Response by the Faculty of Advocates
to
Scottish Government consultation
Adults with Incapacity (Scotland) Act 2000: Proposals for Reform

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Introductory

The Faculty of Advocates welcomes the opportunity to respond to this consultation. Within the Faculty of Advocates, our members have experience of guardianship and other issues arising from the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"), both from conducting contentious cases, and in the provision of advice in contentious and non-contentious matters.

We agree that this is a convenient time at which to review the operation of the 2000 Act in light of developments both domestic and international. As the consultation document records, the Scottish Law Commission has done important work in this area, and the Faculty has provided input to the Commission and to the Scottish Government's previous consultation in this area in March 2016.

CHAPTER THREE – RESTRICTIONS ON A PERSON'S LIBERTY

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

In its response to earlier consultation, the Faculty has indicated its support for the separate concept of restriction of liberty as distinct from deprivation of liberty, and we remain of that view.

As a general principle, the idea of endeavouring to obtain an individual's consent to their placement as an invariable first step seems to us a sound approach, and the idea that restrictions on a person's liberty ought to be in accordance with their wishes whenever possible seems a reasonable one. Not least is the consideration that if an adult is content with the arrangements for their care then it is less likely that they, or anyone else, will seek to challenge those arrangements regardless of the legal position. Nevertheless, there may be practical concerns as to how an adult's consent is obtained and recorded, and further to ensure that adults falling within the scope of the 2000 Act, who by definition are likely to be vulnerable, are not pressured into consenting to a placement when they do not want it.

The idea of a legal principle distinct from a formulation of deprivation of liberty directly aligned with Art 5 ECHR avoids reliance upon a concept that is at once fairly complex (particularly for non-lawyers) and subject to changing jurisprudence from a supranational court.

Nevertheless, there are important consequences of adopting a distinct legal concept as a basis for regulation that should be borne in mind.

- It is perhaps obvious, but the idea of a separate legal concept - "significant restriction" - will inevitably not match with the original concept, namely deprivation of liberty. This means that there will be cases which are likely to fall within the scope of one concept but not the other. Depending on how "significant restriction" is defined, this may result in (i) cases where significant restriction exists but deprivation of liberty does not and/or (ii) cases where there is a deprivation of liberty but there is not a significant restriction.

- If the concept is not sufficiently simple then there exists the potential for an increased volume of litigation about whether something amounts to significant restriction or not. It is not possible to quantify the volume of such an increase in advance.

- If the concept of significant restriction is comparatively narrow, then there will be cases in which recourse is had to the concept of deprivation of liberty. The more narrowly the concept of significant restriction is defined, the more arguments there are likely to be about whether particular circumstances amount to deprivation of liberty.

Similarly, if the protections afforded to adults are less under the concept of restriction of liberty then there will be cases in which recourse is had to the concept of deprivation of liberty. Powers of attorney are an obvious example – there would be nothing stopping the creation of limited review for attorneys in cases of significant restriction, but the requirements of article 5 of the ECHR may be greater in relation to deprivation of liberty.

Conversely, if the concept of significant restriction is defined broadly then it will result in protections being afforded to those who do not strictly require them in terms of ECHR obligations. This may be viewed as an undesirable consequence in a context of limited public funds, since there are likely to be administrative consequences of the proposed changes, as well as the potential for litigation.

In short, it appears to the Faculty that the idea of significant restriction has merit so long as it is cast in sufficiently straightforward and broad terms.

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**

Do you agree with this approach? Please give reasons for your answers.

The Faculty considers that a focus on freedom to leave alone is appropriate, so long as that test is understood broadly. There may be concerns that elements of these tests are not in practice sufficiently clear. For example:

- What does "continuous" mean in this context? Does it literally mean without any break of time whatsoever?
- What does "not free to leave" mean? Does it mean changing residence? Does it mean leaving temporarily? Is someone free to leave if they can only leave with

permission? Does it make a difference if permission is always, sometimes or never granted? How is one to know if an adult's actions are controlled by medication?

- Similarly how is one to know if an adult's actions are controlled by close observation and surveillance?
- In relation to the question of physical force, is the threat of physical coercion enough?

Are there any other issues we need to consider here?

We note the proposal, not focussed in the questions, that "measures applicable to all adults living at a given place (other than staff) and which are intended to facilitate the proper management of the premises without disadvantaging adults excessively or unreasonably are not to be regarded as giving rise to significant restrictions (for example standard security cameras)".

Care has to be taken in this regard not to narrow the concept of significant restriction to the point that it excludes cases of deprivation of liberty. Standard security cameras would appear to be unobjectionable, but the exclusion of locked doors may well narrow the concept of significant restriction to such an extent that it is narrower than deprivation of liberty.

Moreover, it may not be easy to apply the tests of measures being "intended" or for "proper management" or adults being "disadvantaged excessively or unreasonably". The disadvantage provisions, in particular, do not seem likely to give an obvious or clear answer and they seem to be inherently fact-sensitive. Introducing these tests increases the scope for disagreement and litigation. This would tend to undermine the purpose of having a separate legal concept of "significant restriction".

CHAPTER FOUR

PRINCIPLES OF THE ADULTS WITH INCAPACITY LEGISLATION (Part 1, s.1)

Do you agree that we need to amend the principles of the AWI legislation to reflect Article 12 of the UNCRPD? `

Yes.

The UNCRPD read with the General Comment[1] requires a paradigm shift in the treatment of persons with a disability. Its application to persons with mental disability is challenging and, in relation to persons with certain classes of mental disorder, in some respects counter-intuitive.

There is not sufficient emphasis placed upon the will of the adult in the present regime. Although a shift in regime might be achieved in a number of ways the amendment of the guiding principles is probably the most straightforward. Article 12.3 requires support to be provided to adults.

The view of the Faculty is that the requirement of Art 12 of UNCRPD to ensure that safeguards are "proportional and tailored to the person's circumstances" cannot be fulfilled without further express provision. Accordingly, the proposal that wishes and preferences of an adult can only be overridden as a "necessary and proportionate" means of achieving the wider aims of Art.12.2 & 12.4 of the UNCRPD is necessary to give effect to the policy of giving effect to the Convention.

[1] UN Committee on the Rights of Persons with Disabilities, General Comment No 1 on Art 12 (2014).

Does our proposed new principle achieve that?

The principle goes some way towards compliance with the UNCRPD, and, specifically, article 12.3.

However, the wording of the first new principle requires careful scrutiny. One particular concern is that there are two significantly subjective elements; namely what amounts to "all practical help" and also what yardstick is used to determine that support has been given "without success"? Aside from the imprecise nature of the wording itself, a real question is how the wide range of persons who discharge functions under the 2000 Act could properly assess how well they have achieved that outcome. We also wonder if "practicable" would be closer to what is intended than "practical"?

As currently formulated, the principle is slightly odd in that it requires demonstration of a state of affairs rather than just the state of affairs to exist. A form of words "There shall be no intervention in the affairs of an adult unless all practical help and support to help the adult make a decision about the matter requiring intervention has been given without success." would be in line with the existing principles.

The use of the phrase "without success" may cause problems. By what criterion is success to be gauged in this context? Presumably the principle is to encourage adults to use any capacity that they have in order to make decisions for themselves. There will be cases in which adults would make objectively unwise decisions. Would that be "success"? On one view, that is one of the situations the 2000 Act is designed to avoid, and on another view, it is the autonomy which the UNCRPD supports. We note that the English MCA contains a similar (though different) principle at section 1(3): "A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success."

Moreover the principle is aimed at the making of a decision rather than merely the expression of a view. It would seem to be appropriate that steps be taken to try to ascertain the views of the adult, not merely trying to help him make a decision. Although the existing principles cover the views of the adult they only do so "so far as they can be ascertained" which would seem to be a somewhat less demanding test than "all practical help and support".

Is a further principle required to ensure an adult's will and preferences are not contravened unless it is necessary and proportionate to do so?

It is possible that a further principle may be necessary if the application of the first proposed principle alone merely results in trying to help the adult make a decision in relation to the question.

There is scope for a situation where an adult expresses a clear preference but is perhaps unable to make the relevant decision. In those circumstances it would seem entirely appropriate that the adult's preference be respected but there is no obligation on an intervener to do so as the law stands or would stand. It may be that on a proper application of the existing principles such an outcome would arise in any event but not necessarily.

If consideration is given to adopting the proposed principle, it is perhaps difficult to see how an intervention that was necessary could ever be disproportionate. It might then be appropriate for a test of necessity alone to apply.

Having the proposed second principle may also alleviate some of the difficulties that might otherwise arise in relation to the application of the first principle. If the adult expresses a view and it is not necessary and proportionate to go against that view then it does not matter if the adult has "successfully" made a decision or not – because in light of the second principle the course for which the adult has expressed a preference will be adopted in any event.

Are there any other changes you consider may be required to the principles of the AWI legislation?

No.

Please give reasons for your answers.

We refer to our comments on the proposed additional principles.

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?

Yes. In the Faculty's view, powers of attorney would require significant alterations in order to meet the requirements of article 5 of the ECHR. Without meeting those requirements the purpose of the "significant restriction" concept would be undermined in cases in which an attorney acted.

If so, do you consider that the proposal for advance consent provisions will address the issue?

The Faculty considers that this issue is more nuanced than the Consultation Paper indicates, and we discuss this below.

Please give reasons for your answers.

We note the sentences in the consultation paper:

> "The ECtHR has confirmed that a person can only be considered to be deprived of their liberty if there is no valid consent to that position. We consider that this principle can be applied to consent by an adult in advance of losing capacity, as long the consent is valid and relates to specific arrangements."

The first of these is undoubtedly correct. However, we do not see that there is any sound jurisprudential basis for the second statement – there is a supporting citation in relation to the first statement but not the second. There is no explanation given for why the authors consider the principle capable of extension in the manner they suggest.

In the seminal case of *De Wilde, Ooms and Versyp v Belgium* (1970) 1 EHRR 373, the European Court of Human Rights stated

> "Finally and above all, the right to liberty is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into

detention. Detention might violate Article 5 even although the person concerned might have agreed to it." (paragraph 65).

On that basis, it is at least arguable that a person cannot give themselves up to detention and by doing so lose their article 5 rights. That is not to say that a person cannot consent to detention, rather it throws into sharp relief the residual Article 5 rights which the person has.

The granter of a power of attorney will have lost capacity by the time that a power of attorney is triggered. As a consequence, he or she would be unlikely to be able to revoke the attorney's appointment. This means that the granter of the power of attorney will, in effect, have lost his or her right to freedom because he or she has given it away to their attorney. The right to freedom, along with other fundamental and human rights, is often regarded as an inalienable right. By permitting powers of attorney or advance directives to be used in the manner proposed we change the character of the right to an alienable one. That is perhaps unavoidable in the context of the anticipation of permanent loss of capacity, but it is important that any regime for advance consent should face up to this.

There may be a tension between the UNCRPD which, arguably, suggests that adults could give themselves over to detention and the more paternalistic approach of the ECHR which requires greater safeguards. Although the UK is a signatory to both conventions, the UNCRPD is not directly enforceable in the UK, unlike the ECHR.

Given the importance attached to personal liberty by the ECHR, it is perhaps difficult to avoid the conclusion that if a deprivation of liberty is the consequence then there ought to be periodic review by some form of judicial body (cf. *HL v UK* (2005) 40 EHRR 32).

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

Yes. In the Faculty's view the present regime does not meet the requirements of Article 5 ECHR if deprivation of liberty is to be authorised by the attorney, even on the hypothesis that advance consent can be given. Moreover there are procedural guarantees in relation to Article 8 ECHR whereby an individual ought to be involved in decision-making processes to an extent commensurate with the importance of the decision to them. Activation of a power of attorney would seem likely to be important in relation to an adult and so there ought to be the potential for a greater involvement on their part

A properly drafted POA ought to provide for the point in time at which the Attorney has powers conferred on him/her. As regards Continuing Powers, there could be provision for the powers to be conferred whenever requested by the adult or, for example, the issuing, by a medical practitioner or clinical psychologist, of a certificate of incapacity in relation to some or all of the adult's property and financial affairs, etc. Assuming that the question relates to Welfare Powers, it might be that Section 16(3) (ba) could be amended to provide that the Welfare Powers would only be conferred on the Attorney when reports of an examination and assessment of the granter carried out not more than 30 days before by two medical practitioners one of whom, in a case where the incapacity is by reason of mental disorder, must be a relevant medical practitioner have been issued (as in the present Guardianship provisions).

If you have answered yes and have views on how this should be done, please comment here.

Before detention can be authorised the adult requires to be reliably shown to suffer from a mental disorder of a sufficient degree to require confinement. In cases in which an individual

is deprived of his/her liberty there also requires to be a degree of legal formality about the process (it was partly on this basis that the *Bournewood* case was decided against the UK). As noted above, in a case where important decisions are made about an individual's personal autonomy they ought to have the opportunity to be involved in any decision-making process. There are a number of ways in which these requirements might be met but the present scheme is insufficient. Supervision of the process by a judicial body (whether court or tribunal) would be likely to mean that these points could be addressed.

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

While the Faculty entirely appreciates the point made about help and support short of a formal office-holder such as an attorney, we are not persuaded either that there is a need for a formal status short of attorney or Guardian, or that the models proposed are useful as analogies. The British Columbia model, for example, seems to envisage an active substitute decision-making role, which is very different from what is proposed in the consultation.

The existing concept of mandate, a well-established common law doctrine, might assist in this context. What may really be required is some form of recognition by external agencies of the helper, for example, the bank in the example on page 22. Guidance from the Mental Welfare Commission, including a simple form of mandate, might be an effective, and less bureaucratic, way forward.

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?

Our answer to this is qualified agreement. The UNCRPD background probably merits consideration of the position, but it is not self-evident that change is desirable.

If you answered yes, can you please suggest which professionals should be considered for this purpose?

As a preliminary point, we would observe that section 47 of the 2000 Act enables a number of groups of professionals to assess capacity for very specific purposes. It would not necessarily be appropriate for all of those professionals to be assessing capacity generally.

Secondly, the UNCRPD requirements alluded to on page 24 are problematic in this context. On the one hand, as the consultation notes, the principle of non-discrimination is important in the context of the UNCRPD architecture, on the other hand, there are arguably certain circumstances where the absence of capacity is of the essence of the condition or illness. The treating professional group is likely to be best placed to make the assessment in such cases, and it is not obvious that an extended group is required.

CHAPTER SEVEN
GRADED GUARDIANSHIP

Introductory

We agree that the Scottish Government has identified significant barriers to achievement of protection of an adult with a disability which is consistent with Art.12 of the UNCRPD;

namely whether Guardianship is used at all in some cases, and whether, if granted, the powers granted are excessive. The Faculty supports the general idea of graded Guardianship, subject to the adoption of proper safeguards and the retention of adequate judicial scrutiny.

Do you agree with the proposal for a 3 grade Guardianship system? Please give reasons for your answer.

Yes. There is a danger of adults with incapacity falling into a legal vacuum as the result of the current Guardianship regime proving too complicated to operate effectively and impractical in the case of adults with small resources to manage. A system which addresses such concerns is broadly to be welcomed.

We note that the range of powers proposed to be granted in a number of ways resembles the Model Form currently suggested by the OPG for Powers of Attorney. The model proposes that it will be a matter for an applicant for appointment as a Grade 1 Guardian to decide what powers should be sought and that the Public Guardian should not be able to propose additional powers.

We appreciate that the intention is to make the process one which is administrative - as opposed to judicial - in nature, and that the resource implications for the Public Guardian of assessing the adequacy of an application may be considerable. Nevertheless, the omission of necessary powers in some cases may create difficulty in resolving short-term issues, and may create the very vacuum the proposal aims to avoid. While the goal of administrative simplicity is to be commended, there will in any event require to be some sort of sift at the point of receipt by OPG, and it may be that some kind of informal process of drawing attention to obvious omissions prior to the grant of powers may assist.

It is obviously necessary that the Public Guardian should have essential information regarding the adult with incapacity as part of determining an Application for Grade 1 Guardianship. Nevertheless, the process of obtaining an Incapacity Certificate and Local Authority Report – and ensuring that these are chronologically relevant – may be daunting to lay individuals who are prospective Grade 1 Guardians, and the process should be made as straightforward as possible. With regard to Local Authority reports, the Faculty is of the view that these require to be prepared by social workers with the knowledge and experience necessary to assess the need for the application, having regard to the circumstances and disability of the adult. Preferably, this exercise ought to be conducted by an MHO, or by a social worker with a specific qualification in mental disability.

The Faculty is content that the period of any Grade 1 Guardianship Order should be a maximum of 3 years. Reference is made to the comments made in Chapter 6 regarding people able to sign Incapacity Certificates. As regards the proposed Powers to be available to a Grade 1 Guardian, the Faculty would comment that the power in relation to Self Directed Support should also encompass the making of appeals or referrals as part of the process. It is also suggested that the mechanics of the Management of the adult's Funds should be made as simple as possible (See 2000 Act, Part 3).

The issue of Grade 2/3 Guardianship raises more complex issues. The logic of having a system whereby uncontentious Applications are dealt with on paper by a judicial official, whereas disputed matters are determined by a full Hearing is understandable. In some respects, this reflects systems considered by the Scottish Law Commission – and particular the Australian State of Victoria – in its consideration of the law relating to Vulnerable Adults. In some cases, such an arrangement may facilitate the adult making supported decisions

and also meet the expectations of Art.12 of the UNCRPD (See 2000 Act, s.1 (5) and our comments on proposed new principles).

It seems to us that the proposed provisions about applying for a Grade 2 Guardianship are similar to the present requirements for Guardianship under the 2000 Act. It would be helpful if the position regarding the making of an Interim Grade 2 Guardianship could be clarified.

The Scottish Government propose that circumstances where it is certified that a Grade 2 application should not be intimated to the adult, the matter automatically converts to a Grade 3 application. It is submitted that the standard that the adult "might disagree" with the application is potentially confusing and liable to create uncertainty as to how the matter might be dealt with. In essence, an application may be made at Grade 3 unnecessarily because of the possibility of "disagreement" or alternatively, a dispute requires to be resolved as to whether there is a "disagreement".

More generally, we pose the question of the importance of having a clear mechanism of identifying the views and wishes of the adult, so far as reasonably practicable. That is a general question, though it is perhaps particularly important in the Grade 2/Grade 3 context. There may, for example, be a role of independent advocacy services here.

We suggest that it would be preferable for the issue of whether an application should proceed as Grade 2 or Grade 3 to be dealt with initially before a Sheriff or Tribunal Chair. He or she could consider the application based upon the paperwork submitted and any direct evidence – whether oral or written – considered necessary to resolve the matter.

The proposals for obtaining caution are also uncontroversial. We would observe that the OPG has negotiated a form of Master Policy for Guardians with insurers, and provision should be made for equivalent arrangements to continue. The OPG should ensure this is properly signposted to applicants.

Our intention at grade 1 is to create a system that is easy to use and provides enough flexibility to cover a wide range of situations with appropriate safeguards. Do you think the proposal achieves this? Give reasons for your answer.

We recognise that the basket of powers proposed for a Grade 1 Guardian is similar to those proposed by Model Forms of Powers of Attorney. Care will require to be taken to ensure that these are not simply granted automatically, given the potential conflict with Art.12 of the UNCRPD, as previously considered, but are tailored to the capacity of the adult. On the other hand, close consideration should be given to representations that practical powers are currently absent.

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

Broadly, they are, subject to the proposals being consistent with the UNCRPD and the changes to the Section 1 principles being adopted.

We are suggesting that there is a financial threshold for Grade 1 Guardianships to be set by Regulations. Do you have views on what level this should be set at? For example, the Public Guardian requires that financial guardians have to seek financial advice on the management of the adult's estate where the level is above £50,000. Would this be an appropriate level, or should it be higher or lower?

The Faculty has no particular view with regard to the correct threshold for Grade 1 Guardianship. There is no objection to that level being set by Regulations.

We are proposing that at every grade of application, if a party to the application requests a hearing, one should take place. Do you agree with this? Please give reasons for your answers.

The Faculty agrees that a hearing should take place if requested. We suggest that, particularly at grade 1, the decision maker should be encouraged to resolve such issues by means of written representations wherever possible. The OPG and other relevant sources of information should clearly signpost effective sources of assistance such as solicitors and Independent Advocacy Services.

We have listed the parties that the Court rules say should receive a copy of the application. One of these is "any other person directed by the Sheriff". What level of interest should be required to be an interested party in a case?

The Faculty is aware of anecdotal evidence from practitioners in the field that some Sheriffs have been interpreting this power in a very broad sense, resulting in substantial – and often fruitless – investigations of persons who have had limited recent contact with an adult. We suggest that this could be revised so as to embrace "any other person having an interest in the affairs of the adult in the preceding five years, other than on cause shown, as directed by the [decision – maker]"

We have categorised grade 3 cases as those where there is some disagreement between interested parties about the application. There are some cases where all parties agree, however there is a severe restriction on the adult's liberty. For instance very isolated and low stimulus care settings for people with autism, or regular use of restraint and seclusion for people with challenging behaviour. Do you think it is enough to rely on the decision of the Sheriff/tribunal at grade 2 (including a decision to refer to grade 3) or should these cases automatically be at grade 3?

We refer to our comments about restrictions on liberty in relation to Chapter 3 above.

Please add any further comments you may have on the graded guardianship proposals.

The Faculty has comments on four points dealt with under this general heading.

Renewal of Guardianship
The Faculty notes that the proposals in this respect amount essentially to an adaptation of the current provisions of section 70 of the 2000 Act to reflect adoption of Graded Guardianship, and as such, has nothing further to add on this point. However, we recommend that extension of Guardianship for 3 years should be the default period, except on cause shown, such as the adult having PVS or other permanent inability to communicate wishes or feelings.

Variation of Guardianship
The Faculty notes that the proposals in this respect amount essentially to an adaptation of the current provisions of section 70 of the 2000 Act to reflect adoption of Graded Guardianship. That seems to us a reasonable approach.

Intervention Orders
The Faculty notes the comments made with regard to the uses being made of Intervention Orders, which in some cases do not reflect either the spirit or wording of the relevant parts of the 2000 Act. Intervention Orders were not designed to supplant Guardianship as a long-term means of authorising involvement in the affairs of an adult with an incapacity. Rather they are intended to fill any lack of provision which requires a specific and time-limited authority to be given.

The issues arising from misuse of the power to grant Intervention Orders, and particularly the absence of clear means of supervising their operation and remuneration are acknowledged. In this regard, the Faculty considers that the ability to retain a means of reacting to an unforeseen or emergency situation is rather more important than the actual label attached. Equally, provision of a comprehensive and effective system of supervising the conduct of such authority may be more significant than the identity of the supervisor.

That said, the logic of placing the granting of such powers within the system of Graded Guardianship is acknowledged, not least because it is more likely to engender a focus on the need for powers granted under an Intervention Order or equivalent to be limited and to offer a process for moving to a "full" graded Guardianship.

Appeals
At page 35, it is suggested that appeals from a Grade 2 or Grade 3 decision taken by a single member of the Mental Health Tribunal for Scotland (if that were the chosen forum) would be to a 3-member panel of the Tribunal. That is unsound for two reasons. First, although the appeal would be to a 3-member configuration of the Tribunal, it would be to the same body and to the same level in the tribunal structure. That would offend against the general constitutional principle that an appeal from a judicial decision should be to a body further up the court or tribunal structure. Secondly, the MHTS will fairly soon form part of the unified tribunal system, with the expectation that appeals will go to the Upper Tribunal. Consistency of approach with other appeals also points to that being the appropriate destination for appeals of this kind.

Do you think our proposals make movement up and down the grades sufficiently straightforward and accessible?
Please give reasons for your answer.

Yes.

Do you agree with our proposal to amalgamate intervention orders into graded guardianships? Please give reasons for your answers.

Yes. The Faculty would observe that the gains to be obtained from a closer control and supervision of Intervention Orders should not be obtained at the expense of making such orders more difficult to obtain in appropriate cases, or unduly burdensome to operate in practice. The need to reflect the terms of Art.12 of the UNCRPD is equally apt here. That said, we also recognise that there may be exceptional cases where, for unforeseen reasons, a specific additional power becomes necessary, in circumstances where an intervention order would probably be the current response. It will be important that that degree of flexibility is retained in whatever form of revised structure is put in place.

Do you agree with the proposal to repeal Access to Funds provisions in favour of graded guardianship?
Please give reasons for your answer.

Yes.

The Faculty broadly agrees with the analysis made of the current provisions for Access to Funds and the Management of Residents' Finances, both of which are designed to address specific circumstances of adults with incapacity. Again, the experience in practice is that many such adults may be receiving no legal protection as a result of the relatively cumbersome rules and restrictions which apply, as well as the possible conflict of interest within the Management of Residents' Finances arrangements.

There is evidence that the coverage of the provisions is sufficiently restricted as to leave potentially many adults with incapacity and limited funds without proper and adequate legal protection. In addition, the practical operation of management of funds is cumbersome and subject to several restrictions. On the basis that supervision of such management will form part of Graded Guardianship, the proposal is welcomed by the Faculty

Do you agree with the proposal to repeal the Management of Residents' Finances scheme?

For the reasons already stated, we agree.

If so, do you agree with our approach to amalgamate Management of Residents' Finances into Graded Guardianship?
Please give reasons for your answer.

For the reasons already stated, we agree.

CHAPTER EIGHT
FORUM FOR CASES UNDER ADULTS WITH INCAPACITY LEGISLATION

Do you think that using OPG is the right level of authorisation for simpler guardianship cases at grade 1? Please give reasons for your answer.

The Faculty supports the principle of authorisation of Grade 1 Guardianship by the OPG. It is preferable that authority for support of decision-making by adults with incapacity is made available in appropriate cases, and a simpler procedure for achieving that aim is more likely to encourage applications – particularly where relatively small estates are in question. However the practical operation requires consideration of matters discussed in our response to chapter 7.

Which of the following options do you think would be the appropriate approach for cases under the AWI legislation?
Please give reasons for your answer.

The Sheriff Court has advantages as an established civil court which has substantial experience in determining disputes relating to matters of property and welfare of individuals, including children and persons of full capacity. There is no intrinsic reason why it is not a suitable forum for managing Graded Guardianship – with suitable adjustment to the rules of

court, there is no need for such proceedings actually to be held on court premises. The primary arguments against are the substantial workload which the Sheriff Court deals with, and the competing priorities, and also the variable level of knowledge between sheriffs, particularly in smaller courts.

On the other side, there has been a substantial development of the expert tribunal system over the last 20 years, and moving supervision of Graded Guardianship to the existing MHTS from the Sheriff Court can be seen as being of a piece with that development. However, it is trite that issues of mental health are not the same as mental capacity, and the decisions of the MHTS currently cover areas such as authorisation of the detention of patients or their regime in the community which is of a different nature to much of Graded Guardianship. In that connection the recognition in the consultation document of training needs in the event of transfer of jurisdiction is welcome.

There is also a question about funding. We anticipate that, in their nature, cases at Grades 2 & 3 will require the involvement of solicitors, and in some cases, counsel. That is because they will concern issues of law, or potentially complex issues of fact, or both. As court proceedings, AWI applications currently fall within the scope of civil legal aid, and applicants require to meet the normal criteria about probable cause and financial qualification. MHTS proceedings do not fall within the scope of civil legal aid, though civil Advice & Assistance cover may be available. It would also be a matter of great concern were shifting jurisdiction to a reformed tribunal to make Legal Aid become less widely available for interested parties.

Two matters may point towards the jurisdiction remaining with the Sheriff Court. In the first place, as a court with a general civil jurisdiction, the Sheriff Court has a wide range of powers and remedies at its disposal. Those are particularly relevant when it comes to compelling performance or issuing a sanction for non-performance. That may be of particular relevance in the management of applications about financial powers, but contempt of court powers would be available in welfare cases too. By contrast, the powers of a tribunal are entirely statutory, and are typically less widely drawn.

Secondly, in cases where there may be a need for the recognition of orders in other jurisdictions, it is possible (and we put it no higher) that in some jurisdictions, the order of a court would prove more readily enforceable than an order made by a tribunal.

CHAPTER NINE
SUPERVISION AND SUPPORT FOR GUARDIANS

Is there a need to change the way guardianships are supervised?

If your answer is yes, please give your views on our proposal to develop a model of joint working between the OPG, Mental Welfare Commission and local authorities to take forward changes in supervision of guardianships.

If you consider an alternative approach would be preferable, please comment in full.

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

Do you have views on who might be best placed to provide this support and advice?

Please give reasons for your answers

Do you think there is a need to provide support for attorneys to assist them in carrying out their role?

If you answered yes, what sort of support do you think would be helpful?

The Faculty has no observations to make in response to these questions.

CHAPTER TEN
ORDER FOR CESSATION OF A RESIDENTIAL PLACEMENT, CREATION OF A SHORT TERM PLACEMENT

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

The Faculty has previously expressed the view that it is necessary that there be some sort of mechanism for these types of cases, and we continue to be of that view.

If so does the proposal cover all the necessary matters?

No.

Depending upon the particular facts and circumstances there may be a need for further or other orders ancillary to the order for cessation. If the relevant forum is a statutory tribunal, because its powers are limited by the statute(s) conferring the particular jurisdiction, considerable care would require to be taken to give it a full suite of powers.

Moreover, although the Faculty is of the view that some sort of remedy is needed, the creation of the remedy that seems to be envisaged will result in three possible courses of action in any given case. An incapable adult may be deprived of his/her liberty in a variety of ways and, depending on the process by which that has been done, the question will be whether an application should be to the MHTS under the 2003 Act, or an application under the proposed legislation in the present consultation, or an application for liberation by way of judicial review.

It may be very difficult to determine, particularly in cases that are dealt with quickly, as one would hope a case of unlawful detention would be, what the appropriate course of action is. The adult may well not be able to provide much relevant information. In the context of deprivation of liberty legal certainty and foreseeability is particularly important. Having three separate remedies does not seem likely to achieve this result.

It appears to the Faculty that it is desirable to try to consolidate these three remedies.

There is then a question of which remedy ought to be utilised in future.

The Faculty would tentatively suggest that section 291 of the 2003 Act be repealed and that no specific remedy be provided in the proposed legislation.

This would leave individuals with a right to apply to the Court of Session by way of judicial review for an order requiring their liberation if they were deprived of their liberty unlawfully or if they were subject to significant restriction unlawfully. We propose this route since judicial review would endure as a remedy anyway to deal with unforeseen or exceptional cases and it may be preferable to specify that as the route to a remedy in this context too. The other two remedies mentioned are specific statutory procedures restricted to dealing with particular sorts of cases. While judicial review is a court-based procedure, it builds on the

existing power of the court to grant suspension and liberation. Legal aid is currently available in appropriate cases. These sorts of events ought to be exceptional – so there ought not to be much increase in workload.

Applications in terms of section 291 of the 2003 Act are already departures from the usual business of the MHTS. Those applications deal with what might be considered "black letter" law rather than care and treatment which is the usual ambit of the MHTS.

Judicial review would also mean that, as a court was dealing with the case, there was an inherent jurisdiction to grant necessary ancillary orders. It is a flexible procedure that can be tailored to meet the requirements of speediness within article 5 or any other particular issue or circumstance relevant to that particular case. In our experience, the current shrieval AWI jurisdiction is nowhere near fast enough to meet the requirements of Article 5 ECHR.

There is a related issue in that the Court of Session does not have a specific AWI jurisdiction. It may be prudent to provide one, and we discuss this further below.

Do you agree that there is a need for a short term placement order within the AWI legislation?

Yes.

If you agree, does the above approach seem correct or are there alternative steps we should take? Please comment as appropriate.

No.

There are clear differences of treatment as between those individuals subject to deprivation of liberty under the 2003 Act, and those under the proposed new legislation.

It is difficult to see what objective justification there could be for having a different regime in respect of those two classes of individuals, since it is often a matter of chance which regime an individual will first fall within. The 2003 Act sets a fairly high standard in terms of respecting the rights of the individual.

The proposals for AWI appear to be less favourable to an adult than the comparable order (short term detention) is to a patient. The proposals appear to suggest a more limited right of appeal and a longer time in which an individual can be subject to deprivation of liberty before they are brought before a judicial decision-maker.

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

No. In our view the section was always unnecessary, because it does no more than clarify the position in relation to powers that already existed.

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?

If we do make legislative provision for advance directives, is the AWI Act the appropriate place?

Please give reasons for your answers.

The Faculty has no observations to make in response to these questions.

CHAPTER TWELVE – AUTHORISATION FOR MEDICAL TREATMENT(s.47-50)

Do you agree that the existing s.47 should be enhanced and integrated into a single form?

We agree that on the face of it, the logic for certifying necessity for treatment implies a logic for detention for that treatment. However, it seems to us that what might appear just to be a simple "extension" to such a Certificate would involve an appropriate, Article 5 compliant, regime for dealing with an adult being subject to significant restrictions on his/her liberty. It also appears to us that in some cases there may be difficulties reconciling the apparent simplicity of section 47 (as extended) with UNCRPD.

Do you think that there should be provision to authorise the removal of a person to hospital for the treatment of a physical illness or diagnostic tests? Please explain your answer.

The Faculty considers this to be one of the most problematic aspects of this proposal. Our understanding is that section 47 is currently used most commonly in situations where treatment is neither so acutely required as to be justified on the common law principle of necessity nor, on the other hand, where it would be appropriate to apply for guardianship or an intervention order. In that context, it seems to us that the threshold for certification would have to be quite carefully considered. That is, perhaps, a matter on which medical consultees may have views.

Do you agree that a 2nd opinion (medical practitioner) should be involved in the authorisation process?

With the exception of cases where there is a dispute, it is not clear in what other circumstances a second opinion from a medical practitioner should form part of the process. The Faculty does not consider that a second medical opinion should be a routine part of the process. It is also not wholly clear whether the second opinion envisaged here is about capacity or about necessity, and that ought to be clarified.

If yes, should they only become involved where the family dispute the need for detention?

We are troubled by the apparent confusion on page 66 between consultation with family members of the adult (required by principle 4) which may or may not result in agreement with the clinician(s), and disagreement with a proxy decision-maker. These are not the same in law, albeit they may involve some of the same people. Family members who are not the adult's attorney or Guardian have no power of proxy decision-making.

There is a separate question about whether a second opinion should be obtained in cases where family members, whether or not having proxy decision-making powers, disagree with

the clinicians in charge of the particular episode of care. Subject to the point made above about clarification of the purpose of a second opinion, there is perhaps something to be said for making provision about that, and with the proviso if the second opinion is in agreement, the treatment will go ahead.

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?

Yes.

How many reviews do you think would be reasonable?

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?

These two questions run together. We can envisage many instances where an adult should be admitted to hospital for investigation and only after investigation would the treatment, if any, be decided by the medical team in charge of his/her care. In those circumstances, we think it would be extremely difficult if not impossible to provide for an end date at the time of certification. Further, it may be that the time spent in hospital was extended beyond that which might have been envisaged if, for example, other medical issues requiring treatment as a hospital inpatient became known during investigation and/or treatment of the original condition.

Since the consultation looks to the example of the STDC under the 2003 Act, one possibility might be to allow for two periods of 28 days on the basis of the clinicians' review, and if further time was thought necessary to require an application to the court or MHTS.

In chapter 6 we have asked if we should give consideration to extending the range of professionals who can carry out capacity assessments for the purpose of guardianship orders. Section 47 currently authorises medical practitioners, dental practitioners, ophthalmic opticians or registered nurses who are primarily responsible for medical treatment of the kind in question to certify that an adult is incapable in relation to a decision about the medical treatment in question. It also provides for regulations to prescribe other individuals who may be authorised to certify an adult incapable under this section.

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 ?

Apart from including clinical psychologists, the list should not be further extended. That is partly because of the level of intrusion into personal autonomy which will typically be in issue, and the consequent need to keep these matters within proper professional parameters.

CHAPTER THIRTEEN – RESEARCH (s.51-52)

The Faculty has no observations to make in response to the questions in this chapter.

CHAPTER FOURTEEN

MISCELLANEOUS MATTERS

Are there any other matters within the Adults with Incapacity legislation that you feel would benefit from review or change?

Two points occur to us.

First, it is unclear whether the court's power in section 3(3) of the 2000 Act to give directions is always being used in the manner that was intended.

It is at least arguable that the sheriff does not have the power to order someone to disregard apparently mandatory requirements of the 2000 Act. If the sheriff has the power to order non-compliance with that aspect of the statutory scheme, the question arises whether the sheriff could order non-compliance with the entire Act? That seems unlikely, but there does arise a question about where any line would be drawn. It may be that directions were intended for those cases in which a discretion required to be exercised and the intervener sought guidance from the court on the proper exercise of that discretion.

The application for directions is a useful expedient which the Public Guardian uses in cases where there are concerns about her fulfilling her statutory obligations (for example, the revocation of a power of attorney). As the Public Guardian does not have investigatory powers of her own this enables a consideration of the facts surrounding an application.

We would suggest that the Court of Session be given an AWI jurisdiction to give directions, and to make any consequential orders which may be required (e.g., to give a guardian authority to do a specific thing), and perhaps also in relation to intrusive medical procedures.

Secondly, our members practising in this area have encountered cases where there are, or appear to be, conflicts of interest between local authorities as guardians and as parties against adults. In our view, consideration should be given to how this might best be addressed on the face of the 2000 Act. Consideration might usefully be given to implementing mandatory third party involvement when there is a conflict between the adult and their guardian.

Please give reasons for any suggestions.

Members have experience of a petition for judicial review in which consideration had to be given to whether the Court of Session could exercise an inherent jurisdiction in order to create a guardianship as it has no statutory power to do so. There are likely to be rare cases in which it may be desirable for the Court of Session to have the powers provided within the AWI legislation, particularly when exercising its supervisory powers. This is not to detract in any way from any other forum, it is to allow justice to be done in exceptional cases.

Members have experience of at least one case brought against a local authority not being insisted upon, when the local authority had also been acting as guardian for the adult and, in that capacity, made the decision not to continue with the action. There may or may not have been good reasons for so doing, however, there is a risk of the appearance of the local authority's self-interest being contrary to the interest of the adult.