

Response ID ANON-7PY6-VV54-B

Submitted to **Scottish Law Commissions Report on Adults with Incapacity**

Submitted on **2016-03-30 17:30:33**

Introduction

1 Are you responding as an individual or an organisation?

Organisation

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

Name/orgname:

Solar Community Care Group

3 What is your email address?

Email:

jan.todd@southlanarkshire.gov.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.:

The Solar Community Care Group supports proposals which protect the interests of Adults that find themselves in hospitals where they need care and treatment for physical health issues, but where there is currently no provision for authorisation of detention or deprivation of liberty. If a person who lacks capacity cannot consent to staying in hospital or remaining in hospital and is being prevented from leaving then we believe that a process needs to be in place to adequately protect that individual. In the short term we can see that a process such as a certificate from an appropriate Doctor (who we would be satisfied would be the Doctor that is in charge of the Adult's care and treatment) should be sought. In the longer term if the Adult had a Guardian or Welfare Power of Attorney then consent of those parties or at least their views should be taken into account in any continuation of the detention or deprivation.

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?

No

Please provide an explanation for your answer:

We consider that the current proposals are appropriate in an urgent/emergency situation but are concerned about the lack of time limits, the lack of automatic review of this process by judicial authority and we would like to see the availability of the Advocacy Services for the Adult to enable them to exercise more appropriately any appeal. Again where a Guardian or Welfare Power of Attorney is available we feel it should be clearly stated that their views should be sought and taken account of where there are particular powers to make decisions about what care and treatment the Adult should receive and whether or not and in what circumstances any deprivation of the Adult's liberty should be allowed.

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

As stated above we feel that there would need to be an automatic judicial review of any process and availability and referral to advocacy for the Adult themselves.

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) . :

The Solar Group considers the draft provisions would work well particularly with Section 47 of the 2000 Act as we have concerns that there are Adults that are currently kept in hospital settings who do not have capacity to consent to their situation and that situation may include a deprivation of liberty.

The Solar Group however believes that it would be necessary to be human rights compliant that there is an automatic judicial right of review of any such deprivation of liberty and that the views of any Guardian or Attorney with relevant powers should also be taken into account. The Solar Group is also concerned that the Adult may not have the ability to challenge unless they have the provision of Advocacy Services to assist them and that there is the ability to obtain Legal Aid that is not means tested.

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:

Solar's view is that authorisation to restrict an individual's liberty in a community setting may be able to be authorised by a Guardian or Attorney if such a person has appropriate powers as either this restriction of liberty will have been subject to a judicial review at the time the Guardianship is granted or will be the Adult's choice when the Power of Attorney was created and the powers selected. However, Solar notes that there are different practices across different Sherifdoms with regard to the granting of current powers that would allow Local Authority Guardians to deprive someone of their liberty in appropriate circumstances. It is noted that some Sheriffs are refusing these powers as unnecessary or too restrictive. However it can be envisaged that such powers would be required in the foreseeable future. There are also the cases where a Guardianship is granted and those powers are not sought because at that point in time, they are not required and this would not be the least restrictive option, but due to a change in circumstances such powers would be useful. In those cases a process which allowed an Adult to be subject to a restriction or deprivation of liberty in a community setting for their own benefit or an emergency basis would be necessary.

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?

No

Please give an explanation for your answer.:

Solar appreciates why the Law Commission has suggested this however we have concerns that this proposal does not entirely meet the current case law test set out for example in Cheshire West and that if there is no legal authorisation for living in a care home where restraint or seclusion or control from time to time was enforced that this would therefore leave Local Authorities' vulnerable to challenges.

Perhaps more guidance on what "time to time" means would be more helpful and could alleviate the concerns that such an arrangement would amount to a deprivation of liberty

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. :

Solar's view on the approach of using "significant restriction" rather than deprivation of liberty is that this may lead to confusion and differing practices across the country. We are also concerned that if such a definition is drafted it would not meet the current case law which admittedly is still changing and could change further. On balance we are not clear why there needs to be a different test. Solar are also very concerned that the measures set out in the draft Bill are present most of the time and again would reiterate our calls regarding clarification of how the phrase of "from time to time" should be interpreted.

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.:

Yes and No. Solar's view is that if a Guardian or Power of Attorney has the specific power to deprive an Adult of their liberty then the Guardian or Power of Attorney's consent to those arrangements should be sufficiently robust to meet the requirements of Article 5. The Guardian or Power of Attorney in this situation is stepping into the shoes of the Adult on making decisions on his or her behalf and should be allowed to make those decisions. However, in order to further protect the Adult and ensure compliance with human rights and case law, there needs to be a further automatic right of review and adequate rights for the Adult and interested parties to appeal any consent to such deprivation.

Solar would however support the suggested proposal that if the consent of the Guardian or Power of Attorney (if there is one) cannot be obtained immediately or if time is needed to obtain or to proceed to Guardianship then there needs to be suitable instant interim measures and we would support the suggestion of the relevant person referring the matter to a medical practitioner without delay and if the medical practitioner certifies that the Adult is incapable, introducing for a period of up to 28 days, measures restricting the Adult's liberty that are immediately necessary for the safety of the Adult and to further extend that 28 day period to allow the consent of the Welfare Guardian or Attorney to be sought or an Application for a suitable Guardian, to be made.

In this respect Solar is extremely concerned that the relevant person should not be the Care Manager of a Care Home but should be a qualified Social Worker who is in effect the appointed Social Worker for the Adult. Solar would respectfully suggest that Care Managers are not always suitably qualified to make decisions about whether or not an Adult is subject to restriction or deprivation of liberty. We would further suggest that if they have concerns, they should have the responsibility of passing this to the Social Worker allocated to the Adult, who would then look into their concerns and take the appropriate steps as necessary to seek the relevant consents of the Welfare Guardian or Welfare Power of Attorney or to make suitable application for an interim restriction/deprivation of liberty

whilst applying for a Guardianship Order.

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.:

Solar would welcome the amendment of community based Compulsory Treatment Orders to authorise measures which could amount a deprivation of liberty and we think this is a current lacuna in the legislation

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.:

Given the views expressed earlier in this paper Solar is of the view that it is necessary for either additional processes or amendments to existing processes to be made to protect the Adult in both hospital and community settings including in both settings an automatic right of judicial review of any deprivation or restriction of liberty.

That said, Solar recognises that there is currently a national shortage of MHOs, that their workload and that of Psychiatrists and of Doctors under both the 2000 Act and 2003 Act continues to increase year on year. Solar would welcome proposals to ensure that there is adequate funding and support to allow MHOs and Social Workers to carry out any further duties.

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

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

As stated above, Solar is of the opinion that in relation to restriction or deprivation of liberty in community settings this can and should be managed on the whole with changes to Guardianships and Powers of Attorney to ensure automatic right of judicial review of the lawfulness of the restriction of liberty as well as a clear and time limited procedure by a qualified Social Worker to authorise a temporary deprivation or restriction of liberty pending such further authorisation. Solar believes that the additional process described in the draft Bill may result in a duplication of process as either a Guardianship Order has already been sought or may need to be sought or the Adult has thought about this in advance and has chosen a Power of Attorney and agreed specific powers to allow for this to happen, in which case an additional SSR may not be required. In addition Solar considers that the proposed definition of relevant person to include the Care Home Manager places undue and unrealistic responsibility on Care Home Managers which could either result in a flood of referrals or a dearth of referrals. Solar would respectfully submit that it would be a more appropriate role to be given to a qualified Social Worker. In suggesting this it is thought that a Social Worker in these situations may have more knowledge and understanding of the Adult to provide for temporary authorisations of any restriction or deprivation of liberty than a MHO would, as such MHO would be new and unfamiliar to the case. The existing workload for MHOs would also affect their ability to carry out this task

Finally Solar recognises that Guardianship Applications in themselves can be lengthy processes and would like to see a more streamlined process especially for more straightforward cases.

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.:

We believe it is essential for the protection of an Adult's rights that they, and any person claiming an interest, have appropriate rights of appeal against being kept in a place where they have not consented to be or are not able to consent to being detained and where they are resistant to being detained.

Is the proposed approach comprehensive?

No

Please give an explanation for your answer:

Solar believes that the approach is on the whole comprehensive but would welcome further proposals that would ensure that the Adult is assisted to exercise his or her appeal rights and that legal aid is available to the Adult timeously.

Are there any changes you would suggest?

Are there any changes you would suggest?:

Next steps/wider review

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

No

Please give an explanation for your answer:

Whilst we believe on the whole that the 2000 Act is working well to safeguard vulnerable adults, we believe there are improvements that can be made and we welcome the opportunity the Government is inviting for a more general review and would suggest a few areas as detailed below.

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::

Solar represents Local Authority Solicitors from all over Scotland and there appears to be a wide variation of experience to date in the way Adults with Incapacity Applications are dealt with in the Sheriff Courts. Some Courts are reluctant to make orders without a report from a Safeguarder. Safeguarder Reports and the fees for Safeguarder Reports can run into thousands of pounds which is a huge drain on already strained public resources. We would welcome further clarity on the use of such safeguarders .

Suggestion::

Concerns have also been noted as to whether the Sheriff Court is the appropriate forum for such sensitive cases especially when some extremely vulnerable Adults are left in very open busy Courts, local courts have closed and there are differing practices across the country.

Solar would like to see more consistency in handling of all AWI Applications and the questions of deprivation of liberty across Scotland. We would also welcome a review of the current process when applying for Guardianship and Intervention Orders to try and reduce timescales for non complex applications.

Suggestion::

Finally we would also appreciate legislative clarity around the recognition of foreign powers of attorney as there are more cross border moves, to and from England and Scotland in particular. This has become, and we believe, will become a more challenging issue and it would benefit all professionals to be clear that we can rely on a power of attorney granted in good faith by an Adult in another jurisdiction. We would also like to see a similar straightforward approach to the recognition of guardianship orders across borders as well

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?:

Slightly satisfied

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using Citizen Space to respond to consultations?:

Slightly satisfied

Please enter comments here.: