

# Annex A

## Adults with Incapacity (Scotland) Bill [DRAFT]

An Act of the Scottish Parliament to make further provision as regards the safety and liberty of adults with incapacity; and for connected purposes

### 1 Amendment of Adults with Incapacity (Scotland) Act 2000

- (1) The Adults with Incapacity (Scotland) Act 2000 is amended as follows.
- (2) After section 50 insert the following sections—

#### **“50A Measures to prevent adult patient from going out of a hospital**

- (1) This section applies—
  - (a) where an adult (“the patient”) either—
    - (i) is receiving medical treatment in a hospital, or
    - (ii) is being assessed in a hospital for the purpose of ascertaining whether the patient requires such treatment, and
  - (b) the medical practitioner primarily responsible for that medical treatment or as the case may be for that assessment—
    - (i) is of the opinion that the patient is incapable in relation to a decision as to whether or not to go out of the hospital (or whether or not to go out of some part of the hospital), and
    - (ii) has so certified in accordance with subsection (10).
- (2) The medical practitioner who by virtue of subsection (1) has issued the certificate shall have authority to do what is reasonable to prevent the patient’s going out of the hospital (or as the case may be going out of some part of the hospital) as shall any person acting—
  - (a) on behalf of, and under the instructions of, the medical practitioner, or
  - (b) with the medical practitioner’s approval or agreement.
- (3) The authority conferred by subsection (2)—
  - (a) shall subsist for so long as the need for such preventative measures is manifest, and
  - (b) shall not authorise—
    - (i) the use of force unless immediately necessary and then only for so long as is necessary in the circumstances, or

- (ii) action which would be inconsistent with any decision by a competent court.
- (4) Subsections (2) and (3) do not affect any authority conferred by any other enactment or rule of law.
- (5) Without prejudice to the generality of subsection (2), what is done under that subsection may include the administering of medication for the purpose of confining the patient to the hospital (or some part of the hospital).
- (6) Any exercise of the authority conferred by subsection (2) (other than the administering of medication by virtue of subsection (5)) may be appealed against by application to the sheriff—
  - (a) by the patient, or
  - (b) by any person claiming an interest in the personal welfare of the patient.
- (7) A decision to administer medication to a patient by virtue of subsection (5) is, for the purposes of section 52, a decision as to the medical treatment of the patient.
- (8) Where—
  - (a) an appeal has been made under subsection (3) of section 50 in relation to the medical treatment of the patient and has not been determined,
  - (b) an application has been made under subsection (6) of that section in relation to that treatment and has not been determined, or
  - (c) an appeal has been made under section 52 in relation to that treatment and has not been determined,
 any appeal under subsection (6) shall be sisted pending such determination.
- (9) Where a nomination has been requested under section 50(4) in relation to the medical treatment of the patient and the opinion to be given has not been obtained, any appeal under subsection (6) shall be sisted pending the opinion being obtained and the determination of any resultant appeal under section 50(6).
- (10) A certificate for the purposes of subsection (1) shall be in the prescribed form.
- (11) In this section and in sections 50B and 50C, “hospital”—
  - (a) is to be construed in accordance with section 108(1) of the National Health Service (Scotland) Act 1978 (c.29), but
  - (b) does not include a care home service (as defined in schedule 12 to the Public Services Reform (Scotland) Act 2010 (asp 8)).

## NOTE

Section 50A implements recommendations 21-28 and 31. It provides for authorisation of use of measures to prevent a patient going out of a hospital (or a part of a hospital) unaccompanied whilst in the course of receiving medical treatment or undergoing medical assessment to establish if they need medical treatment. It covers short-term absences, as well as attempts to leave a hospital on a permanent basis. Its aim is to capture measures that restrict an adult's

liberty to such an extent that the European Court of Human Rights would regard Article 5 ECHR as being engaged.

By subsection (1), authorisation is to be granted by means of the issuing of a certificate by the medical practitioner primarily responsible for the treatment of the adult. The certificate is to the effect that the medical practitioner takes the view that the adult is incapable in relation to a decision as to whether or not to go out of the hospital, or some part of the hospital. This distinction is made to reflect the differing layouts of hospitals; whether measures are taken at ward exits or main entrances will vary.

Subsection (2) is intentionally framed in a general way, enabling the medical practitioner and any person acting on behalf of that medical practitioner or with their agreement to do what is reasonable to prevent a patient from going out of a hospital or any part of a hospital. The provision is not, though, intended to capture measures taken purely as part of general hospital care, but which have the effect of preventing someone from leaving a hospital. Such general measures would include use of bed rails, and, indeed, anaesthetics.

Subsection (3) deals with the duration of the authorisation of use of restrictive measures and imposes certain constraints as to what measures can be used. As regards duration, subsection (3)(a) makes clear that the certificate should remain in place for so long as the medical practitioner who issued the certificate considers that the need for the measures is manifest. This is intended to be a flexible test, catering in particular for a possible period when treatment or assessment is complete but the adult requires to remain in hospital, pending the putting in place of suitable arrangements for the future. As regards the nature of the measures, subsection (3)(b) provides that use of force is to be taken to be authorised only where this is immediately necessary, and where it is to be used for the minimum amount of time possible in the circumstances. Moreover, no action is to be taken to be authorised which would be inconsistent with a competent court decision.

Subsection (4) is intended to ensure that where keeping a person in hospital has already been authorised via other statutory or common law authority, for example the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"), such authorisation is not affected by any certificate issued under section 50A(1).

Subsection (5) explicitly provides that notwithstanding the general approach provided for in subsection (2), use of medication is one measure that might be invoked for the purposes of confining a patient to a hospital where it is appropriate to do so.

Subsections (6) and (7) deal with rights of appeal. Subsection (6) establishes that any exercise of authority in terms of a section 50A(1) certificate can be appealed to the sheriff and thereafter the relevant Sheriff Principal and ultimately the Court of Session. The right to go to court is intentionally widely framed, allowing it to be exercised by a concerned friend or neighbour in appropriate circumstances. Subsection (7) provides that where an appeal is brought in connection with use of medication under subsection (5), this is to be treated as an appeal against a decision as to medical treatment.

Subsection (8) deals with timing and sisting of appeals. Where an appeal or application under section 50(3) or (6) or section 52 of the 2000 Act has been brought but has not yet been determined, the determination of the appeal under section 50A(6) is to be sisted pending completion of the other proceedings.

Similarly, subsection (9) provides for sisting of an appeal under subsection (6) where there has been a request to the Mental Welfare Commission to nominate a person to deal with a dispute between the person who issued a certificate under section 47(1) and a welfare attorney, welfare guardian or person authorised by an intervention order in relation to the adult, as to medical treatment authorised in terms of section 47(1). The appeal is to be sisted pending the provision of an opinion by the nominated person. In any situation where an appeal is brought, it is

intended that measures authorised by a certificate issued under section 50C should continue to be implemented pending the determination of the appeal. This is to apply also where an appeal under subsection (6) has been sisted until the outcome of another appeal is determined.

Subsection (10) makes clear that a certificate of incapacity issued in terms of subsection (1) must follow the prescribed form. Applying the definition of “prescribed” in section 87(1) of the 2000 Act, this will be by means of regulations.

Subsection (11) makes provision in relation to the definition of “hospital”. The definition in section 108 of the National Health Service (Scotland) Act 1978 is applied, subject to the express exclusion of care home services. Both NHS and independent hospitals are caught by this definition.

#### **50B Review and revocation of certificate issued by virtue of section 50A(1)**

- (1) A medical practitioner who by virtue of subsection (1) of section 50A has issued a certificate in respect of a patient admitted to a hospital shall, from time to time while the patient continues to receive medical treatment or continues to be assessed there, consider whether the patient remains incapable in relation to a decision mentioned in paragraph (b)(i) of that subsection.
- (2) If, having conducted such a review, the medical practitioner is no longer of the opinion that the patient is incapable in relation to such a decision, the medical practitioner shall revoke the certificate.

#### **NOTE**

Section 50B implements recommendation 30. It seeks to ensure that certificates under section 50A remain in place only for so long as there is a need for them.

Subsection (1) imposes a requirement that any patient in respect of whom a section 50A certificate has been issued be kept under review by the medical practitioner who issued the certificate, to determine if they continue to lack capacity in relation to deciding whether to go out of a hospital. Where it is thought that they no longer lack such capacity, the certificate is to be revoked in terms of subsection (2).

#### **50C Setting end date for exercise of authority conferred by section 50A(2)**

- (1) This section applies where a certificate—
  - (a) has been issued under section 50A(1)(b)(ii) in respect of a patient, and
  - (b) has not been revoked under section 50B(2).
- (2) The patient, or any person having an interest in the personal welfare of the patient, may apply to the sheriff for an order setting a date beyond which measures in respect of the patient are not to be treated as authorised under section 50A(2).
- (3) The sheriff may grant the application if satisfied, after giving the applicant, the medical practitioner who issued the certificate, the chief social work officer of the local authority and (where the applicant is a person having an interest in the personal welfare of the patient) the patient an opportunity to be heard—
  - (a) that the patient—

- (i) no longer requires the medical treatment for which admitted to hospital, or
  - (ii) does not require continuing assessment there, and
- (b) that—
- (i) it is appropriate and practicable for the patient to return home, or
  - (ii) accommodation, where appropriate long term care can be provided, is available for the patient elsewhere than at the hospital.”.

#### NOTE

Section 50C implements recommendations 5 and 29. It caters for the scenario in which, for a variety of possible (and non-clinical) reasons a patient remains in a hospital beyond the point at which they are receiving medical treatment or undergoing assessment.

Subsection (1) makes clear that the application of the section is confined to circumstances where a certificate under section 50A(1)(b)(ii) has been issued in respect of a patient and has not been revoked.

Subsection (2) provides for the patient or any person having an interest in the personal welfare of the patient to apply to the sheriff for an order, the effect of which would be that use of measures of restriction would no longer be authorised as from the date specified in the order.

Subsection (3) sets out certain requirements which the sheriff must consider are met before an order under section 50C can be made. Firstly, the sheriff must be satisfied that the need for the medical treatment or assessment which initially gave rise to the patient’s admission to hospital has come to an end. Secondly, the sheriff must take the view that the patient is ready to return home (this being practicable) or to move to other accommodation where appropriate long-term care can be provided. The reference to accommodation providing “long term care” is intended to cover any residential accommodation. Suitable accommodation or arrangements must already be available or in place before the order can be made. By “home” may be meant the care home or facility in which the patient lived prior to admission to hospital.

- (3) After Part 5, insert the following Part—

### **“PART 5A**

#### LIBERTY OF ADULTS

#### **52A Interpretation of Part 5A: the expression “significant restriction” etc.**

- (1) For the purposes of this Part, an adult’s liberty is subject to “significant restriction” if (and only if) measures mentioned in more than one of paragraphs (a) to (c) apply on a regular basis as respects the adult—
- (a) the adult either—
    - (i) is not allowed, unaccompanied, to leave the premises in which placed, or
    - (ii) is unable, by reason of physical impairment, to leave those premises unassisted,
  - (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.
- (2) But measures applicable to all residents at those premises (other than such staff as reside there) and intended to facilitate the proper management of the premises without disadvantaging residents excessively or unreasonably are not to be regarded as giving rise to significant restriction.
- (3) In this Part, "placed" means placed, by reason of the adult's 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.
- (4) In subsection (1)(c), "restraint"—
  - (a) includes specially designed clothing, but
  - (b) does not include a device the sole purpose of which is to act as a safeguard against falling.
- (5) In subsection (3), "vulnerability or need" means vulnerability or need arising as mentioned in any of paragraphs (a) to (c) of the definition of that expression in paragraph 20 of schedule 12 to the Public Services Reform (Scotland) Act 2010 (asp 8).
- (6) In this Part, "care home service" and "adult placement service" have the meanings assigned to those expressions by section 47(2) of, and paragraphs 2 and 11 of that schedule to, that Act.

#### NOTE

Section 52A implements recommendations 32-34. It provides for the interpretation of key terms in relation to restriction of liberty in certain care settings within the community, namely in care homes and in accommodation arranged by adult placement services. We refer to this as the community process. In connection with the community process the term "relevant person" is used in a number of places in the Bill. In essence it is a shorthand reference to the manager of the premises in which accommodation is, or is to be, provided or, absent such a manager, the social worker assigned to the adult.

Subsection (1) sets out three categories of measures of restriction. When two or more are in use on a regular basis, this will give rise to what is referred to as "a significant restriction of liberty." The key consideration is that their cumulative effect produces elements of confinement, seclusion and control, to such a degree that the European Court of Human Rights in Strasbourg would be likely to regard Article 5 of the ECHR as being engaged. The requirement effectively operates as a screening test to help keep the application of the process within suitable limits. Subparagraph (a) is intended to cater for any situation where a person would be prevented from leaving premises unaccompanied. This might be by means of a physical barrier – such as the presence of a locked door for which they do not have a key or keypad code – or by staff whose duty it is to supervise the entrance and exit points or monitor CCTV footage of them. It also ensures that the protection of the scheme extends to those who would not be affected by the presence of a locked door or any other physical means of preventing unaccompanied departure, given that they are not physically able to leave alone. This could be of relevance to people who have both physical and learning disability, living in small group homes.

Subsection (2) is intended to exclude from the process what may be regarded as house rules. In other words, it is concerned with rules which are intended to ensure the calm and efficient running of the premises, but without impinging to an unreasonable extent on the life of any particular resident. Examples may include that there should be no visitors after a certain time in the evening, and that residents can only gain access to a computer to send e-mails during

normal business hours. An overarching consideration is that the rules are applicable to all residents. Importantly, the provision is not intended to exempt practices that are used to deal primarily with staff shortages and other similar organisational factors, without any tangible benefit to residents.

Subsection (3) provides a definition of the word “placed.” The use of that particular term is designed to capture the intention that the procedure provided for in section 52B should operate where it is envisaged that a person will remain in a given care setting on a permanent or at least long-term basis.

Subsection (4) makes express provision as to what is, and is not, intended to be covered by the term “restraint”. Paragraph (b) is intended to ensure that where a device such as a bed rail or wheelchair lap belt is used solely for protective purposes, this should not be taken to constitute a restraint and, therefore, to contribute towards a significant restriction of liberty.

Subsection (5) defines the term “vulnerability or need” with reference to certain paragraphs of schedule 12 to the Public Services Reform (Scotland) Act 2010. The result is that the vulnerability or need may stem from the effects of infirmity or ageing, or the effects of illness, disability or mental disorder, or from drug or alcohol dependency.

Subsection (6) defines the terms “care home service” and “adult placement service.”

## **52B Significant restriction of adult’s liberty: placement**

- (1) This section applies where an adult has been placed, or is to be placed, in accommodation and a relevant person forms the view—
  - (a) that the adult’s needs may call for the adult’s liberty to be subject to significant restriction, but
  - (b) that the adult is incapable in relation to decisions about such restriction.
- (2) The relevant person must without delay refer the matter to a medical practitioner.
- (3) If a medical practitioner, on a reference under subsection (2), is satisfied that the adult is incapable as mentioned in subsection (1)(b) and so certifies, the relevant person—
  - (a) must initiate an assessment of what measures are called for, and
  - (b) if the adult has been placed in the accommodation, may introduce during the period of the assessment (being a period which, subject to subsections (4) and (5), is not to exceed 28 days from the date of certification under this subsection) such significant restriction of the adult’s liberty as is immediately necessary to ensure that the adult does not come to harm.
- (4) On one occasion only, the relevant person may, if that person considers it necessary to do so for the purposes of the assessment, again refer the matter to a medical practitioner.
- (5) If a medical practitioner, on a reference under subsection (4), is satisfied that the adult continues to be incapable as mentioned in subsection (1)(b) and so certifies, the relevant person may, for a period not exceeding 28 days from the date of certification under this subsection, continue to impose the significant restriction introduced by virtue of subsection (3)(b).
- (6) The relevant person must intimate without delay—

- (a) the issuing of a certificate under subsection (3) and the imposition, by virtue of paragraph (b) of that subsection, of significant restriction of liberty, or
  - (b) the issuing of a certificate under subsection (5) and the continuation, by virtue of that subsection, of such restriction,
- to each person mentioned in subsection (10).
- (7) The relevant person's concluding that there is an immediate necessity to impose significant restriction by virtue of subsection (3)(b) may be appealed against by application to the sheriff by any person mentioned in subsection (10); but the relevant person may, pending the determination of that appeal, impose the restriction in question.
  - (8) A certificate for the purposes of subsection (3) or (5) shall be in the prescribed form.
  - (9) In this section and in sections 52C to 52I, any reference to a "relevant person" is to—
    - (a) the manager of the premises within which the accommodation is, or as the case may be is to be, provided, or
    - (b) if there is no such manager, a social worker (as defined in section 77(1) of the Regulation of Care (Scotland) Act 2001 (asp 8)) who has been assigned responsibilities in relation to the care and supervision of the adult.
  - (10) The persons are—
    - (a) the adult,
    - (b) if the adult has a guardian with welfare powers, that guardian,
    - (c) any welfare attorney of the adult,
    - (d) any person who is the adult's named person,
    - (e) the adult's primary carer, and
    - (f) the adult's nearest relative (in the case of intimation, unless unknown).

#### NOTE

Section 52B implements recommendations 35 and 36. It provides for the process for authorisation of a significant restriction of liberty where an adult who lacks capacity is to live on a long-term basis in a care home or in accommodation arranged by an adult placement service.

Subsection (1) sets out the "trigger" for use of the community process in relation to placing of adults who lack capacity. The test to be met is two-fold. Firstly, the adult has been or is to be placed in accommodation to which the community process potentially applies. Secondly, the relevant person (see Note on section 52A) has come to the view that the adult may require to be subject to significant restriction of liberty, on account of his or her needs, but that the adult is incapable in relation to decisions about such restriction.

Subsection (2) sets out the first practical step in the process, namely that the relevant person is to refer the matter to a medical practitioner as quickly as possible.

Subsection (3) details the procedure to be followed in the event that the medical practitioner issues a certificate to the effect that the adult is incapable in relation to decisions about restriction of liberty. The relevant person comes under a duty to initiate an assessment of what measures



should be put in place. There is also provision for measures giving rise to a significant restriction of liberty to be put in place on an interim basis, pending the completion of such an assessment, where the adult has already been placed in the accommodation. This is to be done only where it is thought immediately necessary to ensure that the adult does not come to harm. Interim use of measures is for an initial maximum period of 28 days. In terms of subsection (5) an extension of a further 28 day period may be granted on one occasion only. This is dependent on the re-referral of the adult's case to a medical practitioner under subsection (4), and certification by the medical practitioner in terms of subsection (5) that the adult continues to lack capacity in relation to decisions about significant restriction of liberty.

Subsection (6) places the relevant person under a duty to notify a number of individuals, as subsequently listed in subsection (10), of the issuing of a certificate of incapacity and of any interim use of measures giving rise to a significant restriction of liberty. An identical duty arises where a further certificate is issued under subsection (5).

Subsection (7) makes provision for an appeal against a decision that there is a need to impose measures amounting to a significant restriction of liberty on an interim basis, pending completion of assessment. The right of appeal is exercisable by each of the persons listed in subsection (10). Subsection (7) also makes clear that the fact an appeal has been brought does not prevent measures of restriction validly being imposed during the period when the outcome of the appeal is yet to be determined. This might include putting the measures in place during that time, as opposed to mere continuation of their usage.

Subsection (8) requires that any certificate of incapacity that is issued should be in the form prescribed by regulations.

Subsection (9) provides for a definition of the term "relevant person" as set out above in relation to section 52A.

Subsection (10) lists those who are entitled to be advised of the matters and to exercise the rights of appeal set out in section 52B. These include the adult and any welfare attorney or guardian of the adult, where the guardian has welfare powers.

## **52C Significant restriction of adult's liberty: short term care**

- (1) This section applies where an adult is receiving short term care in accommodation provided by (or as the case may be arranged for by) a care home service or an adult placement service.
- (2) If a relevant person forms the view—
  - (a) that the adult's needs may call for the adult's liberty to be subject to significant restriction, but
  - (b) that the adult is incapable in relation to decisions about such restriction,

the relevant person must without delay refer the matter to a medical practitioner.

- (3) If a medical practitioner, on a reference under subsection (2), is satisfied that the adult is incapable as mentioned in subsection (2)(b) and so certifies, the relevant person may introduce, for a period which, subject to subsections (4) and (5), is not to exceed 28 days from the date of certification under this subsection, such significant restriction of the adult's

liberty as is immediately necessary to ensure that the adult does not come to harm.

- (4) On one occasion only, the relevant person may, if that person considers it necessary to do so for the purposes of the short term care, again refer the matter to a medical practitioner.
- (5) If a medical practitioner, on a reference under subsection (4), is satisfied that the adult continues to be incapable as mentioned in subsection (2)(b) and so certifies, the relevant person may, for a period not exceeding 28 days from the date of certification under this subsection, continue to impose the significant restriction introduced by virtue of subsection (3).
- (6) The relevant person must intimate without delay—
  - (a) the issuing of a certificate under subsection (3) and the imposition, by virtue of that subsection, of significant restriction of liberty, or
  - (b) the issuing of a certificate under subsection (5) and the continuation, by virtue of that subsection, of such restriction,to each person mentioned in section 52B(10).
- (7) The relevant person's concluding that there is an immediate necessity to impose significant restriction by virtue of subsection (3) may be appealed against by application to the sheriff by any person mentioned in section 52B(10); but the relevant person may, pending the determination of that appeal, impose the restriction in question.
- (8) A certificate for the purposes of subsection (3) or (5) shall be in the prescribed form.

#### NOTE

Section 52C implements recommendations 35 and 36. It makes provision for authorisation of significant restriction of liberty on a short-term basis. It is designed to cater for the situation in which an adult who is incapable in relation to decisions about restriction of liberty moves temporarily into accommodation to which the community process applies. A typical scenario may arise where an adult's carer is unavailable on a temporary basis, for example during a hospital stay.

Subsection (1) sets out the types of setting in which significant restriction of liberty might be authorised on a short-term basis. This mirrors precisely the types of accommodation in which significant restriction might be authorised in connection with a placement, namely in care homes and in accommodation arranged by adult placement services.

Subsection (2) makes provision as to the initiation of the process for authorisation of significant restriction of liberty on a short-term basis. A duty is placed on the relevant person to refer the matter to a medical practitioner without delay where they come to the view that the adult's needs may require them to be subject to significant restriction, but that the adult does not have capacity to make a decision about such restriction.

Where the medical practitioner is satisfied that the adult lacks capacity as regards decisions relating to restriction of liberty, and issues a certificate to that effect, subsection (3) functions as authority for the use of measures amounting to a significant restriction of liberty. These may be put in place initially for a maximum period of 28 days. The degree of restriction must be no greater than is thought immediately necessary to ensure that the adult does not come to harm.

Subsection (4) provides for re-referral of an adult's case to a medical practitioner, on one occasion only, in connection with possible renewal of short-term authorisation of a significant restriction of liberty.

Subsection (5) provides for a one-off renewal of authority to impose measures on a short-term basis, allowing them to be imposed for a further period of 28 days. This is conditional on the issuing of a further certificate by a medical practitioner to the effect that the adult continues to lack capacity in relation to decisions about restriction of liberty.

Subsection (6) requires the relevant person to notify each of the persons listed in section 52B(10) of the issuing of a certificate under subsection (3) and the imposition of any measures of restriction on the basis of that. An equivalent duty arises where a further certificate is issued, covering a subsequent period of 28 days.

Subsection (7) makes provision for challenge of a decision of the relevant person that there is an immediate necessity to impose a significant restriction of liberty on a short-term basis. The challenge is by means of appeal to the sheriff. It also covers any decision to authorise continued use of the measures for a further period of 28 days. The right of appeal is exercisable by each of the persons listed in section 52B(10). It is also made clear that measures may validly be imposed pending the determination of an appeal.

Subsection (8) requires that any certificate of incapacity that is issued should be in the prescribed form.

#### **52D Assessment initiated under section 52B(3)(a)**

- (1) For the purposes of an assessment initiated under section 52B(3)(a)—
  - (a) the relevant person is to prepare a statement (to be known as a "Statement of Significant Restriction")—
    - (i) specifying the measures to which that person considers the adult's liberty should be subject, and
    - (ii) explaining why those measures are called for, and
  - (b) there is to be obtained by the relevant person, as regards the statement—
    - (i) a report from a mental health officer (as defined in section 329(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)), and
    - (ii) a report from a medical practitioner described in subsection (2).
- (2) The descriptions of medical practitioner are—
  - (a) an approved medical practitioner (within the meaning assigned by section 22(4) of that Act of 2003),
  - (b) a medical practitioner with expertise in medical care of the elderly (but only if that practitioner is primarily responsible for the medical treatment of the adult), and
  - (c) any other medical practitioner if, by reason of—
    - (i) possessing skills, qualifications and experience of particular relevance to the medical treatment of the adult, and
    - (ii) having personal knowledge of the adult's circumstances,

that practitioner may be regarded as the most appropriate person to produce the report in question.

- (3) For the purposes of subsection (1)(b), the persons from whom the reports are to be obtained are each to be sent a copy of the Statement of Significant Restriction.
- (4) After considering those reports the relevant person may (but need not) revise the Statement of Significant Restriction.
- (5) Subsections (6) to (8) apply where, because the reports disagree with, or about, measures specified, under subsection (1)(a)(i), in the Statement of Significant Restriction, the relevant person does not consider revision under subsection (4) to be feasible.
- (6) The relevant person and the authors of the reports shall attempt, whether by meeting or otherwise, to reconcile their views as respects the Statement of Significant Restriction and to reach agreement as to what revision (if any) of that statement is appropriate.
- (7) But where, after such an attempt, it becomes apparent to the relevant person that such agreement cannot be arrived at, the relevant person shall apply to the sheriff—
  - (a) for a determination as to whether (and if so how) to revise the Statement of Significant Restriction, and
  - (b) seeking authorisation to implement the measures specified in the statement (if revised by virtue of paragraph (a), as so revised).
- (8) The sheriff is not to make such a determination, or to grant such authority, without affording an opportunity to be heard to—
  - (a) the relevant person,
  - (b) the authors of the reports,
  - (c) the adult to whom the statement relates, and
  - (d) if that adult has a welfare attorney or a guardian with welfare powers, that attorney or guardian.
- (9) A report for the purposes of subsection (1)(b) shall be in the prescribed form.
- (10) Different forms may be prescribed according to whether the report is from a mental health officer or a medical practitioner.

#### NOTE

Section 52D implements recommendations 37- 42. It sets out in detail how the assessment required by section 52B(3)(a) is to be carried out. The assessment is founded on preparation of a document to be known as a “Statement of Significant Restriction.”

Subsection (1) introduces the concept of a Statement of Significant Restriction.

Subsection (1)(a) lays down the main components of a Statement of Significant Restriction, namely specification of the measures to which the relevant person considers the adult’s liberty should be subject, and an explanation of why those measures are needed.

Subsection (3) makes clear that the statement as originally drafted should be sent to a mental health officer and a medical practitioner falling within the description in subsection (2). A report should be prepared by both, offering their assessment on the measures set out in the statement

(subsection (1)(b)). This requirement of input from other professionals –without a direct connection to the accommodation in which the adult lives or is to live – is intended to contribute to the satisfaction of the criteria laid down by the *Winterwerp* judgement, as also the principles set out in section 1 of the 2000 Act.

Subsection (2) specifies various categories within which a medical practitioner who provides comments on a Statement of Significant Restriction might fall. The approach is such that the medical practitioner *may* be an approved medical practitioner, but this will not automatically be the case. The aim is to ensure that the medical practitioner who is invited to comment on a draft Statement of Significant Restriction is the one who is most suited to that task, both in terms of their skills and experience and their knowledge of the adult's particular circumstances.

Subsection (4) deals with the handling of reports on draft Statements of Significant Restriction. Whilst it is open to the relevant person to modify a draft statement in light of such reports, where it is feasible for them to do so, they do not fall under any obligation so to modify it.

As subsection (5) makes clear, subsections (6) to (8) deal with certain circumstances where the reports produced are at variance with each other or with the content of the draft Statement of Significant Restriction. The situation envisaged is one where the nature of the reports is such that it is not feasible for the relevant person simply to effect a revision under subsection (4) to take account of comments received, or to decide not to make any revision. The typical scenario might be where either or both of the authors of the reports takes the view that imposition of measures of the nature set out in the draft statement is not warranted. Subsection (6) places an express duty on the relevant person and the report authors to seek to reach an agreed view on the content of a draft Statement of Significant Restriction, incorporating any revision that is thought to be needed. They are to resolve any matters of dispute by any means open to them. The holding of a meeting is given as an example of a possible route to agreement.

Where agreement cannot be reached, subsection (7) applies. The relevant person is required to refer the case to the sheriff. It is then for the sheriff to determine how, if at all, the statement should be revised. On the basis of any such revision, the sheriff is also required to reach the decision as to whether or not authorisation for implementation of the measures giving rise to a significant restriction of liberty should be granted. In terms of subsection (8), both of these determinations are to be made taking account of the views of any welfare attorney or welfare guardian of the adult. Importantly, however, neither decision will rest with the guardian or attorney. Other parties whose views must be taken into account include the adult him or herself and the authors of the reports on the draft statement.

Subsections (9) and (10) deal with the form of reports to be produced on draft Statements of Significant Restriction. These must follow the form prescribed. There is provision for different forms to be prescribed as between reports by mental health officers and medical practitioners.

## **52E Authorisation of implementation of restrictions**

- (1) A relevant person who has received the reports required by subsection (1)(b) of section 52D as regards a Statement of Significant Restriction (the reports so required being referred to in this section as “the reports”) shall without delay, though after revising, under subsection (4) of that section, the Statement of Significant Restriction if the person considers it appropriate to do so, seek authorisation to implement the measures specified in the statement—
  - (a) in a case where the adult to whom the statement relates has a welfare attorney or a guardian with welfare powers, from the attorney or guardian, and

- (b) in any other case, or if the attorney or guardian declines to grant authorisation, by application to the sheriff.
- (2) But subsection (1) does not apply in relation to a Statement of Significant Restriction as regards which an application has been made under section 52D(7).
- (3) A welfare attorney, or a guardian with welfare powers, is by virtue of this subsection entitled to grant an authorisation sought from that person under subsection (1)(a) unless the power of attorney or guardianship order expressly provides otherwise.
- (4) Subsection (3) is without prejudice to any entitlement which a welfare attorney or a guardian with welfare powers may have, other than by virtue of that subsection, to grant an authorisation sought under subsection (1)(a).
- (5) In relation to a power of attorney made, or a guardianship order granted, before the coming into force of section 1(3) of the Adults with Incapacity (Scotland) Act 2014, any question as to whether a welfare attorney, or a guardian with welfare powers, has such entitlement as is mentioned in subsection (4) must be determined by reference only to the terms of that power of attorney or guardianship order.
- (6) Where authorisation is sought under subsection (1)(a), the attorney or guardian in question must be sent—
  - (a) a copy of the Statement of Significant Restriction (as revised under section 52D(4) if it has been so revised), and
  - (b) a copy of each of the reports.
- (7) If a welfare attorney, or a guardian with welfare powers, grants authorisation by virtue of subsection (1)(a), that person must give it in writing and must include a declaration—
  - (a) of having given it after reading the reports, and
  - (b) of being satisfied that—
    - (i) the significant restriction will benefit the adult,
    - (ii) that such benefit cannot reasonably be achieved without such restriction, and
    - (iv) that the measures specified in the Statement of Significant Restriction are the least restrictive option in relation to the freedom of the adult which is consistent with their purpose.
- (8) On being granted authorisation by virtue of subsection (1)(a), the relevant person is to intimate that occurrence to each person mentioned in section 52B(10).
- (9) An authorisation granted by virtue of subsection (1)(a) may be appealed against by application to the sheriff—
  - (a) by the adult, or
  - (b) by any person having an interest in the personal welfare of the adult.
- (10) The relevant person may, pending the determination of the appeal, implement the measures specified in the Statement of Significant Restriction.

- (11) The reports and the Statement of Significant Restriction shall be lodged in court along with any application—
- (a) under subsection (1)(b),
  - (b) by virtue of subsection (9), or
  - (c) under section 52D(7).
- (12) On—
- (a) an application under subsection (1)(b) or 52D(7)(b), the sheriff may—
    - (i) grant the authorisation if satisfied as mentioned in subsection (7)(b), or
    - (ii) authorise implementation of the restrictions subject to such modifications to them as the sheriff may specify (being modifications necessary for the sheriff to be satisfied as mentioned in subsection (7)(b)), or
  - (b) an application under subsection (9), the sheriff may—
    - (i) uphold the authorisation if satisfied as mentioned in subsection (7)(b),
    - (ii) authorise implementation of the measures subject to such modifications to them as the sheriff may specify (being modifications necessary for the sheriff to be satisfied as mentioned in subsection (7)(b)), or
    - (iii) nullify the authorisation.
- (13) A relevant person receiving authorisation by virtue of this section may implement the measures specified in the Statement of Significant Restriction (or as the case may be those measures as modified by virtue of subsection (12)(a)(ii) or (b)(ii)) for a period of one year after the date on which authorisation is obtained.
- (14) In subsection (13), “authorisation” does not include an authorisation appealed against under subsection (9) unless it is upheld under subsection (12)(b)(i).

#### NOTE

Section 52E implements recommendations 9, 10, 43 and 44. It makes provision in relation to authorisation of implementation of measures of restriction set out in a Statement of Significant Restriction.

Subsection (1) places a duty on the relevant person to seek authorisation of implementation of the measures in the Statement of Significant Restriction following receipt of the relevant reports. Authorisation should ordinarily be sought from the welfare attorney of the adult or the welfare guardian, where either such person has been appointed. Where, however, there is no such attorney or guardian, or where they decline to authorise implementation of the restrictions, recourse must be had to the sheriff.

Subsection (2) excludes the application of subsection (1) where application to the sheriff under section 52D(7) has been required. In other words, it makes clear that the default procedure under subsection (1) applies only where consensus has been reached between the relevant person and authors of the reports as to the measures set out in a Statement of Significant Restriction.

Subsection (3) makes clear that as from commencement of the provision, any guardianship order or power of attorney made or granted will be assumed to confer power to authorise significant restriction of liberty, unless the order or instrument expressly provides otherwise.

Subsection (4) clarifies that the general provision in subsection (3) does not displace any specific power in a power of attorney or guardianship order to authorise significant restriction of liberty.

Subsection (5) makes clear that, in relation to powers of attorney and guardianship orders made or granted prior to the commencement of Part 5A, whether authorisation of significant restriction of liberty can be authorised will depend on the terms of the order or instrument. Given that the context of the restriction is care, however, we would anticipate that general powers to safeguard a person's welfare would suffice.

Subsection (6) lays down a requirement that where authorisation by a welfare attorney or welfare guardian is sought, the guardian or attorney must be sent a copy of the Statement of Significant Restriction and each of the reports prepared in relation to it.

Subsection (7) lays down requirements on the basis of which authorisation by a guardian or attorney is to be given. The attorney or guardian must make a written declaration to the effect that authorisation is given having taken account of the content of the reports produced on the statement. Moreover, the declaration must set out the basis on which the attorney or guardian is satisfied that the significant restriction will benefit the adult, that such benefit cannot be achieved without the restriction and that the restriction will have the minimum possible effect on the freedom of the adult.

Subsection (8) requires the relevant person to notify any grant of authorisation by an attorney or guardian to each of the persons listed in section 52B(10).

Subsection (9) entitles the adult and any person claiming an interest in the personal welfare of the adult to challenge the granting of any authorisation by a welfare attorney or welfare guardian by means of appeal to the sheriff. This seeks to give effect to the Article 5(4) ECHR requirement for access to a court.

Subsection (10) confirms that, where there is authorisation by a guardian or attorney of implementation of measures set out in a Statement of Significant Restriction, these measures may continue to be imposed, notwithstanding that an appeal against the authorisation has been brought.

Subsection (11) lays down the procedural requirement that the reports and the Statement of Significant Restriction to which they relate be lodged in court along with any application to the sheriff in connection with authorisation of significant restriction of liberty. This covers an application because there is no welfare attorney or welfare guardian (or the attorney or guardian declines to grant authorisation), an application for review of authorisation by a guardian or attorney, or an application because of ongoing disagreement between the relevant person and authors of reports as to the measures set out in a draft Statement of Significant Restriction.

Subsection (12)(a) makes clear that where there is an application to the sheriff as a result of absence of a welfare attorney or welfare guardian, or an unwillingness of the guardian or attorney to grant authorisation, or as a result of an ongoing dispute, the sheriff has two available options for disposal of the application. The sheriff may simply grant the authorisation, without modification, if satisfied that the criteria set out in subsection (7)(b) are met. Where the sheriff is not so satisfied, authorisation may be granted subject to such modification as the sheriff thinks necessary to ensure that the subsection (7)(b) criteria are fulfilled.

Subsection (12)(b) deals with disposal by the sheriff of appeals against authorisation granted by a welfare attorney or welfare guardian. The sheriff has three available options: upholding of the



authorisation, modification of its terms such as to ensure that the requirements of subsection (7)(b) are met or nullification of the authorisation.

Subsection (13) sets a period of one year as the duration for which measures authorised in terms of a Statement of Significant Restriction can be implemented. The period runs from the date on which authorisation is obtained. Subsection (14) makes clear that, for the purposes of the running of the one year period referred to in subsection (13), authorisation does not include an authorisation that is subject to review by the sheriff, unless that authorisation is upheld. The result is that where the sheriff authorises implementation of measures originally authorised by a welfare attorney or welfare guardian, but with modification, the one year period effectively restarts. It runs from the date on which authorisation is obtained from the sheriff.

**52F Application under section 52E to sheriff: consideration of need for guardianship order**

- (1) Without prejudice to section 3(4), in an application under section 52E(1)(b) in relation to an adult who does not have a guardian the sheriff shall require the local authority within whose area the accommodation in which the adult has been, or is to be, placed is situated—
  - (a) to consider whether a guardianship order is necessary for the protection of the personal welfare of the adult, and
  - (b) if it appears to the local authority that there is such a necessity, to apply under section 57 for such an order.
- (2) Where an application is made by virtue of subsection (1)(b), the sheriff is not to appoint the chief social work officer of the local authority as guardian if there is an individual mentioned in section 59(1)(a) who may instead be appointed.

**NOTE**

Section 52F implements recommendations 11 and 12. Subsection (1) makes further provision in relation to the specific scenario where an application for authorisation falls to be considered by a sheriff because the adult to whom it relates does not have a welfare guardian. A duty is placed on the local authority within whose area the accommodation is situated to consider whether a guardianship order is necessary for the protection of the personal welfare of the adult. Where it appears to the local authority that it is necessary, the authority is required to apply for an order under section 57 of the 2000 Act.

Where an application is made under section 57, the sheriff is not to appoint the chief social worker of the local authority as guardian if there is an individual who, in terms of section 59(1)(a), is suitable for such appointment and has consented to being guardian. That individual should be appointed instead. This is in terms of subsection (2).

**52G Renewal**

- (1) Where, during a period in which the measures specified in a Statement of Significant Restriction may be implemented (that period being in this section referred to as the “current period”), the relevant person forms the view that, in the interest of the adult to whom that statement relates, those measures ought to continue to be implemented (whether or not with modifications) after the current period ends, the relevant person may seek authorisation for such continuance.

- (2) For the purposes of seeking authorisation under subsection (1), the relevant person is to prepare a copy of the Statement of Significant Restriction (whether or not with modifications).
- (3) Sections 52D(1)(b) to (10), 52E and 52F apply for the purposes of seeking authorisation under subsection (1) and in relation to a copy prepared under subsection (2) as they apply for the purposes of an assessment initiated under section 52B(3)(a) and in relation to a statement prepared under section 52D(1)(a).
- (4) The reference in subsection (1) to “a period in which the measures specified in a Statement of Significant Restriction may be implemented” includes a reference to a period in which such measures may be implemented (whether or not with modifications) by virtue of this section.

## NOTE

Section 52G implements recommendation 16. It caters for the situation where there is thought to be a need to seek authority for the continued use of measures amounting to a significant restriction of liberty beyond the expiry of the period of one year for which they are originally authorised.

Subsection (1) confers power on the relevant person to seek renewal of authorisation for use of measures giving rise to significant restriction of liberty where this is thought to be necessary for the benefit of the adult who is currently subject to them.

Subsection (2) sets out the first practical step towards renewal of authorisation, namely that the relevant person produce a copy of the Statement of Significant Restriction as it currently stands, showing any modification that is thought to be required.

Subsection (3) makes clear that a copy of a Statement of Significant Restriction produced in connection with a possible renewal is to be subject to the same procedure as regards reports by professionals and authorisation as an initial draft statement that is drawn up. In practice, though, it is envisaged that the statement submitted for renewal might in many cases be very similar to the original statement.

Subsection (4) makes clear that a decision to seek renewal of authorisation to implement measures amounting to a significant restriction of liberty may be taken during a period when the authorisation is already subsisting on the basis of a renewal. The result is that there is no limit to the number of occasions on which authority to implement measures may be renewed for a further 12 month period.

### **52H Variation to implement a further measure**

- (1) Where, during a period in which the measures specified in a Statement of Significant Restriction may be implemented, the relevant person forms the view that, in the interest of the adult to whom that statement relates a further measure ought to be implemented, the relevant person may implement that measure.
- (2) If a measure is implemented by virtue of subsection (1), the relevant person must without delay—
  - (a) vary the Statement of Significant Restriction accordingly, and

- (b) intimate to each person mentioned in section 52B(10) that the measure is being implemented and why.
- (3) Any variation occurring by virtue of paragraph (a) of subsection (2) may be reviewed by the sheriff on application by a person receiving intimation by virtue of paragraph (b) of that subsection.
- (4) The relevant person may, pending the determination of the review, continue to implement the further measure.
- (5) References in this section to a Statement of Significant Restriction include references to a copy of such a statement prepared under section 52G(2).

#### NOTE

Section 52H implements recommendation 17. It caters for the possibility that the view of the relevant person as to what measures of restriction are necessary in the interests of an adult may change during the currency of an authorisation.

Subsection (1) provides that a variation takes place where a further measure of restriction is to be added to those set out in a Statement of Significant Restriction. This is intended to include the scenario where a measure of restriction is to be subject to modification of such a fundamental nature that a new measure is effectively imposed instead of the existing measure. It is open to the relevant person simply to implement the new measure, where they consider that it is to the benefit of the adult to do so. The decision in this scenario lies entirely with the relevant person – it is not a matter for the welfare attorney or welfare guardian of the adult, if such a person has been appointed. This gives effect to the intention that variation during the course of the year should be readily available and reasonably informal.

In the event that a variation is effected, subsection (2) places on the relevant person a duty that is two-fold. Firstly, the relevant person is required to amend the Statement of Significant Restriction, in physical terms, to reflect the variation. Secondly, they are required to intimate the variation to each of the persons listed in section 52B(10), including providing reasons for it. Subsection (3) confers on any person who receives intimation of a variation the opportunity to challenge it. These provisions are intended to ensure that sufficient safeguards are in place, notwithstanding the intentionally informal nature of the process of variation.

Subsection (4) puts beyond doubt that where there has been a variation in measures of restriction imposed, the additional measure may continue to be effected, notwithstanding that an appeal against the addition has been brought.

Subsection (5) provides confirmation that the variation process applies also to any copy of a Statement of Significant Restriction, where renewal has been granted.

#### **52I Further duties of relevant person**

It is the duty of a relevant person who has prepared a Statement of Significant Restriction under section 52D(1) (or, under section 52G(2), a copy of such a statement)—

- (a) to intimate to the Mental Welfare Commission, without delay, any authorisation granted by virtue of section 52E(1) to implement, as regards the adult to whom the statement relates, the measures specified in the statement (or as the case may be in the copy), and
- (b) to deliver to the Mental Welfare Commission with that intimation a copy of the statement prepared under section 52D(1) (or as the case may be a copy prepared under section 52G(2)).

## NOTE

Section 52I imposes on the relevant person a duty of intimation to the Mental Welfare Commission for Scotland of any authorisation of a significant restriction of liberty. It encompasses any authorisation of continued use of measures of restriction, in terms of the provision for renewal. In addition, a duty is imposed to provide a copy of the Statement of Significant Restriction as authorised or, as the case may be, renewed. This is intended to strike a balance between ensuring that the Mental Welfare Commission is aware of any authorisation that takes place, and avoiding an unnecessary burden in terms of retention of documents.

### **52J Application to sheriff in relation to unlawful detention of adult**

- (1) This section applies where an adult who is, or may be, incapable is being detained in accommodation provided (or arranged for) by a care home service or an adult placement service.
- (2) The adult, or any person claiming an interest in the personal welfare of the adult, may apply to the sheriff for an order requiring the manager of the accommodation, or any person effecting the detention of the adult in the accommodation, to cease to detain the adult.
- (3) On an application under subsection (2) the sheriff—
  - (a) if satisfied that the adult is being detained unlawfully in the accommodation, shall grant the order mentioned in that subsection, or
  - (b) if not so satisfied, shall refuse the application.
- (4) This section is without prejudice—
  - (a) to any other provision of this Act, or
  - (b) to any provision of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp13).”.

## NOTE

Section 52J implements recommendation 45. It provides for application to the sheriff for an order to bring to an end detention which is unlawful. In effect it offers an equivalent to section 291 of the 2003 Act, applicable in certain non-hospital settings within the community, and with applications being determined by the appropriate sheriff rather than the Mental Health Tribunal for Scotland.

Subsection (1) sets out the circumstances where section 52J applies. This is the case in any situation where a person who lacks capacity to make decisions as to their own living arrangements is being detained in a care home or in accommodation arranged by an adult placement service. The detention may be argued to be unlawful because the nature of the restrictions is such as to require authorisation but no authorisation has been sought. Such authorisation may be via the community process or, alternatively, via the 2003 Act or other provisions of the 2000 Act. Alternatively, the detention may be unlawful because it falls outwith the scope of an authorisation that has been granted for significant restriction of liberty.

Subsection (2) provides that application to the sheriff for an order may be submitted by the adult or any person claiming an interest in the personal welfare of the adult. The order is to require a particular person – namely the manager of the accommodation in which the adult is living, or any other person who is directly involved in effecting the detention of the adult – to cease to detain the adult.

Subsection (3) lays down the test to be applied by the sheriff in determining an application. An order should be made only if the sheriff is satisfied in all the circumstances that the adult is being subject to detention which is unlawful. The power will operate in tandem with the existence of section 3(1) of the 2000 Act. This could serve to bridge a gap in the event that the release is ordered of a person who has care needs as a result of their incapacity, meaning that they cannot live independently in the community.

Subsection (4) confirms that any measures of restriction imposed either in terms of the 2003 Act, or other provisions of the 2000 Act, cannot be set aside by a decision under section 52J.

## **2 Amendment of Mental Health (Care and Treatment) (Scotland) Act 2003**

In section 291(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (which provides for applications to the Mental Health Tribunal for Scotland as regards the detention in hospital of certain patients), for the words “or the 1995 Act” there is substituted “, the 1995 Act or the Adults with Incapacity (Scotland) Act 2000 (asp 4)”.

### **NOTE**

Section 2 provides for amendment of section 291 of the 2003 Act to insert reference to the 2000 Act. This serves to update section 291 to reflect the existence of the new provisions introduced in section 1.

## **3 Commencement**

- (1) This section and section 4 come into force on the day after Royal Assent.
- (2) Sections 1 and 2 come into force on such day as the Scottish Ministers may by regulations appoint.

### **NOTE**

Section 3 makes provision in relation to commencement of the legislation. With the exception of those provisions which come into force on the day after Royal Assent, the provisions will come into force on a date appointed by the Scottish Ministers in making an order.

## **4 Short title**

The short title of this Act is the Adults with Incapacity (Scotland) Act 2014.