

ADULTS WITH INCAPACITY LAW REFORM PROJECT
Summary Version of Discussion Paper

Introduction

The Scottish Law Commission is an independent body which advises the government on law reform. This may lead to changes in the law, which are made by the Scottish Parliament or, in some areas of law, the Westminster Parliament.

At present, the Commission is conducting a project on part of the law affecting adults with incapacity, and has published a Discussion Paper to focus the issues. The project relates to possible breaches of the right to liberty when adults with incapacity are cared for in residential facilities where a consequence of the care provided is that the freedom of residents is curtailed.

The background to the project is a decision of the European Court of Human Rights in a case involving the care of a person with autism. The person had been admitted to a psychiatric hospital in England, Bournemouth, and requests by his carers for him to return home had been refused. The care he was receiving in hospital involved close observation and control over contact with his carers. The Court's decision was that there had been a breach of his right to liberty. That result caused a change in the law of England and Wales. Admissions to long-stay hospitals for people with autism or other neurological conditions or disabilities could no longer be regarded as being voluntary and informal. A new system was introduced to authorise these admissions. The changes also affected some admissions to care homes.

It was therefore suggested to the Scottish Law Commission that it was necessary to examine the position in Scots law concerning the right to liberty of adults with incapacity in residential facilities. The Commission agreed that such a project was necessary and the Discussion Paper is its first published paper in that project.

This summary outlines what is in the Discussion Paper and contains information about responding to the issues involved. In particular, this summary looks at:

- The human rights background to the project
- What is meant by “incapacity”
- Informal admission to residential care for those with incapacity
- The meaning of “deprivation of liberty”
- Alternative approaches to definition
- Problems with these approaches
- Current Scots law
- Possible changes
- The changes already made in England and Wales
- The Discussion Paper and how to respond to it

The human rights background

Most people in Scotland will have heard of the European Convention on Human Rights. Article 5 of the Convention protects an individual's right to liberty against unlawful interference by the State. Of course, a person's liberty can be removed by the State – detention – and the Convention allows this to happen in particular situations. The most obvious situation in which it happens is imprisonment. But another situation in which people can be detained is on the basis of what the Convention calls “unsoundness of mind”.

Under the Convention, however, detention on the basis of unsoundness of mind is only allowed if a lawful process has been followed. Lawful process has to involve the application of particular criteria relating to the person's condition. A Court or Tribunal must be involved, either in making the decision or providing a review of it after it has been made. If these requirements have not been complied with, and the failure is the responsibility of the State, then there will have been a breach of Article 5.

Unsoundness of mind and incapacity

Unsoundness of mind can be due to mental illness, and Scotland has extensive legislation authorising particular periods of detention on that basis. This is sometimes known as being “sectioned”.

Unsoundness of mind can also be due to learning disability, or to damage to the brain or decline in its functioning (such as dementia). Such conditions may lead to loss of what the law terms “capacity”. Capacity in law is essentially decision-making power: a person has capacity if they can understand an issue and make a decision about it on their own.

Residential care for people without capacity to consent

A person who lacks capacity because of one of the conditions mentioned above may not be able to look after themselves, and need to be looked after in residential facilities, such as a long stay hospital or a care home. Within the hospital or home, the person may be subject to measures which have the effect of restricting or even removing their liberty.

At present, Scots law does not have legislation similar to the mental health legislation to authorise detention for those whose “unsoundness of mind” results in incapacity. That was not previously regarded as a problem because admission to care homes or long stay hospitals for people with incapacity could generally be arranged by their families or, sometimes, by social workers or hospital authorities. But, in *HL v United Kingdom*, usually known as the Bournemouth case, the European Court of Human Rights made clear that this was a breach of the right to liberty. If a person enters residential facilities in which they are being deprived of their liberty, the fact that they themselves do not have capacity and so cannot consent to their own admission means that a lawful authorisation process is required.

Defining “deprivation of liberty”

Of course, most people with learning disability, or decline in brain function, do not live in residential care. And most of those who do are not regarded as deprived of their liberty. Recognising when deprivation of liberty is occurring has proved extremely difficult. This is because admission to residential care for those with incapacity is almost always for their own benefit (to keep them safe, and to ensure that their physical health is maintained). Should that be regarded as a deprivation of liberty?

The different approaches

Two different approaches to answering this question have emerged. The first says that for anyone to be kept in locked premises, from which they are not free to come and go as they wish, should be seen as a deprivation of liberty – especially if there are other measures in place, such as monitoring of activities or restriction of contacts with friends and family. If the person concerned does not have decision-making capacity and therefore cannot consent to living in those conditions, a lawful process of authorisation will require to take place.

The second approach involves looking at the context in which the person has come to be in the facilities. More specifically, if the purpose of the care is to benefit the person, or at least to protect them from harm, the idea that there is deprivation of liberty is wrong.

Problems with each approach

The difficulty with the first approach described above is that with the rise in the numbers of people with dementia, a proportion of whom will at some stage need residential care, very large numbers of people might come to be regarded as deprived of their liberty. It would require vast resources to provide a formal assessment and authorisation process for each one of them – resources which could be spent on providing a higher standard of care. And individuals and families might find such a process intrusive and stressful.

The difficulty with the second approach is that it is considerably more vague; it is hard to know what sort of factors are relevant to this sort of contextual analysis. In addition, it is hard to know what importance to attach to each factor – for example, is it relevant that doors are locked if the person is able to go out with a companion any time they like? And keeping the doors locked may be the only way to prevent someone with severe dementia from endangering their own safety by wandering outside and getting lost. It may seem odd to describe this as “deprivation of liberty”. But in the context of other types of detention, the European Court of Human Rights has rejected the argument that a measure cannot be a deprivation of liberty if its purpose is to benefit someone.

Current Scots law

At present, Scots law allows for the type of residential care decisions discussed to be taken by a welfare guardian (a representative appointed by the Sheriff Court to make welfare decisions for another person). Welfare decisions can also be made by one person on behalf of another who lacks capacity if the second person granted a welfare power of attorney before they lost capacity. That option is not available to those who have never had capacity. A substantial number of admissions to hospitals and care homes are arranged by families or by public authorities on an informal basis, whether or not the conditions in those premises would be considered by the European Court to amount to deprivation of liberty.

Possible changes

In the Commission’s project, it is necessary to assess:

- a) if Scots law as it currently stands is adequate to meet the requirements of the European Convention in this area, and
- b) if not, how it should be changed.

In particular, there is a need to decide if there should be a new procedure for authorising deprivation of liberty in residential care for adults with incapacity. If there should, what should that process be? And, very importantly, what sorts of care and what type of facilities should be regarded as involving deprivation of liberty for those who live there?

Changes in England and Wales

Extensive new legislation was introduced to cater for situations where adults with incapacity are to be cared for in hospitals or care homes in conditions which may amount to deprivation of liberty. Now, such care cannot happen without a series of assessments being conducted and a formal authorisation being granted.

These changes have proved controversial. Many who have to apply the legislation find it complicated and difficult to understand. The assessments take a lot of time and resources. Probably the biggest difficulty is that it is still not clear what amounts to a deprivation of liberty in these circumstances. There are already a lot of decided cases on this point from the courts. Many of them are highly complex.

The Discussion Paper

The Commission's Discussion Paper looks at those matters in very much greater detail. It looks at the development of case-law on Article 5 by the European Court of Human Rights. It sets out Scots law on incapacity. There are chapters on the law in England and Wales, and some assessment of the position in other countries. Finally, there is an attempt to analyse the problems summarised here in greater depth and to discuss possible ways forward.

The whole topic is quite complex, and much of the paper will be easier for lawyers than for the general public. But everyone is welcome to give their views. There is a list of 27 questions on the matters covered in the Paper to help focus the issues.

The Commission would be especially interested to hear from people involved in or affected by these matters. This might be because they have, or a member of their family has, dementia or learning disability. It might be because they work in health or social care, or another connected field. Anyone responding can either answer some or all of the questions, or simply provide general comments.

After the Commission has received responses to its Discussion Paper, it will prepare a report, which will be sent to the Scottish Government. If there are to be changes to Scots law, these will require to be made by the Scottish Parliament.

How to respond

The Discussion Paper is available at <http://www.scotlawcom.gsi.gov.uk/consultations/>

where there is also an electronic response form for answering the questions.

You can also write to:

Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR

Or e-mail: susan.sutherland@scotlawcom.gsi.gov.uk