Response ID ANON-7PY6-VVC1-P

Submitted to **Scottish Law Commissions Report on Adults with Incapacity**
Submitted on **2016-03-31 15:41:58**

Introduction

1 Are you responding as an individual or an organisation?

Organisation

2 What is your name or your organisation's name?

Name/orgname:
The Faculty of Advocates

3 What is your email address?

Email:
deans.secretariat@advocates.org.uk

4 The Scottish Government generally seeks to publish responses to a consultation, in summary and where possible in detail. We would like your permission to publish:

Your response along with your full name

5 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

Questions relating to the Draft Bill Provisions on Hospital Settings

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

Please provide an explanation for your answer.:
Yes. Steps amounting to de facto detention would likely be considered to amount to deprivation of liberty within the meaning of Article 5 ECHR. For reasons set out in the Commission's report, such deprivation of liberty would not be capable of authorisation under section 47 of the Adults with Incapacity (Scotland) Act 2000.
There clearly are circumstances where such steps require to be taken in the interests of patients. However, aside from the doctrine of necessity, it is not obvious what would or could currently authorise their being taken. In the Faculty's view, the Commission's reasons for not addressing this issue by way of guardianship and intervention orders are persuasive.

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

Please provide an explanation for your answer:
In the Faculty's view, the arrangements set out in the proposed new sections 50A to 50C represent a practical system for addressing the problems and issues identified.

Are there any changes you would suggest to the process?:
The Faculty observes that, if the proposed changes are implemented, it will be important to ensure that the appeal provided for in section 50A(6) is heard promptly by the sheriff in order to ensure compliance with Article 5(4). We consider that it may be preferable for this to appear in legislation to emphasise the importance of prompt compliance. Provisions to achieve that result could be made either in primary or subordinate legislation.

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) .

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) . :
It appears to the Faculty that the proposed new provisions ought to be capable of working effectively alongside existing provisions. It occurs to us that consideration should be given to the most appropriate design of form for the certificate to ensure compliance whilst keeping the administrative responsibility of medical practitioners within reasonable bounds, since there may well be cases where dual certification is foreseeable.

Questions relating to the Draft Bill Provisions on Community Settings

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

Please give an explanation for your answer:
Deprivation of liberty must be lawful. This carries with it the requirement that the rules which permit deprivation of liberty must be precise and accessible, and there must be procedural safeguards for those affected. These are not features of the law as it stands. The Faculty therefore agrees with the Commission that legislative provision is required for a procedure which has these features.

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

Please give an explanation for your answer.:
Yes, subject to qualification below.

The rationale of this proposal is that doors will very often be locked to prevent intruders, rather than to prevent the exit of all residents. It would be unfortunate and disproportionate if an authorisation process were required where there was no intention to confine an individual. The Faculty notes that the criteria in draft section 52A(1)(a) focus on the question of whether the individual can leave the premises. It agrees that this is an appropriate focus.
The Faculty notes that the measures set out in s52A(1)(a)-(c) will constitute a significant restriction of liberty only if they apply "on a regular basis". Where such measures, and the Faculty has here in mind particularly restraint and seclusion, are used on an intermittent basis or even "one-off" basis, rights under Article 8 ECHR are likely to be engaged even if rights under Article 5 are not. The character and duration of even a single intervention may determine which Article is engaged.

In many situations where seclusion or restraint takes place, there will already be a lawful basis for detention, and the question is as to the lawfulness of the further intervention. Examples are the removal from association of prisoners, and the use of seclusion or restraint on detained patients.

Interferences with Article 8 rights must be in accordance with the law, and those responsible for decisions to restrain or seclude should have clear and accessible policies in relation to the circumstances in which such decisions will be taken, and which require decisions to be proportionate. The Faculty suggests that there might be merit in including a provision specifically requiring relevant persons to produce such policies.

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. :
The Faculty supports the approach taken by the Commission. The question of what constitutes deprivation of liberty is not a straightforward one. The concept of significant restriction of liberty should capture the sorts of situations which engage rights under Article 5 ECHR, and may be a little broader, to the advantage of the person affected by the measures.

The focus on freedom to leave the premises is a correct one (section 52A(1)(a)). The Faculty agrees that it is important explicitly to include within the scope of the relevant procedural protections the category of person to whom subsection (1)(a)(ii) applies.

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?

Not Answered

Please give an explanation for your answer.:
The Faculty has the following reservations regarding this approach.

Section 52C (short term care) is broadly structurally analogous to the provision that is made for the short-term detention of persons with mental disorder under the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). The safeguards preceding the grant of authority for longer term restriction of liberty are also broadly similar, involving as they do the provision of reports by the Mental Health Officer and a medical practitioner. The structural analogy breaks down at the point when authority is sought for longer term restriction of liberty. Under the 2003 Act, at this point, the decision regarding detention would be one of an independent judicial body. Under the proposed legislation, there is no scrutiny by a court unless the relevant person and the authors of the reports have been unable to agree on the terms of the Statement of Significant Restriction (section 52D(7) and (8)).

Consideration should be given as to whether there would be scope for challenge under Article 5 read together with Article 14 ECHR. The 2003 Act and the proposed legislation both deal with restricting the liberty of persons with mental disorder. Some groups, and in particular (but not just) older people, are much more likely to be dealt with under the proposed legislation than under the 2003 Act. It might be suggested that there would be indirect discrimination involved in affording the protection of independent judicial scrutiny to one group of persons with mental disorder rather than the other. The Faculty does not express a view on the merits of such a challenge were it to be made, but regards a challenge along these lines as foreseeable.

In the consultation on the Discussion Paper that preceded the SLC Report, the Faculty expressed the view that the authority of a court should be required for deprivation of liberty. It remains of that view in relation to significant restriction of liberty.

On the premise that a substitute decision-maker might be vested with the power to authorise significant restriction of liberty, the Faculty is concerned also about the effect of section 52E(3), and in particular the respect afforded by it to the autonomy of the adult. A particular difficulty arises in relation to powers of attorney drafted and guardianship orders granted before the provisions come into force. Once drafters of powers of attorney and of writs seeking guardianship orders are aware of section 52E(3), it is reasonable to suppose that they will draft in the light of the provision. Granters of powers may specifically authorise welfare attorneys to make decisions regarding restriction of liberty, or specifically exclude such powers. The Faculty here refers to its earlier comments regarding the desirability of express recording that each party has received legal advice where a power of this sort is granted.

Similarly, in guardianship cases, powers may in the future be sought, which may or may not be granted by the sheriff. It would be open to sheriffs to grant powers specifically excluding the power to restrict liberty if so advised. Most orders are in practice at present likely to be expressed in positive, rather than negative, terms.

It is therefore likely that there will be many existing orders and powers which make no express provision that the welfare attorney or welfare guardian should not have power to authorise restriction of liberty.

Where there is an existing guardianship order, it is not clear why an additional power should not be sought from the sheriff in this regard.

The Faculty acknowledges that where a power of attorney is at issue, the effect of requiring someone to seek an order from the sheriff is to bring a matter into court which has not otherwise been the subject of proceedings but regards that as preferable to a provision which effectively deems a granter to have given a power to the attorney which he has not.

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.:
The Faculty is strongly of the view that the problem identified here requires a solution in legislation. The 1995 Act (so far as concerned with mental disorder) and the 2003 Act authorise detention only in hospital. Other orders are community-based and do not authorise detention, although they may include a requirement as to where a person resides. This presents real difficulties in relation to some patients and their moving from hospital to a community setting. The difficulties arise where a patient can be accommodated in a community setting but cannot, for his safety or the safety of others, be allowed to leave the accommodation without supervision. That is sometimes the position in relation to mentally disordered offenders, whose risk can be managed outwith a hospital, but not without deprivation, or at least significant restriction, of liberty. The problem is not confined to forensic patients, but is probably more acute in that context. It is essential that there is provision within the law to allow this to happen. In some circumstances it is the least restrictive option available for the patient, and the legislation in its current state may be a barrier to lawful provision of the necessary care and treatment in an appropriate setting.

The Faculty has reservations about trying to resolve this in the context of the amendment to the 2000 Act. It is anomalous to transfer safeguards for patients who are otherwise able to access and who are subject to the jurisdiction of the Mental Health Tribunal for Scotland to another jurisdiction. It is not entirely clear what is proposed here. Would the Statement of Significant Restriction be subject to approval by a sheriff? If so, it is not obvious why the sheriff should have the jurisdiction, rather than the tribunal. Is it envisaged that in this context also the guardian or welfare attorney of a patient might become involved? Again, it is difficult to see such a process as other than highly anomalous in a regime whereby all authorisations for long term detention are made in the first instance either by a criminal court or by a tribunal, and extensions are subject to review by the tribunal.

The better solution would be to amend the 2003 Act so as empower courts and tribunals to make orders which permit significant restriction of liberty within settings other than hospital settings. The tribunal should be empowered to vary existing orders to that end, in the context of all the principles applicable to decision making under the 2003 Act. Applications for variation of existing orders could be brought by relevant persons, and other specified persons. Consideration would have to be given as to integrating orders of this sort into the regime for patients subject to a restriction order, and as to how they might fit into the arrangements for conditional discharge.

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.:
In answer to the “Next Steps”/”Wider Review” question below, the Faculty makes certain observations about the demands on mental health officers, and refers to that answer. Otherwise, we do not consider that the nature of the work carried out by members of Faculty provides a sufficient basis for giving a view on this matter.

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

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Power to make 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

Please give an explanation for your answer.:
Yes. A process is required, and the question supplies the premise for the process, namely the detention of an adult in circumstances which are arguably unlawful. Article 5 ECHR requires some form of judicial determination of the question.
In the Faculty's view, the sheriff court would be the appropriate forum. It does of course already exercise the existing Adults with Incapacity Act jurisdiction, but more pertinently in the context of arguably unlawful detention, the sheriff court already has a range of powers available to it to deal with enforcement and sanctions for non-compliance.

Is the proposed approach comprehensive?

Not Answered

Please give an explanation for your answer:

Are there any changes you would suggest?

Are there any changes you would suggest?:
We take these questions together.

On balance, we consider that the approach proposed in draft section 52J is satisfactory subject to one issue which we suggest requires to be clarified. We agree with the underlying policy mentioned in paragraph 53 of the consultation of providing an equivalent recourse to that contained in section 291 of the Mental Health (Care and Treatment)(Scotland) Act 2003 for informal patients in hospital. There is one point which arises from that. We note that draft section 52J provides that the adult "or any person claiming an interest in the personal welfare of the adult" may make the application. While that is plainly intended to be broadly applied, we suggest that there may be merit in identifying specific persons as well as having the broad classification. Section 291 provides a model. The point of doing so, we suggest, would be to emphasise that there are a number of potentially interested persons, such as relatives, care-givers or social workers.

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

Please give an explanation for your answer:
Overall, our answer to the question of whether the 2000 Act is working effectively in safeguarding the welfare and financial affairs of people is a qualified yes.

From members practising in this area, we are aware of severe and growing pressure on resources. This is particularly evident in relation to the time taken to appoint an MHO and to obtain MHO reports in support of guardianship applications in a number of local authority areas. Section 57(4) of the 2000 Act requires notice to be given by any person proposing to seek the appointment of a guardian to the chief social work officer of the local authority, and for an MHO to be appointed and to report within 21 days. That timescale is frequently not observed, and while it might just be acceptable if a practical solution involving a recognised and maintained longer period were adopted, that is not in our experience the case. We are aware of a number of instances where it has been a number of months before an MHO has been appointed and thereafter has reported. In the meantime, of course, the guardianship application is unable to progress. From contacts amongst practitioners, our impression is that this is not an isolated problem.

A second area which seems to us worthy of further consideration is the question of the overlap with the 2003 Act. There are plainly some individuals the nature of whose condition is such that they may potentially fall within the scope of the 2000 Act and the 2003 Act. We have already alluded to the potential problems in connection with deprivation of liberty in the community in the context of community-based CTOs as these are presently framed. In our view, the Scottish Government will wish to be satisfied that broadly equivalent rights and protections are in place under both regimes. There is at least a possibility that there may be a problem of indirect discrimination which might trigger claims arising under Art 14 ECHR.

The Scottish Government will be aware that a number of issues arising from the UN Convention on the Rights of Persons with Disabilities are controversial, in particular the debate around assisted and substituted decision making. While supporting the general aim of the Convention, we entertain doubts about the soundness of some aspects of the General Comments published by the UN Committee on Rights of Persons with Disabilities. Having regard to the nature of some types of mental disorder and many types of incapacity falling within the 2000 Act, it seems to us that some sort of process-based decision taking is necessary and inevitable. That appears to be at odds with the direction of some of the discussion in the General Comments. We would welcome the opportunity to participate in consultation on any broader work which the Scottish Government may undertake in this area.

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

Suggestion::

Suggestion::

Suggestion::

Would you like to upload any supporting documentation?

File Upload:
No file was uploaded

Evaluation

7 Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:
Neither satisfied nor dissatisfied

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using Citizen Space to respond to consultations?:
Neither satisfied nor dissatisfied

Please enter comments here.: