Response to AWI Consultation

Chapter 3

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

Yes.

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

The criteria for assessing whether a person has significant restrictions placed on their liberty must be clarified. The guidance does not specify if an adult must satisfy one or all three of the conditions highlighted.

Further detail must be provided on whether de facto detentions place a significant restriction on a person's liberty, and therefore fall under the category of 'the use of restraints'. For example, an adult under de facto detention will receive verbal or written communication stating they cannot leave a given premises, otherwise legal action will be taken and the police may be called to visit the adult in question.

An adult may also be free to leave a premise but still be considered as having significant restrictions placed upon their liberty. The guidance should clearly explain how this may be the case.

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

'Close observation and surveillance' often occurs to alert staff about an adult's welfare. For example, door alarm monitoring systems are used to signal to staff when an adult with incapacity attempts to leave particular premises. Surveillance is therefore used as a means of harm prevention.

There is a concern about whether the criteria including 'surveillance' also refers to telecare measures. 'Buddy systems' are used to track the movements of adults with incapacity to prevent them from endangering themselves. Electronic surveillance can therefore enable positive risk-taking, providing safeguards which allow a patient to utilise residual capacity. In these cases, electronic surveillance would not constitute a deprivation of liberty. These technologies must be referred to as they may fall under the definition of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 'Mental Health Act').

Chapter 4

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

Yes.

- **Does our proposed new principle achieve that?**

No.

We would suggest using the words 'every practical effort' instead of 'all practical help and support'. The new principle would state:

There shall be no intervention in the affairs of an adult unless it can be demonstrated that every practical effort to help the adult make a decision about the matter requiring intervention has been given without success.

Ensuring legislation is commensurate with Article 12 of the UNCRPD means encouraging the practice of supported decision making. However, it is important to recognise that any intervention to minimise risk takes precedent. For this new principle to successfully influence practice, there need be a comprehensive range of examples in the code of practice to demonstrate what constitutes '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?**

Yes.

Particularly when considering the detention of patients, the degree of sophistication and intervention required is very much dependent on the urgency of the treatment. It would be appropriate to refer to the need for proportionality when using the principles as a framework for intervention.

This new principle should subsume the existing advisory guidelines present within the Adults with Incapacity (AWI) Act. However, these advisory guidelines should still be included within the new revised code of practice. More information should also be provided about cases where adults are able to utilise residual capacity.

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

In terms of the feasibility of intervention, it may be more accurate to refer to what is practicable rather than what is practical.

Chapter 5

- **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.

The present powers of attorney are not sufficient. The legislation must recognise powers of attorney should be used to grant very specific powers, such as the day-to-day finances of an adult with incapacity.

There were mixed views amongst College members over which medical practitioners could enact the power of attorney. Some members feel an appropriate person would be medical practitioners on the General Practitioner or specialist register, or a medical professional who is an Approved Medical Practitioner (AMP). There was also the view amongst members that doctors practising under the supervision of a medical practitioner who is on the GP or specialist register, or who is an AMP, may be able to grant the power of attorney.

We would suggest the person enacting the power of attorney have sufficient seniority and expertise and that who this is be the subject of further discussion and consideration.

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

Yes.

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

No.

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

Uncertain.

While it is important to formally recognise supported decision-making, Scotland currently recognises independent advocates who can help adults with incapacity understand their situation and support a person in making a decision.

People who fall under the Mental Health Act are legally entitled to independent advocacy. Independent advocates are free from conflicts of interest. However, the involvement of close family members through an 'official supporter' model may mean decisions are made which are underpinned by conflicts of interest.

The Scottish Government may want to consider how existing models of independent advocacy can inform best practice when supporting adults with incapacity.

- **If you have answered yes, please give us your views on how an official supporter might be appointed.**

No comment.

- **Countries that have created a role of supported decision maker have used different names, such as supportive attorney in Australia, or a 'Godman' in Sweden, meaning custodian. We have suggested 'official supporter' Do you think this is the right term or is another term preferred?**

No comment.

Chapter 6

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

Yes.

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

Consideration should be given to extend the range of professionals who can carry out capacity assessments. However, more clarity must be provided about what these assessments are intending to achieve.

Capacity assessments should ultimately be carried out by a professional who is most familiar with a person's condition and circumstance, who then refers back to the adult's GP. We would like to see a competent (trained in assessing) and appropriate person (ongoing role) undertaking capacity assessments.

Unlike section 47 of the AWI Act — which demands specific, clinical expertise — responsibility for guardianship applications should vary proportionately according to the level of powers requested.

Capacity assessments which relate to grade 2 and grade 3 guardianships should be carried out by a medical professional who is an AMP. For grade 1 cases, greater flexibility may be adopted, and assessments should be carried out by a medical practitioner who is familiar with a person's condition and circumstances. Assessments in these cases should not have to rely on a person who is an AMP, and could be carried out by a GP.

We encourage the Scottish Government to consider a likely surge in demand for training in capacity assessments through NHS Education for Scotland.

Chapter 7

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

Yes.

The College agrees, in principle, to a 3-grade guardianship system. However, the proposals as they currently stand are based largely on legal frameworks and differences. There are concerns around the practical operation of a 3-grade guardianship. There will be difficulties in the implementation of the processes and thresholds for the different grades.

The Scottish Government must ensure timescales are incorporated into the regulatory system for graded guardianships — like the Mental Health Act — to ensure decisions are made in a time sensitive manner. We would also like clarity on the regulatory body which will enforce these timescales.

- **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 answer.**

Yes.

Where there is a degree of contention, the opportunity to request a hearing should be provided. However, we need clarity over the definition of 'party' and which individual/s and group/s fall under this definition.

- **What level of interest should be required to be interested party?**

Clinicians and other practitioners who are involved in an adult's care should be included.

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

No.

The appropriate safeguards which should underpin guardianship applications are not robust enough in some of the example powers under the proposed grades.

It is also important to note that when it comes to medical interventions, the urgency for intervention will exist regardless of application grade under consideration.

- **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? Please give reasons for your answer.**

The full range of powers covered in under grade 1 are too extensive and lack sufficient scrutiny. Generally, the powers under grade 1 put too much weight on financial decisions rather than welfare decisions. The powers which the College feels may be overreaching include:

<u>Welfare</u>

- Consent to any medical treatment not specifically disallowed by the AWI Act, or procedure or therapy of whatever nature and provide access for that, or refuse such consent.

<u>Finances</u>

- To enter into a tenancy agreement
- To open or close any account containing the adult's funds
- To sign and deliver deeds and documents
- To buy, lease, sell and otherwise deal with any interest the adult may have in property of any kind or description
- To borrow and grant security for any sum
- To grant Deeds of Covenant or make other provision for the adult's estate; to set up any form of Trust

- To incur expenditure on others as, in judgement, acting reasonably, the adult would have done if consulted or able to be consulted

We are also concerned people requesting guardianship applications will directly apply for grade 2 guardianships, and ignore grade 1.

A simple, accountable process must be established. For example, limited financial powers, sharing medical information, or signing a tenancy for a person to move into sheltered housing must be made as feasible as possible. The financial powers included should relate to day-to-day finances rather than irrevocable spending. The parameters for grade 1 should ultimately be less extensive and more clearly defined.

- **We are suggesting 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?**

No comment.

- **Do you think it is enough to rely on the decision of the Sherriff/tribunal at grade 2 (including a decision to refer to grade 3) or should these cases automatically be at grade 3?**

Grade 3 applications should not just be necessitated where there is disagreement, but also where complex issues and ethical concerns are present. Guardianship applications still demand scrutiny, even if everyone agrees.

- **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 do you think should be required to be an interested party in a case?**

Left blank.

- **Do you think the proposals make movement up and down the grades sufficiently straightforward and accessible?**

Yes.

Movement between grades should not be difficult and should not take an excessive amount of time, particularly if an application for a lower or higher level of guardianship has already been made. Firm timescales should be established. For example, a grade 1 application should take between 2-4 weeks and should be processed very quickly.

A consistent level of scrutiny must be established, so that applications moving gradually up from grade 1 to grade 3 are scrutinised in the same

way as an application made directly at Grade 3 level. The guidance should therefore consider the level of an adult's deterioration.

Information on the status of guardianship applications should be the responsibility of a Mental Health Tribunal or the Office for Public Guardian (OPG), depending on the grade. A public body should hold the information and notify relevant individuals.

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

Yes.

- **Do you agree with our proposal to repeal Access to Funds provisions in favour of graded guardianship?**

Yes.

These provisions should be subsumed into the grade 1 application process.

- **Do you agree with our approach to repeal the Management of Residents' Finances scheme?**

Yes.

- **Do you agree with our approach to amalgamate the Management of Residents' Finances into Graded Guardianship?**

Yes.

The Management of Resident's Finances scheme should be subsumed into the grade 1 applications process.

Chapter 8

- **Do you think that using OPG is the right level of authorisation for simpler guardianship cases at grade 1?**

Yes.

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

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

Or

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

RCPsych in Scotland is strongly in favour of the Mental Health Tribunal for Scotland (MTHS) overseeing both grade 2 and grade 3 applications. The guardianship application process will benefit from the range of professionals who sit on MHTS panels. Compared to a Sheriff in chambers, the professionals present at tribunals are more likely to have greater cumulative knowledge and experience on issues relating to mental health. Sheriffs in rural areas may also be less likely to oversee many guardianship applications.

It is important to acknowledge restricted tribunals are chaired by a Sheriff. These tribunals may be appropriate for very complex or highly contentious cases, and provide more protection for patients discharged under section 13ZA.

Tribunal members should receive training on financial matters, and on the principles of the AWI Act and human rights legislation.

Chapter 9

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

Yes.

- **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.**

The College suggests no form of supervision should be required for grade 1 applications.

For the grades 2 and 3, robust safeguards and monitoring processes must be established. There needs to be a mechanism for the review of guardianship proposals when the guardian is not the local authority. Under the Mental Health Act, a person can have a named supporter removed through a tribunal. This mechanism would be useful when family

members, who may be negatively affecting an adult, refuse to give up their guardianship power. In certain cases, it can be very difficult to remove a family member as an approved welfare guardian. RCPsych in Scotland would therefore suggest the same mechanism is used for guardianship applications.

The Scottish Government should ensure local authorities can be substituted for a guardian who is regarded to be unsuitable. The Mental Welfare Commission (MWC) should also resume annual visits to people on guardianship orders. More generally, adult support and protection issues should be considered as part of the scrutiny process.

The terminology used in these proposals is complex and will be difficult for people outside of the OPG, MWC and local authorities to understand. Further clarity must be provided on how this model will work.

There is also ultimately a lack of clarity over who these levels of scrutiny apply to.

- **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?**

The Office of Public Guardian should provide free advice and support to guardians.

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

Yes.

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

Attorneys should receive the same level of support and training which guardians should be provided with.

Chapter 10

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

Yes.

There are cases where adults with Alcohol Related Brain Damage no longer require the same level of care years after their initial residential placement was arranged.

The College recommends the Scottish Government establish an excessive security appeal process. Where needed, the MHTS could order the responsible local authority to find an alternative placement for an adult with an appropriate level of security. There should be clear timeframes for this process, and if a local authority fails to act, cases should then be heard at the Court of Session to contest a failure of statute of duty.

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

Yes.

However, the process for short-term placement orders articulated in the guidance lacks detail. Time limits for these orders should be established, and a duty should be imposed on local authorities to provide an alternative placement in such circumstances. These should link in with time limits for guardianships.

The College suggests that to grant short-term placement orders, a medical certificate of incapacity is signed by an AMP trained medical practitioner. If there is no available medical practitioner who is AMP trained then the order may be granted, but an AMP trained practitioner must review the adult within 72 hours of the order's initial approval.

An appeal process must be built into this system for granting short-term placement orders. If an appeal is successful, then short-term placement orders should be reversed. We suggest providing medical practitioners with the capacity to place an adult on short term placement, who may then reverse this decision by appeal. This process already occurs through the appeal of short-term detention orders.

- **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?**

This section is redundant, provided section 13ZA is replaced with an equally speedy, non-bureaucratic process.

Chapter 11

- **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?**

Yes.

Clear legislative provision should be made for advance directives, particularly with regards to granting power of attorney. The Mental Health (Scotland) Act 2015 includes an amendment on advance statements. The AWI Act should include a similar provision. A clear framework must be provided for how advance directives are lodged, maintained, communicated and invalidated. People should be encouraged to make provisions for a welfare attorney. For example, advance directives could be incorporated into the welfare power of attorney statement.

We also recommend advance directives are lodged with the OPG or an alternative register maintained by a public body.

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

We need more information about advanced directives. There needs to be a broader consultation about the process around advanced directives, even if legislative provisions are not made for advance directives within the AWI legislation.

Chapter 12

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

Yes.

The need for safeguards is important. The enhancement of section 47 seems to be formulated to facilitate a physician to treat an adult with incapacity who has a mental health issue. However, we would rather establish safeguards equivalent to when an adult is placed under a short-term detention order (STDO). If the safeguarding provisions in an enhanced section 47 are softer than a STDO, liaison psychiatrists may not be provided with powers robust enough to detain patients. We are also concerned that if safeguarding provisions are watered down further, then section 47 will be used more frequently and inappropriately.

As the safeguards suggested though the enhancement of section 47 are not robust enough considering this level of deprivation of liberty, we

suggest the Scottish Government look at establishing an equivalent to STDOs.

- **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?**

Yes.

- **Please explain your answer.**

We would welcome a process which does not use the Mental Health Act to keep people in hospital. Existing processes are unsuitable for people who require acute care but do not fall under the Mental Health Act.

- **Do you agree that a 2nd opinion (medical practitioner) should be involved in the authorisation process? If yes, should they only become involved where the family dispute the need for detention?**

Yes.

Although we agree a second opinion from a medical practitioner should be required in the authorisation process, we do not think this second person should only become involved when a family disputes the need for an adult's detention. We do not think the medical practitioner who provides the second opinion must necessarily be AMP trained. The second medical practitioner should provide a second approval 72 hours after the initial detention of an adult.

The authority to detain a resistant patient requires a higher threshold. There are no comments on minimum necessary force in this consultation, or on what constitutes reasonable forced under the AWI Act. There must be a specific part of section 47 which considers these circumstances, and makes provisions for additional safeguards. We would also insist family opinion is not included as a relevant criterion for authorising a detention, and medical treatment should not be approved through consent by nearest relative.

- **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? How many reviews do you think would be reasonable?**

We are not in favour of continual renewal of detention authorisation, and therefore we support the establishment of a time limited review process. The review process should not exceed 28 days. If 28 days pass and it is

deemed the patient still needs to be detained, then the process to approve an adult's guardianship should begin.

- **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?**

N/A

- **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? Please give reasons for your answers.

Please refer to answers in Chapter 6.

- **When there is no appropriate guardian or nearest relative, should we move to a position where two doctors (perhaps the adult with incapacity's own GP and another doctor, at least one whom must be independent of the trial) may authorise their participation, still only on the proviso that involvement in the trial stops immediately should the adult with incapacity show any sign of unwillingness or distress?**

Yes

- **When drafting power of attorney, should individuals be encouraged to articulate whether they would wish to be involved in health research?**

Yes

- **Should there be provision for participation in emergency research where appropriate (e.g. if the adult with incapacity has suffered from a stroke and there is a trial running which would be likely to lead to a better outcome for the patient than standard care)?**

Yes

- **Should authorisation be broadened to allow studies to include both adults with incapacity and adults with capacity in certain circumstances? (e.g. an adult with incapacity who has an existing condition not related to their incapacity may respond differently to different types of care or treatments to an adult with capacity)**

Yes

- **Should clinical trials of non-medicinal products be approached in the same way as clinical trials of medicinal products?**

Yes

- **Should there be a second committee in Scotland who are able to share the workload and allow for appeals to be heard respectively by other committees?**

Yes.

- **Should part 5 be made less restrictive?**

Yes.

Miscellaneous Matters

The capacity assessment test presently used needs revision and should be included in the statute. While the definition of capacity is not currently in the scope of this consultation, it is important for refined tests of capacity to be given consideration by the Scottish Government. These tests are crucial instruments used by professional medical practitioners. For example, capacity assessments clearly affect whether guardianship applications are granted.

Analogous Acts have been passed since the AWI Act elsewhere across the UK and the Republic of Ireland. The Mental Capacity Act 2005 (England & Wales); the Mental Capacity Act (Northern Ireland) 2016, and the Assisted Decision-Making (Capacity) Act 2015 (Republic of Ireland) all include more detailed definitions of incapacity. These Acts include the consideration of the ability to understand, appreciate the relevance of, retain information, and to use and weigh it as part of the decision-making process. None of these acts uses Scotland's AWI Act's criteria of being able to 'make' or 'act' in their capacity definition.

We therefore suggest consideration of an amendment of s.1(6) as follows:

- In section 1, page 2, subsection 6, line 16, leave out 'incapable of' and insert—

  'to be unable to'

- In section 1, page 2, subsection 6, line 17, leave out 'acting' and insert—

  'Understand and believe the information relevant to the decision, and in particular, appreciate that the information is of personal relevance to them'

- In section 1, page 2, subsection 6, line 18, leave out 'making decisions' and insert—

  'Retain that information for the time required to make the decision'

- In section 1, page 2, subsection 6, line 19, leave out 'communicating decisions' and insert—

  'Use and weight that information as part of the process of making the decision'

- In section 1, page 2, subsection 6, line 20, leave out 'understanding decisions' and insert—
  'Communicate the decision,'

- In section 1, page 2, subsection 6, line 21, leave out '(e) retaining the memory of decisions,'

To read:

(6) For the purposes of this Act, and unless the context otherwise requires—

"adult" means a person who has attained the age of 16 years;

"incapable" means to be unable to

a) Understand and believe the information relevant to the decision, and in particular, appreciate that the information is of personal relevance to them; or

b) Retain that information for the time required to make the decision; or
c) Use and weigh that information as part of the process of making the decision; or
d) Communicate the decision,

as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and

"incapacity" shall be construed accordingly.