Advances in psychiatric treatment (2010), vol. 16, 438–439 doi: 10.1192/apt.bp.110.008524

COMMENTARY

Unappealing legislation?

COMMENTARY ON … INTERFACE BETWEEN THE MENTAL HEALTH ACT AND MENTAL CAPACITY ACT[†]

Donald Lyons

Donald Lyons is Director of the Mental Welfare Commission for Scotland. The Commission produces reports on the use of Scottish mental health and incapacity legislation.
Correspondence Donald Lyons, Thistle House, 91 Haymarket Terrace, Edinburgh EH12 5HE. Email: donald.lyons@mwcscot.org.uk

[†]See pp. 430–437, this issue.

SUMMARY

The deprivation of liberty safeguards apply to England and Wales. In Scotland, trends and uncertainties in the use of welfare guardianship (the equivalent action under Scottish law) provide a useful comparison. In both jurisdictions, there are risks to the rights of individuals.

DECLARATION OF INTEREST

None.

Brindle & Branton (2010, this issue) provide a comprehensive and helpful study of the issue of deprivation of liberty. The concept is an inexact science and must be decided for individual patients, taking into account the factors that the authors outline from existing case law. The safeguards do not apply beyond England and Wales, but the case law is important and useful for practitioners in other parts of the UK.

The law in the UK must be compatible with the Human Rights Act 1998. Any deprivation of liberty must be in accordance with a procedure prescribed by law. The person deprived of liberty must be able to challenge such deprivation in a competent court.

The authors express concerns about the deprivation of liberty safeguards. These are similar to the concerns of Shah & Heginbotham (2010). I would like to take two particular points: inconsistent application and the right of challenge or review. In doing so, I would like to make comparisons with the Adults with Incapacity (Scotland) Act 2000.

Deprivation of liberty in Scotland

Scotland has no equivalent of the deprivation of liberty safeguards. In hospital, the only lawful action to deprive a person of liberty is detention under the Mental Health (Care and Treatment) (Scotland) Act 2003. Where the person is not in hospital, the appointment of a welfare guardian under the 2000 Act is likely to be necessary. This is a cumbersome process involving application to a sheriff court and involves two medical and one social work report, but is probably no more cumbersome than the deprivation of liberty safeguards and does allow proper judicial scrutiny.

Inconsistent application

Given the uncertain meaning of 'deprivation of liberty', inconsistent application of the safeguards is almost inevitable. Practitioners in Scotland have struggled with this since the implementation of the 2000 Act. Social work legislation has been amended to ensure that the guardianship procedures are only applied in cases of deprivation of liberty. Even so, there are still significant variations in applications for welfare guardianship. The judgment in the case of *Muldoon* [2004] (Scottish Courts Service 2005) implied that admission to a care home was in itself a deprivation of liberty. This appears inconsistent with the guidance in the case law quoted by Brindle & Branton. The variation in the rate at which welfare guardianship is granted at least partially reflects the fact that local authorities have different thresholds for deciding what constitutes deprivation of liberty (Mental Welfare Commission for Scotland 2009).

Rising numbers

From around 250 orders granted in 2002–03, the number of welfare guardianships granted in Scotland rose to more than 1300 in 2009–10 and continues to rise. There are now more than 4000 people subject to welfare guardianship in Scotland, more than twice the number of people subject to mental health legislation (Mental Welfare Commission for Scotland 2010). Most welfare guardianship orders are for an indefinite period so we can confidently predict that the number will continue to rise.

Key differences in Scotland

Given that guardians in Scotland exercise similar controls to care services in England and Wales (subject to the deprivation of liberty safeguards), there is an interesting difference. In Scotland, most new applications for welfare guardianship are made by private individuals, usually relatives,

and not by local authorities. Local authorities must supervise the actions of welfare guardians but the extent to which they do so is variable. Also, staff often care for people subject to welfare guardianship without knowing the powers of the guardian (Care Commission 2009).

The right of challenge or review

So, how good a safeguard is guardianship and is it any better than the deprivation of liberty safeguards? Both probably pass the human rights test of legality, although Scotland is on a stronger footing because the Court authorises the powers at the outset. Both can be appealed: to the Court of Protection in England and Wales and to a sheriff court in Scotland. However, there are concerns about how easy it is for people to make challenges. The lack of procedures for statutory review can mean that people stay subject to significant deprivation of liberty without a proper judicial procedure for ensuring that it remains lawful. This must be a matter of concern for both jurisdictions because it may fall foul of human rights legislation.

Shortcomings in both systems

Both jurisdictions have a similar legislative gap: short-term interventions. The safeguards are unlikely to apply to people admitted for short or crisis spells. In Scotland, a sheriff court can authorise interim welfare guardianship but it can still take some time to arrange. This may partly explain the rise in the use of short-term detention in hospital for older people. Greater attention to Article 5 of the European Convention on Human Rights and the lack of other legal procedures may leave clinicians with no option other than the Mental Health (Care and Treatment) (Scotland) Act 2003.

What about the person whose package of care at home is a deprivation of liberty? Shah & Heginbotham (2010) express concern that such people are not subject to deprivation of liberty safeguards. Inconsistent procedures for applying for welfare guardianship in Scotland may also deny such people the legal safeguards to which they are entitled. Brindle & Branton correctly assert that it is the nature and degree of the controls, not merely the provision of a particular care setting, that may constitute deprivation of liberty. Clinicians and legislators must bear this in mind to avoid contravening human rights legislation.

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