Creating a fairer Britain
Equality and Human Rights Commission
Response Adults with Incapacity Act (Scotland) 2000 Proposals for Reform

30 April 2018

Contact details:

Laura Hutchison
Equality and Human Rights Commission
2nd Floor 151 West George Street
Glasgow
G2 2JJ

Laura.Hutchison@equalityhumanrights.com
The Equality and Human Rights Commission is the National Equality Body for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC). Alongside the SHRC, we are part of the UK Independent Mechanism that was established by the UK under Article 33(2) of the UN Convention on the Rights of Persons of Disabilities (CRPD) to promote, protect and monitor implementation of the Convention.

In our role as the national equality body and as part of the CRPD Independent Mechanism for Scotland we welcome the opportunity to respond to this consultation. We are pleased to be able share our views on the proposals for reform of the Adults with Incapacity (Scotland) Act 2000 (AWI) and in particular where we think the proposals could be strengthened to ensure Scotland meets its international and domestic law obligations.

**Legal framework**
The Human Rights Act 1998 directly incorporated the European Convention on Human Rights (ECHR) into domestic law and it is unlawful for a public body to violate ECHR. In addition the Scotland Act 1998 requires that all legislation of the Scottish Parliament must be compatible with the ECHR.

The UK ratified both the CRPD and its Optional Protocol in 2009. The process of ratification binds all aspects of the State – the legislative, the executive and the judiciary. The CRPD is therefore binding on the UK and devolved governments as a matter of international law. As many areas covered by the CRPD articles are devolved to Scotland, it is the responsibility of the Scottish Government to ensure effective implementation of these articles in Scotland. This follows from the requirements in the Scotland Act 1998, that Scottish Ministers observe and implement all of the UK’s international human rights obligations.

Article 5(1) of the CRPD requires that all people are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. Article 12(2) requires that disabled people enjoy legal capacity on an equal basis with others in all aspects of
life. Article 12(3) requires appropriate measures are taken to provide disabled people with access to the support they may require to exercise their legal capacity.

Along with many others, we have expressed concern that the AWI does not comply with the requirements of Articles 5 and 12 of the CRPD because it expressly provides that incapacity must be by reason of ‘mental disorder’ (mental illness, personality disorder or learning disability) or ‘an inability to communicate because of a physical disability.’ In doing so, the law discriminates against disabled people with these conditions by allowing, in certain circumstances, for them to be lawfully denied the right to exercise their legal capacity and for this decision to be made on the basis of their disability.

Section 149 of the Equality Act 2010 places duties on listed public authorities, including Scottish Ministers, in the exercise of their functions to pay due regard to the need to:

- Eliminate discrimination, harassment and victimisation that is prohibited under the Equality Act 2010;
- Advance equality of opportunity between people who share a protected characteristic and those who do not; and
- Foster good relations.

Scottish Ministers are also required under The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended) to:

- Assess the impact of applying a proposed new or revised policy or practice against the three needs mentioned in s.149 of the EA 2010;
- In making the assessment, consider relevant evidence related to people who share a relevant protected characteristic;
- Take into account the results of the assessment; and
- Publish the results of the assessments within a reasonable period.

Therefore, in addition to the requirement to implement the rights in CRPD, the Scottish Government must comply with the requirements of both the general and specific public sector duties.

---

It is our view that this requires the Scottish Government to give due consideration to the discriminatory treatment of disabled people that is built into the current system and the need for a non-discriminatory test for determining incapacity. There is also a requirement to give due consideration to the need to advance equality of opportunity for disabled people, including consideration of how to provide the support they may require to exercise legal capacity on an equal basis to non-disabled people. These considerations should form part of the assessment required under the specific duties.

CHAPTER 3 – Restrictions on liberty

Do you agree with the overall approach taken to address issues around significant restrictions on a person’s liberty?

The Commission agrees that there is a need to improve human rights protection and compliance with the CRPD in relation to authorising the deprivations of liberty for people who lack capacity.

The key right at issue under the ECHR in relation to deprivation of liberty is Article 5 (right to liberty). However, the care and treatment arrangements for people who lack capacity, which may amount to a deprivation of liberty, also engage Article 8 (right to private life). The most intrusive forms of control used in care and treatment settings, such as the use of physical restraint and medication without informed consent may also breach Article 3 (prohibition against torture, inhuman or degrading treatment).

The key provisions of the CRPD are Article 12 (equal recognition before the law), Article 14 (liberty and security of the person) and Article 5 (equality and non-discrimination).

The Commission has a number of concerns about the proposed approach to address issues around the deprivation of liberty for people in community or hospital settings who lack capacity to agree to their placement. These are listed below:

1. The consultation document explains that the Government is in agreement with the approach taken in the Scottish Law Commission (SLC) 2014 report on AWI. In its report, the SLC recommended the introduction of a statutory definition of ‘significant restriction on liberty’ for people in community or hospital settings who lack capacity to agree to their placement. However, it is not clear from the consultation document whether the Scottish Government is also
minded to introduce its proposed definition of ‘significant restrictions on liberty’ in statute. In the Commission’s view it is unwise to introduce a statutory definition. The meaning of deprivation of liberty must reflect the obligations set out under Article 5 and established in case law. A statutory definition may not be able to accommodate the inevitable evolving case law on Article 5. In our view, an understanding of what constitutes a deprivation of liberty is best provided in an accompanying statutory Code of Practice and other forms of non-statutory guidance.

2. The use of the term and the proposed definition for ‘significant restrictions on liberty’ may include a narrower set of circumstances than the definition of ‘deprivation of liberty’ in the Cheshire West judgment and may add to, rather than resolve, the lack of clarity in identifying deprivations of liberty. Guidance from the European Court of Human Rights (ECtHR) on Article 5 explains that it is essential that the conditions for the deprivation of liberty under domestic law are clearly defined and sufficiently precise.3

3. The ECtHR has confirmed that the starting point for determining whether someone has been deprived of their liberty within the meaning of Article 5 must be the ‘concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measures in question.’4 We do not believe that the proposed definition accurately reflects this requirement.

4. We also do not think the proposed approach and suggested definition of ‘significant restrictions on liberty’ address both the objective (the confinement of someone in a particular restricted space) and the subjective (that the person has not validly consented to the confinement) elements of the meaning of deprivation of liberty under Article 5.

Guidance from the ECtHR confirms that relevant objective factors to be considered include:
- The possibility to leave the restricted area;
- The degree of supervision and control over the person’s movements; and

---

4 European Court of Human Rights (2014) see note 3, p5
5 Storck v Germany (2005) 43 EHRR 96 at para 74 and Stanev v Bulgaria [2012] ECHR 46 (application no. 36760/06) at para 117
• The extent of isolation and the availability of social contacts.

There is a need to identify the circumstances when someone will be considered to have validly consented to their confinement. ECtHR case law is clear that the right to liberty is too important in a democratic society for a person to lose the benefit of ECHR protection for the single reason that they may have given themselves up to be taken into detention, especially when they are legally incapable of consenting to, or disagreeing with, the proposed action\(^6\). The fact that a person lacks legal capacity does not necessarily mean that they are unable to understand and consent to the situation.\(^7\)

5. It is not clear from the consultation document that the proposed approach will ensure a lawful process is in place regardless of the location of the deprivation of liberty. The State’s positive obligation under Article 5 ECHR requires relevant public authorities to take measures to protect vulnerable people who may be subject to a deprivation of liberty of whom they have or ought to have knowledge.\(^8\) This would therefore include deprivations of liberty that take place in a domestic setting.

**Deprivation of liberty – are there any other issues we need to consider here**

The Commission considers that the approach adopted by the Government requires greater emphasis on the steps that must be taken (and the evidence provided to demonstrate that these steps have been taken) to ensure that people are provided with the support they need to exercise their legal capacity and therefore avoiding, or minimising the chance, of depriving them of their liberty.

To promote the aims of Article 14 CRPD as far as possible, we suggest an additional legal provision that steps by way of reasonable accommodation must have been considered, and if appropriate taken, so as to avoid the need for a deprivation of liberty or otherwise minimise the level of restrictions to which someone is subject.

For example, the provision of extra care support, assistive technology, or alternative accommodation may enable a lower level of restriction

---

\(^6\) *HL v UK* [2004] ECHR 471 (application no. 45508/99) at para 90; *Stanev v Bulgaria* [2012] ECHR 46 (application no. 36760/06) at para 119

\(^7\) *Shtukaturov v Russia* [2008] ECHR 223 (application 44009/05) at para 107-09; *DD v Lithuania* [2012] ECHR 254 (application 13469/06) at para 150

\(^8\) *Storck v Germany* (2005) 43 EHRR 96
than a deprivation of liberty.

Reasonable accommodations may also be required to prevent a breach of the duty to make reasonable adjustments under ss.20 and 29 of the Equality Act 2010 and Article 14 ECHR in conjunction with the relevant Convention rights that are engaged. However, the Commission considers that the inclusion of an express provision concerning the duty to make reasonable accommodations would help to focus the decision maker on this requirement and this will minimise the discriminatory effect of the deprivation of liberty.

<table>
<thead>
<tr>
<th>CHAPTER 4 – Principles of the Adults with Incapacity Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Do you agree that we need to amend the principles of the AWI legislation to reflect Article 12 CRPD, does our proposed new principle achieve that and do we need a further principle to ensure an adult’s will and preferences are not contravened unless it is necessary and proportionate to do so?</strong></td>
</tr>
</tbody>
</table>

As set out above, the Scottish Government is required, under international law and the Scotland Act 1998, to implement the rights in CRPD. It has been established that the AWI principles are not consistently applied in practice. Therefore, amending and / or adding to them is only part of the solution to implement CRPD and the proposed approach does not, in our view, go far enough.

The Commission recommends that the Scottish Government adopt the recommendations from the Essex Autonomy Project Three Jurisdictions Report, ‘Towards Compliance with CRPD Art. 12 in Capacity / Incapacity Legislation across the UK,’ to ensure implementation of Article 12 CRPD. In relation to this question, we would draw particular attention to the following recommendations:

1: Respect for the full range of the rights, will and preferences of everyone must lie at the heart of every legal regime. That must be achieved regardless of the existence and nature of any disabilities. Achieving such respect must be the prime responsibility of anyone who has a role in taking action or making a decision, with legal effect, on behalf of a person whose ability to that action or make that decision is impaired. The role may arise from authorisation or obligation. The individual with that role should be obliged to operate with the rebuttable presumption that effect should be given to the person’s reasonably ascertainable will and preferences, subject to the constraints of possibility and non-criminality. The presumption should be rebuttable only if stringent criteria are satisfied. Action which contravenes the person’s known will and preferences should only be permissible if it is shown to be a proportional and necessary means of effectively
protecting the full range of the person’s rights, freedoms and interests.

2: Adult incapacity statutes should incorporate an attributable duty to undertake all practicable steps to determine the will and preferences of disabled people in applying any measure designed to respond to impairments in that person’s capabilities.

5: The scope of statutory requirements regarding the provision of support should be expanded to encompass support for the exercise of legal capacity not simply support for communication.

6: Statutory provisions regarding support in the exercise of legal capacity must be attributable. For example, statutes that state only that support should be provided must be supplemented with clear guidance about who bears the responsibility for providing that support.

9: Adult incapacity legislation should be structured to ensure that provisions and procedures necessary to ensure CRPD compliance apply throughout the legal system, and not only measures relating to the exercise of legal capacity contained within the principal legislation.

10: A regular programme of monitoring and review should be maintained to review compliance with adult incapacity legislation.

Therefore, there is a need to strengthen the principles by including attributable duties requiring evidence that:

- Efforts have been made to ascertain the will and preferences of the individual
- Access to support for the exercise of legal capacity has been provided; and
- The proposed intervention is necessary and proportionate.

CHAPTER 5 – 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? Is there a need to clarify how and when a power of attorney should be activated?

Yes. Where the law is insufficiently precise and predictable, it can mean uncertainty for those involved as to what to do and whether any steps taken are lawful.

It is currently unclear whether a welfare attorney can prevent an adult, who is not restrained or subject to physical force or medication, from
leaving the place of confinement if they want to leave and have capacity to make that decision.

In one particular legal case, a power of attorney (PoA) had been put in place with the full consent of the granter. The PoA was then used to force the granter to live in a specific care home and to prevent a move to another. When the granter requested that the PoA be revoked so they would be free to leave the place of confinement a legal dispute arose about whether the adult was capable of deciding where to live.

In the Commission’s view this situation represents an unlawful deprivation of liberty. Even though a PoA is in place, the adult is not free to leave despite clearly expressing their wish not to remain in the place of confinement.

Advance conditions may help to prevent a deprivation of liberty in these circumstances. However, appropriate and effective safeguards must be put in place to ensure that PoA and advance conditions are not open to abuse. In particular, they must support the exercise of legal agency by complying with Article 12 (4) CRPD and containing safeguards that ensure they both:

- Respect the rights, will and preferences of the adult
- Are free of conflict of interest and undue influence
- Are proportional and tailored to the adults circumstances
- Apply for the shortest time possible
- Are subject to regular review by a competent, independent and impartial authority or judicial body.

The Commission also recommends the Government implements recommendation 8 from the Essex Autonomy Project Three Jurisdictions Report and develop definitions (and related guidance) on the concepts of undue influence and conflicts of interest which will be suitable for providing robust safeguards across all aspects of exercise of legal capacity and in doing so should include consideration of weaving in aspects of related concepts such as ‘facility and circumvention’ in Scots law.

We also support awareness raising and public education about PoA.

**Official Supporter for decision-making – do you think there would be value in creating a role of official supporter?**

Yes. The Commission would however, reiterate the need to also put in place effective and appropriate safeguards that comply with Article 12 (4).
The introduction of such a role must include the availability of support for the adult to ensure they understand the difference between an Official Supporter and an attorney as well as the decision they are making. There is also a need for comprehensive training and guidance for Official Supporters and attorneys. An independent body that will review and monitor the activities of Official Supporters to prevent abuse would also be needed.

CHAPTER 6 – 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 mentioned above, the Commission considers that the Government must give due consideration to introducing a non-discriminatory capacity test. We agree that to do this properly the Government should wait for the findings and recommendations from the independent review of the inclusion of learning disability and autism in the Mental Health (Care & Treatment) (Scotland) Act 2003. We understand that this review is considering whether psychologists should be able to carry out capacity assessments. In principle, we do not object to this extension because it recognises that capacity is not only a medical issue and it may support a broader understanding of capacity.

However, we are of the view that extending the category of people who can carry out capacity assessments should be accompanied by the necessary reforms to guarantee that people can access the support they may require to overcome obstacles to exercising their legal capacity. There should also be clear statutory requirements for continuous training and the provision of evidence that training has been undertaken and completed. Without these additional measures, we are concerned that this proposal may hinder any moves to supporting people to exercise their legal capacity.

Further, capacity assessments are central to determining a person’s enjoyment of their fundamental rights. With this in mind, we cannot envisage any circumstances when it would be appropriate for dental practitioners, ophthalmic opticians or registered nurses to be authorised to carry out capacity assessments for guardianship orders.

CHAPTER 7 – Graded guardianship
**Do you agree with the proposal for a 3 grade guardianship system?**

The Commission does not agree with the proposal for a 3 grade guardianship system as it is currently framed. In particular, we are concerned that the proposal does not implement CRPD or comply with Articles 6 and 8 ECHR.

In general, we are concerned that the focus of the proposals appears to be on simplifying the process of obtaining guardianship powers and this may have taken precedence over the protection and promotion of fundamental rights. We note the findings of a survey of welfare guardians undertaken by the Mental Welfare Commission that the majority felt the appointment process was reasonably straightforward and most were satisfied with the outcome.9

We are also concerned that the proposals do not have at their core guaranteed access to support to exercise legal capacity and will not address concerns that wide ranging powers are being granted unnecessarily.

**Do you think the proposed grade 1 guardianship is easy to use and provides enough flexibility to cover a wide range of situations with appropriate safeguards?**

We do not think the proposed grade 1 guardianship focuses sufficiently on, or guarantees access to, support to exercise legal capacity and does not provide effective and appropriate safeguards to protect from abuse.

The ECtHR has also clarified that the same procedural requirements and safeguards that apply for cases about the deprivation of liberty are also required to ensure compliance with Articles 6 and 8 ECHR in cases about guardianship applications.10

We have some concerns about the suitability of the Office of the Public Guardian (OPG) to review and monitor the exercise of welfare guardian powers. We understand that the focus of the OPG’s work is in relation to financial affairs and that they may not have sufficient expertise in welfare matters, including care and treatment. This may affect the ability of the OPG to satisfy the requirements of Article 12 CRPD by ensuring that safeguards are subject to regular review by a competent, independent and impartial authority or judicial body.

---

9 Mental Welfare Commission (September 2016) Adults with Incapacity Act Monitoring 2015/16, available [here](http://example.com) [accessed 27 April 2017]

10 Case of A.N. v Lithuania (2016) ECHR (Application no. 17280/08)
We also do not agree that it is appropriate to adopt a purely administrative process of granting welfare powers and there is a need for much greater scrutiny of whether it is proportionate and necessary to grant such powers. The proposals could be viewed as a tick-box exercise, leading to the granting of a wide range of powers. It is not clear how the proposals will ensure that applicants only seek powers that are strictly required.

In our view the appointment of a guardian at any level, for any purpose, must:

- Involve the participation of the adult, in particular to be able to establish their will and preferences and being confident that support was provided to identify this;
- Build in regular review of guardianship powers that satisfy the requirements of Article 12 CRPD and Articles 5, 6 and 8 ECHR; and
- Recognise the risk of undue influence and conflict of interest.

We recommend the Government reworks the proposed grade 1 guardianship to ensure that any proposals comply with the CRPD and ECHR.

**Are the powers available at each grade appropriate for the level of scrutiny given?**

As set out above, it is the Commission’s view that the powers listed under grade 1 are significantly too far-reaching to be effectively and appropriately safeguarded by an administrative process. In addition to our concern about the use of an administrative process to grant welfare powers, we do not agree that all of the financial powers are suited to this type of process.

**Do you have views on what the financial threshold for Grade 1 guardianships should be?**

Article 12 (4) CRPD requires that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards that are proportionate to the degree to which the measures affect the adult’s rights and interests.

Therefore, safeguards should relate to the types of powers being sought and tailored to the person’s circumstances. They should not be based on the amount of money involved. The emphasis should instead be on the power and control that the appointed person has over the person’s affairs.
Do you agree with the proposal that at every grade of application, if a party to the application requests a hearing, one should take place?

The Commission agrees that a hearing should be available to all those who request it. However, we think the proposals should go further to ensure that the emphasis is centred on guaranteeing access to support to exercise legal capacity and the participation of the adult.

As set out above, the Commission is of the view that the adult should take part in the application process unless there is clear and evidenced decision from them confirming that they do not want to take part.

We have some concerns that safeguards which allow the participation of the adult in a hearing only may not be sufficient to allow adults to participate properly in the application process or ensure meaningful support is available to the adult. Setting out in legislation attributable duties to provide support for the exercise of legal capacity would ensure the involvement of the adult at the earliest stage and reduce the need for interventions.

Do you think it is enough to rely on the decision of the Sheriff/tribunal at grade 2 or should cases where there all parties agree and there is a severe restriction on the adult’s liberty automatically be at grade 3?

Appropriate and effective safeguards must be put in place to prevent abuse and these must meet the requirements of Article 12 (4) CRPD. Therefore, safeguards should be linked to the powers being sought, rather than only when there is evidence of disagreement.

If an adult is to be lawfully deprived of their liberty the safeguards must ensure that there is judicial scrutiny and determination that:

- There is evidence that valid consent has been given by the adult or that there is evidence of respect for the rights, will and preferences of the adult;
- There is no conflict of interest or undue influence; and
- The intervention is proportional and tailored to the person’s circumstances, applies for the shortest time possible and will be subject to regular review.

Do you agree with our proposal to amalgamate intervention orders into graded guardianship

The Commission supports the principles behind Intervention Orders and in particular their ability to ensure that the intervention does not go beyond what is necessary in the specific circumstances. Therefore, we have reservations about the proposal to amalgamate them into the
| **proposed system of graded guardianship as it currently stands.** |
| Do you agree with the proposal to repeal Access to Funds provisions in favour of graded guardianship? Do you agree with the proposal to repeal the Management of Residents’ Finances Scheme? Do you agree with our approach to amalgamate Management of Resident’s Finances into Graded Guardianship? |
| The Commission agrees that it may be useful to incorporate these types of interventions into a system of graded guardianship. However, as already stated the Commission has number of concerns about the proposed system of graded guardianship. |
| We have reservations about the proposal to extend the category of those who may be appointed as a guardian to include third sector organisations, solicitors and care providers on the basis that we believe this is likely to increase the risk of conflict of interest situations and undue influence. |
| In our view, the guiding principle should be to ensure that people who don’t have anyone who could act as an appointed person have access to state based support to exercise their legal capacity. Therefore, we recommend consideration of other models, such as court appointed Decision Making Representatives who can provide assistance and support to help people make decisions about their welfare and their property and affairs. |

**CHAPTER 8 – Forums for guardians**

| Do you think that using OPG is the right level of authorisation for simpler guardianship cases at grade 1? |
| As set out above, the Commission strongly disagrees with the proposal to adopt an administrative process to authorise grade 1 guardianships and is not convinced that the OPG satisfies the Article 12 CRPD requirement for the review body to be ‘a competent’ authority or judicial body. |
| Please give your views on the level of scrutiny suggested for each grade of guardianship application. |
| Please see the sections above covering our response to the proposals in Chapter 7 on graded guardianship. |

**CHAPTER 9 – Supervision and support for guardians**

| Is there a need to change the way guardianships are supervised? Please give your views on our proposal to develop joint working between the OPG, Mental Welfare Commission and local authorities to take forward changes in supervision of guardianship. |
Yes. However, we are not convinced on the proposed approach to determining supervision. In accordance with the principles set out in Article 12 CRPD, we recommend that the level of supervision should be based on the circumstances of a particular case, including how the intervention affects the adult’s rights and interests, and ensuring that this supervision will provide an appropriate and effective safeguard to prevent abuse, undue influence and conflicts of interest.

**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?**

The Commission is of the view that the provision of accessible advice and support for guardians and attorneys is fundamental. To ensure this happens in practice, the legislation should include an attributable duty to provide advice and support to guardians and attorneys that includes making sure there is advanced understanding of how the role:

- supports the exercise of legal capacity
- identifies and articulates the will and preferences of the adult
- can put into practice CRPD and AWI principles

### CHAPTER 10 – Order for cessation of residential placement, short term placement order

**Do you agree that an order for the cessation of a residential placement or restrictive arrangements is required in the AWI legislation?**

Yes and the Commission recommends adopting a similar approach to s.291 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Article 8 ECHR requires that the adult is sufficiently involved in the decision-making process about their care and treatment. Therefore, the legislation should be clear that the adult is entitled to apply for this order.

There is also a need to clarify that this order covers situations when the adult has not validly consented, has complied with their detention but may not have the capacity to consent or has not been provided with support to exercise their legal capacity to consent.

**Do you agree that there is a need for a short term placement order within AWI legislation? Does the approach seem correct or are there alternative steps we could take?**

Yes. However, decisions about the proposed placement should not be made until and unless evidence that demonstrates that all efforts that have been made to support the exercise of legal capacity and to ascertain, where possible, and act upon the rights, will and preferences of the adult has been provided and considered. This should include evidence that the adult has been provided with support to understand
what is being proposed and their right to oppose and appeal the proposed placement. As set out above, the legislation should include attributable duties that require support and assistance to be provided to allow the exercise of legal capacity.

Article 5(4) ECHR provides that everyone who is deprived of their liberty by detention is entitled to bring proceedings which question the lawfulness of the detention. This shall be decided speedily by a court and release ordered if the detention is not lawful. It is our view that the system for short term placement orders should require prior review and authorisation because this provides more appropriate and effective safeguards.

Do you consider that there remains a need for section 13ZA of the Social Work (Scotland) Act 1968 in light of the proposed changed to the AWI legislation?

If proposals are implemented that ensure that individuals are provided with support and assistance to make decisions and exercise legal capacity, this should avoid the need for such intervention.

CHAPTER 11 – Advance directives

Should there be clear legislative provision for advance directives in Scotland?

Yes. We agree with the view expressed in the Essex Autonomy Project Three Jurisdictions Report that advance directives provide an opportunity to support the exercise of legal agency in circumstances where decision specific decision making capacity is impaired, intermittent or absent. It can also provide evidence of someone’s will and preferences and may be an indication of whether they would consent to particular care and treatment. However, to protect against abuse and unlawful interference with fundamental rights, advance directives must be accompanied by appropriate and effective safeguards that satisfy the requirements of Article 12 (4).

We also consider that concrete efforts should be made to promote and raise awareness of advance care and treatment planning to encourage greater use. If advance directives are used more often in care planning and treatment there should be fewer situations when intervention is required.

CHAPTER 12 – Authorisation for medical treatment

Do you think there should be provision to authorise the removal of a person to hospital for the treatment of a physical illness or diagnostic tests?

This proposal includes the potential deprivation of liberty in the care and treatment arrangements of people who lack capacity. ECHR articles 5
and 8 are engaged and depending on the type of control and treatment may engage Article 3. In addition, we would also draw the Government’s attention to the guidance of the ECtHR that where the facts indicate a deprivation of liberty within the meaning of Article 5 ECHR the relatively short duration of detention does not affect this conclusion.\textsuperscript{11} The relevant CRPD articles are 5, 12 and 14. Please refer to our response to the proposals in Chapter 3 above for our position about how these should be applied.

The proposal includes a requirement for the medical practitioner to seek consent to the proposed treatment and explains that the new enhanced AWI principle will mean that the adult must be supported to participate in the decision. As set out in our response to Chapter 4 above, we do not think the new enhanced principle on its own goes far enough to support the exercise of legal capacity or to respect the adult’s rights, will and preferences as required by Article 12 CRPD. We recommend this proposal is strengthen by introducing an attributable duty to provide support to exercise legal capacity.

Acts of care and treatment for people who lack capacity to consent to them almost invariably engage Article 8 because they will in some way restrict or interfere with an individual’s autonomy, physical or psychological integrity. Decisions about care and treatment that are contrary to the adult’s ascertainable wishes or otherwise made without valid consent need to be ‘necessary and proportionate’ to comply with Article 8.

We note that the Government has proposed a further AWI principle to ensure that the adult’s will and preferences are only contravened if it is shown to be a ‘necessary and proportionate’ means of protecting the full range of rights and freedoms. As set out in our response to Chapter 4 above, we do not think this goes far enough. We recommend the introduction of an attributable duty requiring all decisions that are contrary to the adult’s ascertainable will and preferences or otherwise made without valid consent to be shown to be ‘necessary and proportionate.’

It is the Commission’s view that all formal care and treatment decisions taken on the basis that a person lacks capacity should require a written record. This will enhance accountability and human rights compliance.

We recommend that effective safeguards are built into the legislative

\textsuperscript{11} Case of Rantsev v Cyprus and Russia (2010) ECHR application no 25965/04 at para 317; Case of Iskandarov v. Russia (2011) ECHR application no. 17185/05 at para 140
provisions. These safeguards should include a requirement that the medical practitioner records in writing:

- The steps taken to assess capacity
- The steps taken to respect the rights, will and preferences of the adult
- The steps taken to support the exercise legal capacity
- Where possible, a description of the ascertained will and preferences of the adult
- If valid consent has not been obtained, an explanation of why the proposed care and treatment is ‘proportionate and necessary’
- Confirmation that have met the duty to provide support to exercise legal capacity
- Confirmation that they have met the ‘necessary and proportionate’ duty

In our view, introducing these statutory requirements will achieve the transformational change in practice that is required to fully protect and promote human rights of disabled people and guarantee access to support to exercise legal capacity.

<table>
<thead>
<tr>
<th><strong>Do you consider that there should be provision to authorise the removal of a person to hospital for the treatment of physical illness or diagnostic tests?</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>This proposal may involve a more intrusive interference with someone’s rights and in those cases is likely to engage Article 3 ECHR. Therefore, these interventions should be subject to judicial determination.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Do you agree that a 2nd opinion should be involved in the authorisation process? If yes should they only become involved where the family dispute the need for detention?</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>The proposals require the medical practitioner to refer cases to a Nominated Practitioner for a 2nd opinion only if there is disagreement about the care and treatment proposed.</td>
</tr>
</tbody>
</table>

We do not think this goes far enough to meet the requirements of Article 12 (4) CRPD. To ensure this safeguard is effective, we recommend that the duty to refer to a Nominated Practitioner should also include situations when:

- It is reasonable to believe that the adult does not wish to receive the care or treatment proposed;
- The adults will and preferences cannot be ascertained; and
- The care and treatment proposed are particularly intense or intrusive, including the use of physical or chemical restraint.

<table>
<thead>
<tr>
<th><strong>Do you agree that there should be a review process every 28 days to ensure that the patient still needs to be detained under the new provisions?</strong></th>
</tr>
</thead>
</table>
As set out above, Article 5 requires both speedy review of the lawfulness of detention and continuing review at regular intervals.

We agree the authorisation should be time-limited, the end date fixed and the adult and their family/proxy/guardian should be able to appeal the detention.

To comply fully with Article 5, it is our view that, if the period of detention is for longer than 28 days, there should be an automatic judicial review. During the 28 days the need for detention should be subject to regular review by the medical practitioner and a record kept of why detention continues to be proportionate and necessary.

**Do you think we should give consideration to extending further the range of professionals who can carry out capacity assessments for the purposes of authorising medical treatment?**

As set out in our response to the proposals in Chapter 6, we do not support extending the range of professionals who can carry out capacity assessments. We have particular concerns about extending the power of professionals who can authorise medical treatment to include the power to assess capacity and detain an adult.

Capacity is an evolving concept with continuous developments in our knowledge and understanding of it. In our view, only those with a full grasp of what constitutes capacity and how to assess it should have the power to make such an assessment.

**CHAPTER 14 – Miscellaneous issues**

**Are there any other matters within the AWI legislation that you feel would benefit from review or change?**

On the basis that the Scottish Government has committed to moving towards a system that provides support for the exercise of legal capacity, we are of the view that it would be beneficial to replace the terms guardian/guardianship with something new, which captures the role of assisting and supporting someone to exercise their legal capacity. For example, in Ireland the terminology has been changed to Assisted Decision-Making.

The Commission also considers that before any changes are introduced there must be a clear commitment to adequately resource them and comprehensive plans for implementation, including training.