results solely from inability to communicate.

Currently the MWC must consult the Public Guardian and any local authority on cases or matters relating to the exercise of the AWI Act where there is , or appears to be a common interest; if the MWC is not satisfied with any investigation made by a local authority , into a complaint made under section 10 of the AWI Act , or where the local authority have failed to investigate the complaint the MWC may investigate complaints relating to the personal welfare of the adult made in relation to welfare attorneys , guardians or persons authorised under intervention orders.

The SMHLR recommended that the MWC may intervene if they have concerns, in cases where an adult has with support, expressed a will and preference to remain in their current living arrangements, even if those arrangements constitute a DOL

We agree with this but we think the role of the MWC should be extended to permit them to investigate any placement where an adult is deprived of their liberty under the AWI Act, if concerns are raised with the MWC by any person having an interest in the adult's welfare , or by the MWC themselves in the course of a visit to the adult from a Commission visitor, under section 13 of the Mental Health (Care and Treatment)(Scotland) Act 2003.

Questions

66. Do you agree with the overall approach we are proposing to address DOL?

☐ Yes
☒ No

Please give the reason(s) for your answer

No. While we support many of the individual measures suggested and believe that they will make meaningful improvement in some areas, they do not address the longstanding legislative gap in this area in Scotland: that, in order to be lawful under UK and ECHR law, non-consensual deprivation of liberty for a medical condition must be judicially challengeable, subject to review, subject to appeal and made on the basis of objective evidence from a medical practitioner with expertise in the condition. This applies in all cases, not only those where there is objection by the adult.

We acknowledge the difficulties of a comprehensive scheme to address this legal gap and welcome the fact that the consultation document suggests ongoing and further work. Nonetheless, this current amendment process should aspire to address all, and not only some, of the issues in this area. A consistent approach, with generally applied safeguards and oversight, is also desirable to offer protections to the most vulnerable – those without proxies or those with an interest in their welfare who are also, because of their condition, unable to self-initiate any appeal.

67. Is there a need to consider additional safeguards for restrictions of liberty that fall short of DOL?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes. The legal standard must be that of the UKSC in Cheshire West. Non-consensual restrictions which are applied, or might be applied, must have appropriate oversight.

Powers of attorney

68. Do you agree with the proposal to have prescribed wording to enable a power of attorney to grant advance consent to a DOL ?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes. Provided the original PoA document gave clear authority for the Attorney to use this power then this proposal might be useful in some cases, over the position at the moment. However, it seems to allow for DoL without judicial oversight which is itself undesirable.

69. What are your views on the issues we consider need to be included in the advance consent?

Please give the reason(s) for your answer

A clear documentation of current capacity to agree with what is proposed, a clear statement of what the advance consent will and will not authorise, a clear indication regarding whether the POA can be utilised to authorise non urgent conveyance to hospital and maintaining the person in hospital for physical health care where they lack capacity to consent, a clear indication of the situations in which the powers would be used, and an independent medical assessment of incapacity and clinical necessity for the intervention.

70. What else could be done to improve the accessibility of appeals?

Please give the reason(s) for your answer

Increased awareness of the possibility of appeal; a clear, straightforward, and timely process; a properly funded form of independent advocacy in the AWIA patient cohort.

71. What support should be given to the adult to raise an appeal?

Please give the reason(s) for your answer

Timely and specifically trained independent advocacy. Access to legal aid.

72. What other views do you have on rights of appeal?

Please give the reason(s) for your answer

There should be statutory timescales for the hearing.

73. How can DOLs authorised by a power of attorney be appropriately reviewed?

Please give the reason(s) for your answer

Availability of judicial review; oversight by an independent ombudsman (e.g. the MWC).

Guardianships

74. Do you agree with the proposal to set out the position on DOL and guardianships in the AWI Act?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes. This would be a helpful clarification and add a degree of legal certainty for these patients at least.

75. In particular what are your views on the proposed timescales?

Please give the reason(s) for your answer

While the maximum timescales might be unduly short for those with permanent incapacity with no prospect of improvement we believe that there should be a maximum period. Care must be taken to ensure that sufficient court time is available for review and for new cases.

76. What are your views on the proposed right of appeal?

Please give the reason(s) for your answer

The position set out in the consultation document appears reasonable. However, consideration should be given to support for initiators, resources for the process, and to what powers should be available for sheriffs to direct Local Authorities and Health Boards where appeals are upheld.

77. What else could be done to improve the accessibility of appeals?

Please give the reason(s) for your answer

Provision of independent advocacy, increased information and publicity, and training and resource. As for our answer to Q63, a move of cases and appeals to the Mental Health Tribunal for Scotland would, in our view, increase accessibility.

78. Do you agree with the proposal to have 6 monthly reviews of the placement carried out by local authorities?

☒ Yes
☐ No

Please give the reason(s) for your answer

We support this proposal but note it will require adequate resource and rapid access to alternative placement if the review identifies urgent deficiencies.

79. Is there anything else that we should consider by way of review?

Please give the reason(s) for your answer

Stand-alone right of appeal

80. Do you agree with our proposal for a stand - alone right of appeal against a deprivation of liberty?

Please give the reason(s) for your answer

In principle we support this proposal. However we note: 1) it seems more desirable to have an overarching legal process to ensure all DoLs are lawful, rather than a stand-alone right which might be less likely to be used by those most vulnerable, 2) the proposal sounds very similar to the powers in s291 of the Mental Health (Care and Treatment) (Scotland) Act 2003 which is very little known and rarely used. 3) In the proposals the onus is on the appellant to demonstrate how the will and preference of the adult has been obtained. It would be more appropriate for the test to be that it should be demonstrated by the respondent that the DoL is in line with the adult's will and preferences.

Role of the MWC

81. Do you agree with our proposal to give the MWC a right to investigate DOL placements when concern is raised with them?

Please give the reason(s) for your answer

Appointment of safeguarders/curators ad litem

Safeguarders are appointed by the court to represent and safeguard the best interests of adults with incapacity in legal proceedings. Their primary responsibility is to ensure that the views, wishes and welfare of the adults they represent are fully considered and represented within the legal process.

Curators ad litem are appointed by the court to provide independent representation for individuals who are unable to represent themselves effectively in legal proceedings. They serve as a vital link between the court, their clients, and relevant stakeholders such as mental health officers, facilitating communication and ensuring that decisions are made in the best interests of those they represent.

There is a gap in terms of public awareness and understanding of the roles of safeguarders and curators ad litem. This can lead to misconceptions and challenges in implementing effective measures for both roles.

We agree with the recommendations set out in in the SMHLR for both safeguarders and curators ad litem. There is a need for consistency of approach and transparency of appointment to both roles, and the tasks they are expected to complete.

There is a distinction to be drawn between the appointment of safeguarders and curators. Safeguarders for adults are only used in AWI cases in the sheriff court where as curators ad litem can be used in other proceedings.

For safeguarders, we propose granting Ministers the power to establish regulations for a scheme that includes the appointment, training and payment of safeguarders. This aims to ensure consistent quality in reporting and a better understanding of the safeguarder's role and responsibilities.

For curators, we propose mandatory training for AWI cases and a requirement to report on actions taken to determine the will and preferences of the adults they work with. This statutory duty for curators ad litem will be outlined in forthcoming regulations that will be subject to consultation.

Questions

82. Do you agree with the proposals to regulate the appointment, training and remuneration of safeguarders in AWI cases?

☒ Yes
☐ No

Please give the reason(s) for your answer

83. Do you agree with the proposals for training and reporting duties for curators?

☒ Yes
☐ No

Please give the reason(s) for your answer

84. What suggestions do you have for additional support for adults with incapacity in AWI cases to improve accessibility?

Please give the reason(s) for your answer

1) As for our answer to Q63, we support a move of judicial forum to the Mental Health Tribunal for Scotland.

2) Venues chosen for hearings need to be appropriate for adults with both physical and mental health issues.

3) For teleconference hearings we note that, in our experience, patients with cognitive impairments struggle with audio-only hearings. In-person, or at least video hearings are to be preferred.

4) The best way to improve accessibility is to work to ensure the process is timely and efficient.

Making financial abuse of an adult lacking capacity a criminal offence

Presently the AWI Act states that it is a criminal offence for anyone with powers under the AWI Act relating to the personal welfare of an adult to ill-treat or wilfully neglect that adult[28].

A person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or both. On conviction on indictment a person guilty of this offence is liable to imprisonment for a term not exceeding 2 years or to a fine, or both.

We are suggesting that there is an equivalent criminal offence for financial abuse of an adult lacking capacity, with similar liability as welfare. We know that welfare and financial abuse often come hand in hand. We hear that because of a lack of a specific criminal offence under the AWI Act, there can be uncertainty over whether a criminal offence has occurred, or whether it is a civil matter.

We think financial abuse of an adult lacking capacity is a criminal matter and whilst it can be prosecuted under other criminal charges like embezzlement, fraud or theft, there is merit to having a specific criminal offence of this kind. Adults with incapacity are one of the most vulnerable sectors in our society and already have a specific welfare offence of ill-treatment and wilful neglect. As such we think they deserve the profile of having a specific offence of financial abuse.

[28] AWI Act S.83

Question:

85. Do you think there should be a specific criminal offence relating to financial abuse of an adult lacking capacity?

☒ Yes
☐ No

Please give the reason(s) for your answer

86. If so, should the liability be the same as for the welfare offence?

☒ Yes
☐ No

Please give the reason(s) for your answer

Safeguards whilst awaiting discharge from hospital

The proposals contained within this consultation aim to streamline and improve the AWI process, enhance the rights of incapable adults and address the challenges around deprivation of liberty for incapable adults.

We know that nearly 20% of all delayed discharges are people in hospital settings, recorded as being adults with incapacity. These can be in-patients

for planned care such as a hip replacement, or as an emergency through Accident and Emergency.

Clinicians will ensure that they receive the most appropriate care to support them to become clinically fit to be discharged. If someone is deemed not to have the capacity to make decisions on their own, as to the care and support needed at this stage and in particular where they might live, provisions under the AWI Act can be used.

Some patients will have made provision for this kind of situation by granting power of attorney to a friend or relative to make decisions on their behalf. However, if no such provision is in place, or the PoA does not give authority for the set of circumstances the adult is faced with, and the adult even with support is unable to make decisions for themselves, a welfare guardianship may be required. This process can take time, as it rightly ensures that the rights of the individual are fully protected.

This accounts for nearly 400 people each week who, despite no longer needing hospital care, are currently staying in that hospital rather than in a setting that would be more appropriate. In many circumstances this is not the least restrictive option to meet their health and care needs. Within the hospital setting, people are often disconnected from their families, friends and social connections which impacts on their rights to respect for private and family life.

Of particular concern is the duration of discharge delay for those that are classified as AWI-related delays. Compared to ‘standard delays,’ whose average length of delay is 16 days, we know that this increases to 66 days for AWI.

Part 2 of this consultation set out proposals for change to powers of attorney, part 6 of the consultation sets out proposals for change to guardianship orders, and later in part 7 of the consultation, we have set out the suite of options proposed to address the challenges around deprivation of liberty and incapable adults.

We are very interested to hear your views on whether there are additional steps that could be implemented to ensure those individuals, who are a delayed discharge from hospital and who are currently going through the guardianship process, could be moved out of an acute setting and into a more appropriate care setting. An example would be a care home, that better meets their needs, while ensuring their rights are safeguarded.

We are also interested in your views on using different care settings, out with the NHS, for those who no longer need acute hospital care but for whom the guardianship process has not yet concluded.

Questions

87. Do you have experience of adults lacking in capacity being supported in hospital, despite being deemed to be no longer in need of hospital care and treatment? What issues have arisen with this?

☒ Yes
☐ No

Please give the reason(s) for your answer

Yes – this experience is universal amongst psychiatrists. Indeed, one of our members reported that recently in her 15 bedded ward 13 patients were delayed discharges. Multiple of our members reported experience of their patients remaining in hospital unnecessarily for several years, due to a lack of suitable placement for them in the community.

This is of course a major resource issue, but the primary issue here is the lack of realisation of people's rights. Individuals remaining in hospital despite no longer needing inpatient care is associated with increased risk of mortality and morbidity, as well as ongoing frustration for the patient and their relatives.

There are two issues we must highlight here:

1) Resource issues with the downstream transfer of patients. Lack of provision and of funding is a major issue in delayed discharge – particularly for complex and/or specialist cases.

2) Lack of urgency once someone is admitted to hospital and is seen as 'safe in a bed'. As in our responses for Q56 and Q58 we would argue that statutory timescales are required here in order to ensure timely achievement of rights.

88. Do you foresee any difficulties or challenges with using care settings for those who have been determined to no longer need acute hospital care and treatment?

☒ Yes
☐ No

Please give the reason(s) for your answer

Any move from acute care to a care setting for an incapable patient should be 1) under the authorisation of a lawful process, 2) to a setting which fully meets the patient's needs, 3) aimed to be a final rather than an interim move. Moves which are undertaken without these considerations to 'clear beds' as a priority risk being inappropriate and attracting future criticism – as occurred the COVID-19 pandemic.

89. What safeguards should we consider to ensure that the interests and rights of the patients are protected?

Please give the reason(s) for your answer

Independent medical experts, statutory timescales, judicial oversight, rights of appeal and timed review.

The safeguards which should be considered are those which are required by law, but access must be quicker. This is because delays are not associated with increased legal scrutiny, but increased harm and a very real risk of increased mortality for the patients concerned.

90. What issues should we consider when contemplating moving patients from an NHS acute to a community-based care settings, such as a care home?

As for our answer to Q88.

Geography of these placement so that these people can remain connected with family, friends and their community

Part 8

Proposals to amend the AWI Act in respect of the governance of incapacitated adults participating in research

Proposal 91: Permitting more than one ethics committee to review research proposals involving adults with incapacity

Currently, only a single ethics committee in Scotland is legally allowed to assess such research applications that involve adults with incapacity as participants (AWI research). This committee is known as Scotland A Research Ethics Committee (Scotland A REC). If the volume of AWI research in Scotland were to increase in the coming years, this could lead to workload issues at this lone committee and lead to a bottleneck in the overall approvals process of AWI research in Scotland. Secondly, other ethics committees in the UK can offer an appeal system, whereby if researchers feel their application has been wrongly issued an unfavourable opinion by one committee, they can request a second opinion and that the application is reviewed by a different committee. This is not possible with AWI research applications in Scotland as there is only one committee capable of reviewing such studies.

This proposal asks whether legislation should be amended to permit the establishment of more than one ethics committee in Scotland that is capable of reviewing research involving adults with incapacity.

Proposals 92 & 93: Permitting adults with incapacity to be included in research studies without consent for the types of studies where consent is already not required from adults with capacity

We have heard from the Scottish research community about the difficulties associated with conducting research studies that wish to make use of patient data taken from incapacitated adults. Whilst there are pathways to allow researchers to access and use unconsented data from participants with capacity under certain circumstances, this is not the case for incapacitated participants. This is due to consent being obtained from a welfare attorney, guardian or nearest relative being a necessary requirement for incapacitated adults to participate in research under the Adults with Incapacity Act.

Ultimately, this leads to circumstances in which data collected from an adult with capacity can be included in a research study without their consent in special situations, but data collected from an adult with incapacity cannot. One of our proposals (**Proposal 92**) puts forward a high level question that seeks views on the general principle of allowing adults with incapacity to be included as participants without consent, for research studies in which adults with capacity are already able to be included as participants without consent.

Proposal 93 then provides one example of how this principle could be practically implemented. Instead of consent being an absolute requirement for

adults with incapacity to participate in research as is outlined in the current legislation, this proposal asks whether legislation should be amended to allow Scotland A REC to determine that, just like current practices for research involving participants with capacity, there will be special circumstances in which researchers would not be required to obtain consent to include adults without capacity in their study.

If implemented, the aim of this proposal would be to allow adults with incapacity to follow the same research approval pathways that are already in place for adults with capacity. This would apply almost exclusively to studies that make use of patient data; and would not apply to interventional research that tests new forms of treatment or care.

Proposals 94 & 95: Pathways for emergency waivers of consent
Generally speaking, Clinical Trials of Investigational Medicinal Products (CTIMPs) are research studies that involve testing new drugs, or testing an existing drug for a purpose distinct from the one for which it was originally approved. CTIMP research is governed by UK-wide legislation - The Medicines for Human Use (Clinical Trials) Regulations 2004. In these Regulations, there are pathways for emergency waivers of consent that permit enrolling incapacitated adults in CTIMP research studies without seeking consent from the appropriate representative of that person. However, this is not the case for all other (non-CTIMP) studies involving adults with incapacity in Scotland, which are governed by the Adults with Incapacity Act. This makes conducting emergency non-CTIMP research in Scotland incredibly difficult, as a decision about whether a patient should be entered in a research study must be made as soon as possible, and there is often insufficient time to locate and consult an appropriate representative of a patient who has lost capacity in order to make this decision in a timely manner.

These proposals outline new provisions that could be added to Adults with Incapacity legislation which would offer some pathways for emergency waivers of consent for participation in non-CTIMP studies in Scotland.

The first proposal (**Proposal 94**) asks whether researchers should be permitted to consult with a registered medical practitioner to determine the suitability of an incapacitated individual to participate in a given study. If both are in agreement, the incapacitated adult could be enrolled in the research study.

The second proposal in this section (**Proposal 95**) asks whether researchers should be allowed to enrol adults with incapacity in research studies without seeking the consent of the appropriate representative of the adult in question OR the consent of a registered medical practitioner, provided that

researchers adhere to protocols outlined in advance in their research application which has undergone review at the Scotland A REC.

It must be noted that both the proposals discussed here would only apply in emergency situations, where it is not practical to locate and consult with the adult's usual representative (guardian, welfare attorney, or nearest relative). In addition, for both of these proposals, at the nearest practicable time, researchers would be required to seek consent from the adult's usual representative (or, indeed, the adult themselves if they regain capacity) about the continued participation of the adult in the research study.

Proposal 96: Expanding the list of approved persons who can provide consent for adults with incapacity participating in research

Adults with Incapacity legislation only permits three types of persons to provide consent for an adult with incapacity to participate in research. Consent must be sought from the adult's guardian or welfare attorney, or, in circumstances where both of these individuals cannot be reached, the adult's nearest relative.

In circumstances where none of these individuals can be reached, there is no pathway in the legislation for incapacitated adults to participate in non-CTIMP studies. Our proposal here would aim to expand the list of approved persons who can provide consent for adults with incapacity to participate in research.

This proposal puts forward the idea of allowing researchers to nominate a professional consultee (e.g. an individual's GP or social care worker) to consult with about the suitability of involving an individual in a research project. We are not being prescriptive about the specific profession of this nominated consultee, other than the fact they must have a professional duty of care towards the adult in question. This provision would only apply if researchers have taken steps to identify and contact the adult's usual representatives (guardian, welfare attorney, or nearest relative) without success.

Unlike proposals 94 and 95, if implemented, this above proposal (proposal 6) would not be restricted to emergency or urgent situations.

Proposals 97, 98 & 99: Allowing adults with incapacity to participate in a wider range of research studies

As of now, Adults with Incapacity legislation only allows incapacitated adults to participate in research that cannot be carried out on an adult possessing capacity, and where the research in question aims to obtain knowledge about

the ‘causes, diagnosis, treatment or care of the adult’s incapacity; or the effect of any treatment or care given during their incapacity to the adult which relates to that incapacity’.

This essentially means that adults with incapacity cannot participate in research relating to conditions they may experience that are not linked to their incapacity; or indeed research of any other nature. One major consequence of this is that it may result in the exclusion of incapacitated adults from certain research studies, which in turn may risk research outcomes not catering to the needs of these individuals.

Thus, these proposals put forward the idea of opening up research opportunities for adults with incapacity; provided the same robust safeguards and checks are in place to ensure their well-being and rights.

The first of these questions (**Proposal 97**) asks whether adults with incapacity should be able to participate in research investigating conditions that may arise as a consequence of their incapacity. For example, with individuals with dementia more prone to falling, this would make it clear that incapacitated adults with dementia can partake in hip fracture studies, which a strict reading of the current Act may preclude.

The second question **(Proposal 98**) asks whether adults with incapacity should be able to participate in research investigating conditions that they experience, but that do not relate to their incapacity. For example, adults with incapacity who have a chronic condition that occurred prior to a separate condition that caused their incapacity would now be able to participate in research that investigates either of these conditions.

The third question (**Proposal 99**) asks if adults with incapacity should be able to participate in any research; regardless of whether the research explores conditions that relate to their incapacity or any other condition they may experience.

Questions

Permitting the establishment of more than one ethics committee that is able to review research proposals involving adults with incapacity

91. Should the AWI Act be amended to allow the creation of more than one ethics committee capable of reviewing research proposals involving adults lacking capacity in Scotland?

☒ Yes
☐ No

Please give the reason(s) for your answer

Permitting adults with incapacity to be included in research studies without consent for the types of studies where consent is already not required from adults with capacity

92. In research studies for which consent is not required for adults with capacity to be included as participants, should adults with incapacity also be permitted to be included as participants without an appropriate person providing consent for them?

☒ Yes
☐ No

Please give the reason(s) for your answer

93. Should Scotland A REC (or any other ethics committee constituted under Regulations made by the Scottish Ministers in the

future) have the ability to determine that consent would not be required for adults with incapacity to be included as research participants, when reviewing studies for which consent would also not be required to include adults with capacity as research participants?

☒ Yes
☐ No

Please give the reason(s) for your answer

Pathways for emergency waivers of consent

94. Should the AWI Act be amended to allow researchers to consult with a registered medical practitioner not associated with the study and, where both agree, to authorise the participation of adults with incapacity in research studies in emergency situations where an urgent decision is required and researchers cannot reasonably obtain consent from a guardian, welfare attorney or nearest relative in time?

☒ Yes
☐ No

Please give the reason(s) for your answer

95. Should the AWI Act be amended to allow researchers to enrol adults with incapacity in research studies without the consent of an appropriate representative of the adult, in emergency situations where a decision to participate in research must be made as a matter of urgency, where researchers cannot reasonably obtain consent from an appropriate representative of the adult, and where researchers act in

accordance with procedures that have been approved by Scotland A REC (or any other ethics committee constituted by regulations made by the Scottish Ministers)?

☒ Yes
☐ No

Please give the reason(s) for your answer

Expanding the list of approved persons who can provide consent for adults with incapacity participating in research

96. Should the AWI Act be amended to permit researchers to nominate a professional consultee to provide consent for adults with incapacity to participate in research, in instances where researchers cannot reasonably obtain consent from a guardian, welfare attorney or nearest relative?

☒ Yes
☐ No

Please give the reason(s) for your answer

Allowing adults with incapacity to participate in a wider range of research studies

97. In addition to being permitted to participate in research that investigates the cause, diagnosis, treatment or care of their incapacity, should the AWI Act be amended to allow adults lacking capacity to

participate in research that investigates conditions that may arise as a consequence of their incapacity?

☒ Yes
☐ No

Please give the reason(s) for your answer

98. In addition to being permitted to participate in research that investigates the cause, diagnosis, treatment or care of their incapacity, should the AWI Act be amended to allow adults lacking capacity to partake in research that investigates conditions they experience that do not relate to their incapacity?

☒ Yes
☐ No

Please give the reason(s) for your answer

99. Should the AWI Act be amended to allow adults with incapacity the opportunity to participate in any research; regardless of whether the research explores conditions that relate to their incapacity or investigates conditions that they experience themselves?

☒ Yes
☐ No

Please give the reason(s) for your answer