Response by Sheriffs' Association to the Scottish Government Consultation on the Scottish Law Commission Report on Adults with Incapacity and Deprivation of Liberty

The Scottish Law Commission produced a report in October 2014. That report focused 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. The Scottish Government thereafter produced a Consultation Paper seeking 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. There are a number of questions contained within the consultation. The Association answers these questions as follows:-

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 hospital?

2. RESPONSE

   The Association response is to answer this question Yes.

   Article 5 of the European Convention on Human Rights prohibits detention without proper process of law. The Supreme Court of the UK in *P v Cheshire West* concluded that there is a deprivation of liberty for the purposes of article 5 when a person is under continuous supervision and control and is not free to leave and that the person lacks capacity to consent to these arrangements. It is clear therefore that to comply with article 5 a process is required to authorise continued detention.

The Scottish Law Commission in its report makes it clear that people are being confined to hospital wards without any underlying legal process. This is particularly the case in relation to treatment for physical illness or the need to safeguard physical health as a consequence of dementia or other cognitive impairments. Despite the benevolent motivation underlying such measures, this appears to the Commission to be *de facto* detention, therefore incapable of authorisation under Section 47 of the 2000 Act.

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

   Is the proposed approach comprehensive?

   RESPONSE

   The Association answers this question with a qualified Yes.

   Paragraph 50A is headed "Measures to prevent adult patients going out of hospital". That provides authorisation for the use of measures to prevent a patient going out of hospital unaccompanied whilst in the course of receiving medical treatment or undergoing medical assessment to establish if they need medical treatment. It covers short term absences as well as attempts to leave the hospital on a permanent basis. There is a procedure which requires to be gone through by a medical practitioner who certifies that these measures are necessary. That certificate conferring authority to prevent a patient going out of hospital only subsists for so long as the need for such preventive measures is manifest. That decision can be appealed by application to the Sheriff either by the patient or by any person claiming an interest in the personal affairs of the patient. In addition paragraph 50C provides a procedure whereby the certificate can be revoked. There is therefore a procedure for making the decision, appealing that decision, reviewing and revoking the certificate (paragraph 50B) and lastly setting an end date for the exercise of the authority conferred on the medical practitioner who has issued the certificate.

The Association is not clear that the proposed approach is comprehensive. What happens in a situation where a patient refuses a transfer to another hospital for specialised tests etc? These provisions would permit certification preventing that person leaving a particular hospital but would it allow someone not subject to a s47 certificate to be transferred against their will?

Whilst the Association recognises that in a hospital setting it is unwise to build in any delay to the necessary treatment which could be occasioned if intimation to a guardian or attorney was a requirement before the delivery of treatment, nonetheless the Association considers that there should be provision for notification to either the welfare attorney or the guardian as soon as reasonably practicable thereafter. If such parties have the right to challenge the decision making then they can only do so once they know of its existence.

4. 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).

RESPONSE

The Scottish Law Commission points out that part 5 of the Adults with Incapacity (Scotland) Act 200 Section 47(4) provides "(4) in this part "medical treatment" includes any treatment designed to safeguard or promote physical or mental health". However part 5 is directed to the provision of authority for the giving of medical treatment. It does not deal with arrangements that may be required to keep a patient safe while they undergo that treatment. In particular it is pointed out that section 47 of the 2000 Act does not permit the use of force or detention except for immediately necessary treatment and only for so long as necessary. The section 47 certificate therefore would not cover a situation where it is reasonable to prevent a person from leaving hospital for his/her own safety. If the person continually expresses a desire to leave or attempt to leave and has to be prevented from doing

so then the section 47 certificate would not give authority for that level of intervention. The Scottish Law Commission take the view that this new procedure would cover such a situation and complement section 47 of the 2000 Act accordingly. The Association agrees with this view.

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?

   The Association's answer to this is yes.

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?

   RESPONSE

   The Association's answer to this is yes.

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.

RESPONSE

The Scottish Law Commission states that it does not intend to try to fashion for Scotland a definition of deprivation of liberty in the context of incapacity. However it does recommend a new process to authorise arrangements which greatly reduce the liberty of individuals and for which the state has some responsibility. It recognises that the concept of "significant restriction" does not expressly match the concept of deprivation of liberty. One of the difficulties in defining deprivation of liberty can be seen in the deprivation of liberty safeguards (DoLS) in England which have been described as having the appearance of "bewildering complexity". The Scottish Law Commission has tried to avoid the twin difficulties of definition and procedural complexity which are the main explanations for the problems with the DoLs.

The Association's view is that the list of criteria set out in paragraph 52A of the draft bill are sufficiently flexible and workable. It provides for the interpretation of key terms in relation to restriction of liberty in certain care settings within the community namely care homes and then accommodation arranged by adult placement services. Subsection 1 of subsection 52A of the Draft Bill sets out 3 categories of restrictions. When two or more are in use on a regular basis, that would give rise to what is referred to as "a significant restriction of liberty". The key consideration according to the Scottish Law Commission is that their cumulative effect produces elements of confinement, seclusion and control to such a degree that article 5 is engaged. In the Association's view the criteria used are appropriate and proportionate.

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?

RESPONSE

The Association's response is yes.

The Scheme as proposed is that where a statement of significant restriction is drawn up for any person acting under a welfare power of attorney or a guardian with welfare powers should be able to authorise the implementation of the measures set out in the statement of significant restriction. What this means is that apart from the professionals who have drawn up the statement of significant restriction in addition those who hold a power of attorney or hold an appointment from the court will require to authorise the statement of significant restrictions.

In the Association's opinion this does provide significantly strong safeguards to meet the requirements of article 5 of the ECHR.

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.

RESPONSE

The Association understands the term "relevant person" which is used in a number of places in the Draft Bill to be a shorthand reference to the manager of the premises in which accommodation is or is to be provided or, in the absence of such a manager a social worker assigned to the adult. According to paragraph 52B of the Draft Bill if the relevant person forms a view that the adults needs may call for the adults liberty to be subject to significant restriction but that the adult is incapable in relation

to such restriction that relevant person must, without delay refer the matter to a medical practitioner. Thus it would seem that there is an obligation on the relevant person to refer the matter to a medical practitioner who is clearly the person who will make the judgement with regard to the adults needs, presumably in conjunction with opinion of the relevant person. It is only the medical practitioner who can certify the use of significant restrictions. In those circumstances it would seem unnecessary that the relevant person should himself or herself seek a statement of significant restriction.

This procedure seeks to innovate by inference upon mental health proposals made under the 1995 Act and those civil and criminal orders made under the 2003 Act. This raises questions about the interrelationship of these draft provisions and orders made under these Acts. If applicable to, say, civil compulsory treatment orders or compulsion orders out with hospital or conditional discharge of a restricted patient from hospital, all in terms of the 2003 Act there may be duplication of or conflict with the community based orders and the safeguards prescribed in the Act. These are not analysed in the consultation document or the Commission's report. As such there may be scope for confusion, as well as doubt over which court/tribunal provides any remedy available. Similarly the same problem may arise in relation to supervision and treatment orders made under the 1995 Act or Compulsion orders where the patient has been discharged by his RMO from hospital.

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.

RESPONSE

The Association's view is that mental health officers and medical practitioners are best placed to assess the needs and to ensure the safeguarding of vulnerable individuals. The Association recognises that the changes proposed will necessitate an increased number of applications to the Sheriff and hopes that the government is aware of the cost and resource implications of this.

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?

   RESPONSE

   The Association's views answer to this is yes.

   Article 5(4) of ECHR requires that anyone deprived of his/her liberty by detention is entitled to take proceedings whereby the lawfulness of the detention shall be decided by a court. If there is no appeal procedure how can the unlawful procedure be challenged? Clearly a process is required to allow adults to appeal to the Sheriff against unlawful detention.

2. Is the proposed approach comprehensive?

   The Draft Bill allows the adult or any person claiming an interest in the personal welfare of the adult to apply to the Sheriff for an order requiring the manager of the accommodation, or any person effecting

the detention of the adult in the accommodation to cease to detain the adult. In the Association's view nothing more is required.

3. Are there any changes you would suggest?

   RESPONSE

   The Association notes that paragraph 52E (12)(a) of the Draft Bill comes into play if, in terms of section 52E(1)(b) original welfare attorney or guardian with welfare powers from whom to "seek authorisation" or "if the attorney or guardian declines to grant authorisation". An attorney or guardian may decline to grant authorisation. The Association is surprised, in the event that an application then has to be made to the Sheriff for such authorisation, the Sheriff is not also explicitly provided with an option to decline to grant authorisation if she or he is not satisfied as mentioned in subsection (7)(b) but, it appears, is directed to make such modifications as necessary to enable them to be so satisfied. The question then arises as to what happens if the Sheriff takes the view that there should be no such intervention at all having regard to section 1.

   The Association appreciates that Section 52E(12)(a) provides that the Sheriff "may" take these steps then provided. But is that enough to enable the Sheriff to decline authorisation if not satisfied that there should be any such intervention at all? The Association notes that the Note to this section and the Draft Bill records "the Sheriff has two available options for disposal of the application". By contrast the Association notes that the proposed section 52E (12)(b) provides for a third option (to nullify the authorisation) if authorisation is granted under Section 52E(1)(e) by an attorney or guardian and this is appealed against.

NEXT STEPS/WIDER REVIEW

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?

   RESPONSE

   The Association takes the view that it is not appropriate to comment on the working of the 2000 Act beyond matters directly involving the Sheriff's input.