

**RESPONSE FORM**

**DISCUSSION PAPER ON ADULTS WITH INCAPACITY**

We hope that by using this form it will be easier for you to respond to the questions set out in the Discussion Paper. The form reproduces the questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

**Please ensure that, prior to submitting your comments, you read notes 1-2 on page ii of the Discussion Paper.**

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk). If you prefer you can send the form by post to Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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## List of questions

1. We would welcome views from consultees on the likely impact of any reforms resulting from this Discussion Paper on the groups identified in paragraphs 1.15 to 1.19 above.

(Para 1.19)

### Comments on question 1

With minor alteration, the existing AWI legislation is adequate for purpose in addressing the issue providing that the principle driver is safeguarding individual welfare and achieving the most appropriate care and support with minimal restriction on freedom of movement.

A potential shift in emphasis to the deprivation of liberty principle and the introduction of additional forms of orders would detract from the primary focus of ensuring the delivery of care and support in safeguarding welfare.

The existing legislative landscape is already complex with particular operational difficulties between agencies around the assessment of capacity both in terms of the principle, timing and purpose exacerbated by, in many instances, the dynamic nature of task specific related capacity. The introduction of further orders which focus specifically on the deprivation of liberty principle would merely serve to further compound an already complex landscape and detract from the key purpose.

Where there are clear restriction of liberty issues, more often associated with hospital related settings, the existing Mental Health Act with its incumbent Mental Health Tribunal system would appear to be the more appropriate statutory option.

Ideally what is uniformly being sought is AWI and Mental Health legislation that facilitates a proportionate response from statutory services, limits complexity and is adequately resourced. The possible development of graded guardianship whilst requiring further debate may assist in this area.

2. In addition, we would welcome information from consultees which could contribute to an assessment of the numbers of people with incapacity in Scotland who are cared for in residential facilities where they experience some restriction on their liberty.

(Para 1.19)

### Comments on question 2

Comments as note above. Where the emphasis is safeguarding individual welfare through the provision of appropriate care and support services perhaps a more pragmatic interpretation of the definition of what constitutes a restriction upon liberty is preferable to a

more purist approach, when taken in the context of the overall individual circumstances.

In determining if a restriction upon liberty has occurred account must be taken of the type, duration, effects and manner of implementation of the measure in question. In relation to the vast majority of residential or similar placements these would seem to be a responsible measure taken by competent authorities in consultation with all relevant parties in the interests of protecting the individuals welfare. Indeed it could be argued that, it may be a potential restriction on freedom of movement, in some instances, rather than a restriction upon liberty, the latter of which may have been more prevalent prior to the individuals actual placement.

Clearly obligations to take positive action, under other Articles, are relevant in assessing whether there has been a breach of Article 5

3. Do consultees have any observations on our summary of case-law from the European Court of Human Rights?

(Para 2.86)

#### **Comments on question 3**

No ;the summary exemplifies the problems and complexities in determining deprivation of liberty

4. Do consultees have any comments on the structure and/or operation of the Deprivation of Liberty Safeguards in England and Wales?

(Para 4.30)

#### **Comments on question 4**

The term 'deprivation of liberty' may be too narrow and could be widened to cover 'any act of compulsion'. The Bournemouth gap is not covered in DOL safeguards as this was an issue of consent. To remove any confusion with definition it may be preferable to cover 'any act of compulsion'.

5. Do consultees have any comments on our summary of English case-law?

(Para 4.64)

#### **Comments on question 5**

The summary of case law again exemplifies the difficulties in this area of law and the problems associated in determining the question of what is a deprivation of liberty. The case of P provides a clear illustration of these difficulties and agree that the Court of Appeal, in

adding 'reason' and 'purpose' in the factors to be examined under the 'objective test' to be important. We agree fully with the Court's opinion that the reason, purpose and motive, together with the question of 'normality' are relevant to the question of whether there is any deprivation of liberty as without such considerations reasoned and assessed justification for actions by carers are in danger of being ignored to the possible detriment of the individual.

6. Do consultees have any comments on our discussion of comparative law?

(Para 5.58)

**Comments on question 6**

The comparative law chapter was very interesting however served to reinforce the fact that there is currently no definitive clarity on what constitutes a deprivation of / restriction upon liberty.

The discussion may have benefitted from a look at Swedish case law which is reportedly broadly comparable to Scotland's in this area.

7. Do consultees agree that the present lack of clarity on deprivation of liberty in Scots incapacity law is unsatisfactory?

(Para 6.39)

**Comments on question 7**

Comments as noted in response to questions 1 and 2.

It would be useful to have more clarity on what would be regarded as a deprivation of and/or restriction upon liberty whilst acknowledging that a definitive position may not be possible. It is suggested that this lack of clarity should be viewed within the context of general uncertainty and confusion as to when welfare guardianship should be used vis a vis 13ZA.

This area however is clearly addressed within the existing Mental Health and Criminal Procedures legislation.

8. Would it be desirable for there to be greater specification in Scotland on what is to be regarded as deprivation of liberty, beyond a cross reference to Article 5?

(Para 6.41)

**Comments on question 8**

It would be useful to have more clarity on what would be regarded as a deprivation of and/or

restriction upon liberty. Perhaps a more nuanced approach is required which takes account of practicalities and operational issues. A series of case examples outlining circumstances that could be viewed as a deprivation of liberty may be helpful. It is acknowledged, however, that a definitive position may not be possible.

It has been suggested that the Code of Practice for the Mental Capacity Act provides some good examples which could be extended to include sedation,force,non-coercive insistence and direction, denying freedom of movement and association of person, curtailing communication by restricting or denying phone calls,mail or e-mail.

9. Should Scots law provide that there cannot be informal admission to a hospital for the treatment of mental disorder of people who lack the capacity to consent to that admission?

(Para 6.44)

#### **Comments on question 9**

This is a difficult issue. Within the Mental Health (Care and Treatment)(Scotland) Act 2003, grounds are set out for using compulsory powers. These must be met before any compulsory measures are used. Both the 2003 Act and the Adults with Incapacity (Scotland) Act 2000 set out a Principle of 'least restriction' and it may be that such a Principle is not congruent with any measures that would mean treatment is not provided without compulsory measures being in place.

There is argument that those lacking capacity to consent to hospital admission for treatment of a mental disorder should only be admitted through formal arrangements.

This would, however, likely be of concern to carers and patients who have not been subject of such measures previously.

Whilst adopting such a measure would probably satisfy Strasbourg requirements, we believe that existing provision under S.291 of the legislation offers sufficient safeguard to individuals lacking capacity and subject of informal admission.

There is no reference to admission for physical healthcare reasons within the paper.

It would be helpful to examine the parameters of Part 5 of the Act re the nature of treatments allowed, the setting in which it is delivered and the arrangements for transporting adults to where the treatment is to be provided.

10. If so,

(a) should people who lack capacity be admitted to hospitals for the treatment of mental disorder using the mechanisms set out in the 2003 Act, or should their admission to hospital be authorised under incapacity legislation?

(b) what approach should be adopted to those who are already in hospitals on a long-term basis?

(Para 6.44)

**Comments on question 10**

(a) Existing mechanisms under the 2003 Act should be used inclusive of the potential appointment of a curator –ad- litem, advocacy representation and existing powers of the Mental Health Tribunal.

(b) Comment as above

11. Would there be benefit in a statutory provision to the effect that the family or carers of a person with incapacity who are willing and able to provide a home for that person should not be prevented from doing so?

(Para 6.51)

**Comments on question 11**

It is unclear why there would be any requirement to legislate in this area as currently family and/or carers are not prevented from providing appropriate care where they are assessed as appropriate, willing and able to do so. This is deemed 'good practice' and in line with the Principles of the 2000 Act, the 2003 Act and the Adult Support and Protection (Scotland) Act 2007.

12. If so, should that provision be an additional principle in section 1 of the Act?

(Para 6.51)

**Comments on question 12**

Comment as noted in response to question 11. No provision required.

Mechanisms to promote the deployment of advance statements, powers of attorney etc across the general population would be of assistance in many instances in offsetting many of the issues which arise once an individual lacks capacity.

13. Do consultees agree that provision to the effect that certain measures do not constitute deprivation of liberty would be of assistance?

(Para 6.68)

**Comments on question 13**

This may be helpful if an act of compulsion is being considered. However, detention under the 2003 Act should be separate as there are already grounds for appeal.

Clarity on the definition of deprivation of/ restriction upon liberty would be useful.

The Code of Practice for the Mental Capacity Act provides some good examples which could be extended.

14. If so, what should those measures be?

(Para 6.68)

**Comments on question 14**

Measures should be drawn from case law where agreement is universal coupled with the legal obligations of state authorities to protect the life, health and wellbeing of its citizens.

Comment as noted in response to question 13.

15. Should such provision be in legislation or in guidance?

(Para 6.68)

**Comments on question 15**

Comment as noted in response to question 13

16. Would there be benefit in provision to the effect that deprivation of liberty occurs whenever the management of a facility exercise complete and effective control over the assessment, treatment, care, residence and movement of an adult?

(Para 6.70)

**Comments on question 16**

This may be helpful although the role of regulation (eg Care Inspectorate) may assist in this area and may preclude the need for legislation or guidance. It is also to be hoped that certain situations would prompt inquiries under both the 2000 Act and the 2007 Act. It may be that such measures are sufficient.

Ultimately, a clear definition of deprivation of/ restriction upon liberty would assist the definition of safeguards and their parameters. It would be beneficial providing that it is not too prescriptive or definitive.

17. If so, should such a provision be in legislation or in guidance?

(Para 6.70)

**Comments on question 17**

Guidance should be sufficient to enable the primary focus to remain as the protection of individual welfare ensuring the provision of appropriate care and support in consultation with all relevant parties. Care packages ensuring the promotion of independence and self determination as far as practicable.

18. Should Scots law define circumstances in which the consent of a substitute decision-maker would represent sufficient authorisation for an adult lacking capacity to be accommodated in conditions which would otherwise amount to deprivation of liberty?

(Para 6.74)

**Comments on question 18**

Existing orders/powers available under AWI and Mental Health legislation should be sufficient to deal with these matters. The provisions in the Adult Support and Protection Act could also provide a degree of check and balance.

The suggestion made here would appear to question the appropriateness of the organisational 'duty of care' which is concerning.

19. If so, what should those circumstances be?

(Para 6.74)

**Comments on question 19**

Comments as noted in response to question 18

20. Should there be circumstances in which such consent would not be sufficient?

(Para 6.74)

**Comments on question 20**

Comments as noted in response to question 18.

The safeguards available for challenging decisions by proxies should be sufficient in the vast majority of cases.

21. Do consultees consider that the Adults with Incapacity (Scotland) Act 2000 should make clear that an attorney acting under a welfare power of attorney has the power to deprive, or authorise others to deprive, an adult with incapacity of his or her liberty?

(Para 6.76)

**Comments on question 21**

See comments as noted in response to questions 16 and 18.

The current system can authorise a person to decide where a person can reside although does not allow for 'detention'. The use of language here is perhaps not helpful. There is a difference in intention between placing someone somewhere as a safeguarding measure and placing them somewhere to deprive them of their liberty.

The recommendations following the recent Mental Welfare Commission report on "Mr and Mrs D" are perhaps helpful in this area as they outline ways local authorities and others can make better use of Powers of Attorney. Key in this area is the supervisory element of Power of Attorney.

It has been suggested that one possible protection that could be introduced to improve the existing POA system may be that the attorney be required to notify the OPG when it is anticipated that the welfare Power of Attorney will be enacted. This would then enable the OPG to notify the local authority of the welfare powers being used rather than when they are registered. There could also be a requirement that the attorney is required to notify anyone with an interest and that the names of those with an interest could be included on the form which is signed granting the Power of Attorney.

22. If so, should the existence of such a power depend on whether there is provision to that effect in the power of attorney document?

(Para 6.76)

**Comments on question 22**

Comments as noted in response to question 21.

23. If such a power can be conferred upon and exercised by a person acting under a power of attorney, what steps could be introduced to enable the adult to access prompt review of the deprivation by a Court, and periodic review thereafter?

(Para 6.76)

**Comments on question 23**

There are tentative plans to introduce more graded Guardianships and Intervention Orders under the Adults with Incapacity (Scotland) Act 2007. This question is perhaps best addressed within this context.

24. Do you agree that the Adults with Incapacity (Scotland) Act 2000 should be amended to provide that a guardian with welfare powers may deprive an adult of his or her liberty, or authorise another person to do so, if such a power is expressly conferred by the Court?

(Para 6.77)

**Comments on question 24**

Refer to response to Q21 relating to use of language. Key here is the definition of 'deprivation of liberty'. However, leaving that aside, if a court makes a decision and there are sufficient supervisory arrangements in place, there may be occasions when such measures are appropriate to safeguard individuals.

25. Do consultees agree that the existing provisions regarding intervention orders should be amended to provide for deprivation of liberty to be authorised by the Court, by a specific type of intervention order?

(Para 6.78)

**Comments on question 25**

Subject to the issues raised in answer to question 24, this may be feasible with safeguards in place. Any further action could be dealt with as additional powers under existing orders contained within AWI or within the context of the discussions around the development of graded guardianship.

26. What procedures and evidential requirements should apply to any new form of court order authorising deprivation of liberty for a person with incapacity?

(Para 6.81)

**Comments on question 26**

In line with previous comments, a further order is not required. Current welfare Guardianship requirements (under the 2000 Act) or Compulsory Treatment Order (under the 2003 Act) are robust. There would, however, be the added expectation that specific powers are sought for all anticipated significant restrictions on the liberty of the adult as well as anticipated deprivation of the adult's liberty

27. Would there be benefit in a statutory provision entitling an adult or other persons acting on his or her behalf to apply to the sheriff court for an order requiring the managers of residential premises to cease unlawful detention of the adult?

(Para 6.83)

**Comments on question 27**

In line with previous comments, no new provision is required for this action which can be dealt with under exiting AWI, Mental Health and Criminal Procedures legislation and through the statutory role of the Care Inspectorate.

It could be argued however that powers similar to section 291 of the Mental Health Act may be of benefit in respect of adults in both residential and community settings.

**General Comments**

Ideally what is uniformly being sought is AWI and Mental Health legislation that facilitates a proportionate response from statutory services, limits complexity and is adequately resourced. The possible development of graded guardianship whilst requiring further debate may assist in this area.

There are however concerns for Local Authorities of the service implications implicit in legislation changes which will require to be given careful consideration particularly in relation to MHO services.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.