**Adults with Incapacity Amendment Act consultation**

**SAMH Response**

**About SAMH**

SAMH (Scottish Action for Mental Health) is Scotland’s mental health charity. We’re here for your mental health, providing mental health support and accessible, practical information. We listen to what matters locally and we campaign nationally – for the changes, big and small, that can make all the difference in life. Because now, more than ever, we need to make change happen. We’re taking action for Scotland’s mental health.

**Introduction**

We welcome the opportunity to share our views on the proposed reform of the Adults with Incapacity (Scotland) Act 2000 (‘the Act’). We agree with the Scottish Mental health Law Review (SMHLR) and others across the legal and mental health sectors that the Act is in urgent need of reform to ensure compliance with international human rights obligations and to better centre the will and preferences of people with mental health problems. While supportive of many of the proposals, our submission expresses concern that a number of them, such as changes to guardianship application processes, appear to prioritise addressing workforce and administrative pressures rather than being centred on the rights of people subject to the Act.

We are supportive of the proposed changes to the principles of the Act and the prioritisation of someone’s will and preferences. Similarly, we welcome a focus – in the narrative of the consultation – on embedding supported decision making. Despite this, in our view the more technical proposals do not always clearly demonstrate how the principles as a whole or supported decision making are being accounted for or will be implemented in practice.

While the consultation focuses on administrative and legal changes and processes – which are of course essential to better realise people’s human rights – urgent action is also required to adequately resource mental health care and services in all settings, from communities and social care to hospital settings. To ensure the Act’s principles are realised, and the least restrictive approach is always taken, well-resourced, person-centred mental health services, with an adequate and well-trained workforce, is urgently required.

Alongside a need to address resource constraints, we are concerned that the proposals as a whole do not appear to address the fundamental reforms required to ensure Scottish capacity law complies with international obligations, specifically the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD).[[1]](#footnote-2) For example, the proposals appear to retain a “diagnostic threshold” for determining incapacity by retaining the requirement for a mental disorder, which is in breach of UN CRPD article 12.

Nor do the proposals meet the aspirations of the SMHLR. In particular, the proposals do not bring us any closer to replacing Guardianships with a decision making model based on a ‘Human Rights Enablement, Supported Decision Making and Autonomous Decision Making’ framework, as recommended by the Review.[[2]](#footnote-3)

While some of these proposals are welcome as far as they go, our concern is that they largely tinker around the edges by seeking to improve something that we already know is inadequate and human rights non-compliant. The Scottish Government must bring forward a more ambitious package of reform sooner rather than later.

**Part 1 - Principles of the legislation (questions 1 -6)**

We support the proposal to amend the principles of the Act to ensure that respect for the rights, will and preferences of adults affected by the legislation is prioritised. As outlined by the Scottish Government in the consultation and in the final report of the SMHLR,[[3]](#footnote-4) prioritisation of someone’s will and preferences will bring the Act closer to complying with obligations arising from Article 12 of the UN CRPD.[[4]](#footnote-5) We believe that irrespective of someone’s legal capacity, comprehensive efforts must be made to ensure the person is supported to be at the heart of decision making about their own life, including regarding issues related to their financial situation or care and treatment.

Consideration of the views of other people that play an important role in the person’s life - be that family members or people with a legal responsibility for the person (such as a power of attorney or guardianship) - is essential, but we agree that these views should not have parity with the will and preferences of the person subject to the Act.

We agree that any intervention under the Act should be in accordance with the adult’s rights, will and preferences unless not to do so would be ‘impossible in reality’. However, a clear definition of what this means should be provided on the face of any Bill. Additionally, how this provision is framed both in terms of guidance and codes of practice accompanying the Act, as well as recording practices, will be essential to ensure clear accountability of decisions made under the Act which are outwith, or incompatible with, the will and preferences of the person subject to the Act.

To ensure that the will and preferences of the person subject to the Act are meaningfully gathered and acted upon, we agree with the consultation proposals – and recommendations of the SMHLR - that there must be a move to a model of supported decision making. Indeed, the whole wider programme of reform of mental health law in Scotland should be centred on developing a mental health system which minimises restrictions on liberty and use of compulsory treatment, reduces coercion and embeds supported decision making (as opposed to substitute decision making).

Such change will require not just legislative but cultural change in how mental health care and treatment is designed and delivered, alongside changes to the legal basis for depriving someone of their liberty and agency. It will also require a more fundamental approach to reform than is evident in this consultation.

As highlighted in our submission to the SMHLR, good practice and models of supported decision making exist internationally, including the Australian Law Reform Commission’s (ALRC) approach to supported decision making.[[5]](#footnote-6) While outwith the scope of the current consultation, we believe the Scottish Government, with stakeholders and people with lived experience of mental health problems, should prioritise development of the ‘Human Rights Enablement, Supported Decision-Making and Autonomous Decision-Making Framework’ recommended by the SMHLR.[[6]](#footnote-7)

Key to implementing the SMHLR and a creating legal framework for mental health and incapacity law that is UN CRPD compliant is the decoupling of ‘mental disorder’[[7]](#footnote-8) and capacity in legislation. As the 2016 Essex Autonomy Project: Three Jurisdictions Report makes clear, reliance on a “diagnostic threshold” as a component of the test for mental incapacity is in breach of the non-discrimination requirements of UN CRPD art. 5.[[8]](#footnote-9)

To achieve UN CRPD compliance we strongly believe the requirement for a ‘mental disorder’, as a prerequisite for determining incapacity (and applicability of the Act), should be removed (including from any potential future fusion of mental health and incapacity legislation). In our view, the applicability of incapacity legislation to an individual should be determined solely on the basis of whether the person is found incapable after a functional test of capacity, regardless of any diagnosis

Alongside a model of supported decision making, it will be essential that people subject (or potentially subject) to the Act are proactively offered reasonable adjustments, and access to independent advocacy, to support them to communicate their will and preferences. The UN CRPD Committee has made clear in its General Comment no. 1 that this obligation is absolute and that resources must not be a barrier to providing the necessary support:

“The right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate or undue burden. The State has an absolute obligation to provide access to support in the exercise of legal capacity.”[[9]](#footnote-10)

The accompanying guidance and codes of practice to the Act should clearly outline the steps taken to support someone to determine and communicate their will and preferences.

While we support proposals to amend the principles, this will not achieve the necessary change in practice alone. Training for relevant parties will also be necessary but not sufficient. We are not persuaded that the Office of the Public Guardian (OPG) simply asking if the principles have been followed will ensure that this is the case. The Scottish Government should therefore consider how the OPG can perform more of an enforcement or regulatory role in this space.

**Part 2 - Powers of Attorney**

**Mandatory training, support and guidance for attorney**s

To ensure the principles of the Act are upheld, including ensuring that all interventions to support someone who lacks capacity are the least restrictive possible, it is essential that attorneys have a clear understanding of their obligations under the Act.

Proposals to introduce mandatory training for attorneys are welcome. A power of attorney has very significant powers regarding fundamental aspects of the life of the person on whose behalf they are acting, including around financial decisions and decisions relating to welfare and medical care. It is essential that all attorneys have a clear understanding of their role and duties and are enabled to take a supportive decision making approach to their role, maximising the extent to which the person’s will and preferences are sought and adhered to. Any training should be co-produced with people with lived experience, including lived experience of mental health problems, and take an intersectional approach which enables a constructive, culturally appropriate and inclusive means of working to identify the person’s will and preferences and how best to follow through on those preferences.

The accessibility of any training for potential attorneys must be balanced against assurances that the training has been meaningful and understood. As such, we believe the Scottish Government should work with stakeholders to consider developing a test for prospective attorneys to complete following any training. This will ensure key messages about, and responsibilities of, the role have been understood. We do not consider a “short, web based presentation” will be a sufficient guarantee that the significant powers and duties arising from holding a power of attorney have been meaningfully communicated or understood.

**Enhancing the safeguards around power of attorney**

We welcome many of the Scottish Government’s proposals in regard to enhancing safeguards where there is a dispute or query about capacity. As such we agree with the proposed power for the OPG to be able to refuse to register a power of attorney and seek additional capacity reports if there is a dispute about capacity.

The consultation paper states that additional capacity reports will be sought if there is “reasonable cause”. We believe guidance to the OPG should ensure “reasonable cause” is generously defined. Any incorrect determination of capacity (and subsequent use of a power of attorney in decisions about the persons welfare or finances) may have significant impact on the rights (and potentially the liberty) of the person subject to the Act, including risking financial or other abuse.

We welcome that, where the OPG refuses to register the power of attorney, either party will be able to seek direction from the Sheriff. We believe both the granter and prospective attorney should have access to support – such as independent advocacy – during the registration process, including at times where there is a dispute over registration.

**Increasing accessibility of powers of attorney – certification of capacity**

The motivation to extend the list of professionals who can complete a certificate confirming the granter has capacity must be to ensure accurate decision making and to improve the accessibility of the process for the granter, not to reduce workforce pressures or the administrative burden on the existing system.

Any professional making a determination of capacity must have the training, skills and professional experience to confidently determine their ability to make and communicate decisions. As such we agree that extending the certification role to clinical psychologists – due to their role in supporting people living with mental health problems – would be appropriate. We are not convinced by the evidence set out in the consultation paper that accredited paralegals currently have the skills and experience to certify capacity.

Beyond extending the professionals who will have certification of capacity powers, we believe there needs to be a clearer articulation of how people with certification powers can offer and utilise reasonable adjustments and aids to support someone to demonstrate capacity. Reasonable adjustments should always be explored and offered when determining someone's capacity to ensure all reasonable actions are taken to support decision making, determine will and preferences, and comply with equality law and the requirements of the UN CRPD.

**Part 3: Access to funds**

We have concerns about the proposals to reform the Access to Funds (ATF) scheme, which appear to risk undermining the principles of the Act and existing safeguards intended to protect people subject to the Act from financial abuse. We agree with the submission from the EHRC that an Equality Impact Assessment must be carried out to inform any changes to the current Access to Funds or Management of Residents’ Finances systems to ensure disabled people are not unfairly impacted by these changes.

The current system, which requires a new application to the OPG for a variation of the withdrawal certificate where there are changes to the amount requested, provides a significant safeguard against financial abuse. We do not think that the appropriate response to a concern about a high volume of inaccurate documentation is to effectively remove the requirement for accuracy.

We are also not convinced that moving to a pro-forma system and annual oversight or accounting by the OPG provides adequate safeguards against abuse. This is a particular concern as the proposals do not seek to impose a limit on the amount a sum can be increased by, which risks significant amounts of funds being withdrawn by the individual or organisation that holds a withdrawal certificate. Similarly, we are concerned about the proportionality and risk of financial abuse arising from the proposal for the withdrawer to have powers to withdraw funds directly from the adult’s current account, even if only for specific circumstances.

While we recognise the administrative complexities of the current ATF system, it is crucial that the circumstances of the person without capacity are at the centre of ATF arrangements; these arrangements, including withdrawal certificates, must be tailored to the person’s circumstances, rather than a standardised pro-forma approach.

While we have concerns about a number of the proposals to reform ATF we do agree that where ATF is the least restrictive option to best meet the needs for someone without capacity, then this option should be utilised. For example, we agree with the proposal for the Sheriff to be able to approve ATF in cases where a financial guardianship has been applied for but the OPG believes AFT to be more appropriate and less restrictive.

We also note that one means of improving use of ATF provisions would be to remove the financial barrier of the £97 application fee. This would increase access to ATF and support the principle of least restrictive intervention.

**Part 5 Authority to medically treat adults with incapacity**

We agree with the SMHLR that there is a lack of legal clarity regarding the authorisation of people who lack capacity to be conveyed to hospital for treatment for their physical health. We believe a clear legal process - anchored within the AWI principles and overall human rights framework recommended by the SMHLR - to govern these situations has the potential to increase safeguards and better uphold the rights of people requiring urgent treatment.

As such, we broadly welcome – with caveats - the proposals to amend section 47 certificates to allow authorisation for removal of an adult to hospital for the treatment of a physical illness or diagnostic tests where they are unable to consent to admission. The proposals will at a minimum provide clarity over the legal framework used to detain people in these circumstances.

While we agree with the aim of the proposals, we do have some concerns. Firstly, it is essential that all decisions to transfer to hospital, or prevent someone lacking capacity leaving hospital (in the context of treatment for physical health conditions), meet the ‘necessary and proportionate duty’ and are the least restrictive measures in each individual case. We believe there must always be consideration of whether the treatment or diagnostic tests could be carried out at the person’s home or normal place of residence, so mitigating the need to transport the person to hospital in the first place.

We also believe there needs to be a clear definition of ‘hospital’ in the context of section 47, either in primary or secondary legislation. This should be drafted to ensure that section 47 certificates can not be used to transfer people to or hold them within a care home or other social care setting when the context is a need for physical treatment.

It is essential that section 47 certificates are used only in the context of urgent care, not to facilitate detention for ongoing treatment. In cases of ongoing treatment, where the person does not have capacity to consent, the appropriate powers arising from the Mental Health 2003 Act (MHA), other provisions in the AWI Act or a DOL Order should be utilised. Section 47 certifications should not be used in a way that undermines these legal regimes.

In relation to this, we believe the Scottish Government should reconsider the timescales for section 47 certificates. It is our view that allowing 28 days before a review, with the ability for renewal for up to three months prior to consideration by a Sheriff, is far too long, particularly in the context of emergency or urgent physical treatment. We think that a review should be required in days rather than weeks and that a maximum period prior to consideration by a Sheriff should be measured in weeks rather than months.

In regards to reviews, these should be robust and meaningful. All practical steps, including reasonable adjustments should be taken – and recorded – to support the person subject to the section 47 certificate to meaningfully take part in the review and where possible outline their will and preferences – which should be adhered too. Similarly, all reasonable steps should be taken and recorded to demonstrate that the views of the person’s family (or those with an interest in the welfare of the person) have been gathered and used to inform the approach as appropriate. Such consultation must be taken seriously and cannot be treated as a tick box exercise.

We are also concerned by the suggestion in the consultation document that the certificate should provide for an end date which allows an adult to leave the hospital after treatment for a physical illness has ended. We do not agree with this proposal. The continuation (or revocation) of a section 47 certificate should relate only to the capacity status of the person being treated, not to the length of physical treatment. Where someone under a section 47 certificate regains capacity during a period of physical treatment the certificate should be withdrawn and the person enabled to make their own decision regarding the continuation of treatment or hospital stay.

As the Law Society point out in their May 2022 submission to the SMHLR, there must be safeguards against “mass and automatic issue of section 47 certificates for example all residents in a care home having identical section 47 certificates referring to dementia”.[[10]](#footnote-11) We believe there must be a clear recording and auditing process for amended and enhanced section 47 certificates to ensure their appropriate use, and we expect that section 47 certificates should as far as possible reflect the will and preferences of the person in question – and in any event be tailored to their needs and circumstances. We welcome that the consultation document (pages 42-43) states that recording processes for enhanced section 47 certificates must include:

* Recording the reasons why the adult should be admitted to hospital
* Recording the reasons why the adult was unable to consent
* Recording on the section 47 certificate what attempts were made to ascertain the will and preferences of the adult.

We agree with the EHRC that recording should be expanded to also include:

* Recording the steps taken to assess capacity – not just the reasons by the adult was unable to consent
* Recording the steps taken to respect the rights, will and preferences of the adult – not just a record of the attempts to ascertain will and preferences
* Recording the steps taken to support the exercise legal capacity – in line with UN CRPD art.12(3)

We agree with recommendations from the SMHLR that the Mental Welfare Commission (MWC) should have responsibility for auditing the use of section 47 certificates.[[11]](#footnote-12)

We believe the person subject to a section 47 certificate should have the right, and crucially the support, to appeal the decision to detain them in hospital. At a minimum access to independent advocacy should be provided to assist them with this, in line with UN CRPD art. 12(3).

We are also concerned about expansion of the range of professionals who can carry out capacity assessments. The consultation paper proposes that “suitable professionals such as GPs, paramedics and community nurses would grant the authority to convey an adult to hospital who could not make an autonomous decision.” While we accept the rationale that in urgent or emergency situations it may be necessary and proportionate for the attending medical professional (such as a paramedic) to authorise removal to hospital, we believe that wherever possible tests of capacity (and authorisation of a section 47 certificate) should be undertaken by medical practitioners with the experience, skills and training to ascertain capacity. Where this has not been possible such a person should be required to conduct a test as soon as possible. Where this test finds that the person has capacity the s47 certificate must immediately be revoked.

Furthermore, where a certificate has been completed in an emergency or urgent situation, steps should be taken to ascertain whether a guardianship or other relevant power is in place as soon as possible. This could be done as part of, or in preparation for, an earlier review (as we have proposed above).

**Part 6 Guardianships**

**Medical Reports**

We have concerns that the proposals to reform the process to obtain a guardianship order or interim guardianship order appear motivated by a desire to address psychiatric, primary care and Mental Health Officer (MHO) workforce pressure, rather than the protection and advancement of people’s rights. While we recognise and are concerned by acute and longstanding challenges facing the psychiatry workforce (as outlined in the Public Audit Committee’s 2023 Adult Mental Health inquiry[[12]](#footnote-13)), we believe the focus should be on adequately resourcing the psychiatric, primary care and MHO workforces to undertake their AWI duties.

However, we do recognise that lengthy delays in obtaining a guardianship order negatively impact the rights, and potentially the safety, of the people where a guardianship would be appropriate, as it leaves the person outwith the judicial and legal protection that a guardianship order confers. On balance, we are not yet convinced that reducing the number of medical reports from two to one is appropriate or proportionate. That said, while we believe two medical reports should still be required, we acknowledge that what is most important is that the reports are prepared by a clinician who has a meaningful relationship with the person, and who has sufficient insight their personal, medical and social context. From our perspective one of the major benefits of requiring two reports is that it makes it more likely that one of the medical reports will be informed by such a relationship.

Similar to our comments regarding section 47 certificates we believe, where the person lacking capacity is also experiencing a mental health problem, it is appropriate for clinical psychologists to be able to complete medical reports in regards to guardianship applications.

In regard to MHO reports for guardianship applications, we do not feel able to give a view on making the reports more concise, as the consultation document does not clearly outline what aspects of the current report would be amended or removed. Irrespective of the precise requirements of the MHO report, urgent action and resourcing is required to address the historic and continuing shortfall in MHO numbers in Scotland. The Scottish Social Services Council (SSSC) reports that in 2022 adults with incapacity has remained the most reported area by local authorities experiencing a shortfall in MHO numbers.[[13]](#footnote-14) The SSSC state that to address the overall MHO shortfall an additional 72 extra full-time exclusive MHOs would be required across Scotland.[[14]](#footnote-15)

**Variation of guardianship order to add financial or welfare powers**

We do not agree with the proposals to require only the additional mental health officer report, or ‘person with sufficient knowledge’ report together with the OPG guardian declaration form, to be deemed sufficient to add financial or welfare powers to an existing guardianship order. While we recognise that the existing requirement for a full new application and medical reports is time consuming, someone's capacity and ability to make financial decisions compared to welfare decisions may vary substantially. As such a full consideration of the person’s capacity in regards to the proposed variation (i.e. addition of financial or welfare provisions) is required.

**Length of Guardianship orders**

In line with the principles of the Act, any intervention – including a guardianship – should be the least restrictive option to achieve its purpose. As such, a guardianship should only be in place for as long as is necessary to support the welfare and finances of the person. We have anecdotal evidence from our community-based services that guardianships are very rarely rescinded before their initial three year (or five year after review) period. This has been the case even where there has been significant change in the apparent capacity of the person subject to the guardianship order.

This – along with the case law cited in the consultation paper – appears to suggest that the existing requirements for review are either not being met, or are not being carried out with sufficient rigour. The Scottish Government must therefore consider how existing legislative requirements can be adequately met in this context; otherwise, consideration should be given to shortening, rather than lengthening, the period of guardianship orders.

We share the concerns of the Scottish Government that the existing principles are not always being implemented or observed; however, we do not follow the logic of the suggestion that changing the principles will necessarily lead to improvement in implementation. This will require, at minimum, additional resource, as well as improved skills, capacity and culture in the relevant organisations.

**Adding additional exclusions to AWI Act**

We agree with the suggested additional exclusions to the Act.

**Part 7: Approach to Deprivation of Liberty**

We agree with the SMHLR and Law Commission that there is an urgent need to introduce a clear process to authorise lawful deprivation of liberty (DOL) and to challenge the lawfulness of a DOL, and for this regime to be compliant with ECHR Article 5 obligations.[[15]](#footnote-16),[[16]](#footnote-17)

In accordance with the prioritisation of adhering to someone’s will and preferences, we agree with the proposal that if someone demonstrates a clear will and preference (with support or otherwise) to stay in in a particular living arrangement/setting, this should be adhered to, even if it amounts to a DOL. While we agree that in these circumstances (of clearly determined will and preference) further judicial oversight is not proportionate, regular review to determine any change in the will and preference of the adult is essential. The adult should be supported to engage in review processes, though reasonable adjustments and access to independent advocacy.

Support to engage with DOL appeal and review processes should be maximised, including through access to independent advocacy and reasonable adjustments, irrespective of where the DOL arises from – i.e. DOLs authorised by a power of attorney or guardianships. We welcome the proposals for a standalone appeal process to the Sheriff. We also welcome that through appeal (and review processes) all steps to ascertain the will and preference of the person subject to DOL will be taken. This must be meaningful to the person (and those who have an interest in their welfare), and include access to support such as reasonable adjustments and independent advocacy.

We are less convinced about the proposal which will allow power of attorneys to grant advance consent for a DOL, even where the deprivation is proportionate and will demonstrably lead to more respect, protection and fulfilment of the person’s rights overall. We will await the Scottish Government’s proposals and give a fuller response in due course.

In regards to DOL, but also more broadly, we believe reformed advance statements can provide an important, but underused, tool to support determination of will and preferences. It is concerning that the awareness and use of advance statements, which are specific to treatment under the Mental Health (Scotland) Act 2003, is low, despite reforms in 2015, including creation of a new duty on Health Boards to promote their uptake.[[17]](#footnote-18) In 2021 the MWC reported just 6.6% of people receiving treatment under a T3 certificate had an advance statement, a rate little changed over a decade.[[18]](#footnote-19)

In our second submission to the SMHLR we supported suggestions that advance statements be replaced with a ‘statement of will and preference’ (SWAP), which would apply to mental health and wider health treatment.[[19]](#footnote-20) We welcome that the SMHLR recommended this model (termed an ’Advance Choice’), with the recommendation than an Advance Choice should have the same status in law as a decision taken at the time by a competent adult (with proportionate exceptions outlined in the SMHLR report).[[20]](#footnote-21)

We believe the Scottish Government, with stakeholders and people with lived experience, must make urgent progress to implement the SMHLR recommendations on advance statements. Irrespective of replacement of advance statements with advance choices, much more needs to be done by health boards, and the Scottish Government to ensure advance statements/advance choices are promoted and people have the support to develop one. This will also require cultural change to ensure that statements/choices are upheld in practice and not unduly over-ruled, which we know has undermined trust in the advance statement system.

Alongside reformed advance statements, the Scottish Government should consider what additional means can be developed to ensure better compliance with UN CRPD Article 12 . As the General comment No. 1 to Article 12 states:

“All persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others. States parties can provide various forms of advance planning mechanisms to accommodate various preferences, but all the options should be non-discriminatory. Support should be provided to a person, where desired, to complete an advance planning process”.[[21]](#footnote-22)

While we are unconvinced by the proposal for power of attorney and advanced consent, we do welcome that the Scottish Government are planning to consult further on provision for powers of attorney and DOL. It will be essential, if these proposals are proceeded with, that the adult has the ability to meaningfully challenge, including through judicial recourse, a decision to deprive them of their liberty where they no longer consent, or their will and preference has changed.

**Contact**

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