

DEPRIVATION OF LIBERTY: THE POSITION IN SCOTLAND

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I. INTRODUCTION

In Scotland, the principal legislation providing for adults who lack capacity is the Adults with Incapacity (Scotland) Act 2000. This Act was based on work by the Scottish Law Commission (SLC), culminating in the publication in 1995 of a Report on the topic.¹ In 2009, during a consultation to devise the SLC's eighth programme of law reform, representations were received suggesting inclusion of a project on deprivation of liberty in the context of adult incapacity.² Between 2010 and 2014, the SLC therefore undertook such a project. The central issue was whether people with cognitive disability who were considered to require restriction of their freedom of action for their own protection, but were unable to consent to such arrangements, were deprived of their liberty in terms of Article 5 of the European Convention on Human Rights when the arrangements were implemented and, if so, how such deprivations should be authorised.

In this article, I shall refer to 'Bournewood' or 'the Bournewood issue' as shorthand for the litigations which propelled the issue forward over the period 1997 to 2005, these being *R v Bournewood Community and Mental Health NHS Trust ex parte L*³ and *HL v UK*.⁴ I shall begin with the legal landscape in Scotland in relation to the Bournewood issue, both in terms of the legislation which governs decision-making and the case-law which has addressed the circumstances of specific individuals. I shall then chronicle the progress of the law reform project, and set out the recommendations made, with some explanation of the underlying thinking. Finally, I shall offer some reflections on the way forward in relation to these issues for people in Scotland.

II. INITIAL RESPONSE IN SCOTLAND TO BOURNEWOOD

If the formal response to Bournewood in England and Wales is seen as the introduction of the Deprivation of Liberty Safeguards by way of amendment of the Mental Capacity Act 2005, the initial response to Bournewood in Scotland was very different. The only alteration to Scottish legislation in relation to informal detention was the inclusion in the Mental Health Care and Treatment (Scotland) Act 2003 of section 291,⁵ which provides:

291 Application to Tribunal in relation to unlawful detention

(1) This section applies where, otherwise than by virtue of this Act or the 1995 Act, a person ("the patient")—

(a) has been admitted to a hospital; and

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¹ Scottish Law Commission, *Incapable Adults* (Scot Law Com No 151, 1995).

² The Eighth Programme can be viewed on the SLC website www.scotlawcom.gov.uk

³ [1999] 1 AC 458 (HL).

⁴ (2005) 40 EHRR 32.

⁵ At the time of introduction of the Bill, when the provision formed section 202, para 326 of the Policy Memorandum commented '(T)he Tribunal is, by way of section 202 of the Bill, given jurisdiction to consider applications by persons ("informal patients") in respect of whom no authority to detain applies but who may contend that they are *de facto* being unlawfully detained'.

(b) is being given treatment there primarily for mental disorder.

(2) A person mentioned in subsection (4) below may apply to the Tribunal for an order requiring the managers of the hospital to cease to detain the patient.

(3) On an application under subsection (2) above the Tribunal shall—

- (a) if satisfied that the patient is being unlawfully detained in the hospital, make the order mentioned in subsection (2) above; or
- (b) if not satisfied about the matter mentioned in paragraph (a) above, refuse the application.

(4) The persons referred to in subsection (2) above are—

- (a) the patient;
- (b) the patient's named person;
- (c) if the patient is a child, any person who has parental responsibilities in relation to the patient;
- (d) a mental health officer;
- (e) the Commission;⁶
- (f) any guardian of the patient;
- (g) any welfare attorney of the patient; and
- (h) any other person having an interest in the welfare of the patient.

(5) Subsection (2) above is without prejudice to any right that a person has by virtue of any enactment or rule of law.⁷

...

Had a person in the situation of HL been informally detained in hospital in Scotland for the purposes of medical treatment after the commencement of this provision, an order for release could therefore have been sought from the Mental Health Tribunal. In that no new mechanism was provided whereby a deprivation of liberty in the context of adult incapacity could be prospectively and specifically authorised, as appears to be required by Article 5, this was only a partial solution to the issue raised by Bournemouth. Although the case had not considered the situation in Scotland, the practical position was the same. Individuals who were compliant with, but unable to consent to, their living conditions were resident in secure psychiatric hospitals as informal patients, and people with dementia and other analogous conditions were living in nursing homes under private arrangements. Whether the gap in legislation generated litigation in Scotland in the aftermath of Bournemouth is therefore examined.

III. LITIGATION IN SCOTLAND

The first reported case in which the issue arose was *Muldoon, Applicant*.⁸ The applicant sought appointment as guardian to his mother, aged 77, who suffered from severe vascular dementia and was no longer capable of independent living or of managing her own affairs. She was living in a nursing home where she appeared to be content. The mental health officer opposed the appointment as not being the least

⁶ The Commission here referred to is the Mental Welfare Commission, first established for Scotland by section 2 of the Mental Health (Scotland) Act 1960 and given functions in relation to adults with incapacity by section 9 of the Adults with Incapacity (Scotland) Act 2000.

⁷ Only limited use has been made of this provision since its enactment; see Scottish Law Commission, *Adults with Incapacity* (Scot Law Com No 240, 2014) at para 3.64.

⁸ 2005 SLT (Sh Ct) 52. Other sheriffs followed the approach taken by Sheriff Baird in *Muldoon*: see, for example, *M, Applicant* 2009 SLT (Sh Ct) 185 (Sheriff I McDonald); *CJR Applicant*, Kirkcaldy, 27 February 2013 (Sheriff Thornton).

restrictive option, therefore not in conformity with the 2000 Act.⁹ The Sheriff appointed a safeguarder, in terms of section 3 of the Act, to report on the interests of the adult. The safeguarder instructed a report to be obtained by an independent social worker, who concluded that the least restrictive option would be an informal framework of care, which the adult was already enjoying. The Sheriff described the conclusion of the independent social worker as 'significant' and referred to it at length:

While noting her severely impaired capacity to make decisions, [the adult] was, [the safeguarder] said, "compliant" with the care provided and to remaining where she was. Although recognising the noble motivation of the applicant, he noted recent guidance from the Mental Welfare Commission for Scotland (Authorising Significant Interventions for Adults Who Lack Capacity August 2004), which suggests a selective approach towards incapable adults. He said he agreed with that in the case of the adult who was incapable and "compliant" (that word again — I will return to it) and believed that welfare guardianship was not necessary to ensure her health, care and welfare.¹⁰

The Sheriff was not persuaded however, that this was the correct approach. Standing the decision of the European Court of Human Rights in *Bournewood*, he considered that he had no alternative but to grant the guardianship application. He observed:

In other words, where the adult is compliant with the regime, but is legally incapable of consenting to or disagreeing with it, then that person is deprived of his or her liberty in breach of art 5 of the Convention, and that step should not be taken without express statutory [authority] governing it. ...

In the present case, the appropriate statutory intervention is a guardianship order under Pt 6 of the Act. I believe it will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.

I believe that the effect of my ruling in this case will be that in every case where a court is dealing with an adult who is incapable but compliant, the least restrictive option will be the granting of a guardianship order under the Act (assuming of course that all the other statutory requirements are satisfied), for that way only will the necessary safeguards and statutory and regulatory framework to protect the adult (and the guardian), come into play.¹¹

The sheriff did not make any assessment of whether, in terms of case-law from the European Court of Human Rights, the circumstances in the nursing home amounted to a deprivation of liberty, but advocated the appointment of guardians to all adults who were incapable of consenting to their care regimes.

In the wake of this decision, the Scottish Government issued guidance concerning the scope of the Act.¹² This guidance informed local authorities that the Scottish Government did not take the view that a guardian should be appointed in all cases where a move to residential accommodation was contemplated and the adult lacked capacity but was compliant. This divergence between the 'universal' and 'selective' approaches was the background against which the SLC's law reform project began.

⁹ One of the principles set out in s 1 of the Adults with Incapacity (Scotland) Act is that, once it has been determined that an intervention is to be made in the life of an adult, that intervention 'shall be the least restrictive option in relation to the freedom of the adult consistent with the purpose of the intervention': s 1(3).

¹⁰ 2005 SLT (Sh Ct) 52 at 54J.

¹¹ *ibid* at 58K - 59B.

¹² The guidance now appears as Annex 1 to the Adults with Incapacity (Scotland) Act 2000: Code of Practice for Local Authorities Exercising Functions under the 2000 Act, published on 1 April 2008.

IV. LAW REFORM PROJECT BEGINS

In addressing the Bournemouth issue in Scotland, the SLC followed its normal course for a law reform project: (internal) scoping paper in 2010; consultation through issue of a Discussion Paper, published in 2012;¹³ analysis of responses and preparation of (internal) policy paper in 2013 and publication of a report in 2014.¹⁴ At the outset, in 2010, an Advisory Group was formed, consisting of lawyers and other professionals working in the area. This group met regularly throughout the duration of the project and its members contributed to the analysis of the issue and the development of proposals for reform of Scots law.

It is relatively common for law reform in Scotland to take place in the aftermath of legislative change in England and Wales. The statute books yield examples of an Act for England and Wales followed a year or two later by another with (Scotland) in its title, sometimes containing provisions not so very different from what was in the English legislation.¹⁵ Since the reestablishment of the Scottish Parliament in 1999, that trend is probably less marked, but the phenomenon does still occur.¹⁶ There is even a term for such adaptation of legislation from Westminster – ‘putting a kilt on it’. With deprivation of liberty, however, the situation was different. By the time of the drafting of the Discussion Paper in 2012, it was apparent that there were significant difficulties with the operation of the Deprivation of Liberty Safeguards in England and Wales. It did not seem likely that they could be adopted, even with ‘kiltification’, in Scotland. The SLC therefore anticipated that a different approach would be needed. But the project team within the SLC realised early in its work that it was easier to criticise the safeguards than to fashion an alternative scheme.¹⁷

It was apparent from the outset that any scheme devised would have a potential reach that was extremely wide, both in terms of the number of individuals to whom it might apply and the range of settings in which it might operate. Insofar as definition was concerned, the Mental Capacity Act 2005 had simply provided that, for the purposes of the Act, ‘references to deprivation of a person’s liberty have the same meaning as in Article 5(1) of the Human Rights Convention’.¹⁸ In individual situations, it had thus been necessary to try to distil from the Strasbourg jurisprudence the essence of the concept of deprivation of liberty in European Human Rights law. Case-law in England and Wales had canvassed in detail features which were argued to be material in deciding whether or not deprivation of liberty was taking place.¹⁹ In particular, the relevance of reason, purpose and motive underlying the adoption of a particular regime had been debated. Comparison of the person’s situation with the

¹³ Scottish Law Commission, *Adults with Incapacity* (Scot Law Com DP No 156, 2012).

¹⁴ Scottish Law Commission, *Adults with Incapacity* (Scot Law Com No 240, 2014).

¹⁵ Such as the Mental Health Acts of 1959 and 1983, and the Mental Health (Scotland) Acts of 1960 and 1984.

¹⁶ For a rather arcane example, compare the Fur Farming Prohibition Act 2000 and the Fur Farming Prohibition (Scotland) Act 2002.

¹⁷ At para 4.30, the Discussion Paper observed ‘It is certainly evident on an examination of the Deprivation of Liberty Safeguards that they are complex and that the statutory material and supplementary code are voluminous. It is less evident how a simple scheme which meets the needs of those it is designed to safeguard and is easy to administer could be devised’.

¹⁸ Section 64(5).

¹⁹ At the outset of the SLC project, it was evident that the cases of *Surrey County Council v P* and *Cheshire West and Chester Council v P* would be significant, owing to the particular issues raised by the circumstances of the individuals who were the subjects of each litigation.

circumstances of 'an adult of similar age affected by the same condition or suffering the same inherent mental and physical disabilities and limitations' had also been mooted as a relevant exercise.²⁰

The SLC, however, was not persuaded that these features would offer a framework around which to devise a scheme for Scotland. The Discussion Paper suggested:

Were Scots law to develop provisions concerning deprivation of liberty which relied directly on concepts such as the purpose of a measure and the effect of a comparison with another person with similar disabilities in distinguishing deprivation of liberty from the provision of care, there would be a risk that such measures might not accord with Strasbourg case-law on Article 5.²¹

At the same time, the SLC recognised that human rights case-law does not prescribe a particular definition which Member States can simply copy out into domestic law. The Discussion Paper expressed the following view:

The task for member States may therefore be better seen as the development and maintenance of a system which meets the needs and respects the rights of those with incapacity in their own jurisdiction.²²

Thus, a central goal of the project was seen as the achievement of a scheme which was suited to people in Scotland.

V. GENERAL ASPIRATIONS

In planning for a scheme which was more straightforward to operate than the Deprivation of Liberty Safeguards, the SLC hoped to be able to include some definition of situations in which the scheme would apply, in contrast to the Mental Capacity Act 2005. At the outset, one feature which did appear to the project team to delimit the potential ambit of any scheme was the distinction between restriction of liberty and deprivation thereof. That there is a continuum between the two has often been remarked upon. The following passage, from the decision of the Grand Chamber of the European Court of Human Rights in the case of *Stanev v Bulgaria*, is typical:

115. The Court reiterates that the difference between deprivation of liberty and restrictions on liberty of movement, the latter being governed by Article 2 of Protocol No. 4, is merely one of degree or intensity, and not one of nature or substance.²³

In addition to definition, the other main area upon which much effort would clearly be required was the detail of any authorisation process. Whilst there was a desire to minimise what could be perceived as 'red tape' in an area that presented particular challenges of quality of care and allocation of resources, it was also recognised that

²⁰ Lord Justice Munby in *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257, [2012] PTSR 1447 at para 86.

²¹ Scot Law Com DP No 156, 2012, para 6.60.

²² Scot Law Com DP No 156, 2012, para 2.86.

²³ *Stanev v Bulgaria* (2012) 55 EHRR 22 at para 115. See also *Guzzardi v Italy* (1980) 3 EHRR 333 at para 93; *HM v Switzerland* (2004) 38 EHRR 17 at para 42; *HL v United Kingdom* (2005) 40 EHRR 32 at para 89; *Storck v Germany* (2006) 43 EHRR 6 at para 71; *Austin v United Kingdom* (2012) 55 EHRR 14 at para 57.

there would be some irreducible minimum as far as the content of an authorisation process was concerned.²⁴

By the time of beginning work on the policy paper and report in 2013, the appeals from the decisions of the Court of Appeal in the *Surrey* and *Cheshire West* cases had been set down for hearing in the Supreme Court. The project team attended the Supreme Court for the duration of the hearings, in October 2013. The scheme which was developed by the SLC, embodied in a draft Bill and explained in the Report, was informed by these cases and their adjudication, particularly where deprivation of liberty in community settings was concerned.

VI. COMMUNITY SETTINGS

As is well known, the decision of the Supreme Court in the appeals of *Surrey* and *Cheshire West* gave rise to 'the acid test' for deprivation of liberty in this context.²⁵ If a person was 'subject to continuous supervision and control and not free to leave', he or she would be regarded as deprived of their liberty.²⁶

Given the twin elements of the acid test, there must in theory exist individuals who are subject to continuous supervision and control but are also free to leave the premises they are in. Conversely, there must be those who are not free to leave, but are also not subject to continuous supervision and control.²⁷ It is very difficult, however, to formulate specific practical examples of such individuals. If it is not possible coherently to describe people or settings which are not included, then it is likely that, in practice, in a given situation, the test will be deemed to be met. When the penalty of erroneously determining that the test is not met is a breach of Article 5, error on the side of caution is to be expected.

Notwithstanding these difficulties, the SLC proceeded on the basis that the Supreme Court did not intend the test to apply to all those who were unable to consent to their circumstances in all situations. For day to day use, some more concrete version of the test, which could be applied directly by those working in social care, seemed to be required. Particular practical situations where deprivation of liberty needed to be addressed were focused by examining, firstly, how decisions are made about where a person without capacity has their home and, secondly, the conditions which restrict people in their daily life; in other words, the central questions of where people live, and how people live.

A. *Where people live*

'In proclaiming the "right to liberty", paragraph 1 of Article 5 is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person'. This

²⁴ Principally, the need for any deprivation of liberty to satisfy the criteria set out by the European Court of Human Rights in *Winterwerp v Netherlands* (1979-1980) 2 EHRR 387 at para 39.

²⁵ An acid test has been said to be 'a sure test, giving an incontestable result' - The Phrase Finder online dictionary: www.phrases.org.uk/meanings/acid-test.html accessed 1 August 2016.

²⁶ *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19, [2014] AC 896 [48], [54] (Lady Hale), [63] (Lord Neuberger), [87] (Lord Kerr).

²⁷ *ibid*, [49] (Lady Hale), rejecting the suggestion that supervision and control is subsumed by freedom to leave.

statement of the position, from *Engel v Netherlands*,²⁸ is the starting point for examinations of the right to liberty by the Strasbourg court. The Court also observed that '(i)n order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation'.²⁹

At the time when the SLC was formulating its proposals, the European Court of Human Rights had not found deprivation of liberty to exist simply from the fact of incapacity to reach a particular decision and its consequence that the matter will necessarily be resolved by someone else. As was observed by Parker J at first instance in the Surrey case, 'I do not accept that mere placement in a residential or domestic setting can be construed as creating confinement of itself just because the person cannot legally decide whether to remain there or not'.³⁰ But the SLC considered that compelling a person to live somewhere they did not want to be would be likely to involve an element of coercion or even detention. With the stated aim of meeting the needs and respecting the rights of people who lacked capacity in Scotland, it appeared right to attend to the need for process in such a situation. Determining a person's home is so important that, at least where there is dispute, involving the person or their family or friends, the decision should be taken by a court or a court-appointed substitute decision-maker.³¹

The SLC examined existing processes, and proposed that, with some modification, the current mechanism of the Intervention Order be used for the determination of where a person is to live. Only in cases of particular difficulty, as at present, is guardianship likely to be required.³²

B. How people live

In attempting to address deprivation of liberty arising from restriction in community settings, the SLC decided to cover all situations where a person is accommodated under arrangements made by the State, or in places subject to statutory inspection. This includes all care homes and adult placements. The draft Bill therefore provides that this part of the scheme applies where a person has been 'placed, by reason of ... vulnerability or need, in accommodation provided by (or as the case may be arranged for by) a care home service or an adult placement service'.³³

Given the emphasis by the European Court of Human Rights on deprivation of liberty being a matter of the concrete situation of the individual, it appeared to the SLC that there were people whose care arrangements in such locations involved such a high degree of restriction that they should be regarded as deprived of their liberty. The care arrangements of the individual at the centre of the *Cheshire West* case, which were highly intrusive, albeit necessarily so, had generated a unanimous finding in the Supreme Court that he was deprived of his liberty. It may be that, almost instinctively, the justices felt that the magnitude of intervention in P's life was so great that an

²⁸ (1979-80) 1 EHRR 647, at para 58.

²⁹ *ibid*, para 59.

³⁰ Discussed in Scot Law Com DP No 156, 2012, para 4.39.

³¹ See discussion of how these decisions may be reached in Scot Law Com No 240, 2014, paras 4.21 - 4.24 and 4.51.

³² *ibid*, paras 4.25 - 4.28.

³³ Scot Law Com No 240, 2014, draft Bill s 52A(3).

authorisation process was essential. Likewise, the SLC considered that care arrangements which involved a level of restriction above a particular threshold should be subject to an authorisation process. But capturing that threshold in legislation would not be easy.³⁴

It was readily apparent that the tethering of the definition of deprivation of liberty in the English and Welsh scheme to whatever the concept encompassed in Strasbourg jurisprudence from time to time had caused serious practical difficulty. It also appeared to necessitate detailed assessment of the circumstances of every individual potentially covered, and to lead to inconsistent outcomes around the country.³⁵ On the other hand, the rationale for the approach was self-evident – identification of deprivation of liberty under Article 5 depended on what the European Court of Human Rights had said it comprised, and any attempt to fix the concept in Scots law would run the risk of a mismatch.

The SLC concluded that the solution to this was to avoid using the term ‘deprivation of liberty’ in Scottish legislation and, instead, build on the idea of restriction to deprivation being a continuum, by trying to identify the threshold at which the transition occurs. So the concept of ‘significant restriction of liberty’ was fashioned, and defined. It was not intended to be broader than what the European Court of Human Rights would regard as deprivation of liberty, although it was considered that it would do no harm if protection were to be offered more widely than strictly required by Article 5. It was also fundamental to the SLC’s ethos throughout the project that there should be a scheme tailored to circumstances in Scotland. In this regard, an observation made by a respondent to consultation concerning the need to attend to risks of inappropriate and excessive restraint, seclusion and sedation, was influential.³⁶ Finally, to assist those working in social care, the SLC aimed to create something measurable.

In preparing draft amendments to the Adults with Incapacity (Scotland) Act 2000, the SLC endeavoured to utilise the acid test set out in the *Cheshire West* decision. The composite element represented by the twin notions of lack of freedom to leave and subjection to supervision and control was reflected by providing for the regular use of any two of a list of three types of restrictive measure. The expectation was that, in practice, restriction of freedom to leave would be present in all situations where a person was significantly restricted; the triggering of the need for authorisation would therefore derive from the adoption of one of the other types of restriction on top of control of egress.

Elaborating the notion of freedom to leave was challenging. There is a difference between freedom to leave as a matter of law and such freedom as a matter of fact. ‘Leaving’ could be in the sense of going out to buy something from a nearby shop, or ‘in the sense of removing himself permanently in order to live where and with whom

³⁴ Consultation had generated responses suggesting, variously, that any definition be contained in guidance, legislation or both. The SLC concluded that legislation was the appropriate vehicle: Scot Law Com No 240, 2014, paras 3.37 - 3.38 and 4.55.

³⁵ Research by the South London and Maudsley NHS Foundation Trust using real-life examples revealed little agreement in the application of the test amongst lawyers, psychiatrists, Independent Mental Capacity Advocates and Best-Interests Assessors: Cairns et al, ‘Judgements about deprivation of liberty made by various professionals: comparison study’ (2011) 35 *The Psychiatrist* 344.

³⁶ Scot Law Com No 240, 2014, para 3.28.

he chooses'.³⁷ One could further probe the extent to which these different senses are mutually exclusive or overlapping. Such analysis would not necessarily advance the search for a workable solution. The SLC decided to take as simple an approach as possible, partly because it seemed that when the European Court of Human Rights referred to 'freedom to leave' it meant something quite basic: can the person go out at will?³⁸ This probably reflects freedom as a matter of fact, and leaving in the sense of going out of the main door. Accordingly, the first element included in the SLC definition of significant restriction of liberty was that the person:

(a) (i) is not allowed, unaccompanied, to leave the premises in which placed.³⁹

Some individuals who live a restricted life are not prevented from leaving a building by a locked door, because physical disability prevents them from being able to make the attempt. The SLC did not wish that to operate as a practical restriction which would escape regulation, so added as an alternative that the person

(ii) is unable, by reason of physical impairment, to leave those premises unassisted.⁴⁰

Next, the SLC endeavoured to capture the idea of 'subject to continuous supervision and control'. This appeared to relate to how the person's actions are regulated. It could encompass physical measures within premises, or control directly imposed on the person, including by medication. The second and third elements of the definition were, therefore, that

(b) barriers are used to limit the adult to particular areas of those premises,

(c) the adult's actions are controlled, whether or not within those premises, by the application of physical force, the use of restraints or (for the purpose of such control) the administering of medication.⁴¹

C. Factors omitted

In relation to the presence of barriers in particular, the SLC recognised that there could be an overlap between these provisions and rules designed to exclude residents from areas of the premises for safety reasons. The draft Bill therefore included an exemption for what might fairly be described as 'house rules'.⁴²

Another aspect of a person's life which may be relevant in an assessment of deprivation of liberty is the matter of social contact.⁴³ It is possible for those

³⁷ *Cheshire* (n 25) at [40], under reference to Lord Justice Munby in *JE v DE and Surrey County Council* [2006] EWHC 3459 (Fam), [2007] 2 FLR 1150. Practical application of this formula is not straightforward. Residential care may be the only option for an individual when a spouse can no longer care for them; in such a situation, the choice to live with a particular person may not be reciprocal. Whether a person in that situation has 'freedom to leave' in the *JE* sense is difficult to answer.

³⁸ See, for example, *Stanev* (n 22) at para 128: 'free to leave the home without permission whenever he wished'.

³⁹ Scot Law Com No 240, 2014, draft Bill section 52A(1)(a)(i).

⁴⁰ *ibid*, draft Bill section 52A(1)(a)(ii).

⁴¹ *ibid*, draft Bill section 52A(1)(b) and (c). Restraint specifically includes special clothing, but not devices solely to protect against falling, like lapbelts and bedrails (section 52A(4)(b)).

⁴² *ibid*, draft Bill section 52A(2), explained at para 6.27 of the Report.

⁴³ *Chosta v Ukraine* App no 35807/05 (ECtHR, 14 January 2014), where the court observed that in identifying deprivation of liberty, 'relevant objective factors to be considered include the possibility to leave the restricted area, the degree of supervision and control over the person's movements and the **extent of isolation**' (emphasis added).

responsible for the management of premises to take the view that a person who lives there should not have contact with another individual, perhaps a member of their family or a previous associate. The subjective motivation behind the imposition of such restrictions will be positive – the third party is perceived to have a detrimental effect or even to pose a risk of harm to the person living in the premises. But integral to all the Care Standards applying to the sorts of regime addressed is the principle that contact with friends and family is encouraged. The SLC did not want, even by implication, to compromise the primacy of the aim of maintaining social contact. It was also obvious that the rights of the other party to the prospective communication were involved.⁴⁴

This omission from the SLC scheme did not reflect a view that such matters as restriction of contact or communication would be irrelevant to the assessment of whether deprivation of liberty had occurred. From the decisions of the European Court of Human Rights, it was plain that such restrictions would be relevant matters in any such assessment. Rather, the position was premised on the SLC's view that such matters should not be covered in this authorisation scheme, for the reasons explained above. Scotland already has legislation which can be used to restrict contact perceived to be detrimental to a vulnerable adult.⁴⁵

Lastly, it was also decided not to include a 'catch-all provision', of the nature of 'any other restriction applied to the person concerned', on the basis that clarity and certainty were important goals of the scheme. These would be diminished were such generalised wording to be included.⁴⁶

D. Process

Insofar as the process which would operate was concerned, the SLC derived assistance from the work of the Victorian Law Reform Commission in Australia.⁴⁷ The Commission had addressed deprivation of liberty in the context of adult incapacity, and had devised a process of 'collaborative authorisation' involving the manager of the premises where the person lives, a medical professional and the person's healthcare decision maker according to domestic law.⁴⁸ Adapting this to Scotland, the SLC devised a process requiring preparation by the manager of premises, or the person's social worker, of a statement of measures sought to be implemented. The Statement of Significant Restriction is at the heart of the proposed scheme. It is intended as a document which is served on those with an interest in the person's welfare, scrutinised during the authorisation process and available when premises are inspected or the person is visited by those with a monitoring role, such as the Mental Welfare Commission.

Reports addressing the proposed measures must be obtained from a medical practitioner and a mental health officer.⁴⁹ Built in to the scheme are provisions designed to achieve consensus among this group if at all possible. If, and only if, there is unanimity about the need to impose the restrictions in the statement, authorisation

⁴⁴ Scot Law Com No 240, 2014, paras 6.17 - 6.25.

⁴⁵ Adult Support and Protection (Scotland) Act 2007.

⁴⁶ Scot Law Com No 240, 2014, para 6.26.

⁴⁷ Victorian Law Reform Commission, Report on Guardianship (2012).

⁴⁸ *ibid*, paras 15.133 - 15.156.

⁴⁹ Scot Law Com No 240, 2014, paras 6.32 - 6.37; draft Bill section 52D.

could be by a person holding a welfare power of attorney or by a guardian with welfare powers.⁵⁰ If there is no such person, or if they decline to grant authorisation, and in situations where there is dissent among the authors of the reports, then the matter will have to be referred to the sheriff.⁵¹

Procedure in an application to the sheriff will be by summary application, all as governed by the rules specific to adults with incapacity. Service upon a wide range of individuals and bodies would be required, and a hearing would need to be fixed.

In recognition of the requirements of Article 5(4) of the Convention, the SLC also proposed that there should be rights of challenge and of appeal. The use of two distinct terms reflects the potential for authorisation by a substitute decision-maker (either a person holding a welfare power of attorney or a guardian with welfare powers), challenge of whose decision might not, strictly, be described as an appeal. The potentially problematic characterisation of such an authorisation is discussed below. Under the SLC scheme, challenge of such an authorisation would be by application to the sheriff, and could be made either by the adult or by any person having an interest in the personal welfare of the adult.⁵² Where authorisation to implement restrictions has been granted by the sheriff, appeal would be to the sheriff principal in accordance with section 2 of the Adults with Incapacity (Scotland) Act 2000.

Were the scheme to be implemented, then for all such appellate steps but particularly in relation to challenge or appeal by the person themselves, specific practical arrangements would need to be made for the provision of advocacy services and legal advice and assistance, including legal aid, to render the rights conferred both practical and effective, as required under ECHR.⁵³

Insofar as authorisation by a substitute decision-maker is concerned, questions necessarily arise about the required content of a guardianship order or power of attorney document.⁵⁴ More specifically, should an express power to authorise restriction, even of such intensity as to be tantamount to deprivation, be indispensable? The SLC devoted much consideration to this point. Ultimately, the view was taken that this was a matter of interpretation: the nature of what was proposed for the person, rather than any particular label for such measures, would need to be examined and the appointing order or document interpreted to assess whether sanctioning of the proposals was within the powers granted to the decision-maker. It was, however, anticipated by the SLC that this aspect would generate debate in the course of consideration of the scheme and any further consultation thereon.

Once authorisation has been granted to implement significant restriction of liberty, whether by a person holding a welfare power of attorney or by the sheriff, the proposed

⁵⁰ Scot Law Com No 240, 2014, para 6.38; draft Bill section 52E(2).

⁵¹ Scot Law Com No 240, 2014, para 6.40; draft Bill section 52E(1)(b).

⁵² Scot Law Com No 240, 2014, para 6.41 to 6.43; draft Bill section 52E(9).

⁵³ See, for example, dicta regarding the need for a remedy to be available not only in legislation but also in practice: *MH v UK* (2014) 58 EHRR 35.

⁵⁴ Scot Law Com No 240, 2014, para 4.61.

scheme provides that the authorisation, together with a copy of the Statement of Significant Restriction, must be intimated to the Mental Welfare Commission.⁵⁵

E. 'Valid replacement'

Inclusion, in a limited category of cases, of the possibility of authorisation by a person acting under a welfare power of attorney was considered by the SLC to reflect the autonomy the person had exercised when choosing a substitute decision-maker.⁵⁶ As already noted, the scheme also provides that, in some situations, a guardian with welfare powers may authorise significant restriction of liberty. How authorisation by a substitute decision-maker should be analysed in terms of Strasbourg jurisprudence may be debatable: the second or subjective element in the concept of deprivation of liberty is that the person has not validly consented to the measures imposed. In the *Stanev* case, it was suggested that the wishes of a person with incapacity may 'validly be replaced' by those of another person.⁵⁷ As a matter of logic, that suggests that, where measures are authorised by a person acting under a welfare power of attorney or a guardian with welfare powers, the subjective element in deprivation of liberty does not exist – in other words, there is consent to the measures, therefore no deprivation of liberty.

The SLC did not consider that this isolated statement by the European Court of Human Rights provided sufficient authority for the proposition that, in such circumstances, no deprivation of liberty under Article 5 existed. The proposals were therefore drafted on the basis that if such authorisation by a welfare power of attorney or guardian with welfare powers is to be an element of the scheme, it should be viewed as equivalent to an administrative process and, therefore, one requiring access to a court under Article 5(4) to be provided.⁵⁸

F. Duration of authorisation

The scheme provides that any authorisation will last for a period of one year after the date on which the authorisation is obtained.⁵⁹ This is the case whether the authorisation is granted by the sheriff, or by a substitute decision-maker. A renewal process is set out in the draft Bill. Preparation of the same range of reports and adjustment of the terms of the Statement of Significant Restriction amongst participants is provided for in like manner to the original authorisation process.⁶⁰

VII. HOSPITALS: PHYSICAL HEALTHCARE

The SLC also made recommendations in relation to treatment as a hospital in-patient. Part 5 of the Adults with Incapacity (Scotland) Act 2000 sets out the mechanism by which the requisite authority for medical treatment is obtained where an adult patient is unable to consent themselves to such an intervention. There are however no provisions enabling the adoption of measures to prevent an adult who lacks capacity

⁵⁵ Draft Bill, section 52I.

⁵⁶ Scot Law Com No 240, 2014, para 4.59.

⁵⁷ *Stanev* (n 22) para 130.

⁵⁸ *ibid*, para 3.59.

⁵⁹ Scot Law Com No 240, 2014, para 6.44; draft Bill section 52E(13).

⁶⁰ Scot Law Com No 240, 2014, para 6.44; draft Bill section 52G.

from leaving the hospital premises. Such measures are already being adopted in the course of physical healthcare and the SLC recommended that provisions sanctioning that course of action and affording rights of challenge should be introduced. This is all set out in Chapter 5 of the SLC report, and only a brief overview is provided here.

The SLC considered that a process which was simpler than that proposed for community settings was required for physical healthcare situations. By their nature, admissions to hospital are likely to be short-term; it is contrary to Scottish Government policy for any person to have a hospital as their home.⁶¹ There is likely also to be a degree of urgency in most cases, even if the situation does not constitute a medical emergency.

The first step in the SLC's suggested process requires an assessment of the person's capacity to decide whether or not to leave the hospital. If the person is found to lack such capacity, reasonable steps may be taken to prevent them from leaving. Rights of appeal are conferred on the patient, and on anyone claiming an interest in their personal welfare.⁶²

The question of duration of such authority generated difficulty, with a number of different practical problems envisaged. The person's condition may fluctuate. Or there may be difficulty in finding a place to which they can be discharged and, although their medical treatment has concluded, they need to remain in hospital and to be kept safe within the hospital premises. It did not appear likely that selection of a fixed number of days would cover all eventualities. For this reason, the proposed statutory scheme allows restrictions to be imposed for so long as the need for them is 'manifest'; application of this criterion will be for the courts on a case by case basis. The scheme also confers a right to apply to the sheriff court for the sheriff to set a date beyond which there is to be no authority to continue to impose such restrictions.⁶³

VIII. RELEASE PROVISION FOR OTHER PREMISES

Finally, the SLC recommended the introduction of a provision mirrored on section 291 of the Mental Health (Care and Treatment) (Scotland) Act 2003 but applicable in premises other than a hospital, to permit an adult who is in informal detention to obtain an order for release. At common law, such release may currently be available through Judicial Review, but that procedure is confined to the Court of Session; the proposed new provision should offer a remedy that is more straightforward to obtain.⁶⁴

Under the proposed procedure, an order may be made for the release of any adult accommodated under arrangements made by the State, or in premises subject to inspection.⁶⁵ Proof of incapacity is not required: the provision applies where an adult is, or may be, incapable.⁶⁶ Application to the sheriff may be made by the adult, or by

⁶¹ Scot Law Com No 240, 2014, para 5.3.

⁶² Scot Law Com No 240, 2014, draft Bill at section 50A.

⁶³ The provisions were informed by features of the existing Scottish schemes in relation to detention under the public health legislation and for seeking a declaration of excessive security under the Mental Health (Care and Treatment) (Scotland) Act 2003; see further discussion at paras 4.30 - 4.38 and 5.19 - 5.24 of the Report.

⁶⁴ Chapter 7 of the Report.

⁶⁵ Scot Law Com No 240, 2014, para 7.2; draft Bill at section 52J(1).

⁶⁶ *Ibid.*

any person claiming an interest in the personal welfare of the adult.⁶⁷ If the sheriff is satisfied that the person is being detained unlawfully, they must grant an order requiring the cessation of detention.⁶⁸ The mandatory nature of the provision could create practical difficulties in the event that the adult has immediate care needs. The SLC anticipated that, in such a situation, consideration would be given to the use by the sheriff of the powers under section 3 of the 2000 Act, to make an appropriate consequential or ancillary order, provision or direction.⁶⁹

IX. CONCLUSION

This project was directed towards remedying a gap in Scots law. As it progressed, profound questions about the nature of the law reform task emerged. Was the project about more than simply addressing that deficiency, more than achieving formal compliance with Article 5? Could any changes that might be proposed deliver a tangible benefit to people with cognitive disability? What were we trying to fix?

It cannot be claimed that these questions were conclusively answered during the five years of work by the SLC. Perhaps this is not surprising - problems of characterisation in this area are longstanding. As long ago as 1681, the Scottish Institutional writer, Viscount Stair, asserted that restraint of a 'furious person' or a person risking harm to himself was not an interference with the right to liberty, but an action in pursuance of a duty of love and mercy.⁷⁰

At the centre of the project were two essential principles, the right to autonomy and the need for protection. The balancing of these two goals may depend on a third concept, that of benefit, which is at the heart of the Adults with Incapacity (Scotland) Act 2000. Whether benefit to an individual requires greater priority to be given to protection or to autonomy is likely to depend on the context of a proposed intervention, and will vary throughout the span of every human life.

In trying to meet the challenge posed by Article 5 in relation to adults who lack some decision-making capacity, it is likely that several strands will be relevant. Individual rights of challenge of proposed significant restriction of liberty may be part of the response in Scotland, as may the pursuit of government policy and professional commitment directed to reducing levels of security that are excessive.⁷¹ Regular and sometimes unannounced inspection of care facilities is also likely to contribute.⁷² In this regard, a member of the Advisory Group was able to share with the project team her experience of restrictions imposed at an institutional level:

The story is sometimes that when you ask why the door is locked, it turns out that one of the 20 residents used to try to get out a lot, and they just settled for always having it locked in case even though she's now in a wheelchair and the other nineteen haven't ever been consulted.

⁶⁷ Scot Law Com No 240, 2014, para 7.3; draft Bill at section 52J(2).

⁶⁸ Scot Law Com No 240, 2014, para 7.4; draft Bill at section 52J(3).

⁶⁹ Scot Law Com No 240, 2014, page 98, explanatory note to section 52J.

⁷⁰ Stair, *Inst* I, 2, 5.

⁷¹ Lady Hale has referred to the contribution made by government policy and professional commitment in reducing excessive security for patients detained under mental health legislation: *G v Mental Health Tribunal for Scotland* [2013] UKSC 79, 2014 SC (UKSC) 84, [70].

⁷² The regulator in Scotland is the Care Inspectorate: www.careinspectorate.com

Another is that you see the lovely dementia friendly garden or roof terrace and when you ask to step out to look at it, no one on duty knows where the key is, or whether it is "allowed" to open the door, because they've never seen it open.

Another is when all the doors to the bedrooms are locked all day because one resident might go into someone else's room and steal their chocolate.

Only the minimum restraint, for the minimum time, affecting the minimum number of people reviewed as often as humanly possible is the main idea.⁷³

Compliance with Article 5 of the European Convention on Human Rights requires that there should not be arbitrary interference with the right to liberty of any adult in a member State. The need to secure such compliance for Scotland was the genesis of the project conducted by the SLC but, for the project team, it became equally important to contribute to minimising the degree of restriction to which many adults with incapacity are subject in their daily lives. If securing ECHR compliance leads to levels of restriction in residential care and on individuals being as much as necessary, but as little as possible, delivery of a significant tangible benefit will have been achieved.

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⁷³ Professor June Andrews OBE, Dementia Services Development Centre, University of Stirling.