

# **Consultation on The Scottish Law Commission Report on Adults with Incapacity**

# CONSULTATION ON THE SCOTTISH LAW COMMISSION REPORT ON ADULTS WITH INCAPACITY

## INTRODUCTION

1 In October 2014, the Scottish Law Commission ('the Commission') published a report on Adults with Incapacity<sup>1</sup> which focussed on the question of deprivation of liberty as it relates to persons who may be subject to the Adults with Incapacity legislation and associated issues. The report made a number of recommendations and contained a draft Bill, amending the Adults with Incapacity (Scotland) Act 2000<sup>2</sup> ('the 2000 Act') and the Mental Health (Care and Treatment)(Scotland) Act 2003<sup>3</sup> ('the 2003 Act').

2 The Commission's report concluded that adults without incapacity are being confined to hospital wards and residential facilities in Scotland without any underlying legal process which is contrary to Article 5 of the ECHR. Since the paper has been published relevant public authorities will have been considering their practices in the light of the Commission's views. The Commission's report refers to existing legal authority under which adults with incapacity may presently be detained. While the existing legislation provides mechanisms for authorising a deprivation of liberty as a means of avoiding some of the issues highlighted by the Commission the Scottish Government are of the view that the concerns and recommendations raised by the Commission in their report warrant exploration. In particular, the Scottish Government considers that the existing mechanisms do not necessarily provide a sustainable way forward.

3 This consultation paper seeks views on specific matters raised in the Commission's report, with particular reference to the Commission's draft Bill and how that would work alongside the existing legislation. It also takes the opportunity to seek general views on wider aspects of the 2000 Act that may benefit from review. The findings from this consultation will inform the decisions regarding any wider review of the 2000 Act.

## BACKGROUND

4 The Commission's report and draft bill seeks to address a legal problem which has been an issue in the UK since 2005 and the conclusion of the Bournemouth case<sup>4</sup>. That case concerned an individual who had been treated on a reputed informal

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<sup>1</sup> Scottish Law Commission report no 240 available at:

[http://www.scotlawcom.gov.uk/files/6414/1215/2710/Report\\_on\\_Adults\\_with\\_Incapacity\\_-\\_SLC\\_240.pdf](http://www.scotlawcom.gov.uk/files/6414/1215/2710/Report_on_Adults_with_Incapacity_-_SLC_240.pdf)

<sup>2</sup> 2000 asp 4

<sup>3</sup> 2003 asp 13

<sup>4</sup> HLv United Kingdom ( 2005 40 EHRR 32

basis in a psychiatric hospital but against the wishes of his carers who had been deprived access to him. The European Court of Human Rights (ECtHR) found that there had been a breach of the European Convention on Human Rights (ECHR). It determined that the admission to a psychiatric hospital and continued residence there of a person with learning difficulties such that he could not consent to being where he was, represented a deprivation of liberty, could not be characterised as voluntary and needed to take place under a lawful process in order to comply with Article 5 (prohibition of detention without proper process of law) of the ECHR.

5 Following the decision on Bournemouth, the Commission was approached by a number of bodies including the Mental Welfare Commission, ENABLE Scotland and the Mental Health and Disability Subcommittee of the Law Society of Scotland to examine the implications of this decision for the law in Scotland. Accordingly the issue was included in their Eighth Programme of Law Reform. The Commission commenced this piece of work with a discussion paper<sup>5</sup> concerning adults with incapacity and deprivation of liberty. The findings from this discussion paper informed the Report and draft Bill. In making their recommendations, the Commission assessed recent case law from the European Court of Human Rights, and courts within the UK to identify the circumstances in which a placement in residential care accommodation or restrictions placed on a person in hospital for treatment or assessment would constitute a deprivation of liberty and must be authorised in law to comply with Article 5 of the ECHR.

6 In particular, in March 2014, the UK Supreme Court handed down a judgement in the case of *P v Cheshire West*<sup>6</sup> which clarified that there is a deprivation of liberty for the purposes of Article 5 ECHR where the person is under continuous supervision and control and is not free to leave and the person lacks capacity to consent to these arrangements. The effect of this decision is that careful consideration should be given to ensure that appropriate processes are in place to authorise any deprivation of liberty and to whether any changes to current processes are required. The Supreme Court ruling is not binding on Scotland but is nevertheless influential.

7 There are approximately 36,000 persons in care homes in Scotland at present. Of that number, around 20,000<sup>7</sup> at any given time may have some form of cognitive impairment to a level that would mean they were incapable of making decisions about their care and welfare. Any steps that might be taken to restrict those individuals' freedom of movement in some way arguably should be subject to a process to ensure that the individual is not being unlawfully deprived of his or her liberty.

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<sup>5</sup> DP no 156 available at <http://www.scotlawcom.gov.uk/law-reform-projects/adults-with-incapacity/>.

<sup>6</sup> Cf *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19

<sup>7</sup> <http://www.gov.scot/Publications/2015/11/5804>

8 In the same way if a person with cognitive impairment is receiving hospital treatment, is under continuous control and supervision and is not free to leave hospital then the Supreme Court ruling indicates that they too should be subject to a process to ensure that they are not being unlawfully deprived of liberty.

9 The Commission has drafted a bill creating new processes which aim to avoid persons being unlawfully deprived of their liberty within a hospital or community setting. The Bill provides for measures to prevent a person from leaving hospital, whether that person is in hospital for treatment or assessment, where the medical practitioner is of the view that the person is incapable of making decisions as to whether to leave hospital or not, and measures to authorise a significant restriction of the liberty of an incapable adult within a community setting by means of a 'statement of significant restriction'<sup>8</sup>.

10 The Commission's Bill provides for these new measures by means of amendment to the 2000 Act. This consultation therefore also seeks views on the impact such changes might make on the way the 2000 Act is currently operating.

11 **The Scottish Government has yet to take a view on the Commission's recommendations and what changes, if any that may be required to the legislation. Before making any decisions as to the way forward in this area of the law, it is essential to explore and understand the issues from a range of perspectives so decisions are properly informed. This consultation therefore seeks views from stakeholders to assess whether there is broad support or not about the approach the Commission has taken and the detail of the draft Bill.**

## **SUMMARY OF COMMISSION RECOMMENDATIONS**

12 The Commission report looks at persons within hospital settings and persons within a community setting and recommends a different approach for each setting. For hospital settings, an authorisation process is recommended whereby a medical practitioner will be able to put measures in place to prevent an adult with cognitive impairments, who is in hospital for the treatment of physical illness, leaving the hospital if certain conditions are satisfied.

13 In community settings, which in the main are likely to be residential care settings, the focus is on the authorisation of any significant restriction in an individual's day to day life.

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<sup>8</sup> SLC report appendix A

14 The Commission has recommended that a legal authorisation process will not apply universally to all adults in care settings but only to those who are subject to a significant restriction in a community setting, defined by having more than one measure of restraint on a regular basis. The intention behind this is that a person living in a care home where the front door is ordinarily locked, who might require seclusion or restraint from time to time would not be regarded as being sufficiently deprived of their liberty and no legal authorisation process would be necessary.

15 However where a care home manager (or equivalent) is of the view that an adult who is resident in their care home may require to be subject to significant restriction of liberty, and the adult is incapable in relation to decisions about such restrictions, then the care home manager must complete a Statement of Significant Restriction(SSR) which is to specify the way in which the adult's liberty is to be restricted and why.

16 Thereafter a report is required from a Mental Health Officer (MHO) and a medical practitioner as to the appropriateness of the proposed restrictions. If all parties are in agreement, then the care home manager seeks authorisation from the welfare attorney / guardian to implement the restrictions. If there is no attorney or guardian, application is made to the sheriff. If there is disagreement between interested parties then the matter can be referred to the sheriff, and provision is made for the decision to be appealed at each stage.

17 An example of where a statement of significant restriction may be required is the situation where a man with dementia has had a deterioration in his condition such that he is frequently leaving his care placement unaccompanied, and placing himself at risk in doing so. He may need to be subject to restrictions on his movement for his own safety in which case, under the provisions of the Commission's Bill, the care home manager would have to consider the need for the SSR.

18 No legal process will be necessary where the adult is capable in relation to decisions about such restrictions as if they consent to such measures this will not amount to a deprivation of liberty under Article 5.

19 Finally, the bill makes provision for an adult, notwithstanding the fact that he or she may lack capacity to consent to his or her living arrangements, to apply to the sheriff for an order that the adult's unlawful detention in a care home service, or adult placement service should end. Any person claiming an interest in the adult's personal welfare may also make such an application.

20 In making its recommendations the Commission has stated that its intention is to take a pragmatic rather than an absolute approach to ensure that the legal

processes are introduced only so far as is necessary to comply with Article 5 ECHR . As a result it is the view of the Commission that the proposals do not go so far as to would be required to fully reflect the judgement in Cheshire West<sup>9</sup>. The Scottish Government is also conscious that the issue of what constitutes a deprivation of liberty in these types of cases is still being developed by the courts. In the case of Bournemouth Borough Council v PS and another<sup>10</sup> Mootsyn J noted that in the light of the decision of the Supreme Court in Cheshire West, local authorities have to err on the side of caution and bring every case, however borderline, before the court. For if they do not, and a case is later found to be one of deprivation of liberty, there may be heavy damages claims (and lawyers' costs) to pay. He remarked that he remained of the view that the matter needs to be urgently reconsidered by the Supreme Court. Whatever conclusions are reached in view of the consultation will therefore have to take account of the evolving case law. The overall aim is to have a process which is proportionate and manageable and whilst at the same time ensuring that the process respects the rights of adults with incapacity.

## **HOSPITAL SETTINGS –DRAFT BILL PROVISIONS**

*There should be a simple and straightforward process to authorise the use of measures to prevent an adult with incapacity who require treatment for physical health from leaving a hospital unaccompanied*<sup>11</sup>

### **Background**

**21** The Commission observe in the course of their report that Scots law lacks a specific process for the authorisation of measures to prevent a patient from leaving a hospital where this is required to keep them safe during and after treatment for physical health problems.

**22** The report recognises that where adult is admitted to hospital for psychiatric treatment and is unable to consent, the 2003 Act can be used. It also recognises that section 47 of the 2000 Act authorises medical treatment which is intended to safeguard to promote physical or mental health but that this does not extend to authorising the use of force or detention , save in circumstances where it is immediately necessary.

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<sup>9</sup> Report para 4.42 to 4.56

<sup>10</sup> 2015 EWCOP (11 June 2015)

<sup>11</sup> Scottish Law Commission Report recommendation 1

23 In light of this the Commission recommended that an additional process be introduced to enable authorisation of any measure necessary to prevent an adult with incapacity from going out of a hospital unaccompanied.

24 The draft Bill provides for a process which will allow an adult with incapacity to be prevented from going out of the hospital or some part of the hospital whilst they are undergoing treatment or a period of assessment in relation to their physical health. It does so by amending the 2000 Act by the insertion of new sections 50A to 50C. **The full text of the draft bill is included at annex A to this consultation.**

### **KEY ISSUES: CERTIFICATION**

25 Draft section 50A of the Bill, seeks to address the situation where an adult who lacks capacity is required to be admitted to hospital for the assessment or treatment of a physical condition.

26 If the medical practitioner primarily responsible for the medical treatment or assessment in question is of the opinion that the adult is incapable of making a decision as to whether to go out of the hospital or not, the Bill proposes that the medical practitioner may authorise measures to prevent that patient from going out of the hospital , by way of a certificate.

27 The Commission envisage that the new authorisation process would be used where medical treatment is authorised by section 47 of the 2000 Act<sup>12</sup> although the bill is silent on this. Under section 47, where a medical practitioner ,or any of the other persons listed in the section are of the opinion that an adult is incapable in relation to a decision about medical treatment, they may issue a certificate to that effect .The certificate authorises the person specified to do what is reasonable in the circumstances in relation to the medical treatment in question, to safeguard or promote the physical or mental health of the adult for up to a year, or in exceptional cases three years. Medical treatment is defined as including any procedure or treatment designed to safeguard or promote physical or mental health.

28 The process outlined by the Commission in sections 50A to 50C of the draft Bill, extends only to doing what is reasonable to prevent the adult going out of hospital or a part of the hospital whilst treatment or assessment is on-going. Any use of force must be reasonable, immediately necessary and not inconsistent with any decision of a competent court<sup>13</sup> . The right to challenge, including an appeal relating to the use of medication is to the sheriff court.

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<sup>12</sup> Report para 5.5

<sup>13</sup> s50A(3) of the draft Bill

29 The duration of such authorisation is for as long as is necessary. There is provision at section 50B for review and revocation of the certificate, with the medical practitioner who issued the certificate required to keep the need for it under review and revoke if it is no longer necessary. Section 50C provides for the setting of an end date for the authorisation period.

### **Role of the welfare attorney or guardian**

30 If the adult in question has a welfare attorney or guardian, that person is not given any particular role in the process set out in the Commission's bill other than that they along with any other person claiming an interest in the personal welfare of the patient may apply to the court for a section 50A certificate to be reviewed. The Commission did not recommend involving attorneys and guardians in the process of authorising 'detention' in general hospitals because they were concerned that such involvement might undermine the delivery treatment. In so doing consideration was given to the delay that would occur if such a person had to be notified or if their consent was a requirement before a certain measure could be used to keep the patient safe. They therefore chose instead to confer rights of challenge for such people.<sup>14</sup> However nothing in the recommendations would prevent attorneys or guardians from providing support in any way.

31 The provisions in the bill would result in the need for 2 certificates to be issued by, in some cases the same person, in the event that a person is considered to be incapable of making decisions about medical treatment **and** requires to be prevented from leaving hospital. A certificate under section 47 of the 2000 Act can be issued by a medical or dental practitioner, an ophthalmic optician, or a registered nurse in circumstances where medical treatment is needed for an individual who is incapable of making decisions about treatment. If that treatment warrants a stay in hospital, a further certificate under section 50A of the bill may be required. This can only be issued by a medical practitioner. These certificates could be different in duration and in particular the new provision within the bill could allow a person to be detained within hospital for an unspecified period of time, albeit with provision to set an end date for the exercise of authority.

32 As the Commission's bill seeks to amend the existing 2000 Act, the principles underpinning that Act would apply to any intervention taking place under the provisions of the draft bill, should that be enacted. The function of the principles is to ensure that any intervention taking place under the 2000 Act is 'the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention'. The principles also include taking account of the views of any guardian

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<sup>14</sup> SLC report para 5.31



or continuing or welfare attorney<sup>15</sup>. Any consideration of the bill should bear that in mind.

## **QUESTIONS RELATING TO THE DRAFT BILL PROVISIONS ON HOSPITAL SETTINGS**

**1. Is a process (beyond the process of applying for guardianship or an intervention order from the court) required to authorise the use of measures to keep an adult with incapacity safe whilst in a hospital?**

**Yes or No**

**Please provide an explanation for your answer.**

**2. Section 1 of the Commission's draft Adults with Incapacity Bill provides for new sections 50A to 50C within the 2000 Act, creating measures to prevent an adult patient from going out of hospital.**

**Is the proposed approach comprehensive?**

**Yes or No**

**Please provide an explanation for your answer**

**Are there any changes you would suggest to the process?**

**3. Please comment on how you consider the draft provisions would work alongside the existing provisions of the 2000 Act, in particular section 47 (authority of persons responsible for medical treatment) .**

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<sup>15</sup> ASP 2000 s1

## COMMUNITY SETTINGS

***The concept of significant restriction of liberty should be defined in a manner which , as far as possible, enable all those affected to measure the degree of restriction to which a person is subject in a straightforward manner<sup>16</sup>***

33 In common with hospital settings the Commission observed that Scots law does not have a specific process for the authorisation of deprivation of liberty for persons with incapacity. By ‘community settings’ the Commission mean care homes and other arrangements where people live in the community and in relation to which the State has some responsibility.

34 The Commission has drawn a distinction between the often temporary nature of hospital care and the longer term nature of care within the community and accordingly propose a different approach for persons within a community setting who may lack capacity and may require measures that could constitute deprivation of liberty, than that proposed for persons within a hospital setting.

35 The Commission’s bill creates a process whereby rather than define what may constitute a deprivation of liberty in this area, arrangements which significantly reduce the liberty of individuals , and for which the State has a degree of responsibility, must be authorised and may be challenged. <sup>17</sup>

36 Chapter 3 of the report details the responses the discussion paper<sup>18</sup> generated on the question of a definition of deprivation of liberty<sup>19</sup>. There was significant concern from respondents that attempts to define deprivation of liberty would be constrained by the changing flow of the jurisprudence in this area. Any definition would need to reflect that jurisprudence as it evolved, rendering it highly likely that the jurisprudence would make a definition outdated within a relatively short space of time.

37 The Commission has recommended the introduction of a ‘significant restriction of liberty’ which it considers would be more straightforward to apply than a definition of deprivation of liberty. They are of the view that distinction needs to be made between where a person should live and decisions as to the conditions that apply there.

38 The Commission have noted within the report that ‘the concept of significant restriction does not expressly match the concept of deprivation of liberty’<sup>20</sup>. But the

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<sup>16</sup> SLC report recommendation 8

<sup>17</sup> Section 1( 2) of the draft bill inserting new part 5A to the 2000 Act.

<sup>18</sup> Commission discussion paper on adults with incapacity.DP no 156

<sup>19</sup> Report para 3.22 – 3.38

<sup>20</sup> Report para 4.53

Commission further stated that they intend the description to catch the situations which would be regarded by the ECtHR as demonstrating a deprivation of liberty so that the lawful process required by Article 5 can be shown.

39 The proposal is that an adult will be deemed to be subject to significant restriction if more than one of the following measures occurs on a regular basis in respect of an adult who has been placed in a care home service or an adult placement service:

- The adult is not allowed to leave the premises unaccompanied
- The adult is unable by reason of physical impairment to leave the premises
- Barriers are used to limit the adult to particular areas of the premises
- The adult's actions are controlled whether or not within premises by the application of physical force, the use of restraints or ( for the purpose of such control ) the administration of medication.

40 Whether a statement of significant restriction is necessary or not is a decision for the relevant person in respect of an adult. The relevant person is defined as a care home manager if the person is in a care home, if not, a social worker who has been assigned responsibilities in relation to the care and supervision of the adult.

41 If the relevant person considers that the adult's needs are such that his or her liberty may be subject to significant restriction, but the adult is incapable of making a decision about the restriction, the relevant person must refer the matter to a medical practitioner to assess whether the adult is incapable or not.

42 If the medical practitioner is satisfied the adult is incapable, the relevant person must start an assessment of what measures are called for. During the period of assessment, which must be no longer than 28 days , the relevant person **may** place the adult under a level of significant restriction of liberty as is necessary to ensure the adult does not come to harm. This period of assessment may be extended for a further 28 days on one occasion only, if the relevant person considers it necessary for the purpose of the assessment.

43 Intimation of an assessment of incapacity must be made by the relevant person to the adult, any welfare guardian or attorney, named person, primary care and nearest relative of the adult. Each of these persons has a right to appeal the decision to place the adult under a level of significant restriction for the assessment period.

44 For an assessment as mentioned under paragraph 42, the relevant person must prepare a statement to be known as a statement of significant restriction (SSR), specifying the measures of restriction to which the adult is to be subject, and the reasons for those measures. The relevant person must obtain a report from a

mental health officer and a medical practitioner in respect of the SSR. For these purposes a medical practitioner must be either an approved medical practitioner in terms of the 2003 Act, a medical practitioner with expertise in care of the elderly, (but only if that practitioner is responsible for the medical treatment of the adult) and any other medical practitioner if they could be regarded as the most appropriate person to provide a report.

45 If there is disagreement about the SSR between the relevant person, and either of the report authors, attempt must be made to reach consensus. If that cannot be achieved the relevant person shall apply to the sheriff for a determination in respect of the SSR, and authorisation to implement the measures in the statement. But the sheriff must give the relevant person, the adult, any welfare attorney or guardian, and the authors of the reports the opportunity to be heard before any determination is made.

46 If there is agreement with the proposals contained within the SSR, then the relevant person must seek authorisation to implement the SSR from the adult's welfare attorney or guardian. If there is no such person, or if the attorney or guardian is unwilling to authorise the SSR, the matter must be referred to the sheriff for decision. In such circumstances the sheriff is to require the relevant local authority for the adult, to consider whether a guardianship order is necessary for the welfare of the adult and if so to apply for one.

47 The authorisation of the SSR may be appealed to the sheriff by the adult or any person having an interest in the personal welfare of the adult. The SSR may also be renewed, or varied to implement a further measure, with such changes open to appeal. SSRs must be intimated to and a copy delivered to the Mental Welfare Commission.

48 If an adult is in short term or respite care and the relevant person forms the view that the adult may require measures restricting liberty, and is incapable in relation to such decisions, the matter must be referred by the relevant person to a medical practitioner without delay. In this situation if the medical practitioner certifies that the adult is incapable the relevant person may introduce for a period of up to 28 days, measures restricting the adult's liberty that are immediately necessary for the safety of the adult. This 28 day period can be extended once and the matter can be appealed to the sheriff by the adult, any welfare guardian or attorney, named person, primary carer or nearest relative of the adult.

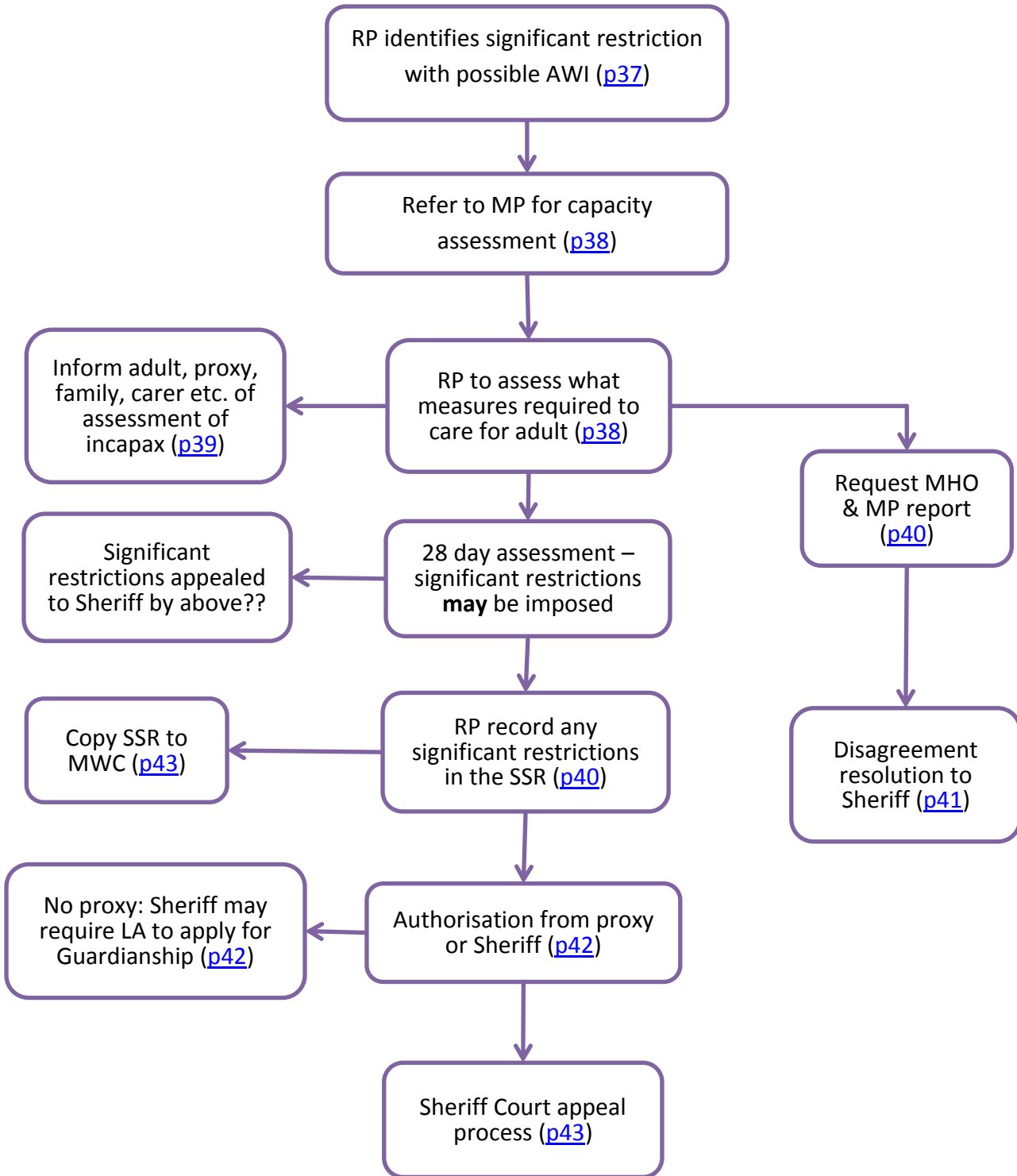
## **PERSONS SUBJECT TO OTHER ORDERS**

49 There are a number of persons across Scotland who are required to reside in a specified place because of either a community based compulsion order or a

supervision and treatment order under the Criminal Justice( Scotland) Act 1995<sup>21</sup>, or a community based compulsory treatment order under the 2003 Act. That legislation does not expressly authorise measures which amount to detention or deprivation of liberty in a community setting and the Bill is silent on whether the intention is for such persons to be included within the new processes for SSRs. Views are sought on this issue.

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<sup>21</sup> 1995 c.20



## Key

RP	Relevant Person (p36)	MWC	Mental Welfare Commission
MHO	Mental Health Officer	Proxy	Power of Attorney or Guardian
MP	Medical Practitioner (p40)	SSR	Statement of Significant Restriction (p40)
LA	Local authority	Pxx	Refer to relevant chapter in consultation document

50. As with the provisions relating to hospital settings , before determining its position on the detail of the Commission's recommendations in this area, the Scottish Government wishes to seek the views of stakeholders on the proposals . The proposals amend the existing 2000 Act, so again, as with the provisions relating to hospital settings, the principles contained within section 1 of the 2000 Act would underpin these new provisions. Consideration of the proposals must bear than in mind.

## **QUESTIONS RELATING TO THE DRAFT BILL PROVISIONS ON COMMUNITY SETTINGS**

**1 .Is a process required to authorise the restriction of an individual's liberty in a community setting (beyond a guardianship or intervention order), if such restriction is required for the individual's safety and wellbeing?**

**Yes or No**

**Please give an explanation for your answer**

**2. The proposed legal authorisation process will not be required for a person who is living in a care home where the front door is ordinarily locked, who might require seclusion or restraint from time to time.**

**Do you agree that the authorisation process suggested by the Commission should not apply here?**

**Yes or No**

**Please give an explanation for your answer.**

**3. In proposing a new process for measures that may restrict an adult's liberty, the Commission has recommended the use of 'significant restriction ' rather than deprivation of liberty and has set out a list of criteria that would constitute a significant restriction on an adult's liberty.**

**Please give your views on this approach and the categories of significant restriction.**

**4. The authorisation process provides for guardians and welfare attorneys to authorise significant restrictions of liberty. Do you have a view on whether this would provide sufficiently strong safeguards to meet the requirements of article 5 of the ECHR?**

**Yes or No.**

**Please give an explanation for your answer**

**5. The Bill is currently silent on whether it should be open to a relevant person to seek a statement of significant restriction in relation to a person subject to an order under the 1995 or 2003 Acts which currently do not expressly authorise measures which amount to deprivation of liberty. Please give your views on whether these persons should be expressly included or not within the provisions, and reasons for this.**

**6. The process to obtain a statement of significant restriction would, as the bill is currently drafted, sit alongside existing provisions safeguarding the welfare of incapable adults, and require the input of professionals already engaged in many aspects of work under the 2000 Act, such as mental health officers and medical practitioners. Please give your views on the impact this process would have on the way the Act currently operates.**

**If you do not agree with the approach taken by the Commission, please outline any alternative approaches you consider appropriate.**

## **POWER TO MAKE AN ORDER FOR CESSATION OF UNLAWFUL DETENTION**

51. The final substantive provision in the Commission's Bill is section 52J which allows for an application to the sheriff to bring to an end a detention within a care home or adult placement service. The Commission intends this section to apply to a situation where an adult who lacks, or may lack capacity to consent to their living arrangements is living in a care home or adult placement service which is not authorised by the 2000 Act or the 2003 Act and therefore might be considered unlawful.

52. The adult, or any person claiming an interest in the personal welfare of the adult may apply to the sheriff for an order ending the detention of the adult in the care home or adult placement service. The sheriff may only grant the order if satisfied that the adult is being unlawfully detained in the accommodation.

53. This section is intended to provide within the 2000 Act an equivalent to section 291 of the 2003 Act which allows for patients who have been admitted to hospital and are receiving treatment, but are not subject to any orders under the 2003 Act , to apply to the sheriff to end the placement in hospital.

## **QUESTIONS ON THE POWER TO MAKE AN ORDER FOR CESSATION OF UNLAWFUL DETENTION**



**Is a process required to allow adults to appeal to the Sheriff against unlawful detention in a care home or adult care placement?**

**Yes or No**

**Is the proposed approach comprehensive?**

**Yes or No**

**Are there any changes you would suggest?**

## **NEXT STEPS AND WIDER REVIEW**

**54. The Scottish Government is also currently consulting on the Draft Delivery Plan 2016-2020 United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). That plan includes the following commitment: -**

We will consult on the Scottish Law Commissions review of the Adults with Incapacity Act in relation to its compliance with Article 5 of the ECofHR, specifically in relation to Deprivation of Liberty and thereafter carry out a scoping exercise in relation to a wider review of the Adults with Incapacity legislation.

**All responses to this consultation will be carefully considered as part of the scoping process in relation to a wider review of Adults with Incapacity legislation . To further assist that process we would therefore welcome responses to the following questions:**

**1. Over and above the question of deprivation of liberty considered by the Commission do you believe the 2000 Act is working effectively to meet its purpose of safeguarding the welfare and financial affairs of people in the least restrictive manner?**

**Yes or No**

**Please give an explanation for your answer**

**2. If you have answered no, can you please suggest two or three key areas which any future wider review of the provisions of the 2000 Act might consider**

## **SUMMARY OF QUESTIONS**

### **QUESTIONS RELATING TO THE DRAFT BILL PROVISIONS ON HOSPITAL SETTINGS**

**1. Is a process (beyond the process of applying for guardianship or an intervention order from the court) required to authorise the use of measures to keep an adult with incapacity safe whilst in a hospital?**

**Yes or No**

**Please provide an explanation for your answer.**

**2. Section 1 of the Commission's draft Adults with Incapacity Bill provides for new sections 50A to 50C within the 2000 Act, creating measures to prevent an adult patient from going out of hospital.**

**Is the proposed approach comprehensive?**

**Yes or No**

**Please provide an explanation for your answer**

**Are there any changes you would suggest to the process?**

**3. Please comment on how you consider the draft provisions would work alongside the existing provisions of the 2000 Act, in particular section 47( authority of persons responsible for medical treatment) .**

### **QUESTIONS RELATING TO THE DRAFT BILL PROVISIONS ON COMMUNITY SETTINGS**

**1 .Is a process required to authorise the restriction of an individual's liberty in a community setting (beyond a guardianship or intervention order), if such restriction is required for the individual's safety and wellbeing?**

**Yes or No**

**Please give an explanation for your answer**

**2. The proposed legal authorisation process will not be required for a person who is living in a care home where the front door is ordinarily locked, who might require seclusion or restraint from time to time.**

**Do you agree that the authorisation process suggested by the Commission should not apply here?**

**Yes or No**

**Please give an explanation for your answer.**

**3. In proposing a new process for measures that may restrict an adult's liberty, the Commission has recommended the use of 'significant restriction' rather than deprivation of liberty and has set out a list of criteria that would constitute a significant restriction on an adult's liberty.**

**Please give your views on this approach and the categories of significant restriction.**

**4. The authorisation process provides for guardians and welfare attorneys to authorise significant restrictions of liberty. Do you have a view on whether this would provide sufficiently strong safeguards to meet the requirements of article 5 of the ECHR?**

**Yes or No.**

**Please give an explanation for your answer**

**5. The Bill is currently silent on whether it should be open to a relevant person to seek a statement of significant restriction in relation to a person subject to an order under the 1995 or 2003 Acts which currently do not expressly authorise measures which amount to deprivation of liberty. Please give your views on whether these persons should be expressly included or not within the provisions, and reasons for this.**

**6. The process to obtain a statement of significant restriction would, as the bill is currently drafted, sit alongside existing provisions safeguarding the welfare of incapable adults, and require the input of professionals already engaged in many aspects of work under the 2000 Act, such as mental health officers and medical practitioners. Please give your views on the impact this process would have on the way the Act currently operates.**

**If you do not agree with the approach taken by the Commission, please outline any alternative approaches you consider appropriate.**

## **POWER TO MAKE ORDER FOR CESSATION OF UNLAWFUL DETENTION**

**1. Is a process required to allow adults to appeal to the Sheriff against unlawful detention in a care home or adult care placement?**

**Yes or No**

**Please give an explanation for your answer**

**2. Is the proposed approach comprehensive?**

**Yes or No**

**Please give an explanation for your answer**

**3. Are there any changes you would suggest?**

### **NEXT STEPS/WIDER REVIEW**

**Over and above the question of deprivation of liberty considered by the Commission do you believe the 2000 Act is working effectively to meet its purpose of safeguarding the welfare and financial affairs of people in the least restrictive manner?**

**Yes or No**

**Please give an explanation for your answer**

**If you have answered no, can you please suggest two or three key areas which any future wider review of the provisions of the 2000 Act might consider**

## Responding to this Consultation

We are inviting responses to this consultation by 31/03/2016.

Please respond to this consultation online at <https://consult.scotland.gov.uk/integration-partnerships/report-on-adults-with-incapacity>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the close date.

If you are unable to respond online, please complete the Respondent Information Form (see “Handling your Response” below) and send to:

The Scottish Government  
Area GE 17, St Andrews House  
Edinburgh  
EH1 3DG

### Handling your response

If you respond using Citizen Space, you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

If you are unable to respond via Citizen Space, please complete and return the **Respondent Information Form** attached to the end of this document as this will ensure that we treat your response appropriately. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

### Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us.

### Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

The Scottish Government  
Area GE17, St Andrews House  
Edinburgh  
EH1 3DG

## **Scottish Government consultation process**

Consultation is an essential part the policy making process. It gives us the opportunity to get your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<http://ideas.scotland.gov.uk>)

After a consultation is closed we publish all responses where we have been given permission to do so.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.



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