

Bill Team
Adults with Incapacity Amendment Bill
Mental Health and Incapacity Law Unit
Mental Health Directorate
Scottish Government

Via email address awireform.queries@gov.scot

Date: 2 December 2024
Our reference: SHRC2024004

Dear Bill Team,

Adults with Incapacity Amendment Act Consultation

The Scottish Human Rights Commission (the Commission) welcomes the proposals to amend the Adults with Incapacity (Scotland) Act 2000, and the advancement of the Mental Health and Capacity Reform Programme. We appreciate that more fundamental reform of mental health and capacity legislation is a goal intended for the longer term, however, the current proposals emphasise the difficulties in attempting to improve compliance with human rights within the existing legislative framework.

As you are considering the responses to the consultation process, the Commission felt that it might be helpful to provide an overview of the Commission's position on the reform programme thus far.

The Commission has previously expressed its support for the implementation of the Scott Review as a means of advancing human rights¹, and we are pleased to see that the proposals take forward a range of specific recommendations of the Review.

Overall, we consider that the proposals do advance protections for European Convention rights (ECHR), in particular by providing improved schemes of regulation for deprivations of liberty (as a whole and specifically in relation to those being treated for a physical health condition in hospital) and the introduction of a number of new rights of appeal and review throughout the proposals. In relation to the

Convention on the Rights of Persons with Disabilities (CRPD), however, the proposals make limited advancements and, in some areas, raise additional concerns.

We offer some further observations below:

Principles

We welcome the proposals to amend the principles of the Act in line with the Scott Review and the Three Jurisdictions report. The Commission participated in the Three Jurisdictions project and has supported the implementation of its recommendations.² The effect of these amendments would be to elevate the adult's will and preferences to the highest degree of priority and make clear the duty to demonstrate how support has been provided. The consultation rightly identifies the fundamental importance of developing a comprehensive supported decision-making regime in order to facilitate this, alongside comprehensive training for those engaging with the Act. We believe these steps are a crucial pre-condition if amending the Principles is to have any effect in practice. Making the fundamental shift from substitute to supported decision-making, required by Article 12 CRPD, is challenging and, and we believe that significant resource will need to be devoted to building understanding, in line with guidance provided by the CRPD Committee of how it must work in practice.

Substitute decision-making

Two areas of the proposals appear to introduce further forms of substitute decision-making or to increase the likelihood of substitute decision-making, namely:

- the proposals for enhanced section 47 certificates to prevent a person being treated for a physical condition from leaving hospital, whether temporarily or permanently. This constitutes a new form of substitute decision-making, although we appreciate that it aims to regulate de facto detentions that may be occurring in its absence
- the proposals to authorise deprivations of liberty via guardianship orders

While both of these proposals provide improved procedural safeguards in terms of the right to liberty under Article 5 ECHR, they nevertheless conflict with the obligation under Article 12 CRPD to abolish substitute decision-making regimes. The Scott Review explained how this conflict could be resolved by the provision of Human Rights Enablement, Supported Decision Making and Autonomous Decision Making frameworks.

We note that, at this stage, the Scottish Government is not tackling the proposals for Human Rights Enablement or Autonomous Decision Making. We would caution that, without this development, reform of the AWI Act heightens the issues with substitute decision-making. This is of particular concern in light of the Mental Welfare Commission's recent reporting³ that welfare guardianship orders are at their highest ever rate and continue to increase. That monitoring also showed that 49% of guardianship orders are for people with learning disabilities. As you may be aware, we are currently undertaking research on delayed discharge in relation to people with learning disabilities and/or autistic people. One of the emerging findings from our research is the significant effect of the current mental health and incapacity legal framework in removing choice and control from those individuals, contributing to significant human rights concerns in their situations, both in terms of ECHR and CRPD rights.

Whilst we appreciate that the sequencing of reforms must be done in a pragmatic way and that urgent action on AWI was recommended by the Scott Review, our emerging findings in this area highlight the pressing need to undertake the broader reforms of the regime to replace substituted decision-making and for the Scottish Government to outline a clear timeline for this exercise.

The Commission will be publishing its report on 30th January 2025, and I will ensure that your team receives a copy.

Other areas of concern

We would also urge caution on some further specific areas

- The proposals for review of an enhanced section 47 certificate:

The proposed period before automatic judicial review is three months with medical practitioners responsible for reviewing the certificate every 28 days until then. We query whether this meets the Article 5(4) ECHR requirement for both speedy review of the lawfulness of detention and continuing review at regular intervals, particularly in circumstances where the grounds for detention are susceptible to change over time, such as mental health.⁴ We recommend that judicial consideration be brought forward to 28 days, similar to a Short Term Detention Certificate in mental health law.

- The proposals to reduce the reports required for guardianship applications to one medical report and a more concise MHO report:

While we appreciate the need to remove bureaucratic barriers to guardianship proceedings that serve no purpose, we wish to highlight the importance of detailed

scrutiny of both the medical and substantive rationale for a guardianship order. Some of the other changes proposed, such as permitting Sheriffs the discretion to allow MHO reports outwith the time limit, appear to be practical steps to ease the process, which may be sufficient. We would caution against reducing scrutiny for the sake of administrative convenience.

- Use of force or covert medication:

We note that you will be taking forward a scheme to set out where force or covert medication may be permitted, which is something we have previously called for in light of the implications for both Article 3 (the prohibition of inhuman and degrading treatment) and 8 (the right to private and family life) ECHR⁵. It is difficult to provide specific views on this without further detail however, given the seriousness of the issues, we consider this should be dealt with in primary legislation rather than Regulations.

We look forward to engaging with the proposals further as they come before Parliament.

In the meantime, if you would find it helpful, our team would be very happy to have a conversation with you on the issues outlined above.

Please do feel free to contact our Legal Officer, Cathy Asante, who will be pleased to assist: cathy.asante@scottishhumanrights.com

Yours sincerely,



Angela O'Hagan
Chair, Scottish Human Rights Commission

CC: Gill Scott, Bill Team Leader

¹ Commission welcomes Scottish Mental Health Law Review (scottishhumanrights.com)

² Scottish Mental Health Law Review: Consultation response (scottishhumanrights.com)

³ Mental Health Act Monitoring Report 2023-24 (mwscot.org.uk)

⁴ Herczegfalvy v Austria (1992) A 244, 15 EHRR 437

⁵ Scottish Mental Health Law Review: Consultation response (scottishhumanrights.com)