



Adults with Incapacity Act Amendments Consultation SIAA Response

October 2024



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Introduction

Independent advocates are human rights defenders. For the Adults with Incapacity (AWI) Act Amendments to successfully increase realisation of human rights for people in Scotland independent advocacy must be strengthened. The Scottish Government say their proposed changes to the Act aim to;

- Improve access to justice for adults affected by the AWI Act
- Shift the focus of the AWI Act to one that truly centres on the adult
- Enable adults to access rights more easily
- Ensure adults are supported to make and act upon their own decisions for as long as possible
- When an adult cannot make their own decisions despite support, ensure that their will and preferences are followed unless doing so would be to the overall detriment of the adult.¹

Independent advocacy is ready made to support the realisation of these aims. When sustainably resourced, independent advocacy expands understanding of human rights, enables accountability mechanisms and embeds participation creating the context for services to uphold right, understand peoples' views and for people to feel truly listened to and included.

SIAA welcome the mention of independent advocacy in the consultation overview as a 'means of empowering people to have their voices heard and realise their rights.'² SIAA call on the Scottish Government to implement SIAA's specific recommendations, namely:

1. Include an explicit right of access to independent advocacy for people under the updated AWI Act
2. Use guidance to adopt an 'opt-out' signposting pathway for independent advocacy provided in connection with the Act

¹ [AWI Amendment Act Consultation, Scottish Government, p4](#)

² [AWI Amendment Act Consultation, Scottish Government, p4](#)

3. Adopt the definition of independent advocacy agreed by SIAA members and include it in the Act and guidance
4. Increase understanding of independent advocacy as a supported decision-making tool.
5. Sustainably increase provision of and resourcing for independent advocacy organisations.

What is independent advocacy?

Independent advocacy is about speaking up for, and standing alongside individuals or groups, and not being influenced by the views of others. Fundamentally it is about everyone having the right to a voice: addressing barriers and imbalances of power, and ensuring that an individual's human rights are recognised, respected, and secured. Independent advocacy supports people to navigate public services/systems and acts as a catalyst for change in a situation. Independent advocacy can have a preventative role and stop situations from escalating, and it can help individuals and groups being supported to develop the skills, confidence and understanding to advocate for themselves

Part 1 Principles of the Legislation

Question 1: Do you agree that the principles of the AWI Act should be updated to require all practicable steps to be taken to ascertain the will and preferences of the adult before any action is taken under the AWI Act?

SIAA welcome the Scottish Government updating the principles of the AWI Act to align more closely with recent recommendations from experts including those with experience of being subject to mental health and capacity law and independent reviews. In particular, taking forward the Scottish Mental Health Law Review (SMHLR) recommendation drawn from the Three Jurisdictions Report³ to give greater priority to the will and preferences of the adult. SIAA strongly support the Scottish Government centring Article 12 of the United Nations

³ [Three Jurisdictions report, p 1](#)

Convention on Rights of Persons with Disabilities (UNCRPD)⁴ within updated Principles for the Act.

As noted in the consultation document the overarching recommendation of the SMHLR was a new overall approach to mental health and capacity law. SIAA agree that the law should have a new purpose, 'namely to ensure that the human rights of people with mental or intellectual disability are respected, protected and fulfilled.'⁵ We welcome the greater emphasis on supported decision-making and agree that 'all practicable help and support to enable the adult to make their own decisions about matters should have been given and shown to have been given without success.'⁶ prior to an intervention under the Act.⁶ As suggested, giving the principles stemming from Article 12 of the UNCRPD (supported decision-making and the rights, will and preferences of the person) priority over other principles is a positive change and we hope to see it shift the decision-making approaches taken, limit power imbalances and ensure more rights are secured for people under the Act.

It is important for the Scottish Government to take stock of the fact that the proposed changes to the principles of the Act are years in the making. People under the Act, civil society organisations, disabled people's organisations, as well as our national human rights institution, and the Mental Welfare Commission, have advocated and campaigned for this shift to a human rights-based approach to AWI legislation for many years.

For example, in their response to the 2018 AWI consultation the Scottish Human Rights Commission (SHRC) said the guiding principle of their response was a move away from substitute decision-making to supported decision-making.⁷ People First (Scotland) have long called for an end to guardianship and instead argued for a new way of thinking about legal capacity by applying a supported decision-making framework.⁸ The Scottish Commission for Learning Disability (SCLD) noted in their State of Our Rights report that guardianship orders frequently result in limiting choice, autonomy and privacy for people with learning disabilities. This is particularly stark considering 46% of all welfare guardian orders under

⁴ [UN Convention on the Rights of Persons with Disabilities](#)

⁵ [AWI Amendment Act Consultation, Scottish Government, p2](#)

⁶ [Adults with Incapacity Amendment Act: consultation, Scottish Government, p12](#)

⁷ [AWI consultation response, Scottish Human Rights Commission, p2.](#)

⁸ [The State of Our Rights, SCLD, p35](#)

the AWI Act relate to people with learning disabilities.⁹ In their response to the AWI consultation in 2018 the Mental Welfare Commission for Scotland (MWC) said that a ‘fundamental strand’ of their response was that ‘reform should be directed at ensuring more respect is paid to the will and preferences of adults, whether or not they are capable.’¹⁰

It is also important to note that recent figures published by the Mental Welfare Commission show that 19,078 Scots were living with a welfare guardianship order in March 2024, the highest level recorded, and a 6.9% increase on 2023. While the increase is similar to previous years, the number of existing guardianship orders has more than doubled in the last 10 years.¹¹ This increase is concerning, considering the AWI Act does not currently prioritise the rights of the person subject to the Act. Taking the ever-increasing number of guardianships as well as the repeated and enduring calls for change into consideration, we call on the Scottish Government to take implementation of supported decision-making very seriously and ensure this is a lived reality for people as soon as possible.

One of the most effective ways to ensure that ‘practicable steps’ are taken to ascertain will and preferences is increasing access to and understanding of independent advocacy. Independent advocates are human rights defenders. The role is unique in that it does not work in best interests and actively minimises conflicts of interest and undue influence. An independent advocacy worker supports people to have their voice heard and specific views taken seriously.

Scotland is very fortunate that independent advocacy is already well established across many local areas and has worked successfully for decades to enable supported decision-making for those with access. As the SHRC noted in their response to 2018 AWI consultation ‘independent advocacy must be recognised for its crucial role in providing supported decision-making’¹². We will go into more detail in our response to subsequent questions about the value of increasing access to independent advocacy so it can make the updated principles of the AWI Act a reality for people.

⁹ [The State of Our Rights, SCLD, p35](#)

¹⁰ [Mental Welfare Commission for Scotland, AWI Consultation Response, p3](#)

¹¹ [Adults with Incapacity Act, Mental Welfare Commission, p5](#)

¹² AWI Consultation Response, SHRC, p2.

Question 2: Do you agree that in the AWI Act we should talk about finding out what that adult’s will and preferences are instead of their wishes and feelings?

SIAA agree with this change as it uses the language lifted directly from human rights. It also aligns with recommendations from SCLD in their State of Our Rights Report to ensure appropriate safeguards are available that respect the rights, will and preferences of people with learning disabilities. This is particularly relevant within AWI due to the high number of people with learning disabilities that have a guardian.

SIAA encourage the Scottish Government to use the language established through human rights wherever there is opportunity to.

Question 3. Do you agree that any intervention under the AWI Act should be in accordance with the adult’s rights, will and preferences unless not to do so would be impossible in reality?

SIAA agree that any intervention under the AWI Act should be in accordance with the adults rights, will and preferences. Where it is impossible in reality to do so, the UNCRPD Committee include the ability for others to make a non-discriminatory best interpretation of the person's will and preferences.¹³ The SMHLR noted that ‘this interpretation is something which is different to a “best interests” decision.’ The final report further clarifies that ‘Consideration also needs to be given to how the views of others impacted by the decisions taken can and/or should be taken into account. As is the case for everyone, rarely is a decision made that only impacts one person.’¹⁴ In question 6 we outline the reasons why the independent advocacy role can enable supported decision-making to a degree that other roles and people with a relationship to the person cannot.

¹³ [Committee on the Rights of Persons with Disabilities, 2014](#)

¹⁴ [Scottish Mental Health Law Review, p116](#)

Question 4. Do you agree that the principles should be amended to provide that all support to enable a person to make their own decisions should be given, and shown to have been unsuccessful, before interventions can be made under the AWI Act?

SIAA agree with the proposed amendments to the principles of the AWI Act. Please see our response to questions 1, 3 and 6 for further comment on supports and supported decision-making that should be included.

Question 5. Do you agree that these principles should have precedence over the rest of the principles in the AWI Act?

SIAA agree with this proposal as this is in line with a human rights-based approach which has been recommended by experts, including those with lived experience of the Act for many years.

Question 6. Do you have any suggestions for additional steps that could be put in place to ensure the principles of the AWI Act are followed in relation to any intervention under the Act?

SIAA have 5 key steps we would recommend to ensure the proposed principles of an amended AWI Act are followed. Many of these calls are supported by recommendations of the SMHLR, which proposed consolidating and aligning policy and legislation to ensure consistency regarding the definition of independent advocacy, the right to access this and how it is commissioned and funded.¹⁵ SIAA's asks centre around strengthening independent advocacy to enable increased supported decision-making, they are:

1. Include an explicit right of access to independent advocacy for people under the updated AWI Act.
2. Use guidance to adopt an 'opt-out' signposting pathway for independent advocacy provided in connection with the Act.

¹⁵ [Scottish Mental Health Law Review, p137](#)

3. Adopt the definition of independent advocacy agreed by SIAA members and include it in the Act and guidance.
4. Increase understanding of independent advocacy as a supported decision-making tool.
5. Sustainably increase provision of and resourcing for independent advocacy organisations.

For SIAA and our member organisations - 'the strongest protection against and remedy for rights infringements is independent advocacy'.¹⁶ The unique elements of the independent advocacy role described below help to make the case for including a right of access to independent advocacy in AWI Act Amendments to ensure that supported decision-making is taking place.

Independent advocacy, risk and 'best interests'

Independent advocacy does not work in a person's 'best interests'. People often think that independent advocacy is about working in the best interests of individuals. In fact, sometimes independent advocacy is about supporting people to explore, understand and express something that is not in their own best interests, that may be risky, but is nonetheless what they want. Often professionals and organisations make decisions that are in the best interests of an individual because they have a duty to do so and must consider the risk for the person. Independent advocacy does not have such a legal duty. An effective independent advocate needs to challenge, question and hold professionals to account when best interests are given as a reason for decisions made about their advocacy partner.

Independent advocacy and conflicts of interest

It states in the Independent Advocacy Principles, Standards and Code of Best Practice that independent advocacy is as free as possible from conflicts of interest, being completely separate from service providers and funders and with the organisation involved providing no services other than advocacy. It is structurally, financially and psychologically free from

¹⁶ [Scottish Government Moving On from Care into Adulthood Consultation Response, Who Cares? Scotland, p8](#)

interests such as being a provider of services, a gatekeeper of services, a funder of services, a statutory body or family and friends.¹⁷

Independent advocates do not provide advice

Independent advocacy and advice are mutually supportive, but distinct, avenues of assistance. Independent advocacy and advice are not interchangeable – they fulfil different functions and provide different levels of support. In addition, it is a fundamental tenet of independent advocacy that people accessing it are “protected from undue pressure, advice or others’ agendas” (SIAA Principles, 2019). Independent advocacy does not give advice but supports people or groups to access information so they can make their own informed decision. This distinction is crucial when considering how independent advice and independent advocacy are set out in law and policy.

‘Independence’ of independent advocacy

Independence for ‘independent advocacy’ has three components - structural, financial and psychological. Structural and financial independence are fundamental to establishing and maintaining the independence of the organisation providing independent advocacy. Psychological independence is part of the practice of independent advocacy, enabling trust to be built with advocacy partners, as well as speaking to the quality of independent advocacy provided. Additionally, psychological independence influences the organisational culture and values necessary for independent advocacy organisations. This goes far beyond semantics - SIAA knows from our members how important the concept of independence is to people using independent advocacy and how critical the use of the word ‘independent’ is in positively shaping their perceptions of and engagement with independent advocacy. If people feel the advocacy is related to or attached in any way to another system or service they also use, this can erode the ability to build trust. We go into more detail later in this response about why it is important to include a clear definition of independence in legislation and guidance.

¹⁷ [Independent Advocacy Principles, Standards & Code of Best Practice, p16](#)

The unique role of independent advocacy

These foundational elements of the independent advocacy role that allow the focus to be on supporting the person to have their voice heard - enables it to be a mechanism for empowering individuals and groups to make decisions for themselves.

The SMHLR points to the UNCRPD Committee's General Comment Number 1 in which it sets out informal and formal means by which supported decision-making can practically be provided. These include:

- Support from one or more trusted persons, peer support and independent advocacy
- Assistance with communication as appropriate to the needs of the individual, particularly for those who use non-verbal forms of communication to express their will and preferences
- Advance care planning – including providing support to a person to complete an advance planning process.
- Specialist support in legal and administrative proceedings
- Communities and support (collective advocacy)¹⁸

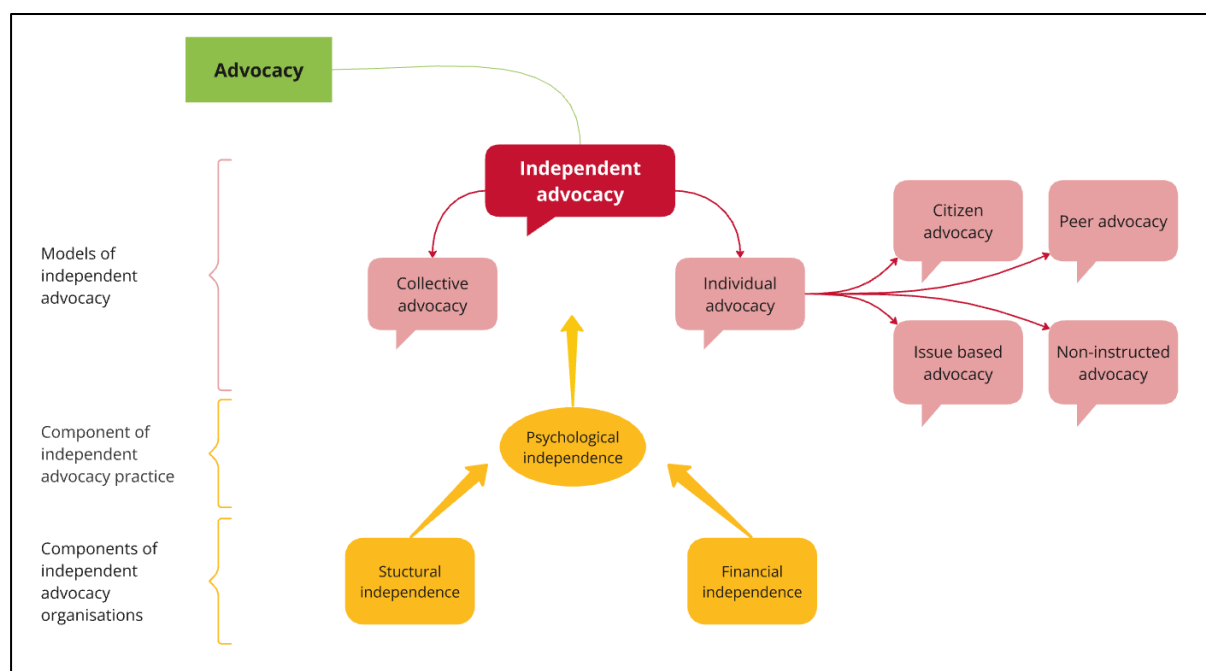
Apart from 'specialist support in legal and administrative proceedings', independent advocacy is part of or can support everything listed above. Independent advocates support people in court processes or when speaking to legal professionals but would not provide advice, including legal advice. SIAA member organisations who deliver independent advocacy regularly support people with advanced care planning or advanced statements. An independent advocate would also be ideally positioned to support people to write the SMHLR proposed Statement of Rights, Will and Preference (SWAP) if adopted into practice in Scotland¹⁹. Independent advocates often undertake specialist training in communication, for example Talking Mats, to ensure that they can gather views effectively. Different models of independent advocacy are also mentioned above e.g. collective advocacy.

¹⁸ [Chapter Six: From provisions to practice: implementing the Convention – Legal capacity and supported decision-making, UN](#)

¹⁹ [Scottish Mental Health Law Review, p129](#)

Models of independent advocacy

SIAA have found that there is a common misconception that collective advocacy is separate from independent advocacy. For example, a recent Scottish Government consultation analysis document said that ‘collective advocacy [should] be championed alongside independent advocacy’²⁰. In fact, collective advocacy is a model of independent advocacy that shares the same principles, standards and code of best practice. Other models of independent advocacy include citizen advocacy and non-instructed advocacy.



Above is a diagram of independent advocacy components and models

Non-instructed advocacy is a model particularly relevant to the AWI Act as it helps someone that cannot instruct an independent advocate have their rights upheld. Non-instructed advocacy happens when there are issues with a person’s capacity perhaps due to dementia, or limited communication due to a physical disability or a learning disability. In such situations a non-instructed advocate seeks to uphold their advocacy partner’s rights and ensure that decisions are taken with full consideration of their unique preferences, rights

²⁰ [Learning Disabilities, Autism and Neurodivergence Bill: consultation analysis, p62](#)

and perspectives.²¹ Independent advocates working in the non-instructed model of independent advocacy use the SIAA Non-instructed Advocacy Guidelines²² as well as the Adults with Incapacity Resource Hub²³ written by independent advisor and ex Public Guardian Sandra McDonald specifically for independent advocacy use. Some SIAA member organisations are also developing new non-instructed best practice learning materials for providing non-instructed advocacy to children and young people. SIAA recommend that expertise in non-instructed advocacy from SIAA and its member organisations is sought by the Scottish Government when it reviews existing support decision-making practices.

When the Scottish Government is developing its understanding of supported-decision making, consideration should be given to the extra time and resource required for non-instructed advocacy practice. The SIAA Non-instructed Advocacy Guidelines say non-instructed advocacy is about:

- Where possible, spending time getting to know the advocacy partner, observing how the partner interacts with others and their environment and building a picture of the partner's life, likes and dislikes.
- Trying different methods of communicating with the partner.
- Gathering information from the advocacy partner through a variety of measures. This may include identifying 'past wishes' or any Advanced Statement made.
- Speaking to the significant others in the partner's life.
- Ensuring that the partner's rights are respected.
- Ensuring that account is taken of the partner's likes and dislikes when decisions are being made and that the partner is enabled to make choices as far as is possible.
- Ensuring that all options are considered and no particular agenda is followed.

Many of the activities and practices listed above take time and expert communication skills. This should be considered in the development of supported decision-making practices under the Act.

²¹ [Independent Advocacy Principles, p17](#)

²² Available to SIAA member organisations

²³ Available to SIAA member organisations

Independent advocacy is already used for supported decision-making in Scotland, it has been developed for over three decades with the expertise of independent advocacy organisations, SIAA and advocacy partners and groups. The AWI Act Amendments are an important opportunity for the Scottish Government to commit to practically realise human rights by increasing people's access to independent advocacy. A right of access in the Act itself would help guarantee this.

1. Include an explicit right of access to independent advocacy for people under the updated AWI Act.

SIAA recommend that everyone under the AWI Act should have a right of access to independent advocacy. This would ensure that in cases where will and preferences are more challenging to gather due to conflicts of interest, capacity or communication barriers an independent advocacy worker, in some cases working in a non-instructed manner, would enable supported decision-making to take place.

Currently, only some people have the right to access independent advocacy in Scots law. The Mental Health (Care and Treatment) (Scotland) Act 2003 gave people the most significant access to independent advocacy. Under Section 259 of the Mental Health (Care & Treatment) (Scotland) Act 2003 there is a legal right to access independent advocacy for everyone with a 'mental disorder' (as defined by the Act) as per s328 of the Act²⁴. However, as highlighted by the Mental Welfare Commission in their 2018 report *The Right to Advocacy*, the way the funding has been distributed in Scotland often means people subject to statutory processes under this legislation are prioritised when accessing independent advocacy²⁵. This means people not subject to compulsory treatment may have to wait or may not have access to independent advocacy at all.

The way independent advocacy was written into various laws and policies, and has subsequently been resourced, has meant both a widening of access to independent advocacy but also a funnelling of independent advocacy provision, linking it to statutory processes (e.g. a Mental Health Tribunal) in the minds of both advocacy partners and public

²⁴ [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003, section 259](#)

²⁵ [The Right to Advocacy, MWC, p5](#)

services. This has meant independent advocacy cannot fulfil its potential in the context of early intervention and prevention or enable participation and supported decision making to the extent it could. The gaps in provision and barriers to accessing independent advocacy, despite the right in law was noted in the Independent Review of Learning Disabilities and Autism in the Mental Health Act which highlighted that although autistic people and those with an intellectual disability have the right to access independent advocacy under the 2003 Act, the reality is that people do not have equal access²⁶. The SMHLR subsequently identified that only around 5% of people who have a right to independent advocacy actually access it.²⁷ SIAA research for The Advocacy Map shows there are significant gaps in the provision of independent advocacy across Scotland, including:

- children and young people
- people with dementia
- people with learning disabilities
- autistic people
- people within the prison system
- unpaid carers²⁸

Despite these gaps, we know from our member organisations local commissioning that the Mental Health Act has consistently remained the area that has the best provision due to the right of access and duty to provide on Health and Social Care Partnerships that exists in law. Provision under other pieces of legislation that only mention independent advocacy is even poorer. **For this reason, SIAA urge the Scottish Government to include a right of access to independent advocacy in AWI Act amendments.**

Additionally, SIAA recommend that independent advocacy involvement should be a key marker for monitoring where a person's will and preferences have been gathered and shared. In order to use independent advocacy as a key monitoring tool for understanding if supported decision-making is taking place people must know that the independent advocacy they receive is of high quality. SIAA and its member organisations have recently begun work on understanding what quality independent advocacy entails and would

²⁶ [Independent Review of Learning Disability and Autism in the Mental Health Act](#)

²⁷ [Scottish Mental Health Law Review, p136](#)

²⁸ [SIAA Advocacy Map: Sustainability of Independent Advocacy in Scotland, p14](#)

welcome further discussion with the Scottish Government around this. This would align with SMHLR recommendations around independent advocacy in Chapter 4 of the final report.²⁹

2. Use guidance to adopt an 'opt-out' signposting pathway for independent advocacy provided in connection with the Act.

The Independent Review of Learning Disability and Autism in the Mental Health Act and the SMHLR made clear recommendations to the Scottish Government to increase access to independent advocacy. Both reviews specifically recommended opt-out provision of independent advocacy as they argue this would best protect rights. The SMHLR report noted that if someone is struggling with their mental health they may not have the capacity to understand the role of an independent advocate' as well as that 'by making it 'opt out' it will give an indication of what the true need actually is.'³⁰ SIAA agree but would strongly advocate for increased resources for independent advocacy organisations before an opt-out model is adopted as organisations are currently working significantly beyond their capacity and frequently with long waiting lists.

SIAA recommend that a system of opt-out provision is developed in guidance for the updated Act and this is sustainably resourced so grassroots independent advocacy organisations can consistently provide independent advocacy to those under the Act.

3. Adopt the definition of independent advocacy agreed by SIAA members and include it in the Act and guidance.

SIAA believe expanding access to quality, grassroots independent advocacy for all those who need it can be achieved, in part, through strengthening the definition of independent advocacy in upcoming law and policy. A clear definition shapes the types of procurement and contracts that are created to provide independent advocacy, independent advocacy organisations themselves, independent advocacy practice and, most importantly, shapes the experience of advocacy partners and groups accessing independent advocacy to address

²⁹ [Scottish Mental Health Law Review, p137](#)

³⁰ [Scottish Mental Health Law Review, p139](#)

injustices and human rights issues. The definition in the 2003 Mental Health Act is a starting point but can be improved upon.

SIAA are clear that the components of independent advocacy identified by SIAA members through their collaboration on the Independent Advocacy Principles, Standards and Code of Best Practice, should be the basis upon which our proposed definition is built. This definition comprises of 'structural, financial and psychological independence' being the key components of independent advocacy, as described earlier in our response.

In order for the definition of independent advocacy to be as robust as possible in law, SIAA are proposing that two of the three components of independent advocacy are outlined in primary legislation. The third component of independent advocacy is difficult to define in law and therefore SIAA propose that psychological independence is included and expanded upon in regulations or standards that support the law and guidance documents that provide more detail on implementation. The definition is entirely derived from the definitions and foundational work that was completed with members for the 'Principles' document so maintains the agreed definition and components of independent advocacy.

Primary legislation

"Independent advocacy organisations or groups providing support and representation must have structural and financial independence from other organisations and services. An organisation providing independent advocacy must have structural and financial independence.

- Structural independence means an independent advocacy organisation or group is a separate organisation in its own right. For example, it is registered as a charity or company and has its own Management Committee or Board of Directors. An independent advocacy organisation only provides independent advocacy. The organisation must provide no other services, have no other interests, ties or links other than the delivery, promotion and support of independent advocacy.
- Financial independence means an independent advocacy organisation or group has its own source of funding that does not cause any conflict of interest and does not compromise the work it does."

Guidance and regulations

In order to practice effective independent advocacy, an independent advocacy organisation or group must be structurally, financially and psychologically independent. Structural and financial independence are outlined in the Act.

The independent advocacy organisation or group should provide no other services, have no other interests, ties or links other than the delivery, promotion, support and defence of independent advocacy. Structural and financial independence support psychological independence. Independent advocates must have psychological independence through acting in the absence of undue influence and minimising conflict of interests. Psychological independence is fundamental to the practice of independent advocacy, meaning the primary loyalty and accountability of an independent advocate is to the advocacy partner and enables the independent advocate to better support a person to express their views. Psychological independence builds trust with an advocacy partner or group and shapes the nature of the advocacy being provided.

4. Increase understanding of independent advocacy as a supported decision-making tool.

SIAA recommend including independent advocacy in different training and learning work related to AWI. Practitioners working in public services using AWI, carers, Guardians and people with Powers of Attorney should be supported to have a clear understanding of independent advocacy and its ability to enable supported decision-making. We will go into more detail about this later in our response and make suggestions for including independent advocacy in specific training proposals.

5. Sustainably increase provision of and resourcing for independent advocacy organisations.

SIAA research for The Advocacy Map found that 71% of respondents (all independent advocacy organisations) identified groups with an unmet need for independent advocacy through approaches to their resource from people who don't meet their existing criteria for

access. In addition, 64% identified other provision that was lacking.³¹ As detailed earlier in our response to this question few people with the right to access independent advocacy have that right realised. This reality is coupled with independent advocacy organisations being under increasing financial pressure in recent years, operating long waiting lists and supporting advocacy partners experiencing increasingly complex barriers to accessing their rights. In order for independent advocacy to fulfil its potential to enable supported decision-making it must have increased resources and clearer commissioning and funding practices.

SIAA member organisations that deliver Children’s Hearings independent advocacy have consistently noted how well that piece of national Scottish Government funding works for independent advocacy organisations as well as the children accessing independent advocacy. The independent advocacy is delivered by local independent advocacy organisations with the local organisations coming together regularly to develop best practice guidance and share experiences to develop the work locally and nationally. SIAA members that provide Children’s Hearings independent advocacy have regularly told us how valuable the Children’s Hearings Advocacy Expert Reference Group (ERG) is. The ERG is chaired by Scottish Government and brought together providers, SIAA, Children’s Hearings Scotland (CHS), Scottish Children’s Reporter Administration (SCRA) and key stakeholders including Social Work Scotland, the Law Society of Scotland, Centre for Children’s Care and Protection (CELCIS), Centre for Youth and Criminal Justice (CYCJ), Clan Childlaw, and Scottish Child Law Centre. Together this group was able to identify local issues and work together to develop a National Practice Model, develop learning and troubleshoot rights infringements to increase consistency of high quality provision across the country. The improvement for children going through the Children’s Hearings system and receiving independent advocacy in having their rights upheld is reflected in the Hearings System Working Group’s Redesign Report from independent chair Sheriff Mackie, ‘this provision is positive and [we] recognise its significance for children’³²

SIAA recommend that Scottish Government learn from colleagues that led on independent advocacy provision for the Children’s Hearing system and replicate the best practice in this area for AWI. The CHS reported that there were 21,613 children's hearings held in

³¹ [SIAA Advocacy Map: Sustainability of Independent Advocacy in Scotland, p14](#)

³² [Hearings System Working Group's Redesign Report, p32.](#)

2023/2024 and they supported 10,197 infants, children and young people in the same year.³³ The Mental Welfare Commission has published recent statistics showing that 19,078 Scots were living with a welfare guardianship order in 2024³⁴. SIAA believe that these comparable population numbers support the suggestion to transpose the Children's Hearings independent advocacy provision model to AWI. Additionally, SIAA encourage Scottish Government to include different models of independent advocacy when considering provision, particularly citizen advocacy and collective advocacy.

SIAA also suggest that providing independent advocacy to those under the Act could become a monitoring tool for understanding where the proposed principles of an amended Act are being complied with. Due to its unique and clear role independent advocacy provision could be monitored nationally to see where supported decision-making is taking place and therefore where Article 12 of the UNCRPD is being realised for people. This monitoring would be more straightforward if a national funding model for local provision of independent advocacy (similar to Children's Hearings provision) was adopted. It would also be a useful measurement for a Human Rights monitoring tool that civil society organisations and rights holders hope to see developed in Scotland. SIAA suggest that as independent advocacy is a clear way to monitor whether Article 12 of the UNCRPD is being realised (as well as Article 12 of UNCRC), it stands to reason that independent advocacy must be of high quality. SIAA have recently embarked on two projects a national learning platform for independent advocacy and a quality project to explore what quality independent advocacy means and how this can be championed. SIAA are keen to develop these pieces of work to support our members to continue and increase provision of high-quality independent advocacy.

Summary

The SMHLR noted that if the Scottish Government is truly committed to developing a human rights-based system it must direct resources to develop supported decision-making. SIAA's and our members' view is that this resourcing must include investment in independent

³³ [Children's Hearing System website](#)

³⁴ [Adults with Incapacity Act, Mental Welfare Commission, p5](#)

advocacy, through providing rights of access, opt-out provision and sustainable resourcing of grassroots independent advocacy organisations.

Investigations into cases under the AWI Act

Question 11. Will these changes provide greater clarity on the investigatory functions of OPG and local authority?

SIAA do not hold a particular view on the changes in this area. It is important to note that when carrying out an investigation either the local authority or OPG should have a clear understanding of the independent advocacy role, and whether the person under AWI has an independent advocate. SIAA would hope that if opt-out provision for independent advocacy is adopted this would form part of the investigatory process. Monitoring whether independent advocacy has been involved or not would help to establish if a person's will and preferences have been sought.

Part 2: Powers of Attorney

Question 13. Do you agree with the proposals for training for attorneys?

SIAA agree that attorneys should undergo a mandatory short introductory training course. SIAA recommend that this course includes information about the role of independent advocacy and its enablement of supported decision-making. SIAA also urge the Scottish Government to not only include human rights in the training but frame any mandatory training course within a human rights-based approach. The training should emphasise the importance of the UNCRPD Article 12 and linked supported decision making that we hope to see become the prioritised principle of the Act. If established, the training should be as accessible as possible and available in different languages and formats.

Question 14. Do you agree that OPG should be given power to call for capacity evidence and defer registration of a power of attorney where there is dispute about the possible competency of a power of attorney document?

SIAA do not hold a particular view on whether the Act should amend powers of the Office of the Public Guardian (OPG), we would defer to other experts in this area. However, SIAA recommend that if these amendments to increase powers of the OPG in relation to power of attorney go ahead there should be a mechanism built into the system at this point for opt-out independent advocacy referral for the granter of the power of attorney. This suggestion is a practical way to support taking a human rights based approach that ensures supported decision-making becomes a reality for the granter.

Of course, the granter could opt out of involving independent advocacy but the information should be provided and clear referral routes introduced.

Question 15. Do you agree that OPG should be able to request further information on capacity evidence to satisfy themselves that the revocation process has been properly met?

SIAA recommend a similar approach for the amendments suggested as we did for question 14. SIAA recommend that identifying points within AWI processes where there are capacity question marks are clear points that opt-out independent advocacy referrals could take place.

Question 16. Do you agree that OPG should be given the power to determine whether they need to supervise an attorney, give directions or suspend an attorney on cause shown after an investigation rather than needing a court order?

SIAA suggest that this is another area where a referral to opt-out independent advocacy for the granter would be beneficial and support a human rights based approach.

Question 23. Do you agree that the Public Guardian should have broader powers to suspend powers granted to a proxy under the AWI Act whilst an investigation is undertaken into property and financial affairs?

Please see our answer to questions 14-16. SIAA does not hold a view on broadening powers. However, we would emphasise the importance that where any suspension of powers to a proxy is granted, opt-out independent advocacy should be offered to the granter so that the will and preferences of the person can be fed into the investigation without undue influence or conflicts of interest.

Question 24. Do you agree that the MWC and local authority should have broader powers to suspend powers granted to a proxy under the AWI Act whilst they undertake an investigation into welfare affairs?

Please see our answer to question 14-16. SIAA suggest points in the processes described relating to financial decisions are a good opportunity to signpost to independent advocacy to ensure proposed amendments to the principles of the Act are enacted.

Part 4: Management of Residents' Finances

Question 35. Do you think alternative mechanisms like the ATF scheme, guardianships and intervention orders adequately address the financial needs of adults with incapacity living in residential care settings and hospitals?

SIAA would emphasise the need for a human rights based approach to underpin the alternative mechanisms that are used to address financial needs of adults with incapacity living in residential care settings and hospitals. There are many power imbalances that will exist in residential care settings and hospitals so ensuring support decision-making is well understood by professionals in these settings is important. SIAA recommend independent advocacy should be provided on an opt out basis to address financial needs of people living in these settings.

Part 5: Authority to Medically Treat Adults with Incapacity

Question 38. Do you agree that if the adult contests their stay after arriving in hospital that they should be assisted to appeal this?

SIAA agree that adults should be assisted to appeal in these instances. For reasons outlined in our answers to previous questions, ensuring opt-out referral to independent advocacy is made in these circumstances would support taking a human rights-based approach.

Question 39. Who could be responsible for assisting the adult in appealing this in hospital?

An independent advocacy worker would not be responsible for the appeal, however there should be a referral to independent advocacy and clear explanation to the person about what independent advocacy is, where possible from the independent advocacy organisation themselves.

Question 46. What sort of support should be provided to enable the adult to appeal treatment and restriction measures?

Echoing our answers to questions 38 and 39 - having an opt-out independent advocacy referral at this point would support taking a human rights-based approach.

Part 6: Guardianships

Question 61. Do changes require to be made to ensure an appropriate level of scrutiny for each guardianship order?

SIAA urge the Scottish Government to carefully consider where opt-out independent advocacy referrals should happen within guardianships. Considering the increase in guardianships over the last decade there needs to be clearer routes to accessing independent advocacy, including non-instructed advocacy. This must be accompanied by more funding for independent advocacy organisations to respond to increased need for enabling supported decision-making when guardianships are used. Please see our detailed response to question 6 on replicating successful work on providing independent advocacy within Children's Hearings for an amended AWI Act.

Part 7: Approach to Deprivation of Liberty (DOL)

Question 71. What support should be given to the adult to raise an appeal?

This is another circumstance under the Act which would benefit from an opt-out referral to independent advocacy. Please see our answers to previous questions for more detail.

Question 77. What else could be done to improve the accessibility of appeals?

Similarly to question 17 on PoA, this is another circumstance under the Act which would benefit from an opt-out referral to independent advocacy. Please see our answers to previous questions for more detail.

In both the case of a DOL linked to PoA or Guardianship, it is important that the decision-maker has an understanding of the role and value of independent advocacy.

Question 81. Do you agree with our proposal to give the MWC a right to investigate DOL placements when concern is raised with them?

The MWC have a good understanding of independent advocacy and its role, they are well placed to investigate and could monitor the involvement of independent advocacy where concerns have been raised. Monitoring independent advocacy involvement could be a helpful component of assessing whether a human rights based has been taken.

Question 82. Do you agree with the proposals to regulate the appointment, training and remuneration of safeguarders in AWI cases?

SIAA recommend that training for safeguarders should include information on the role of independent advocacy and its function in supported decision-making.

Question 83. Do you agree with the proposals for training and reporting duties for curators?

To echo our answer to question 82, SIAA recommend that training should involve information on independent advocacy and its function in supported decision-making. SIAA suggest that any training information developed on independent advocacy should be co-designed by SIAA and our member organisations. SIAA are currently developing a national learning platform for independent advocacy so are likely to have useful views to contribute.

Question 84. What suggestions do you have for additional support for adults with incapacity in AWI cases to improve accessibility?

Independent advocacy could provide additional support in these cases if resourced appropriately.

Conclusion

Independent advocacy is ready made to support the realisation of these aims of an amended AWI Act. When sustainably resourced, independent advocacy expands understanding of human rights, enables accountability mechanisms and embeds participation creating the context for services to uphold right, understand peoples' views and for people to feel truly listened to and included. SIAA urge the Scottish Government to carefully consider our 5 asks and engage with SIAA and our member organisations to develop them. Implementing our asks would allow supported decision-making to thrive under an updated AWI Act.

Appendix 1: Scottish Independent Advocacy Alliance (SIAA) and our members

The Scottish Independent Advocacy Alliance (SIAA) advocates for independent advocacy. As the only national organisation with a remit to promote, support and advocate for independent advocacy we have been examining the provision, quality, availability, and accessibility of independent advocacy for over two decades. Our aim is to raise awareness about the value and impact of independent advocacy, and influence decision makers with the aim of widening access to quality independent advocacy for all who need it in Scotland.

SIAA is a membership organisation that has members providing independent advocacy across Scotland. SIAA members are a diverse range of organisations and groups that provide independent advocacy to different people and groups in a variety of settings including:

- individual independent advocacy in the communities, hospitals, forensic mental health, and prison settings,
- organisations specialising in citizen advocacy,
- carers advocacy organisations,
- collective advocacy groups based in hospitals, care homes and the community, and
- organisations providing independent advocacy to remote and rural communities.

Each SIAA member works to the Independent Advocacy Principles Standards and Code of Best Practice, which is the foundational document for independent advocacy in Scotland. The Principles and Standards are provided in Appendix 2. We will provide more detail on how independent advocacy, both individual and collective, works in practice in our response. The Independent Advocacy Principles Standards and Code of Best Practice are intrinsically linked to the principles of Participation, Accountability, Non-discrimination and equality, Empowerment and Legality (PANEL). Independent advocacy groups have a human rights-based approach that support individuals and groups to consider how human rights laws may apply to their specific circumstances.

Appendix 2 – Principles and standards of independent advocacy

Principle 1: Independent advocacy is loyal to the people it supports and stands by their views and wishes.

- Standard 1a: Independent advocacy follows the agenda of the people supported regardless of the views, interests, and agendas of others.
- Standard 1b: Independent advocacy must be able to evidence and demonstrate its structural, financial, and psychological independence from others.
- Standard 1c: Independent advocacy provides no other services, has no other interests, ties, or links other than the delivery, promotion, support, and defense of independent advocacy.

Principle 2: Independent advocacy ensures people’s voices are listened to and their views are taken into account.

- Standard 2a: Independent advocacy recognises and safeguards everyone’s right to be heard.
- Standard 2b: Independent advocacy reduces the barriers people face in having their voice heard because of communication, or capacity, or the political, social, economic, and personal interests of others.

Principle 3: Independent advocacy stands up to injustice, discrimination, and disempowerment.

- Standard 3a: Independent advocacy recognises power imbalances or barriers people face and takes steps to address these.
- Standard 3b: Independent advocacy enables people to have more agency, greater control, and influence.
- Standard 3c: Independent advocacy challenges discrimination and promotes equality and human rights. Find out more about independent advocacy and how it works in Scotland from the Independent Advocacy Principles, Standards and Code of Best Practice.

SIAA is a Scottish Charitable Incorporated Organisation | Charity number SC033576

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