May 2020

[**Mental Health Law in Scotland**](https://cms.mentalhealthlawreview.scot/wp-content/uploads/2020/02/Mental-Health-Legislation-Review-Call-for-Evidence-Final.pdf)

**Independent Review**

**The Review is also looking at the way people with a mental disorder are affected by the** **Adults with Incapacity (Scotland) Act 2003, and the Adult Support and Protection (Scotland) Act 2007.**

**• Is there anything else you wish to tell the Review?**

Age Scotland is the national charity for older people. This submission has been produced by Age Scotland’s policy team and About Dementia project team which aims to empower people affected by dementia to develop solutions to everyday challenges and create change led by lived experience. We have focused our submission to comment on Adults with Incapacity (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007.

Age Scotland welcomes the Scottish Government’s commitment to ensuring that Mental Health Laws in Scotland are human rights based. It is the obligation of all governments to implement these rights and create a society where human rights can be enjoyed by all people. Clear indicators of success are also needed alongside robust and independent evaluation to ensure that human rights are experienced as a reality rather than simply an aspiration.

**Adults with Incapacity (Scotland) Act 2003**

**Power of Attorney**

As the national charity that provides free information, friendship, and advice for older people, their family, and carers we find that Power of Attorney (POA) is one of our most asked about topics.

Statistical monitoring by the Mental Welfare Commission for Scotland found a significant rise in the number of Guardianship orders, which are used to safeguard those without the capacity to make their own decisions. Over the last ten years there has been a 149% rise in guardianship orders, highlighting the need for more people to put in place a Power of Attorney much earlier in their lives.[[1]](#footnote-1) It is also worrying that 41% of guardianship orders in Scotland placed in 2017 were for people with dementia, highlighting the need for greater public awareness about POAs.

In the context of the Adults with Incapacity Act it is essential that there is clarity when considering the rights and wishes of individuals, and the obligations placed on local authorities to provide appropriate person centred care. Age Scotland understands that the Review is considering the need to amend the  principles of the Adults with Incapacity legislation to reflect Article 12 of The Convention on the Rights of Persons with Disabilities (UNCRPD) and takes the view that the implementation of a new standard by which an assessment can be made of the provision of support that enables an adult to exercise decision making within their capabilities would be welcome.

Age Scotland believes that there should be a responsibility placed on care providers to provide evidence of this standard being delivered through quantitative and qualitative monitoring indicators which objectively verify, measure and assess their effectiveness of support provided to individuals at all stages of the decision making process.

We know from calls to our freephone helpline that the POA process can be confusing and that the cost is often a barrier. Age Scotland believes there should be a simpler and more cost-effective process to encourage people to complete a POA earlier in their lives. It is also important for people to have open conversations with their close family and/or friends about this subject as a means of better planning for the future. These discussions should be encouraged at a national level as a way to increase understanding of POA.

However we also know from calls to our helpline that even where there are POAs in place, attorneys are often not consulted properly about decisions regarding care and treatment due to a lack of understanding of what their role is by health and social care professionals. Coupled with this, is the fact that people acting as a POA need to be better equipped to understand what their role as a POA is, and would greatly benefit from more availability of training and support. The quality and accessibility of information available to people considering Powers of Attorney is also important in ensuring informed consent around any decision.

A clear gap in the Adults with Incapacity (Scotland) 2003 Act is for people who have no one that they can trust to be their POA. For individuals in this scenario, there is no legal provision for support with money or welfare until an they have reached a crisis point when the local authority will then step in to apply for court appointed guardianship. This is ultimately a time consuming and stressful route for someone who lacks capacity and with additional support provided earlier in the process, such a crisis point may be averted. We would encourage greater exploration of early intervention as part of this review.

Access to independent advocacy services and peer support is often found to be beneficial to those undertaking POA and Guardianship responsibilities. Age Scotland would welcome national efforts to improve awareness of and signposting towards advocacy services.

Age Scotland recognises that POAs unfortunately do not always guarantee to protect vulnerable adults who do not have the capacity to make decisions for themselves. Indeed, there are instances of abuse of POAs and we would encourage an evaluation into how well they are operating and the scope of any issues that arise.

The Review has asked if 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. Age Scotland notes that the Mental Welfare Commission for Scotland has previously stated its concern that the Adults with Incapacity Act “does not spell out the extent of an attorney’s powers to overcome the resistance of an incapable adult in respect of measures which might amount to a significant restriction or deprivation of liberty”[[2]](#footnote-2)[1] . Age Scotland agrees with this and would welcome safeguards being strengthened in relation to potential restrictions on liberty by clarifying the use of powers of attorney in this regard. Comprehensive data sharing and collaborative inter-agency working should also be promoted across all aspects of system. Age Scotland would welcome consideration of how this can be improved.

**Anticipatory care planning**

It is clear that a balance must be struck between statements made by people in advanced of losing capacity to have their wishes for their care and treatment to be followed, as well as understanding that people are free to change their mind. Such cases should be considered on an individual case basis and anticipatory care plans should not be automatically ignored after a person has lost capacity. As many people with early stage dementia retain the capacity to make informed choices, anticipatory care plans should be initiated, in a person-centred manner, as soon as possible after diagnosis in order that they can be an active participant for as long as possible.

We have become aware through the recent COVID-19 crisis of an increase in the use of Do Not Attempt Resuscitation (DNAR) orders for people aged over 70. We are particularly concerned about the way in which some of these conversations have been initiated, including with people living with dementia, without their carers or power of attorney present. These conversations have caused considerable distress to both the individuals and their families. Wherever possible conversations about end of life care should take place in advance. In situations where this is not possible medical professionals should conduct these sensitively and in line with existing NHS guidance[[3]](#footnote-3)). Age Scotland also believes that there is a need for more detailed guidance to support conversations with people living with dementia. Such guidance must include the importance of person-centred care, and respect for human rights as well as the involvement of family members and powers of attorney where appropriate.

**Adult Support and Protection (Scotland) Act 2007**

One of Age Scotland’s main concerns regarding the Adult Support and Protection (Scotland) Act 2007 concerns the lack of prosecution of criminal harm suffered by vulnerable adults. Whilst we support the immediate safeguarding of vulnerable adults, the legislations works to remove the vulnerable adult from the threat, but not the threat itself. An example would be an older person reliant on care from an abusive family member who is subsequently placed in a care home. We believe more work should be done to remove the threat – in this case the abusive family member, in order to allow vulnerable adults to stay in their own home and community where they are able to do so.

Understandably this is a complex issues and there will be cases where vulnerable adults do not wish to see family members prosecuted, but we feel this is an area of Mental Health Law that should be reviewed more fully with greater options for the prosecution of elder abuse. This would help to send a message that such instances of elder abuse will not be tolerated in Scotland, and that older people will feel empowered to report instances of abuse.

**Want to find out more?**

As Scotland’s national charity supporting people over the age of 50, Age Scotland works to improve older people’s lives and promote their rights and interests. We aim to help people love later life, whatever their circumstances. We want Scotland to be the best place in the world to grow older.

Our Policy, Communications and Campaigns team research, analyse and comment on a wide range of public policy issues affecting older people in Scotland.

Our work is guided by the views and needs of older people themselves.

**Further information**

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1. <https://www.mwcscot.org.uk/sites/default/files/2019-06/10.09.2018_2017-18_awi_monitoring_report_0709_with_appendix_b.pdf> [↑](#footnote-ref-1)
2. [1] https://www.mwcscot.org.uk/sites/default/files/2019-06/poa\_restrictions\_liberty.pdf · PDF file [↑](#footnote-ref-2)
3. <https://www.nhsinform.scot/care-support-and-rights/palliative-care/planning-for-the-future/make-an-anticipatory-care-plan> [↑](#footnote-ref-3)