**Health and Social Care Alliance Scotland (the ALLIANCE)**

Response: Adults with Incapacity (Scotland) Act 2000 – Proposals for Reform

30 April 2018

The Health and Social Care Alliance Scotland (the ALLIANCE) is the national third sector intermediary for a range of health and social care organisations. The ALLIANCE has over 2,200 members including a large network of national and local third sector organisations, associates in the statutory and private sectors and individuals. Many NHS Boards and Health and Social Care Partnerships are associate members.

The ALLIANCE’s vision is for a Scotland where people who are disabled or living with long term conditions and unpaid carers have a strong voice and enjoy their right to live well.

**Introduction**

This response is informed by a roundtable meeting of ALLIANCE members and partners, held to share early and emerging thinking in relation to the consultation’s proposals.

**Chapter three – Restrictions on liberty**

**Do you agree with the overall approach taken to address issues around significant restrictions on a person’s liberty? In particular, we are suggesting that significant restrictions on liberty be defined as the following;**

* **The adult is under continuous supervision and control and is not free to leave the premises**
* **barriers are used to limit the adult to particular areas of premises**
* **the adult’s actions are controlled by physical force, the use of restraints, the administration of medication or close observation and surveillance**

The definition should consider a wider range of factors which may constitute a significant restriction on a person’s liberty, including;

* the person either is not allowed, unaccompanied, to leave the premises in which placed (including only being allowed to leave with permission), or is unable, by reason of physical impairment, to leave those premises unassisted
* restrictions on contact with the community and individual relatives, carers or friends

The third bullet point would benefit from expansion to acknowledge the potential role of digital technology (such as tagging) within the context of significant restrictions on liberty, over and above observation and surveillance undertaken solely by physical means.

**Are there any other issues we need to consider here?**

Page 13 references if “ . . . it is clear that there is no apparent objection on the part

of the adult”. Further careful consideration is required to determine the indicators of an “apparent objection” and also the supportive steps that can be taken to make people aware of their right to object in such circumstances.

**Chapter four – Principles of Adults with Incapacity legislation**

**Do you agree that we need to amend the principles of the AWI legislation to reflect Article 12 of the UNCRPD? Does our proposed new principle achieve that?**

The ALLIANCE strongly supports a new principle which places emphasis on the requirement to provide all support necessary to enable an adult to exercise such capacity as may – with such support – be within their capabilities.

The proposed principle would be strengthened by being backed up by an attributable duty on specified persons and to require evidence of its being performed. Within that context, the term ‘without success’ requires careful consideration amid concern that it could subjectively be interpreted as making a decision deemed appropriate by others, rather than simply making a decision.

**Chapter five – Powers of attorney and official supporter**

**Do you agree that there is a need to clarify the use of powers of attorney in situations that might give rise to restrictions on a person’s liberty? If so, do you consider that the proposal for advance consent provisions will address the issue?**

The proposal to strengthen the safeguards against unlawful significant restrictions on liberty by clarifying the use of powers of attorney is welcome. Given the complexity and sensitivity of the decisions, it is crucial that quality and accessible information is available for people considering Powers of Attorney to ensure that they are supported to have an informed discussion on what they are consenting to.

**Do you think there would be value in creating a role of official supporter?**

Yes. However once again, accessible information would be required to support people to have a clear understanding of what the role entails (including their responsibilities and the limitations on their power) and how it is distinct from existing roles such as an Attorney, Named Person, Guardian or Independent Advocate.

**Chapter six – Capacity assessments**

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

As noted in the consultation paper, a need has been identified to develop a more consistent approach across law and medicine on the assessment of capacity and a programme of work is underway with the aim of addressing this. Given the risk that the proposal could have the unintended consequence of exacerbating current inconsistency in practice, we believe that the range of professionals who can carry out capacity assessments should not be extended until the ongoing work is completed, and its practice developments are fully implemented (and evaluated over a period of time).

**Chapter seven – Graded guardianship**

Whilst we support the concept of a tiered guardianship system, we believe that the proposed gradations require further consideration. Our engagement with ALLIANCE members highlighted concern that Grade 1 Guardianship grants significant powers which are not in line with the (low) levels of scrutiny proposed. We encourage the Scottish Government to consider the Scottish Human Rights Commission’s response, which outlines a proposed re-working of the Grade 1 Guardian as a supported decision-making / co-decision making model.

**Chapter eight – Forum for guardians**

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

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

**Or**

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

The ALLIANCE does not have a particular view on whether the Sheriff Court or the Mental Health Tribunal is the appropriate forum for these matters. Regardless of setting, important elements we believe need to be considered include:

* The participation of the adult. The Law Society of Scotland has previously called[[1]](#footnote-1) for “a clear requirement to facilitate the personal participation of the adult, to supplement this where necessary, to record how this has been done, and in the absence of participation to record the reasons and to record the steps nevertheless taken to ascertain the ‘will and preferences’ of the adult.
* Support and training for judicial decision-makers. This should include training in relation to CRPD and supported decision-making.

A number of ALLIANCE members expressed the view that grade 2 and 3 applications should both be considered by a full panel of the Mental Health Tribunal.

**Chapter nine – Supervision and support for guardians and attorneys**

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

**Do you think there is a need to provide support for attorneys to assist them**

**in carrying out their role?**

Effective support and advice for both guardians and attorneys is a key element in enabling them to carry out what can be a sensitive and challenging role. Our discussion with members highlighted that the current Office of the Public Guardian guidance for Attorneys would significantly benefit from being redeveloped in to a more accessible format.

Advice and support should focus on developing an understanding of their role in supported decision-making, how to apply CRPD principles and AWI principles. Additionally, it was suggested that access to independent advocacy services and peer support may be beneficial to those undertaking these roles.

**Chapter eleven – Advance directives**

**Should there be clear legislative provision for advance directives in Scotland or**

**should we continue to rely on common law and the principles of the AWI Act to ensure peoples’ views are taken account of?**

Advance directives play an important role in supporting the exercise of legal capacity and all mechanisms (including specific legislative provision) which can encourage its use) should be implemented.

**Chapter fourteen – Miscellaneous issues**

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

Alongside advance statements, independent advocacy plays an important role in supporting the exercise of legal capacity and enabling supported decision making. We believe that further consideration of the resourcing of independent advocacy providers is required, to enable this role to be carried within a climate of increasing demand.

**For more information**

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1. <https://www.lawscot.org.uk/media/9581/rights-of-people-with-disabilities-in-scotland-submission-to-the-uncrpd-by-the-mental-health-and-disability-sub-committee-of-the-law-society-of-sco-2.pdf> [↑](#footnote-ref-1)