

**GUARDIANSHIP RESEARCH,
ANALYSIS AND PROJECTS 2014**

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ABOUT THIS REPORT

Andrew Symonds, the author of this report, worked with the Commission on a voluntary basis while on sabbatical from his human rights based work in Australia. His interest in the Commission arose out of our involvement in the UK's National Preventive Mechanism (NPM) under OPCAT, the UN's Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment which the UK ratified in 2003. OPCAT requires that signatory nations set up a mechanism for regular visits to places of detention to report on findings and make necessary recommendations for improvement.

Andrew's report primarily consists of three strands. The first is research and comparative analysis regarding welfare and financial guardianship arrangements in Australia and Scotland. The second strand relates to current debate about the concepts of 'substitute' and 'supported' decision-making, including in international law. The third strand consists of Andrew exploring and developing a system to assist the Commission in prioritising those adults on welfare guardianship we choose to visit each year.

The research was particularly timely as during his time here the Supreme Court had issued an important judgement in the "Cheshire West" case and the Scottish Law commission had subsequently issued a report and draft legislation suggesting amendments to the current legislation in Scotland.

April, 2015

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INTRODUCTION AND OVERVIEW

The following report outlines research and analysis undertaken in 2014 for the Mental Welfare Commission for Scotland (MWC) regarding welfare and financial guardianship. It is a poignant time to reflect on welfare and financial guardianship and to have the debate about the benefit of future reform. The use of formal decision making arrangements, including guardianship, is consistently increasing in Scotland and in Australian States and Territories. There is also a consistent trend towards greater use of formal decision making in relation to adults with age related conditions, such as dementia and Alzheimer's disease.¹ As the population ages, the trend is likely to continue and warrants proactive assessment of the related legal, policy and service frameworks.

Contemporary discussion about guardianship focusses on what is termed a 'paradigm shift' in thinking about disability. This new paradigm is epitomised by a greater focus on autonomy and legal capacity for adults with a disability and is reflected in the *Convention on the Rights of Persons with Disabilities* (CRPD).² The change in thinking and the commencement of appearances before the UN Committee on the Rights of Persons with Disabilities provides additional impetus for reflection and review of existing arrangements.

This year, 2014, was a specifically poignant time to be investigating guardianship arrangements in Australia and Scotland. In August 2014 the Australian Law Reform Commission finalised its report into Equality, Capacity and Disability in Commonwealth Laws. In March 2014 the United Kingdom Supreme Court handed down its decision in the *Cheshire West* case,³ defining the circumstances in which persons with 'incapacity' were regarded as deprived of their liberty under the *European Convention on Human Rights* (ECHR). The 'acid test' in this case was considered to broaden the existing definition, meaning a greater number of adults with incapacity would be deemed to be 'deprived of their liberty' as a result of their care arrangements. This case was considered to have significant implications for carers and service providers. In October 2014 the Scottish Law Commission published a report about the extent to which various Scottish laws and frameworks provided adequate legal authority for depriving a person with incapacity of liberty under the ECHR. The review focussed significantly on Guardianship arrangements.

A focus of the analysis in this report is the manner in which proxy decision making regimes function in practice. Discussion about the 'new paradigm' and reviews of legislation focus significantly on the legal architecture, theory, policy and the appropriateness of words in provisions. However, the ultimate judge or 'acid test' of any guardianship regime should be the manner in which the legal and policy architecture flows through into the real world of the adults, carers, families and guardians that rely on them.

¹ These trends are consistently highlighted in annual reports of Australian decision making authorities, in most cases the relevant Tribunal. MWC's annual statistical analysis of the use of guardianship legislation in Scotland also demonstrates these trends. Please see section 'Decision making body – a possible new authority'.

² Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws, Final Report, pp 3, 41, 75.

³ [2014] UKSC 19, on appeal from [2011] EWCA Civ 1257; [2011] EWCA Civ 190

Part 1 Comparative Analysis - Overview

This Part analyses various elements of the guardianship regime in Scotland and compares them to the regimes in Australian States and Territories.

The analysis includes various key issues that were raised in initial discussions with the Commission – for example, the extent to which Guardianship is used, in practice, as a measure of last resort.

The analysis draws upon recent major reviews of Guardianship legislation that have taken place in Queensland, Victoria and New South Wales. The Australian Law Reform Commission's report into legal capacity for persons with disabilities is also discussed.

- *The 'Paradigm shift' and the CRPD*

The analysis in Part 1 focusses predominantly on the extent to which existing regimes align with the 'paradigm shift' in thinking about guardianship and decision-making assistance. The paradigm shift is described as the movement away from the 'social welfare' model of disability that gained favour in the 1970s. The new paradigm views people with disabilities as holders of rights rather than as recipients of care and welfare. The associated 'social model' of disability views disability as the result of the manner in which society is organised, rather than the result of a person's 'impairment'. The social model focusses on removing barriers and obstacles that society imposes on 'persons with disabilities' and their choices and participation. The 'new paradigm' focuses on ability rather than disability, autonomy and legal capacity rather than paternalism.⁴

The paradigm shift and the 'social model' of disability are reflected in the CRPD which came into force on 3 May 2008.⁵ Article 12 of the Convention 'equal recognition before the law' is centrally important to the analysis of welfare and financial guardianship in this report. There is disagreement about what form of decision making assistance is permitted by Article 12, and whether 'substitute' decision making is permitted at all.⁶ This report will not make an assessment about the correctness of interpretations of the Article 12. The report will review the regimes with primary focus on the general principles underlying Article 12 and the core themes of the 'new paradigm'. These core themes include an emphasis on maintenance of legal capacity, the existence of appropriate safeguards, and provision of support.

The analysis in Part 1 assumes that some form of substitute decision making is permissible and acceptable. This assumption is required in order for analysis to focus on existing arrangements and possible adjustments to them. Adopting an assumption that substitute decision is impermissible would require a more significant overhaul of existing regimes. It is important to note that the report accepts alternative terminology such as 'full support' (used by the Australian Law Reform

⁴ Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws (DP 81), 22 May 2014, pps. 29, 30; and NSW Standing Committee on Social Issues, 2010, 'Substitute decision-making for people lacking capacity', pps 37-39

⁵ NSW Standing Committee on Social Issues, 2010, 'Substitute decision-making for people lacking capacity', pps. 37-39

⁶ Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws (DP 81), 22 May 2014, pps 43-45

Commission) as being equivalent to substitute decision making. The focus is on the practical effect, that is, a proxy decision maker making a decision for the adult.

That some form of substitute decision-making is permissible and appropriate appears to be generally accepted in Australia and Scotland. This issue, article 12, 'supported' and 'substitute' decision making are discussed in Part 2 of the report. The debate is irrelevant to the project outlined in Part 3 of the report, which focusses on targeting existing MWC visits, described below.

The analysis in Part 1 is still useful to those who oppose any form of substitute decision making. Discussion about modern 'threshold' provisions for entry into existing guardianship regimes (for example, the concept of 'capacity') are easily translated to debates about entry into 'supported' decision making regimes. Discussion in most sections, especially about the nature of decision making bodies (such as courts or tribunals), monitoring and requirements of the Guardian/Supporter are also transferable.

Part 2 Supported Decision Making - Overview

Part 2 provides a variety of information about the debate relating to Article 12 of the CRPD and the rise in advocacy for 'supported' decision making. As mentioned, there are divergent opinions about what decision making regimes are permitted under the CRPD. The debate is complicated by confusion about what the terms 'supported' and 'substituted' decision making specifically mean and whether these terms are useful at all. The UN Committee for Persons with Disabilities published a 'general comment' on Article 12 in April 2014.⁷ Discussion with stakeholders in Scotland demonstrated that the general comment further confused the definitional issue.

Rather than make any firm conclusions about the debate, Part 2 provides a range of links, resources and comments as 'food for thought'. Scotland is beginning to have the debate about options for 'supported' decision making. Dr Jill Stavert and the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University held a seminar in October 2014 to progress discussion of the issue. The MWC is interested in further discussion about the appropriateness of supported decision making for Scotland. It is hoped that the unbiased information provided in Part 2 will assist in this discussion.

Part 3 Guardianship visit allocation project - Overview

The final Part outlines the project to develop a system for allocating MWC visits to adults under guardianship who may be deprived of liberty, subject to significant restriction of liberty and/or subject to certain precarious forms of restriction of liberty such as restraint. The project was born from my interest in the MWC's role as part of the UK's National Preventive Mechanism established under the *Optional Protocol for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment* (OPCAT). Initial discussions with MWC highlighted the fact that no system currently existed for proactively targeting visits towards instances of possible deprivation or restriction of liberty. The project sought to develop a system for allocating visits in this way. As outlined in Part 3,

⁷ Committee on the Rights of Persons with Disabilities, Eleventh session, 31 March–11 April 2014, General comment No. 1 (2014)

the ability to target visits provides a range of benefits, allows the Commission to better fulfil its mandate as part of the National Preventive Mechanism and achieve its aim:

...to ensure that care, treatment and support are lawful and respect the rights and promote the welfare of individuals with mental illness, learning disability and related conditions.

The detailed and methodical process used to find indicators for deprivation of liberty and restriction of liberty provided a number of additional avenues for review. The process became a useful tool for analysing and making suggestions about the manner in which MWC currently collects data about restriction of liberty during visits. The analysis also allowed for review and reflection about the manner in which guardianship orders are constructed in Scotland and the powers in those orders. The analysis demonstrated the concerning trend by Sherriff Courts of wording powers in a very broad and vague manner, resulting in lack of clarity about what each order sanctions. The analysis also highlighted a concerning lack of specific attention paid to restrictive practices in orders and in the Scottish regime generally.

A crisis of language

Conversation and debate regarding guardianship and proxy decision making suffers from a crisis of language. As mentioned, there is significant confusion about what various terminology means and what is required under international law. This confusion makes it more difficult to establish the goals for reform of proxy decision making and clouds understanding of what is being achieved.

As already mentioned, a common dichotomy is made between ‘substitute’ and ‘supported’ decision making. There is disagreement and debate about whether Article 12 of the CRPD permits ‘substituted’ decision making or only ‘supported’ decision making, however, there is also confusion and debate about what these terms mean and where the line is drawn. This confusion is discussed in Part 2. The issue appears to create significant difficulty for jurisdictions attempting to reform existing arrangements.

Debate also becomes complicated by the move away from paternalistic approaches towards a rights based approach. For example, the New South Wales parliamentary committee report refers to the ‘delicate balance’ and ‘competing duties’ of Government towards persons with disabilities ‘to respect and maximise their autonomy while at the same time protecting them from abuse’. The New South Wales Report states that:

We cannot make a decision on someone’s behalf without taking away their right to make that decision for themselves, and at the same time making the difficult judgement that we know better than they where lies their best interests...

In seeking to balance these duties, some encroachment on the freedom of vulnerable individuals is inevitable. To encroach too far is to prevent a person from fully exercising their capacity; to encroach too little is to leave them open to abuse from others and from their own mismanagement.⁸

Further, that the:

⁸ NSW Standing Committee on Social Issues, 2010, ‘Substitute decision-making for people lacking capacity’, pp. 3

...manner in which these competing duties have been weighed throughout history reflects the dominant paradigm of the era in relation to the treatment of people with disabilities.⁹

There is some difficulty in the language used to describe the 'balance'. Words such as 'vulnerable', 'protection', 'best interest' are usually associated with 'old fashioned' and paternalistic approaches to disability. In the forward to the New South Wales Report, Hon Ian West MLC appeared to take a resolute approach to this issue.

At the same time we must be mindful that the presumption of capacity and respect for autonomy does not and must not relieve the government of its duty towards people who lack capacity. We all – the government, service providers and the general community – have an obligation to exercise a duty of care towards society's most vulnerable members. We must exercise that duty of care without being paternalistic or discriminatory – but also without fear of being accused of the same.¹⁰

From a human rights perspective the People with Disabilities Australia analysis of Article 12, published in 2009 couched a similar balancing act in different terms:

Some positive measures to enable particular persons with disability to exercise legal capacity, such as provision for action by proxies, and for substitute decision-making, may involve modifications and limits to autonomy related rights, sometimes only at a theoretical level, but also sometimes in practice. These limits are justifiable (and not arbitrary) where they result in a net benefit to the person. 'Benefit' is to be understood in terms of the realisation of the person's human rights as a whole...¹¹

The Australian Law Reform Commission discussion paper and subsequent report include very useful discussion about terminology and the debate around legal capacity and substitute decision making.¹²

I suggest that any revision and reform of the regime in Scotland should commence with a discussion about exactly what the reform is trying to achieve and how terminology will be managed. It is obviously important to be confident about what the goal posts are for reform.

Suggestion 1-0

That any discussion about reform of the current regime, or the implementation of new measures, including 'supported decision making' commence with a clear discussion about terminology, theory and application of the CRPD to ensure the 'goals' of reform are clear and achievable.

The Australian Law Reform Commission Report recommends changes to a variety of terminology, for example, referring to 'supporters' and 'representatives' as opposed to 'supporters' and 'guardians'.¹³

⁹ Ibid, pp. xiii.

¹⁰ Ibid, pp.xiii

¹¹ People with Disability Australia: 2009, 'Everyone, Everywhere: Recognition of Persons with Disability as Persons Before the Law, pp 49.

¹² Australian Law Reform Commission, 2004, 'Equality, Capacity and Disability in Commonwealth Laws, Final Report'; and Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws (DP 81)

Despite the confusion that currently clouds debate around guardianship, there are clear aspects of the 'modern' approach that are generally agreed and can be used as a bench mark for discussing existing arrangements – for example, least restrictive approaches to decision making assistance, appropriate review and safeguards, and a 'social model' of disability.

¹³ Australian Law Reform Commission, 2004, 'Equality, Capacity and Disability in Commonwealth Laws, Final Report', pps. 80-88.

SUMMARY OF SUGGESTIONS

Throughout the report I have made various suggestions. I have termed them suggestions as opposed to recommendations due to the unofficial nature of the report and because it is written with a view to providing ‘food for thought’.

PART 1

Suggestion 1-0:

That any discussion about reform of the current regime, or the implementation of new measures, including ‘supported decision making’ commence with a clear discussion about terminology, theory and application of the CRPD to ensure the ‘goals’ of reform are clear and achievable.

Suggestion 1-1

That MWC consider options for legislative amendment that provides for fluctuating capacity.

Suggestion 1-2

To consider whether s.58(1) of the *Adults with Incapacity (Scotland) Act 2000* should be amended to more clearly articulate that capacity needs to be determined with respect to each matter or type of decision.

Suggestion 1-3

To consider whether s.58 of the *Adults with Incapacity (Scotland) Act 2000* should be amended to refer to the ‘need’ for a decision to be made (similar to QLD) helping to ensure guardianship orders and powers are granted only when necessary.

Suggestion 1-4

To consider whether s.58(1)(b) of the *Adults with Incapacity (Scotland) Act 2000* should be expanded to require that no other means would be sufficient, not only means provided under the Act. This might help to ensure that an order is not made where other mechanisms, including existing informal arrangements, are sufficient.

Suggestion 1-5

Similar to recommendations 7-11 to 7-17 of the Queensland Review, that guidelines in regulations be considered under the *Adults with Incapacity (Scotland) Act 2000* to facilitate more consistent and appropriate application of the test for ‘capacity’ by Sheriff Courts. Also consider the New South Wales Capacity Toolkit.

Suggestion 1-6

Consider whether standards, agreements or other arrangements could be developed with financial institutions and service providers to provide greater recognition of informal arrangements.

Suggestion 1-7

Consider legislated requirements for disability service providers that encourage the promotion and use of informal social and support networks.

Suggestion 1-8

Consider focussing on, and developing options for, mediation that may resolve conflicts that otherwise result in guardianship.

Suggestion 1-9

Consider the development of pre-hearing investigation units, with skills and knowledge to divert adults and carers to services that may reduce the need for guardianship.

Suggestion 1-10

Consider legislative options that obligate Sheriff Courts or local authorities to conciliate matters.

Suggestion 1-11

Consider reviewing legal aid settings in Scotland and removing the need for legal aid by reducing court costs.

Suggestion 1-12

Consider whether a Tribunal approach to determining guardianship orders may be preferable to existing use of Sheriff Courts.

Suggestion 1-13

Consider developing a standard guardianship application form that guides the applicant through appropriate considerations and legislative criteria for making an order, emphasising the principles in the *Adults with Incapacity (Scotland) Act 2000*.

Suggestion 1-14

That processes for reviewing/monitoring Court processes and the nature/form of orders and are enhanced and given greater focus.

Suggestion 1-15

Consider regulations or legislative amendments that provide more guidance about the form that orders should take.

Suggestion 1-16

Consider the types of matters and decisions that are limited or excluded in Scottish guardianship legislation as compared to Australian regimes, and whether existing legislative settings are appropriate.

Suggestion 1-17

Consider amendment of the *Adults with Incapacity (Scotland) Act 2000* to allow Sherriff Courts to specify in guardianship orders that powers are only active during periods when the adult lacks capacity. This is one form of accounting for fluctuating capacity – see also suggestion 1-1.

Suggestion 1-18

Consider, as a priority, options for regulating when and how guardianship orders confer the power to use restrictive practices with respect to an adult, or to sanction others to use restrictive practices. This consideration should include specific processes for granting powers and overseeing their implementation. See also suggestion 3-7.

Suggestion 1-19

Consider the implementation of ‘community guardianship’ as an alternative to the appointment of the local authority as guardian.

Suggestion 1-20

Consider possible additional criteria regarding the suitability of the proposed guardian in the *Adults with Incapacity (Scotland) Act 2000*, and the benefit of referring to interpersonal, emotional compatibility of the guardian and the adult.

Suggestion 1-21

Legislate to include a mandatory maximum period for guardianship orders.

PART 2***Suggestion 2-0***

Continue to research and consider options for the use of supported decision-making in the Scottish context.

Suggestion 2-1

Carefully consider the definitional and theoretical issues to determine specifically what any reform regarding ‘supported’ decision making is attempting to achieve.

Suggestion 2-2

Consider running pilots of ‘supported’ decision making in consultation with community and civil society organisations, and users of the existing guardianship system.

PART 3***Suggestion 3-0***

Inquire about whether interlocutors and applications could be supplied to MWC as electronic pdfs. Encourage the use of typed material in applications and interlocutors.

Suggestion 3-1

To implement the use of indicators outlined in this Part as a component of the system for allocating guardianship visits.

Suggestion 3-2

MWC visitors discuss why there is a small amount of data recorded in section 6 of the visit form with respect to most forms of treatment listed, and whether there are options to remove obstacles (if uncovered) to accurate and consistent collection of data.

Suggestion 3-3

Discuss and record criteria/definitions for types of treatment in section 6 of the visit form – that is, when treatment should be found to be ‘in place’ and ‘sanctioned’.

Suggestion 3-4

Amend the visit form to reduce confusion (ie. changing 'freedom to leave unassisted' to 'not free to leave') – see fig 3.1.

Suggestion 3-5

Amend the visit form to providing an option for visitors to select whether they are 'uncertain' about treatment being 'in place' or 'sanctioned' – see fig 3.1.

Suggestion 3-6

Amend the visit form and protocols to require that visitors always indicate whether treatment is 'in place', 'not in place' or 'uncertain', also whether treatment is 'sanctioned', 'not sanctioned' or 'uncertain' – see suggested amendments to section 6 of the form in fig 3.1.

Check whether findings above are the result of errors in transporting data from visit forms into IMP.

Suggestion 3-7

Suggest lobbying for more specific/less broad powers in orders – particularly regarding restrictive practices such as restraint and seclusion. Perhaps legislation or regulations could be considered that require Sheriffs to indicate whether certain treatment is sanctioned or not and if so 'why'. This would assist the Commission in its work, especially with respect to allocating visits based on particular treatment or restriction/deprivation of liberty in general.

Suggestion 3-8

As part of discussions under *Suggestion 3-3* - about what criteria/definitions are to be used in determining whether treatment should be found to be 'in place' and 'sanctioned' - I suggest speaking about what broad language should be accepted as sanctioning treatment. In this context, the prevailing test will have to be what broad language is accepted by Courts as sanctioning this treatment.

Suggestion 3-9

Suggest adding an element to section 6 of the visit form that asks visitors to record whether treatment is sanctioned by 'specific' or 'broad' language, where it is found to be sanctioned. For clarity, I suggest changing the current lead-in sentence in section 6 from 'are they sanctioned by specific guardianship powers' to 'are they sanctioned by guardianship powers'.

Suggestion 3-10

Suggest undertaking more work to consider allocating a proportion of guardianship visits to extant order rather than solely to new orders.

Suggestion 3-11

Retrospectively visit some individuals for whom 'restraint' and 'seclusion' are clearly at issue.

If possible, retrospectively visit some individuals who present with a variety of indicators, including restriction on 'freedom to leave'.

Specific suggestion 'restraint'

Suggestion 3.1-1 consider whether to collect data on the use of chemical restraint and what criteria would be used for determining when it is 'in place' and 'sanctioned'.

Part 1 - COMPARATIVE ANALYSIS

Introduction

Part 1 aims to pull together a variety of information about the proxy decision making regimes in Australia and Scotland with a focus on financial and welfare guardianship. The Scottish regime is reviewed and compared to the regimes in Australia. Under the Australian constitution responsibility for welfare and financial guardianship is managed by States and Territories, not by the Commonwealth Government. There are 8 independent guardianship regimes in Australia that can be compared and contrasted with the regime in Scotland – New South Wales, Victoria, Queensland, Western Australia, Southern Australia, Tasmania, the Australian Capital Territory and the Northern Territory.

To compare and contrast all elements of these regimes would be an immense undertaking covering various volumes. The analysis focusses on key issues discussed in the recent Australian reviews and in general commentary, to make some suggestions about areas of future discussion in Scotland. The report also attempts to cover a range of issues that were highlighted in initial meetings with the Commission. Among these, are the proliferation of orders and the impression that orders are being created for adults who potentially do not require them. There are also concerns raised about the standardisation of powers in orders and the granting of powers that are not necessarily needed.

The recent reviews into substitute decision making in New South Wales, Victoria and Queensland produced many hundreds of pages of useful analysis and are a good resource for any future reform considerations in Scotland. The Scottish Law Commission drew significantly from the Victorian Review for its report into deprivation of liberty for adults with incapacity, published in October 2014.

Again, this Part attempts to avoid concrete conclusions, but aims primarily to raise issues and provide useful information to fuel Scotland's own discussions.

The analysis and discussion focus on the extent to which the regimes align with the 'new paradigm' in thinking about guardianship and substitute decision making and the general principles underpinning Article 12 of the CRPD. As discussed in the 'introduction and overview', the new paradigm focuses on maintaining the right of the adult to make decisions for themselves and supporting them to do so. There is a move away from paternalism towards least restrictive options for decision making assistance and the use of substitute decision making as a last resort.

Perhaps the most complex debate that proxy decision making regimes attempt to manage is the line between the competing right to autonomy, and the desire to foster this autonomy, and the obligation to protect and enhance a broader set of human rights. The analysis by People With Disability Australia in the 2009 publication 'Everyone, Everywhere: Recognition of Persons with Disability as Persons Before the Law' supported the view that modifications and limits to autonomy related rights were appropriate where they result in a 'net benefit' to the realisation of the person's human rights as a whole.¹⁴

¹⁴ People with Disability Australia, *Everyone, Everywhere: Recognition of Persons with Disability as Persons Before the Law*, PWDA, pp 249.

The attempt to manage this balance is evident in the legislation outlined below, particularly in the principles embedded in each Act.

Population

Although a crude comparator, it is interesting that from a population perspective Australian States and Territories ('jurisdictions') appear to be useful comparators to Scotland. The States of Queensland and Victoria have the most similar population size to that of Scotland. It would be ideal if it were possible to make comparisons based on budget and caseload. I did attempt to investigate options for this analysis, though it is ultimately beyond the scope of this review and publically available information. It is particularly difficult to make spending comparisons due to the fact that guardianship orders are made and monitored in Scotland by local Sherriff Courts and 'local authorities', which operate on a much smaller scale than the jurisdiction-wide tribunals and legislative authorities (including public guardians) that exist in Australian jurisdictions.

Australia	Population at end Mar qtr 2014
<i>Australia(*)</i>	23,425,700
New South Wales	7,500,600
Victoria	5,821,300
Queensland	4,708,500
South Australia	1,682,600
Western Australia	2,565,600
Tasmania	514,700
Northern Territory	243,700
Australian Capital Territory	385,600 ¹⁵

(*) Includes Other Territories comprising Jervis Bay Territory, Christmas Island and the Cocos (Keeling) Islands.

Scotland	Projected population at 2014
	5,346,120 ¹⁶

Entry into the guardianship regime

Ensuring that substitute decision making regimes operate as a measure of last resort requires significant focus on the legislative and policy settings at the point of entry into the regime. Developing criteria in law to identify which people will be covered by guardianship or substitute decision making orders, and in what circumstances, is a significant focus of the recent Australian reviews.

There are non-legislative issues that also impact upon whether an adult comes into contact with the guardianship process, and whether the regime is truly only covering those adults that need it. 'Push factors' can be examined and removed where possible. For example, consideration can be given to making arrangements with the banking sector to provide for greater recognition of informal support networks or non-traditional ways of communicating decisions. This focus on removing societal

¹⁵ Australian Bureau of Statistics, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/>>

¹⁶ National Records Scotland, <<http://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/population/population-projections/population-projections-scotland/2012-based/list-of-figures>>

barriers to decision making by adults with impaired capacity accords with the social model of disability. There is great value in considering the extent to which society excludes and inhibits persons with disabilities, including through the existence of unnecessary obstacles to participation.

It is also useful to consider what alternatives exist to guardianship and whether further alternatives could be developed, including those alternatives referred to as 'supported decision making'.

Threshold provisions and 'capacity'

Setting legal criteria is complicated by the unique nature of an adult's ability to make decisions, as well as the variety of unique circumstances in an individual's life that determine whether substitute decision making is appropriate. Relevant circumstances might include the nature of decisions to be made in a person's life, the form and size of the estate to be managed, the existence of supportive informal networks, and the personality and disposition of the adult and their carers.

'Gateway' or 'threshold' considerations, such as the concept of 'capacity', are critical to finding the balance between protecting an individual's right to legal capacity and autonomy, and protecting the individual's other rights and interests.

Setting too high a threshold for capacity will tend to weigh against the principle of self-determination, while setting the standard too low may place the adult at risk of harm.¹⁷

A significant focus of discussion of the reviews in Queensland, New South Wales and Victoria was the concept of 'capacity' for decision making. When does a person 'lack capacity' and therefore become a candidate for substitute decision making?

The manner in which legislation flows into practice is always a critical consideration. Constructing provisions that align with the desired theoretical approach is one consideration, the principles also need to be applicable. In addition, the appropriate frameworks and monitoring are critical to ensuring the practical application matches the desired theoretical approach. Monitoring is discussed later in this Part.

Australian jurisdictions and Scotland phrase their 'threshold' provisions in different ways, each revolving around different incarnations of the concept of capacity – sometimes using equivalent phrases such as 'impaired decision-making ability'.

Capacity

There are three general approaches to capacity:

- The functional approach: where a person has impaired capacity for a particular decision if they are unable to understand the nature and effect of the decision at the time the decision is to be made.
- The status approach: where a person lacks the requisite capacity where they have a certain 'status', such as a particular diagnosis or their age, for example, the status of 'children' under 16 years of age.

¹⁷ Page 266, Queensland Law Reform Commission, A Review of Queensland's Guardianship Laws, Report, Volume 1, <http://www.qldrc.qld.gov.au/reports/r67_vol_1.pdf>

- The outcome approach: where a person lacks capacity if their decision is not what other people think it should be, or is not considered a 'good' or 'sensible' decision, or does not objectively appear to be in the person's interests.¹⁸

The functional approach is generally considered to be the 'modern' and preferable approach to capacity.¹⁹ This approach is favored by the reviews in New South Wales, Queensland and Victoria. Many jurisdictions in which law reform has occurred, have adopted a statutory test for capacity that is modelled on the functional approach.²⁰ New South Wales is one Australian jurisdiction where a legislative definition has not been implemented. As discussed, below, New South Wales relies on a common law definition of 'capacity' that was not supported by the Review or submissions to the Review. The Government response referred the question to a NSW Law Reform Commission Review that does not appear to have eventuated.

The functional approach to capacity is thought to best preserve the right of the individual to make choices, even choices that others may not agree with. The functional approach and the focus on the adult's understanding for a particular task aligns with the least restrictive approach. The 'status approach' was considered in the QLD Review to be incompatible with the principle of maximising the adult's autonomy in decision-making. The QLD Law Reform Commission considered that the 'status' approach also violates the adult's right to freedom from discrimination on the grounds of disability. The 'outcome approach' was considered to be unsatisfactory because it involves an assessment of the adult's actual decision rather than an assessment of the adult's ability to make a decision.²¹ An 'outcome approach' could dangerously capture those individuals considered to be unusual or eccentric.

All Australian jurisdictions, other than Queensland, include some form of 'status' element because they specify that the adult must have a disability - that is, a person's impaired capacity results from a disability or condition. The QLD Public Advocate's submission to the QLD Review noted that the inclusion of 'status' elements helped to 'safeguard against interference in the lives of adults who are eccentric or unconventional and who may make decisions from time to time with which others may not agree'.²² Northern Territory and ACT list specific factors that may not be considered in determining impaired capacity, including where the person is 'eccentric' or has engaged in 'illegal or immoral' conduct.²³

The reviews also discuss the need to ensure the legislation's approach to capacity recognizes that capacity can vary from domain to domain and from time to time. This approach recognises what the Victorian Review refers to as a more realistic view of capacity. That is, capacity is not binary or black and white but can fluctuate over time, can depend on the subject of the decision and the complexity of the decision. Ensuring guardianship does not 'over' or 'under' assist an adult, and ensuring it is a measure of last resort requires a more nuanced approach to capacity.

¹⁸ Queensland Law Reform Commission, A Review of Queensland's Guardianship Laws, Vol 1, pp 243.

¹⁹ Ibid, pp 266

²⁰ Eg Guardianship and Administration Act 2000 (Qld); Mental Capacity Act 2005 (UK); Mental Capacity and Guardianship Bill 2008 (Ireland), in Queensland Law Reform Commission, A Review of Queensland's Guardianship Laws, Vol 1, pp 244.

²¹ Queensland Law Reform Commission, A Review of Queensland's Guardianship Laws, Vol 1, pp 270

²² Ibid, pp 269

²³ Guardianship and Management of Property Act 1991 (ACT) s 6A

The Victorian Review considered that a nuanced approach to capacity is especially important considering the demographic of people using the regime. For example, the capacity of an adult with an age-related condition may deteriorate over time. An adult with an acquired brain injury might regain capacity. An adult with mental illness may have fluctuating capacity.²⁴ The legislation in most regimes does not deal particularly well with this understanding of capacity. The QLD Review recommended that conditions could be placed in orders to indicate that powers operate only when the adult lacks capacity, also that the presumption of capacity be applied by the Guardian in this instance.

The Australian Law Reform Commission report preferred an approach that did not focus on 'capacity' at all.

Rather than starting by questioning whether a person has the capacity to make decisions—reflecting a binary view of capacity and decision-making—the preferable approach is to ask what level of support, or what mechanisms are necessary, to support people to express their will and preferences.²⁵

Examples of threshold provisions

Queensland

Queensland legislation provides a three step test for the appointment of a guardian or administrator by the Tribunal.

Section 12 Appointment

- (1) The tribunal may, by order, appoint a guardian for a personal matter, or an administrator for a financial matter, for an adult if the tribunal is satisfied—
 - (a) the adult has impaired capacity for the matter; and
 - (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
 - (c) without an appointment—
 - (i) the adult's needs will not be adequately met; or
 - (ii) the adult's interests will not be adequately protected.

The first step is to determine the adult's capacity for a matter. Under Schedule 4 of the Queensland Act, capacity, for a person for a matter, means the person is capable of—

²⁴ Chapter 7, Guardianship, Final Report 24, Victorian Law Reform Commission

²⁵ Australian Law Reform Commission, 2004, 'Equality, Capacity and Disability in Commonwealth Laws, Final Report', Pp 93

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

This definition reflects a ‘functional’ test of capacity. The presumption of capacity must be applied when considering the capacity of the adult using the above test. The QLD Review recommended that the Act give further direction about the ways in which the adult may communicate their decisions.

The second step in the test focusses on the ‘need’ for a decision to be made, or that the adult is likely to put their health, welfare or property at unreasonable risk. The ‘need’ for a decision is an interesting addition to the test that assists in disqualifying applications for orders that are not strictly necessary, but perhaps applied for ‘in case’ a need arises. The second part of s.12(1)(b), regarding unreasonable risk, appears to allow for preemptive orders.

The Victorian Review argues that it should be possible to appoint a guardian in certain circumstances where there is not an existing need for a decision. It is argued that this allows for advance planning for people with seriously impaired decision making ability who cannot plan ahead for themselves. Note though that this is only recommended as an option for people who ‘...are highly unlikely to attain the capacity to make their own decisions at any stage of their life, even with significant support’.²⁶

The third step, plays a role in ensuring that the right of the adult to make decisions should be restricted and interfered with as minimally as possible. The second and third steps mean that the grounds will not be satisfied if other arrangements, including informal arrangements, are meeting the needs to the adult and protecting the adult’s interests.²⁷ Coupled with the ‘least restrictive’ principle in General Principle 7(3)(c) in Schedule 1, the threshold test for entry into the QLD guardianship regime sets what the QLD Review refers to as a ‘high threshold’.

The QLD Act does not specifically manage fluctuating capacity over time. The primary method by which fluctuating capacity is managed is via monitoring of the order and any subsequent request for review, also through the fact that Queensland orders are time limited. This does not account for individuals whose capacity may fluctuate as a result of a condition that does not always present in a manner that inhibits capacity – for example, some forms of mental illness. As mentioned, the QLD review recommended the Act be amended to allow the Tribunal to place conditions in the order that the powers are only in effect when the adult lacks capacity, and that the guardian should apply the presumption of capacity in making this assessment at a point in time.

Scotland

The Scottish *Adults with Incapacity (Scotland) Act* also recognizes that capacity is decision specific and that capacity can ‘remain stable, improve, fluctuate or deteriorate’. Before the commencement of the Act capacity was ‘all or nothing’ and those deemed to lack capacity had few rights.²⁸ It is not

²⁶ Victorian Law Reform Commission, 2012, Guardianship: Final Report 24, pp. xxvi

²⁷ Queensland Law Reform Commission, 2010, A Review of Queensland’s Guardianship Laws, Vol 1, Page 64 and 65

²⁸ Scottish Government, Guardianship and Intervention Orders – making an application:

clear how the Scottish Act, or the system generally, deals with the fact that capacity can ‘remain stable, improve, fluctuate or deteriorate’. Scotland could consider the discussion in the Queensland Review as described above.

Suggestion 1-1

That MWC consider options for legislative amendment that provides for fluctuating capacity.

Consider the recommendation in the Queensland Review recommendation that powers can be granted on condition that they are enlivened only when the adult lacks capacity, as determined using the presumption of capacity.

Suggestion 1-21 relates to removing indefinite orders in Scotland. Automatic periodic review by Sheriff Courts assists in managing fluctuating capacity.

The threshold test for making a guardianship order is proscribed in section 58 of the *Adults With Incapacity (Scotland) Act 2000*.

Subsection 58(1) - Where the sheriff is satisfied in considering an application under section 57 that—

(a) the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable; and

(b) no other means provided by or under this Act would be sufficient to enable the adult’s interests in his property, financial affairs or personal welfare to be safeguarded or promoted, he may grant the application.

Under the Scottish Act, intervention orders can also be awarded by the Court for ‘one off’ decisions or matters. Interestingly, under s.58(3), if the Sheriff is satisfied that an intervention order would be sufficient (to enable the adult’s interests in his property, financial affairs or personal welfare to be safeguarded or promoted) the Sheriff can consider the application for a guardianship order to be an application for an intervention order, and to grant that application. This is an interesting mechanism for helping to ensure that a guardianship order is granted as a measure of last resort and that least restrictive mechanisms for managing issues are available in the Act.

Suggestion 1-2

To consider whether s.58(1) of the *Adults with Incapacity (Scotland) Act 2000* should be amended to more clearly articulate that capacity needs to be determined with respect to each matter or type of decision.

Suggestion 1-3

To consider whether s.58 of the *Adults with Incapacity (Scotland) Act 2000* should be amended to refer to the ‘need’ for a decision to be made (similar to QLD) helping to ensure guardianship orders and powers are granted only when necessary.

Suggestion 1-4

To consider whether s.58(1)(b) of the *Adults with Incapacity (Scotland) Act 2000* should be expanded to require that no other means would be sufficient, not only means provided under the Act. This might help to ensure that an order is not made where other mechanisms, including existing informal arrangements, are sufficient.

Under the Scottish Act, an adult lacks legal capacity to make a particular decision when there is evidence that they are unable to:

- understand the information relevant to the decision; or
- make a decision based on the information given; or
- act on the decision; or
- communicate the decision; or
- retain the memory of the decision.

The Act also provides that a person cannot be deemed incapable by reason of an inability to communicate decisions, unless all practical steps have been taken to assist the adult to communicate.

This definition follows the ‘functional’ approach. As is the case in South Australia and Queensland, there are direct references to the capacity of the individual to communicate decisions. The specification that all practical steps must be taken to assist in communication accords with the social model of disability and the new paradigm in thinking about disability.

Suggestion 1-5

Similar to recommendations 7-11 to 7-17 of the Queensland Review, that guidelines in regulations be considered under the *Adults with Incapacity (Scotland) Act 2000* to facilitate more consistent and appropriate application of the test for ‘capacity’ by Sheriff Courts. Also consider the New South Wales Capacity Toolkit.

New South Wales

The NSW parliamentary review into guardianship highlighted the fact that there is no single legislated definition for ‘capacity’ in NSW. Both the *Guardianship Act 1987* and the *NSW Trustee and Guardian Act 2009* use ‘capacity’ to determine when substitute decision making arrangements will be applied in relation to an individual. No definition for capacity is provided for in either Act. The absence of a legislated definition leaves common law to provide the relevant test. According to submissions and advice to the NSW Review, the test applied is that formed in the 1982 NSW Supreme Court judgment of Justice Powell in *PY vs RJS*. A good over view of the test and in this case is provided from page 25 of the NSW report.

Incapacity is defined in terms of the ability of the adult to deal ‘in a reasonably competent fashion’ with ‘the ordinary routine affairs of man’, and whether risks result from the absence of this ability. It needs to be shown that there is a real risk resulting from the lack of competence, that the adult

maybe disadvantaged ‘...in the conduct of such affairs; or that such moneys or property which he or she may possess may be dissipated or lost’.²⁹

Justice Powell’s judgement describes a range of incapacities that would not meet the threshold for ‘incapacity’. Justice Powell indicates that it is insufficient that the adult lacks the ‘high level of ability’ required to manage complicated transactions or that the adult does not deal with simple matters in the most efficient manner. In *Re GHI*, two further considerations included:

- Whether the adult is willing to ‘seek and take appropriate advice’, therefore removing the risk of being disadvantaged.
- Whether the adult is able to identify and manage attempts to exploit them.

The test as described in submissions as inadequate for a number of reasons:

- The test does not account for the variable nature of capacity
- Set a bar that excluded some people from assistance who needed assistance. It is not very useful for situations where a person can manage most decisions in their life except complicated matters that may be required of them.
- Tends to define people as having capacity or not
- Is ambiguous and narrow and difficult to apply in practice.
- There is a tension between the test in the judgment, which requires the person not to be able to manage their financial affairs at all, and both NSW Acts that make provision for managing part of an estate.

The NSW Government response to the 2010 report resulting from the Review highlighted a preference for maintaining a common law definition with capacity to shift over time. The Government response referred the matter to the NSW Law Reform Commission for consideration. It does not appear that this review occurred or is currently in the work program for the NSW Law Reform Commission.

Other Australian jurisdictions

The threshold test used in the Australian Capital Territory is very similar to that used in Queensland. The test appears to account for fluctuating capacity by providing that ‘while the person has the impaired decision-making ability – (i) there is, or is likely to be, a need for a decision...’

The ACT legislation focusses on whether the adult’s decision making ability is ‘impaired’ due to a condition or state. In the Northern Territory, Tasmania, Victoria and Western Australia there is a common focus on an adult’s ability to make ‘reasonable judgments’. Western Australia focuses on the adult’s ability to look after their own health and safety. Western Australian legislation also looks to

²⁹ *PY v RJS* [1982] 2 NSWLR 700 in NSW Standing Committee on Social Issues, 2010, Substitute decision-making for people lacking capacity, pp 25.

whether the adult is in need of oversight, care or control, in both the interest of their safety and health or in the interests of protecting others.

South Australian legislation an adult has 'mental incapacity' where they are unable to look after their health, safety or welfare or able to manage their affairs.

All Australian jurisdictions other than Queensland include a diagnostic threshold, that is, the impairment of incapacity must result from a disability, or condition or state. The diagnostic threshold is crafted in a different manner in each jurisdiction. As previously described, this adds an element of the 'status' approach to the definition, in combination with other aspects.

Push Factors

It is useful to consider why people enter into the guardianship regime and what the push factors are, also whether there are push factors that could be removed or managed through a method other than guardianship. What are the alternatives to guardianship that might better maintain the rights and autonomy of the adult?

What are the push factors?

A variety of factors are identified as leading to the decision to formalise decision-making processes via guardianship:

- the person wishing to make a decision for the adult does not have the necessary authority to do so or authority acceptable to third parties;
- the authority of the person making the decision is disputed;
- there is no appropriate person to make the decision;
- a decision being made for the adult is considered inappropriate; or
- a conflict occurs over the decision-making process.
- There is conflict between the adult and their carers about what care they need, or where they need to live.
- The person is struggling to make decisions, or because they cannot safeguard their finances or their property.
- It may be because the carers or relatives want to have a central role in all the decisions being made for the person who lacks capacity. In some situations guardianship is sought primarily to make financial arrangements, and welfare powers are decided at the same time.
- An appointment may be sought if the adult has no family or friends willing and able to make decisions for them and a decision needs to be made for the adult.
- An appointment may be necessary if the adult has family or friends willing and able to make decisions for them, but the adult's needs are not being met – as a result, for example, of inappropriate decisions being made for the adult.
- A formal appointment may also be necessary if an attorney is not acting in the adult's interests and an alternative decision-maker is required.³⁰
- The adult may be at risk of abuse neglect or even exploitation from other people, even their carers.

³⁰ Scottish Government, Guardianship and Intervention Orders – making an application, pp 10.

- The adult may also be at risk of neglecting themselves, potentially because they ‘cannot fully appreciate his or her own needs’.³¹

Dealings with financial and other institutions

As outlined in the list above, carers can face substantial issues in dealing with third parties on behalf of the adult, including banks, doctors, and other service providers. These difficulties have been raised as a factor that encourages carers to seek to create formalised arrangements such as financial guardianship.³² This motivation may be reduced if systems, process, arrangements, standards or agreements were made with the finance industry to provide greater recognition of informal support arrangements. In Queensland, for example, there is an obligation on disability service providers to recognise and support informal networks. Under the *Disability Services Act 2006* (Qld) funded service providers are monitored and measured against Disability Service Standards as a result of a certification process. Disability Service Standard 5 regards support for informal networks.

The *Queensland and Administration Act 2000* (Qld), in section 154, provides for the formalisation of a particular decisions by informal decision-makers.

Suggestion 1-6

Consider whether standards, agreements or other arrangements could be developed with financial institutions and service providers to provide greater recognition of informal arrangements.

Suggestion 1-7

Consider legislated requirements for disability service providers that encourage the promotion and use of informal social and support networks.

Conflict among carers and family members

Where there is conflict among carers about decisions or care relating to the adult, this can result in applications being made to formalise decision making processes via substitute decision making. However, this may not always be necessary and there are a range of programs and approaches used in Australian jurisdictions to manage these situations and to determine if guardianship is strictly necessary. Mediation is used in various jurisdictions to seek to resolve disputes and conflict that might otherwise result in guardianship.

Suggestion 1-8

Consider focussing on, and developing options for, mediation that may resolve conflicts that otherwise result in guardianship.

³¹ South Australian Guardianship Board, Annual Report, 2013-2014, Pp 35

³² Queensland Law Reform Commission, 2010, A Review of Queensland’s Guardianship Laws, Vol 3, Page 13

Mechanisms for identifying and managing resolvable push factors

In NSW, the Guardianship Tribunal focusses significant effort and resources on pre-hearing processes that aim to assist in the development of solutions that do not involve substitute decision making.³³ The Tribunal's Coordination and Investigation Unit is part of 'a number of pre-hearing diversionary strategies to deal with unnecessary or inappropriate applications'. The Tribunal's submission to the NSW Review provides detail about the unit and its processes and expertise. Such a process could be investigated in more detail for replication in the Scottish context. Investigation officers from the unit assess every application and whether there are alternative options for managing the issues raised in the application. The Unit's expertise in the NSW disability service system means they are in a position to suggest various services and options as alternatives to guardianship.

The Tribunal's submission to the NSW Review claimed that for the 2006/2007 financial year 30% of applications for new guardianship orders were resolved 'informally or diverted prior to hearing'. Only 59% of applications that proceeded to hearing resulted in a guardianship order. The process of investigation was also used to identify and manage instances of abuse and exploitation.

The fact that 30% of applications in 2006/2007 could be resolved informally demonstrates that there are likely to be many instances in other jurisdictions where orders are created for people that might not be needed. The statistic also equates to a significant saving of the Tribunal's time and resources. This time could be dedicated towards greater consideration of complex and appropriate applications, and in generating appropriate and tailored orders. Finding additional time and resources will be increasingly important as demand on Tribunals and Sheriff Courts increase because of ageing populations in Australia and Scotland.

Under subsection 66(1) of the *Guardianship Act 1987* (NSW), the Tribunal had an obligation to conciliate matters. The Tribunal has now been absorbed into the larger NSW Civil and Administrative Tribunal.

Suggestion 1-9

Consider the development of pre-hearing investigation units, with skills and knowledge to divert adults and carers to services that may reduce the need for guardianship.

Suggestion 1-10

Consider legislative options that obligate Sheriff Courts or local authorities to conciliate matters.

Legal Aid and cost

An interesting situation in Scotland is the role that legal aid arrangements play in encouraging applications for welfare guardianship orders. In Scotland, legal aid is more readily available to interested persons making welfare guardianship applications or a combined welfare and financial guardianship application. During initial meetings with the MWC it was suggested that this provides an incentive for lawyers to encourage applications for welfare guardianship orders where interested

³³ NSW Standing Committee on Social Issues, 2010, 'Substitute decision-making for people lacking capacity', Pp 70.

adults might not otherwise consider applying. There is also an incentive for interested persons to add welfare powers to an application where the original intention was to apply for financial powers for a variety of practical reasons, for example, for dealing with third parties.

The Tribunal system adopted in most Australian jurisdictions generally attempts to reduce costs. Making a guardianship application is generally free.

Suggestion 1-11

Consider reviewing legal aid settings in Scotland and removing the need for legal aid by reducing court costs.

Supported Decision making

The point of entry into the guardianship regime is also the point at which debate about supported is focused in a practical sense.

The general consensus among commentators and submissions to inquiries is that some form of substitute decision making, or ‘full support’ will always be necessary. The debate about supported decision-making is about determining what alternatives might be implemented in the space between no support or informal support and formal guardianship.

There is overlap between ‘supported’ decision making and both informal and substituted decision making. Situations that might otherwise be dealt with informally can become formalised in supported decision making arrangements. In addition, situations that might otherwise result in substitute decision making might be managed through ‘supported’ arrangements. In this way, advocates for supported decision-making would envisage ‘support’ arrangements absorbing much of the space currently occupied by substituted decision making arrangements - substitute decision making would become a rarer ‘last resort’ option. There is debate about potentially greater formalisation of informal arrangements and whether this is a positive or negative thing. The concept of ‘net widening’ is discussed in Part 2, along with other information and discussion about ‘supported’ decision making.

Resourcing and the need to limit formal guardianship

Aside from theoretical and international legal reasons, there are practical reasons to ensure that guardianship is used as a last resort. A resource constrained environment, combined with an increasing demand for decision making assistance, appears to be the status quo in Australia and Scotland in the foreseeable future.

As the populations in both Australia and Scotland age a greater number of people will develop related conditions that impact on decision making capability. In Scotland the number of guardianship orders made each year has grown steadily since the *Adults with incapacity (Scotland) Act* commenced.³⁴

³⁴ Mental Welfare Commission for Scotland, *Adults With Incapacity Act monitoring 2013/2014*, pp 3.

In Australian jurisdictions the same situation is being experienced. The final annual report for the Guardianship Tribunal of NSW (now integrated into the NSW Civil and Administrative Tribunal) highlighted the struggle of managing increased workload without commensurate increases in funding. The various annual reports from Tribunals in Australia also focus on the changing demographic of those under guardianship.³⁵

In all likelihood, Australian jurisdictions and Scotland face a continuation of this increasing demand without relative increase in resources. In order to ensure adequate time is available for properly assessing, forming, monitoring and reviewing guardianship matters and orders, there needs to be a focus on ensuring that guardianship is used as a last resort.

There will likely need to be continued effort to remove unnecessary cases from the ambit of the guardianship regime through pre-hearing processes and appropriate 'gateway' controls in legislation, procedure and policy. There will also be a need to rationalise application, assessment and other processes.

As will be explained in the following section on 'constructing the order', there appears to be a lack of personalization during the development of guardianship orders in Scotland. There appears to be some standardization of powers being applied for by guardians – perhaps on advice from lawyers who have used the same wording previously. Certain 'industry' influences can creep into guardianship systems. This can occur where lawyers develop standard wording that they find is acceptable to courts and tribunals and then 'roll it out' when assisting individuals with applications for guardianship orders. This is not ideal, and courts and tribunals should be encouraged to take a more tailored approach to creation of orders, that minimize restriction of liberty and maintain legal identity to the greatest extent possible. Orders would ideally be based on the circumstances of the individuals involved. Certainly, the more time courts and tribunals have to allocate to each case, the greater scope there is for this tailoring.

³⁵ See below under 'decision making authorities – a potential new authority'.

Principles and approach to the exercise of powers

Legislation in all jurisdictions contain guiding principles and objects that apply to people and institutions performing functions under the Act. The legislation also generally provides specific additional guidelines that direct guardians and administrators in the exercise of their functions.

The principles and objects are cast differently in each jurisdiction, though there are some common features:

- Interventions should be the least restrictive of the adult's freedom of decision and action
- The wishes and views of the adult should be considered
- The adult's welfare, interests, best interest are to be promoted.³⁶

Reviews of legislation and commentary regarding Article 12 of the CRPD, and the so called 'paradigm shift', focus significantly on these principles. The discussion focuses on whether the principles embody the requirements of Article 12 and the 'paradigm shift'.

As mentioned, the 'paradigm shift' refers to the movement in thinking about disability from a social welfare model to an approach that views persons with disabilities as rights holders and participants in society. The shift includes a greater emphasis on autonomy and the maintenance of legal capacity as opposed to paternalism and a focus on welfare.

The various regimes in Australia afford different weight (at least on the face of the provisions) to the desires and wishes of the adult as opposed to protective considerations such as the adult's 'best interests'. There has been significant focus in commentary about the inclusion of considerations such as 'best interests' or 'welfare' in legislation. Such terms are generally associated with paternalism and not in accordance with the new paradigm. The UN Committee on the Rights of Persons with Disabilities published a general comment on Article 12 in April 2014. In this comment, the committee made the following comments regarding 'best interests':

The 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preference' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.³⁷

The Committee views considerations of objective 'best interests' as a common characteristic of 'substitute decision' regimes that are not permitted under Article 12 of the CRPD. Interestingly, 'best interest' is generally defined in Australian legislation in relatively non-paternalistic terms – focussing on the adults wishes, on developing adult's capacity and ensuring interventions are the least restrictive. Such considerations are generally associated with the 'new paradigm' that generally derides considerations of 'best interests' as being paternalistic and removing the adult's right to choose. This is one of many examples of the manner in which definitions and semantics

³⁶ Queensland Law Reform Commission, 2010, A Review of Queensland's Guardianship Laws, Vol 1, Pp 42.

³⁷ Committee on the Rights of Persons with Disabilities, Eleventh session, 31 March–11 April 2014, General comment No. 1 (2014), pp 5

plague conversations around guardianship. Commentators read terms like 'best interest' and assume paternalistic considerations, though in many instances 'best interests' are defined with the opposite intention. The definitions are also outlined below.

When definitions of 'best interest' are read with the overarching principles, there appears to be a bone fide attempt in Australian jurisdictions, and in Scotland, to embody the approach and philosophy that is reflected in Article 12 of the CRPD and the associated 'paradigm shift' in thinking. Whether the principles effectively achieve this is a matter for debate. Various Australian jurisdictions are having this debate via law reform commission reviews and other reporting.

Scotland

The general principles are outlined in section 1 of the *Adults with Incapacity (Scotland) Act 2000*. The principles apply to all interventions in the affairs of an adult under or in pursuance of the Act, including any orders made. Subsections 1(2) and (3) focus on least restrictive interventions and ensuring interventions are measures of last resort. Under subsection 1(4) account should be taken of the past and present wishes of the adult, views of the relatives and carers and others. The principles require the encouragement of the adult to exercise and develop existing skills to manage their own affairs.

The principles are outlined in full below but, in summary, all decisions made on behalf of a person with impaired capacity must:

- benefit the adult
- restrict the adult's freedom as little as possible while still achieving the desired benefit
- take account of the adult's past and present wishes (providing every assistance to aid communication as appropriate to the needs of the individual)
- take account (as far as reasonable and practicable) of the views of others with an interest in the welfare of the adult
- encourage the adult to use existing skills and, where possible, develop new skills³⁸

1 General principles and fundamental definitions

- (1) The principles set out in subsections (2) to (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult.
- (2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.

³⁸ Scottish Government, Guardianship and Intervention Orders – making an application, Pp 7

- (3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.
- (4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of—
 - (a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;
 - (b) the views of the nearest relative [F1, named person] and the primary carer of the adult, in so far as it is reasonable and practicable to do so;
 - (c) the views of—
 - (i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and
 - (ii) any person whom the sheriff has directed to be consulted, in so far as it is reasonable and practicable to do so; and
 - (d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.
- (5) Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.

Summary of Australian regimes

The principles in New South Wales and Western Australia give the greatest weight of all Australian jurisdictions to 'best interests' and 'welfare' considerations. The views of the adult are considered, least restrictive options are promoted and guardians are instructed to exercise their functions in a manner somewhat consistent with the new paradigm. However, the Act is clear in its statement that the adult's interests and welfare of primary concern. Of all the Australian regimes, Western Australia's legislation, from the perspective of the principles, is likely to be deemed the most incongruous with the new paradigm in thinking about disability.

Legislation in Tasmania, Victoria and the Northern Territory contains similarly worded principles which focus equally on the least restrictive interventions, the best interests of the adult and the wishes and preferences of the adult.

Legislation in Queensland and the Australian Capital Territory focusses to the greatest extent on the wishes and preferences of the adult. In the ACT, the guardian must give effect to the wishes of the adult to the extent that they can be ascertained. The only limit on this obligation to give effect to the wishes of the adult arises in circumstances where a decision is likely to significantly adversely affect the protected person's interests. In this situation, the decision must give effect to the adult's wishes as far as possible without causing significant adverse effect. If the protected person's wishes cannot be given effect to at all, then the protected person's interests must be promoted.

In South Australia a substituted judgement approach is adopted to decision making. The consideration is what, in the opinion of the guardian, would be the wishes of the adult if they were not mentally incapacitated. This is an interesting mix of subjective and objective considerations.

New South Wales

The *Guardianship Act 1987* (regulating the guardianship regime in New South Wales) and the *New South Wales Trustee and Guardian Act 2009* (regulating financial management) contain an almost identical set of indicators. The exception is that section 4 of the *Guardianship Act 1987* contains an additional provision that the community should be encouraged to apply and promote the principles. The 'welfare and interests' of the adult are the primary considerations with the views of the adult to be 'taken into consideration'. The weighting given to these considerations is unlikely to satisfy those in favour of the 'paradigm shift' previously discussed.

Section 4, Guardianship Act 1987

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.

Section 39 of the New South Wales Trustee and Guardian Act 2009 replaces the first sentence above with the following 'It is the duty of everyone exercising functions under this Chapter with respect to protected persons or patients to observe the following principles' and does not include (as already mentioned) the 'community' principle in subsection 4(h) of the Guardianship Act 1987.

Western Australia

Section 4 of the *Guardianship and Administration Act 1990* (WA) establishes the principles of the Act in a slightly different manner to most other jurisdictions. The provisions are certainly more detailed and longer overall. There is also a mix of principles and procedural elements that tend to be dealt with in other parts of the Acts in other jurisdictions. The 'principles' outlined in section 4 of the WA Act include a requirement to exercise functions under the Act in a least restrictive manner.

Rather than state the principle of least restriction, subsections 4(c) to (e) of the WA Act apply the principle to a number of contexts, including by stating that a plenary order shall not be made where a limited order would suffice. Perhaps stating the general principle and then applying it throughout the Act would give the principle of least restriction more general application.

The Act states clearly that the primary concern of the Tribunal shall be the 'best interests' of the adult. 'Best interests' is not elaborated upon within the section as it is in other jurisdictions. The Principles are crafted in a somewhat more outmoded fashion, but they do include the general requirement to 'ascertain' the views of the adult and (as discussed) apply a least restrictive order.

4 Principles stated

- (1) In dealing with proceedings commenced under this Act the State Administrative Tribunal shall observe the principles set out in subsection (2).
- (2)
 - (a) The primary concern of the State Administrative Tribunal shall be the best interests of any represented person, or of a person in respect of whom an application is made.
 - (b) Every person shall be presumed to be capable of—
 - (i) looking after his own health and safety;
 - (ii) making reasonable judgments in respect of matters relating to his person;
 - (iii) managing his own affairs; and
 - (iv) making reasonable judgments in respect of matters relating to his estate, until the contrary is proved to the satisfaction of the State Administrative Tribunal.
 - (c) A guardianship or administration order shall not be made if the needs of the person in respect of whom an application for such an order is made could, in the opinion of the State Administrative Tribunal, be met by other means less restrictive

of the person's freedom of decision and action.

- (d) A plenary guardian shall not be appointed under section 43(1) or (2a) if the appointment of a limited guardian under that section would be sufficient, in the opinion of the State Administrative Tribunal, to meet the needs of the person in respect of whom the application is made.
- (e) An order appointing a limited guardian or an administrator for a person shall be in terms that, in the opinion of the State Administrative Tribunal, impose the least restrictions possible in the circumstances on the person's freedom of decision and action.
- (f) In considering any matter relating to a represented person or a person in respect of whom an application is made the State Administrative Tribunal shall, as far as possible, seek to ascertain the views and wishes of the person concerned as expressed, in whatever manner, at the time, or as gathered from the person's previous actions.

In sections 51 and section 70, the Act provides for additional requirements upon Guardians and Administrators respectively in the exercise of their duties. The provisions state that Guardians and Administrators shall act in the 'best interests' of the adult. Unusually, the provisions specify the need to act in the guardian or administrator's opinion of the best interests. Each provision then outlines elements included in consideration of the best interest of the adult. The non-exhaustive list of elements includes considerations that are similar to provisions in other jurisdictions.

Without limiting the generality of subsection (1), that is, 'his opinion of the best interests of the represented person', a guardian acts in the best interests of a represented person if he acts as far as possible—

- (a) as an advocate for the represented person;
- (b) in such a way as to encourage the represented person to live in the general community and participate as much as possible in the life of the community;
- (c) in such a way as to encourage and assist the represented person to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person;
- (d) in such a way as to protect the represented person from neglect, abuse or exploitation;
- (e) in consultation with the represented person, taking into

- account, as far as possible, the wishes of that person as expressed, in whatever manner, or as gathered from the person's previous actions;
- (f) in the manner that is least restrictive of the rights, while consistent with the proper protection, of the represented person;
 - (g) in such a way as to maintain any supportive relationships the represented person has; and
 - (h) in such a way as to maintain the represented person's familiar cultural, linguistic and religious environment.

Northern Territory

In the Northern Territory the 'best interests of the represented person to be promoted'.³⁹ The test in section 4 of the Adult Guardianship Act (NT) is very similar to that outlined in Tasmania section 6 of the Guardianship and Administration Act 1995 (Tas) and Victorian section 4 of the *Guardianship and Administration Act 1986*. The concise set of principles reflects the general trend of combining a 'modern' focus on the wishes on the adult and the least restrictive intervention, with considerations of 'best interests'.

Section 4 Best interests of represented person to be promoted

Every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that—

- (a) those means which are the least restrictive of a represented person's freedom of decision and action as is possible in the circumstances are adopted;
- (b) the best interests of a represented person are promoted; and
- (c) the wishes of a represented person are, wherever possible, given effect to.

Section 20 of the Act provides an additional set of obligations on Guardians regarding the manner in which they exercise their authority. The focus of section 20 is on the adult's 'best interests', however, 'best interests' is defined in subsection 20(2) to include the need to take the adult's wishes into account as far as possible and to encourage the adult's participation in community life.

20 Exercise of authority

- (1) Without derogating from section 4, a guardian must act in the best interests of the represented person.
- (2) Without limiting subsection (1), a guardian acts in the best interests of a

³⁹ Section 4, Adult Guardianship Act (NT)

represented person if the guardian acts as far as possible—

- (a) as an advocate for the represented person;
 - (b) in such a way as to encourage the represented person to participate as much as possible in the life of the community;
- (c) in such a way as to encourage and assist the represented
- (e) in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person.
- (3) A guardian may on behalf of a represented person sign and do all such things as are necessary to give effect to any power or duty vested in the guardian.

Tasmania

Section 6 of the Guardianship and Administration Act 1995 provides the 'Principles to be observed'

A function or power conferred, or duty imposed, by this Act is to be performed so that—

- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
- (b) the best interests of a person with a disability or in respect of whom an application is made under this Act are promoted; and
- (c) the wishes of a person with a disability or in respect of whom an application is made under this Act are, if possible, carried into effect.

As mentioned, these principles are very similar to those in the Northern Territory and Victoria. Similar to those other regimes, the Act also describes the manner in which guardians and administrators exercise their powers. The overarching requirement is that the guardian or administrator act in the 'best interests' of the adult, though acting in the 'best interests' again requires consideration of the wishes of the adult and attempting to foster their capacity to make their own decisions. Section 27 relates to Guardians and section 57 to Administrators.

27 Exercise of authority by guardian

- (1) A guardian must act at all times in the best interests of the person under guardianship.
- (2) Without limiting subsection (1), a guardian acts in the best interests of a person under guardianship if the guardian acts as far as possible—
 - (a) in consultation with that person, taking into account, as far as possible, his or her wishes; and
 - (b) as an advocate for that person; and

- (c) in such a way as to encourage that person to participate as much as possible in the life of the community; and
- (d) in such a way as to encourage and assist that person to become capable of caring for himself or herself and of making reasonable judgements relating to his or her person; and
- (e) in such a way as to protect that person from neglect, abuse or exploitation.

57 Exercise of power by administrator

- (1) An administrator must act at all times in the best interests of the represented person.
- (2) Without limiting subsection (1), an administrator acts in the best interests of the represented person if the administrator acts as far as possible—
 - (a) in such a way as to encourage and assist the represented person to become capable of administering his or her estate; and
 - (b) in consultation with the represented person, taking into account as far as possible the wishes of the represented person.

Victoria

Sections 28 and 49 of the *Guardianship and Administration Act 1986* (Vic) are essentially the same as those provisions above in Tasmanian legislation, and very similar to legislation in the Northern Territory. They have not been repeated here to avoid repetition.

South Australia

Section 5 of the *Guardianship and Administration Act 1993* (SA) outlines the 'principles to be observed'. Again, although the principles are worded differently to those in other jurisdictions, the obvious intent is to respect the wishes of the adult as much as is possible and to ensure the least restrictive approach to guardianship is taken. Subsection 5(a) employs a 'substitute judgement' approach, which is an interesting 'subjective' assessment by the guardian of the adult's 'subjective' opinions.

Section 5

...

Where a guardian appointed under this Act, an administrator, the Public Advocate, the Board or any court or other person, body or authority makes any decision or order in relation to a person or a person's estate pursuant to this Act

or pursuant to powers conferred by or under this Act—

- (a) consideration (and this will be the paramount consideration) must be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated, but only so far as there is reasonably ascertainable evidence on which to base such an opinion; and
- (b) the present wishes of the person should, unless it is not possible or reasonably practicable to do so, be sought in respect of the matter and consideration must be given to those wishes; and
- (c) consideration must, in the case of the making or affirming of a guardianship or administration order, be given to the adequacy of existing informal arrangements for the care of the person or the management of his or her financial affairs and to the desirability of not disturbing those arrangements; and
- (d) the decision or order made must be the one that is the least restrictive of the person's rights and personal autonomy as is consistent with his or her proper care and protection.

The South Australian Guardianship Board 2013-2014 annual report stated the following:

Guardians and Administrators should not assume that they, and not the protected person, know best and do not make paternalistic value judgements about what is in the best interests of the protected person. Guardians and Administrators are responsible for ensuring that based on the evidence, they make the decision that the protected person would have made in the same or similar situations but for their incapacity. The basis for their decision is what this person would have valued and, therefore, wanted to do.⁴⁰

Australian Capital Territory

The principles in the Australian Capital Territory and Queensland (described below) give the greatest weighting of all Australian jurisdictions to the views of the adult.

Section 4 of the *Guardianship and Management of Property Act 1991* (ACT) sets out the decision-making principles.

4 Principles to be followed by decision-makers

- (1) This section applies to the exercise by a person (the decision-maker) of a function under this Act in relation to a person with impaired decision-making ability (the protected person).

⁴⁰ South Australian Guardianship Board, 2013-2014 Annual Report, Pp 36.

- (2) The decision-making principles to be followed by the decision-maker are the following:
 - (a) the protected person's wishes, as far as they can be worked out, must be given effect to, unless making the decision in accordance with the wishes is likely to significantly adversely affect the protected person's interests;
 - (b) if giving effect to the protected person's wishes is likely to significantly adversely affect the person's interests—the decision-maker must give effect to the protected person's wishes as far as possible without significantly adversely affecting the protected person's interests;
 - (c) if the protected person's wishes cannot be given effect to at all—the interests of the protected person must be promoted;
 - (d) the protected person's life (including the person's lifestyle) must be interfered with to the smallest extent necessary;
 - (e) the protected person must be encouraged to look after himself or herself as far as possible;
 - (f) the protected person must be encouraged to live in the general community, and take part in community activities, as far as possible.
- (3) Before making a decision, the decision-maker must consult with each carer of the protected person.
- (4) However, the decision-maker must not consult with a carer if the consultation would, in the decision-maker's opinion, adversely affect the protected person's interests.
- (5) Subsection (3) does not limit the consultation that the decision-maker may carry out.

Guidance regarding what constitutes the adult's interests is outlined in section 5A:

A person's interests include the following:

- (a) protection of the person from physical or mental harm;
- (b) prevention of the physical or mental deterioration of the person;
- (c) the ability of the person to—
 - (i) look after himself or herself; and
 - (ii) live in the general community; and
 - (iii) take part in community activities; and
 - (iv) maintain the person's preferred lifestyle (other than any part of

- the person's preferred lifestyle that is harmful to the person);
- (d) promotion of the person's financial security;
- (e) prevention of the wasting of the person's financial resources or the person becoming destitute.

Queensland

The Principles in the Queensland Act are the most comprehensive and are reasonably well aligned with the new paradigm of thinking about guardianship and the general principles outlined in the CRPD. The Queensland Law Commission review contained extensive analysis of the Principles and made various recommendations for amendment in order to ensure the principles 'reflect more closely the relevant articles of the United Nations Convention on the Rights of Persons with Disabilities, to provide a more logical structure, and to avoid duplication within the General Principles'.⁴¹ The Queensland Act requires substitute decision makers, and other persons or entities performing a function under the Act, in relation to a health or special health matters, apply the 'health care principles' in conjunction with the general principles.

The Queensland Act also specifies the purpose of the Act:

6 Purpose to achieve balance

This Act seeks to strike an appropriate balance between—

- (a) the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and
- (b) the adult's right to adequate and appropriate support for decision-making.

The General Principles are as follows:

- PRINCIPLES 1 Presumption of capacity

An adult is presumed to have capacity for a matter.

2 Same human rights

- (1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.
- (2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.

3 Individual value

An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

4 Valued role as member of society

⁴¹ Recommendation 4-1, Queensland Law Reform Commission, 2010, A Review of Queensland's Guardianship Laws, Vol 1

(1) An adult's right to be a valued member of society must be recognised and taken into account.

(2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

5 Participation in community life

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

6 Encouragement of self-reliance

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

7 Maximum participation, minimal limitations and substituted judgment

(1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.

(2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.

(3) So, for example—

(a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and

(b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and

(c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.

(4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.

(5) However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.

(6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

8 Maintenance of existing supportive relationships

The importance of maintaining an adult's existing supportive relationships must be taken into account.

9 Maintenance of environment and values

(1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.

(2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

Notes—

1 Aboriginal tradition has the meaning given by the [Acts Interpretation Act 1954](#), schedule 1.

2 Island custom has the meaning given by the [Acts Interpretation Act 1954](#), schedule 1.

10 Appropriate to circumstances

Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs.

11 Confidentiality

An adult's right to confidentiality of information about the adult must be recognised and taken into account.

The Queensland Review made a variety of recommendations for reform of the principles. To preserve space they have not been copied into this report. They are quite an interesting approach and can best be viewed in the 'summary of recommendations' of the Queensland report, relating to Chapter 4.⁴²

The Committee disagreed about how proposed principles 7 and 8 would operate. These proposed new principles 7 and 8 relate to the performance of functions and powers and the process for decision making.

The majority view provides the same approach to performing functions and to exercising power under the Act. A 'structured decision-making' is provided in section 8 which specifies that the decision-maker must first 'recognise and take into account the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions', then second, the substitute judgement principle should be applied.⁴³

The minority view provided different approaches to exercising a power for a matter (principle 7) and an approach to performing a function or exercising a power for other matters (principle 8). The process for performing a power in the minority approach required a focus on the adult's right to make his or her own decision and whether the adult is able to exercise, or be supported to exercise, his or her capacity in relation to the decision. When the adult is not able to make his or her own decision, the 'substitute judgement' should be adopted. When performing other functions or exercising powers, the substitute judgement approach should be adopted and the other views and wishes expressed by the adult should be taken into account.

⁴² Queensland Law Reform Commission, 2010, A Review of Queensland's Guardianship Laws, Vol 1

⁴³ Recommendation 4-4, Queensland Law Reform Commission, 2010, A Review of Queensland's Guardianship Laws, Vol 1

The initial response from the Australian Labor Party Government in Queensland in October 2011 favoured the minority view because:

...it gives greater focus and weight to the principle of substituted judgment (that is, taking into account the views and wishes of an adult when they had capacity). It also clearly separates how the powers and functions should be performed by different persons of entities.⁴⁴

No responses were implemented before the Australian Labor Party Government in Queensland lost the March 2012 election to the Liberal National Party.

The Liberal National Party Government released its response to the Report which accepted 163 recommendations, noted 8, did not accept 34 and kept 112 under consideration. The response was supportive of aligning guardianship legislation with the CRPD and is generally very supportive of the Review's reformative recommendations. The Liberal National Party Government's response indicated its support for the principles in the CRPD and aligning QLD's General Principles and Health Care Principle with them:

The principles contained in the United Nations (UN) Convention on the Rights of Persons with Disabilities are considered world's best practice on equalisation of opportunities for persons with disabilities. Although Queensland already subscribes to the ideas of these principles in its guardianship legislation, the QLRC Report recommended that the General Principles and Health Care Principle be revised to better and more accurately reflect the wording of the principles contained in the UN Convention.⁴⁵

The Government accepted the majority suggestion with respect to principles 7 and 8.

⁴⁴ Department of Justice and Attorney-General, 2011, Queensland Government initial response to the Queensland Law Reform Commission's Report: A Review of Queensland's Guardianship Laws.

⁴⁵ Queensland Government, Queensland Government's Response to Queensland Law Reform Commission Report A Review of Queensland's Guardianship Laws, Page 4

Decision making body – a possible new authority

One of the primary differences between the Scottish regime and the Australia regimes is the nature of the decision making authority that determines guardianship orders. In Australia, guardianship applications and determinations are predominantly made by Tribunals, with review power to the Supreme Court. In Scotland, orders are made by Sherriff Courts. Sheriff Courts are similar to Magistrates courts in Australia. Sheriff Courts in Scotland manage a variety of matters and are distributed across Scotland's six Sheriffdoms. The Sheriffdoms cover much smaller populations than the jurisdiction of Tribunals in Australia, which service whole States/Territories and a population equivalent to the whole of Scotland.

Western Australia

Guardianship determinations are made by the State Administrative Tribunal. The Tribunal deals with a range of matters from 'human rights' (predominantly guardianship and administrative matters), to vocational regulation, commercial and civil disputes, and development and resources issues.⁴⁶ Most applications relate to the 'human rights' stream of matters and the *Guardianship and Administration Act 1990*. Determining applications brought under the Act is the principle task of the Human Rights Stream of the Tribunal, comprising 99% of its work during 2013-14. During 2013-14, 86% of applications under the *Guardianship and Administration Act 1990* jurisdiction related to guardianship and administration.

The proportion of matters relating to the 'human rights' stream, and therefore to guardianship and substitute decision making matters continues to increase.

Applications received	2011/12	2012/13	2013/14
Human Rights Stream	4,616 (60%)	4,801 (65%)	5,237 (67%)

Guardianship matters comprise the majority of the Tribunal's work and staff are appointed specifically for their expertise in these matters, though some Tribunal members from other categories with decreasing workload may be used to assist with human rights matters.

Since the first full year of the Tribunal in 2005-2006, applications in the human rights stream had more than doubled from 2,441 to 5,173.⁴⁷

South Australia

Guardianship decisions are made by the Guardianship Board. The Board is a tribunal that is responsible for appointing guardians and also making determinations about involuntary treatment for mental illness under the *Mental Health Act*. The Board conducts semi-formal hearings.

The Board also reports a significant increase in workload – from 4487 decisions in 2007-2008 to 7,229 decision in 2013-2014, or 61%. During the 2013-2014 year, 4662 orders were made relating to the *Guardianship and Administration Act 1993*.

⁴⁶ WA State Administrative Tribunal, <<http://www.sat.justice.wa.gov.au/>>

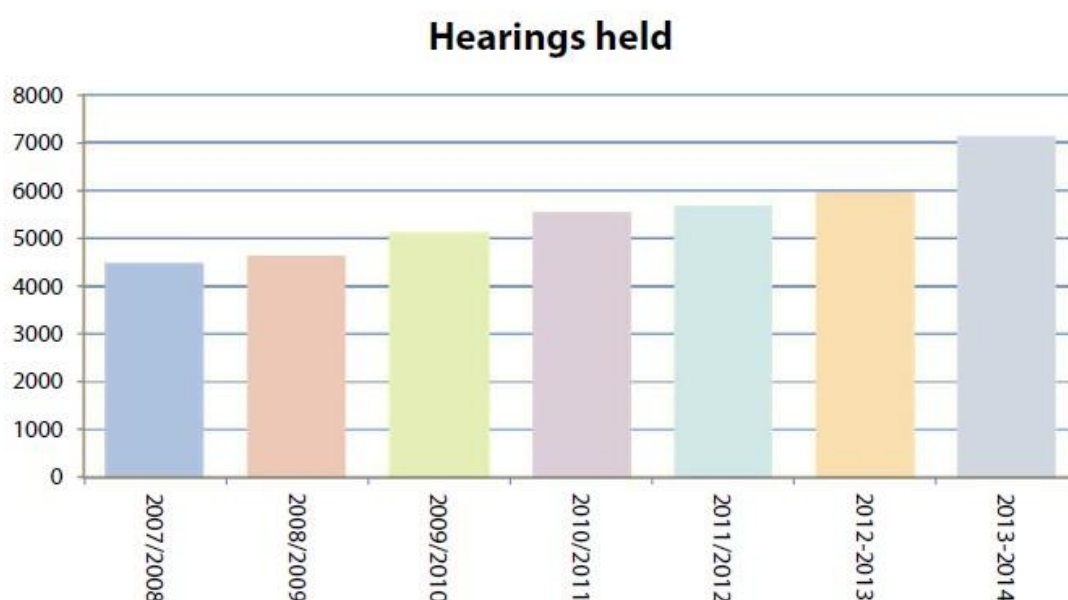
⁴⁷ WA State Administrative Tribunal, 2013-2014 Annual Report

From a funding perspective, during the 2013-2014 financial year, the Guardianship Board had a budget allocation of \$2,765,000 and achieved a \$55,200 surplus.⁴⁸

Table 2

Year	Full Boards	Single Boards	Section 81 Appeals	Section 57 Reviews	Total
2007/2008	1164	1628	582	1113	4487
2008/2009	1168	1919	500	1049	4636
2009/2010	1280	2158	348	1349	5135
2010/2011	1272	2399	344	1519	5534
2011/2012	1493	2374	370	1447	5684
2012/2013	1590	2482	385	1513	5970
2013-2014	1622	3366	386	1855	7229

Figure 8



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New South Wales

The NSW Civil and Administrative Tribunal (NCAT) is the relevant authority in NSW. NCAT was established on 1 January 2014 as a conglomerate of 22 former standalone tribunals, including the former Guardianship Tribunal. NCAT includes a specific Guardianship Division that makes determinations about guardianship orders.

⁴⁸ SA Guardianship Board, 2013-2014 Annual Report, Pp 46.

⁴⁹ Ibid, Pp 46,

Queensland

The Queensland Civil and Administrative Tribunal is the authority responsible for guardianships matters and decisions in Queensland. QCAT began operation in 2009 through the amalgamation of 18 individual tribunals, including the former dedicated Guardianship and Administrative Tribunal. The independent Tribunal seeks to resolve matters 'in a way that is fair, accessible, quick and inexpensive'.⁵⁰

Victoria

The decision making authority is the Victorian Civil and Administrative Tribunal. The Tribunal's vision is to be 'an innovative, flexible and accountable organisation which is accessible and delivers a fair and efficient dispute resolution service', with a focus on being 'a low cost, accessible, efficient and independent tribunal'.⁵¹ The Tribunal's work is divided into four divisions: civil division, residential tenancies division, administrative division and human rights division. Guardianship and administration decisions fall under the human rights division. Although guardianship decisions are made by a Tribunal that is responsible for a range of matters, each matter is managed by a specialist Division. The 'guardianship list' is second only to the 'residential tenancies list' with approximately 11,000 applications in 2013-2014.⁵²

APPLICATIONS BY CLAIM TYPE

	2011-12	2012-13	2013-14
Administration order	1,401	1,511	1,237
Guardianship order	2,248	1,831	2,077
Reassessment of administration order	5,951	6,354	6,348
Reassessment of guardianship order	908	934	783
Others	390	312	420
Total	10,898	10,942	10,865

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Tasmania

The decision making authority in Tasmania is the Guardianship and Administration Board. There were 1,230 applications (including review of orders) in the July 2012 to July 2013 year, an 11% increase on the previous year.⁵⁴ The number of hearings conducted in 2013-2014 was 735, larger than any other year. Most applications relate to individuals over 65 years of age, 60% of all applications. The Board anticipates this proportion continuing to rise as the population ages.

⁵⁰ Queensland Administrative Tribunal, <<http://www.qcat.qld.gov.au/about-qcat>>

⁵¹ Victorian Civil and Administrative Tribunal, <<http://www.vcat.vic.gov.au/about-vcat/who-we-are-0>>

⁵² Victorian Civil and Administrative Tribunal, Annual Report 2013-2014, Pp 6.

⁵³ Ibid, Pp 37.

⁵⁴ Tasmanian Guardianship and Administration Board, 2013-2014 Annual Report, Page 11.

Australian Capital Territory

The ACT Civil and Administrative Tribunal is the decision making body in the ACT. The Tribunal performs functions with respect to a range of matters, including residential tenancy, mental health, discrimination and guardianship. Workload with respect to Guardianship has steadily increased, with more applications and increasing need to review (because new orders exceed the number of revocations and deaths). Dementia is the most prevalent 'condition effecting subject people', representing 35%, 38% and 32% in 2011-12, 2012-13 and 2013-14.⁵⁵

Northern Territory

In the Northern Territory, guardianship decisions are made by a Guardianship Panel of the Local Court. There is a lack of public information online about how Guardianship Panels undertake their duties and statistics regarding the exercise of their duties.

A new authority for Scotland?

Scotland could consider centralising decision-making authority for guardianship and related orders into a national tribunal dedicated to the management of these processes – or at least a more guardianship-centric authority. Funding could possibly be concentrated into an expanded version of the Mental Health Tribunal. An expanded version of the Mental Health Tribunal might operate in a similar manner to the Guardianship Board in South Australia which already undertakes these two functions. On its face, a tribunal setting may be beneficial for a number of reasons, though considering a reform of this nature is a more complex question than the scope of this report.

Possible benefits:

- Will allow for development of greater guardianship-specific expertise. Proxy decision making authorities must navigate unique considerations, including the involvement of parties to matters who may require special support to communicate. A more specialised approach and concentration of expertise in a dedicated authority would be ideal. Some Sheriffs Courts in Scotland may not frequently make or manage Guardianship orders and the difficulties inherent in applying the law to related family and other relationships.
- Concentration of resources may provide for the development of pre-hearing diversionary functions, similar to the Coordination and Investigation Unit in the NSW Tribunal. The Unit plays an important role in resolving issues that may not need to result in a formal guardianship proceeding.
- Greater standardisation of practice, application of the Acts and generation of orders.
- Greater ability of organisations such as MWC and the Office of the Public Guardians to communicate with one overarching and purpose-specific authority.
- Greater capacity to monitor application of the Acts, develop and implement policy changes.

⁵⁵ ACT Civil and Administrative Tribunal, 2013-14 Annual Report, pp 15.

- Greater capacity to work with Government and organisations like MWC, to develop and implement policy changes resulting from the Scottish Law Commission review into the application of Article 5 of the ECHR.
- Greater scope for coordinated involvement in the conversation about ‘supported’ decision making in Scotland.

The MWC’s annual monitoring reports on the use of the *Adults with Incapacity (Scotland) Act* highlight the disparate application of the Act among geographical areas in Scotland. The MWC reports also highlight the difference in the number of applications, and subsequent experience in applying the act, across geographical locations.⁵⁶ The value of effectively and consistently applying guardianship legislation across Scotland is a key reason for considering a nation-wide Tribunal structure. The benefit of pooling, and more efficiently utilising, resources is also a key consideration in a resource constrained environment where demand for guardianship hearings is increasing.

Suggestion 1-12

Consider whether a Tribunal approach to determining guardianship orders may be preferable to existing use of Sheriff Courts.

⁵⁶ Mental Welfare Commission for Scotland, *Adults with Incapacity (Scotland) Act*, 2013 Report.
<http://www.mwscot.org.uk/media/138295/awi_2013_final_report_25_sept_2013.pdf>

Constructing the order

Once it has been determined that a guardianship order is appropriate, the next stage in the process is crafting an order that is appropriate for the individual – considering a least restrictive approach and other guiding principles discussed in previous sections. Legislating for this process is again a difficult task. Ensuring legislative, policy and other settings achieve the desired practical effect is once again the critical consideration.

Powers in the order

Scotland

The *Adults with Incapacity (Scotland) Act 2000* provides broad flexibility regarding the welfare and financial powers that can be granted and tailored to the needs of the adult. The specific powers must be applied for and listed in the order.

64 Functions and duties of guardian

- (1) Subject to the provisions of this section, an order appointing a guardian may confer on him—
 - (a) power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;
 - (b) power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;
 - (c) power to pursue or defend an action of declarator of nullity of marriage, or of divorce or separation in the name of the adult;
 - (d) power to manage the property or financial affairs of the adult, or such parts of them as may be specified in the order;
 - (e) power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.

The guardian has power, unless otherwise specified, to act as the adult's legal representative in relation to any matter within the scope of the power conferred by the guardianship order. Subject to qualifications and restrictions, a guardian with powers relating to property or financial affairs of the adult may use the adult's estate to purchase assets, services of accommodation to enhance the adult's life.

Similar to the regimes in Australia, a guardian may not make certain decisions as specified in the Act.

- consent to marriage on behalf of an adult
- to make a will on behalf of the adult
- consent to specific treatments
- place an adult in a hospital for the treatment of mental disorder against their will. Where an adult resists treatment for mental disorder, an application must be made by a mental health officer for an order under the *Mental Health (Care and Treatment) (Scotland) Act 2003*

- sell property without the Public Guardian’s permission in principle and with regard to cost.

If medical and other health care decisions are required, this must be specified in the application and subsequent order.⁵⁷

As outlined in the section ‘entry into the guardianship regime’, capacity in Scotland is determined with respect to specific decisions. The general principles, outlined in the ‘Principles’ section, need to be applied when making an order. The principles require that the order sought will benefit the adult and that alternatives have been considered insufficient. The order should also be the least restrictive option.

The above requirements theoretically limit the powers in guardianship orders to those that are specifically necessary. Anecdotal evidence suggests that orders in Scotland are potentially being made in a manner that is broader than the legislative requirements suggest. Legislation will not necessarily ensure the principles flow through into practice without necessary accompanying processes and monitoring.

The MWC’s annual reports on the use of the *Adults with Incapacity (Scotland) Act* show that the Act is applied differently across geographical areas of Scotland.⁵⁸

The analysis of orders undertaken in Part 3 of this report highlighted the variety of approaches to structuring powers in orders. Some orders contained very broad powers and others contained more specific descriptions of powers. The second approach is more closely aligned with the terms of the legislation and ensures that orders clearly communicate the specific authority. The broader the power in the order, the more difficult it is to determine what the powers provide for.

Although some orders contain broad powers and some contain more specific powers, there is some standardisation of wording within those categories. That is, where more specific powers are provided, they are often worded in similar terms – likewise with broad powers.

This can occur where lawyers recycle wording that has been used in previous orders. Ideally, the application, review and order creation process would be tailored to the specific nature of the adult’s decision making capacity and their specific circumstances.

Although legislation provides principles to be used in making orders and direction about the types of powers that can be awarded (though with great flexibility) Scotland could consider additional regulations to guide the form and nature of powers produced. As outlined in suggestions under Part 3 of this report, regulations could specify a list of particular powers (for example, the use of restraint) that must be identified as not sanctioned, sanctioned, and if so, why? Scotland could consider legislative requirements that certain powers be specified in the order, if granted. Scotland could consider creating specific additional processes and safeguards for certain powers, for example, restrictive practices. Multiple suggestions in this report address this issue.

⁵⁷ Scottish Government, ‘Guardianship and intervention orders – making an application: a guide for carers’, Pp 16,

⁵⁸ Mental Welfare Commission for Scotland, Statistical Monitoring: AWI Act Monitoring 2013/2014

A template 'Summary Application' is provided for in Scottish legislation. The template is very sparse and there is no guidance about the need for requested powers to satisfy the principles - including the need for there to be no alternative avenue for achieving the related benefit for the adult. Scottish Government guidance 'Guardianship and Intervention Orders – making an application – A Guide for Carers' emphasises the need to apply the principles when choosing powers to include in the application. The guide describes the need to prove that no alternative options exist, et cetera, but the example application forms do not reflect this. By contrast, the standard application form in Queensland guides the applicant through various considerations and emphasises the principles.

Suggestion 1-13

Consider developing a standard guardianship application form that guides the applicant through appropriate considerations and legislative criteria for making an order, emphasising the principles in the *Adults with Incapacity (Scotland) Act 2000*.

The issues identified above, and the general importance of ensuring that principles in legislation flow through into practice, demonstrate why it is important that all elements of any guardianship regime are subject to ongoing review and monitoring. It is important that the nature of the orders being awarded by Sherriff Courts are monitored and that principles and considerations outlined in the Act are adhered to.

Suggestion 1-14

That processes for reviewing/monitoring Court processes and the nature/form of orders and are enhanced and given greater focus.

Suggestion 1-15

Consider regulations or legislative amendments that provide more guidance about the form that orders should take.

One of the key differences between Scotland and the various Australian regimes is the fact that 'restrictive practices' are not dealt with via specific processes and specific powers in Scottish legislation. Some Australian examples for managing restrictive practices are provided below. As outlined below, and in Part 3 of this report, Scotland should consider (as a priority) introducing specific processes for granting restrictive practices powers and ensuring adequate related safeguards.

Queensland

The *Guardianship and Administration Act 2000* in Queensland divides decisions into types of 'matters' and provides for the appointment of substitute or other decision makers on the basis of these categories. Authority for substitute decision making, and regulation of that decision making, flows from the different categories of matter. The *Guardianship and Administration Act 2000* (Qld) differentiates between 'financial matters' and 'personal matters' but also between 'health matters', 'special health matters' and 'special personal matters'.

As in other jurisdictions, ‘guardians’ are appointed to make decisions about person matters, whereas ‘administrators’ are appointed in relation to ‘financial matters’. In Scotland, an ‘administrator’ is referred to as a ‘financial guardian’ and in other Australian jurisdictions this role is referred to as a ‘manager’.

Unless the tribunal orders otherwise, a guardian or administrator is authorised to do, in accordance with the terms of the guardian's appointment, anything in relation to a personal or financial matter that the adult could have done if the adult had capacity for the matter when the power is exercised.⁵⁹ When making an appointment, the Tribunal may make such terms it considers appropriate.

In Queensland, ‘capacity’ is determined with respect to individual matters, meaning that a person may be deemed to have capacity for decisions about some matters and not others. For example, an individual may be deemed to have capacity to make decisions about day-to-day shopping and living arrangements but to not have capacity for more complex financial decisions. This differs from some other regimes that seek to determine ‘capacity’ in a more general sense and then generate the powers and scope of the order. In Queensland legislation the test for capacity plays a key role in defining the powers in the order, given that powers should only be granted in relation to matters for which the adult does not have capacity.

Particular limitations are placed on the power of Administrators, for example, regarding power to give away the adult’s property, to make donations, make investments and using the adult’s estate to make provision for a dependent of the adult.

Suggestion 1-16

Consider the types of matters and decisions that are limited or excluded in Scottish guardianship legislation as compared to Australian regimes, and whether existing legislative settings are appropriate.

In order to better accommodate for fluctuating capacity, the QLD Review suggested that an amendment could be made to legislation providing the Tribunal with the power to limit the exercise of a power by the Guardian to periods when the adult lacked capacity. The review recommended that the Guardian be required to apply the presumption of capacity in making that judgment.

Suggestion 1-17

Consider amendment of the *Adults with Incapacity (Scotland) Act 2000* to allow Sherriff Courts to specify in guardianship orders that powers are only active during periods when the adult lacks capacity. This is one form of accounting for fluctuating capacity – see also suggestion 1-1.

Personal matters are defined as those relating to the adult’s care or welfare, other than ‘special personal matters’ and ‘special health matters’. Personal matters are general those relating to

⁵⁹ Section 33, *Guardianship and Administration Act 2000* (Qld)

personal, health care, lifestyle and some legal decisions. Examples of ‘personal matters’ include decisions regarding accommodation, employment and daily issues including diet and dress.

The Courts have applied a broad scope to the definition of ‘personal matter’. Note that a ‘personal matter’ also specifically includes ‘restrictive practices’ (discussed below) which are specifically regulated under the under Chapter 5B of the Queensland Act. A ‘health matter’ (other than special health care) is also a ‘personal matter’.

‘Special health matters’, including termination of pregnancy, cannot be approved by a Guardian but can be approved through an advanced health directive (made by the adult) or by the Tribunal – except in the case of electroconvulsive therapy or psychosurgery that fall within the jurisdiction of the Mental Health Review Tribunal.

Substitute decision making is not permitted under the Queensland Act with respect to ‘special personal matters’, making or revoking a will or consenting to marriage.

Financial matters are those that relate to the adult’s financial matters. Financial matters included in the definition are matters relating to buying and selling property (including land); paying the adult’s expenses, rates, insurance, taxes and debts; conducting a trade or business on the behalf of adult; making financial investments; performing the adult’s contracts; and all legal matters relating to the adult’s financial or property matters.

Australia Generally

Like Queensland, other Australian jurisdictions differentiate between financial decisions and personal decisions. Likewise, the regimes provide for substitute decision making in relation to an adult’s medical or dental treatment. Legislation in Australian jurisdictions also specifies certain personal decisions which are not permitted to be delegated to another person or entity, and requires that special consent is provided (for example, by the Tribunal) for certain medical treatment.

Restrictive Practices

The NSW Public Guardian defines ‘restrictive practices’ in the following terms:

Restrictive practices refer to the use of a broad range of techniques to manage or change a person's behaviour where, in the absence of consent, these procedures would constitute an assault or wrongful imprisonment. Restrictive practices can include the use of chemical restraint, physical restraint, loss of privileges, seclusion/confinement or denial of access.⁶⁰

In Scotland, it is accepted that guardianship orders can sanction restrictive practices such as restraint and seclusion.⁶¹ Discussion about the manner in which guardianship orders can sanction, or are taken to sanction, restrictive practices is contained in Part 3 of this report. Analysis of data and interlocutors undertaken during the visit allocation project, outlined in Part 3, found that very broad

⁶⁰ NSW Standing Committee on Social Issues, 2010, ‘Substitute decision-making for people lacking capacity’, pp 145.

⁶¹ Scottish Law Commission, 2012, [Discussion Paper](#) on Adults with Incapacity, Discussion paper No 156, pp 89.

and non-specific language was accepted by MWC visitors to sanction the use of restraint and seclusion.

Some restrictive practices are regarded as appropriate when used in very limited circumstances and with appropriate safeguards - regarded as an unfortunate but necessary part of care for some persons with disabilities. However, the use of restrictive practices is contentious and potentially dangerous. The use of restrictive techniques negotiates a very fine line between preserving and impinging upon an adult's rights and interests.

The use of restrictive practices needs to be regulated, limited and subject to safeguards. It is inadequate that the Scottish guardianship regime condones and authorizes this treatment without explicitly referring to it in guardianship orders, or regulating it through associated processes.

Suggestion 1-18

Consider, as a priority, options for regulating when and how guardianship orders confer the power to use restrictive practices with respect to an adult, or to sanction others to use restrictive practices. This consideration should include specific processes for granting powers and overseeing their implementation. See also suggestion 3-7.

A number of Australia guardianship regimes provide special processes for conferring powers to use or sanction restrictive practices, and regulating those practices.

Queensland

In QLD a guardian can authorise restrictive practices if they have applied for and been granted specific authority by the QLD Tribunal (QCAT). The type of restrictive practice the guardian can authorise depends on the nature of the practice and the type of service the adult receives. See the following table as a guide.⁶²

The following table outlines which approvals are required - other than when the adult only receives respite care and/or community access.

Restrictive practice	Approval required by
Containment or seclusion	QCAT
Mechanical, physical or chemical restraint	Guardian for restrictive practice (general) appointed by QCAT
Restricting access to an object	Guardian for restrictive practice (general) appointed by QCAT or an informal decision maker
Any form of restrictive practice plus containment and seclusion	QCAT

⁶² QCAT Website, Guardianship for Restrictive Practices, <<http://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters/guardian-for-restrictive-practices>>

The following approvals are required when the adult only receives respite and/or community access services:

Restrictive practices	Approval required by
Containment or seclusion	Guardian for restrictive practice (respite) appointed by QCAT
Restricting access to an object	Guardian for restrictive practice (respite) appointed by QCAT or if no guardian appointed, an informal decision maker
Mechanical or physical restraint	Guardian for restrictive practice (respite) appointed by QCAT or if no guardian appointed, an informal decision maker
Chemical restraint - PRN (as and when needed) for an adult in respite	Guardian for restrictive practice (respite) appointed by QCAT
Chemical restraint - PRN (as and when needed) for an adult with community access	Guardian for restrictive practice (respite) appointed by QCAT
Chemical restraint - fixed doses for an adult in respite	Informal decision maker or guardian for restrictive practices (respite) appointed by QCAT
Chemical restraint - fixed doses for an adult with community access	Guardian for restrictive practice (respite) appointed by QCAT

The use of restrictive practices must also be accompanied by a positive behaviour support plan. Support plans are required to emphasise the development of 'positive, socially valued skills' as well as strategies for reducing challenging behaviour. The purpose of the support plan is to minimise the need for the restrictive practice.

The existing scheme was criticized in the QLD Law Reform Review for the manner in which it applies to some adults and not others, depending on the services they receive:

[116] The Commission considers it highly unsatisfactory that the lawfulness of using a restrictive practice in relation to an adult with an intellectual or cognitive disability, and the requirements for the lawful use of such a practice, depend on whether the restrictive practice is being used by a disability service provider who receives funding from the Department of Communities.

[117] The current two-tiered system for regulating the use of restrictive practices means that not all adults with an intellectual or cognitive disability are equally protected from the improper use of those practices. Adults who are outside the scope of the restrictive practices

legislation are arguably at greater risk of being arbitrarily deprived of their liberty and of being subjected to abuse in the form of the unlawful use of restrictive practices.⁶³

New South Wales

In New South Wales a 'restrictive powers function' must be specifically applied for and specifically granted by the Tribunal if restrictive practices are to be legally used. Tribunal guidance highlights the questionable legality of such practices in the absence of these specific powers being sanctioned by the Tribunal – amounting to assault, false imprisonment and detainee (withholding a person's possessions) unless the defence of 'consent by a guardian' with a restrictive practices function is available.⁶⁴

Plenary v Limited Guardianship

Various Australian jurisdictions provide the possibility of making a plenary/full order or a limited order. The starting point on the face of the law, or the default, is full guardianship. This compares to Scotland, QLD and the ACT, where orders are built by conferring powers, starting from none. The danger of a regime that refers to full guardianship, or appears to assume full guardianship as default, is that complete loss of legal capacity might occur where it is not needed, or powers are conferred over matters that are not necessary. It is theoretically preferable to start from nothing and build powers based on an assessment of the specific circumstances, rather than start with full guardianship and whittle down the broad-reaching powers.

A plenary guardianship gives the guardian full custody of the person and authority to perform all of the functions a guardian has at law or in equity. In such cases the adult loses legal capacity in the same respect as if they were the young child of the guardian.

The legislation in NSW, WA and Victoria specifies that a plenary order cannot be made where a limited order would suffice.

Legislation in the Northern Territory and Tasmania refers to 'full guardianship' and 'conditional guardianship' - 'limited guardianship' in Tasmania. Although the Acts do not specifically require that a full guardianship only be made where a conditional guardianship would suffice, the principle of least restriction provided in both Acts serves the same role – though less explicitly.

South Australia draws a distinction between a 'guardian' with full guardianship powers and a 'limited guardianship order'. Again, a 'least restrictive' principle should theoretically ensure that full guardianship is used as a measure of last resort. There is likely to be some concern that the default 'guardianship' referred to is that which removes legal capacity completely. The legislation appears to focus on full guardianship more than it perhaps should.

Queensland legislation words the power in a manner that represents full guardianship as the default:

⁶³ Queensland Law Reform Commission, 2010, A Review of Queensland's Guardianship Laws, Vol 1, Pp.xxxiii,

⁶⁴ NSW Civil and Administrative Tribunal, Fact Sheet: Restrictive Practices and Guardianship.
<http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l8/guardianship%20and%20restrictive%20practices.pdf>

Subsection 33(1) Unless the tribunal orders otherwise, a guardian is authorised to do, in accordance with the terms of the guardian's appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter when the power is exercised

Requirements of the Guardian

The legislation in each jurisdiction outlines a variety of characteristics and requirements that a proposed appointee must meet before becoming guardian. There is a common preference for the appointment of private guardians, for maintaining established relationships, taking account of the wishes of the adult, and ensuring the absence of any conflict of interest. All jurisdictions word their requirements in a different manner though appear to be targeting a similar set of goals. The requirements in each jurisdiction appear to show a bone fide interest in creating the best possible arrangement for the adult, including 'protecting' them from harm while attempting to maintain their right to choose.

In most jurisdictions legislation specifically provides that a public authority should be appointed as guardian only where no viable alternative exists.

Unfortunately an appropriate family member, or similar person or group of persons, is not always available to undertake the role of guardian. It is difficult to know whether any trends regarding availability of guardians will manifest over time. It is possible that the increased mobility of younger generations, and the subsequent lack of proximity to parents, may impact on the availability of children to provide the role of guardian for their parents. The lower birth-rates of younger generations and small number of siblings in an individual family, may also impact on the availability of familial guardians in future. The absence of a viable informal support network is one reason why an adult may require a guardianship order (appointing a public guardian) where it might otherwise have been prevented.

Community guardians

An interesting option that Scotland may consider is the concept of 'community guardians'. Community guardianship is discussed in the NSW Review from page 151.⁶⁵

Community guardianship is currently used in Western Australia and Victoria.⁶⁶

'Community guardianship' schemes involve training (and possibly paying) appropriate individuals in the community to undertake the role of guardian for individuals who have no available family member or other appropriate private guardian. A 'community guardianship' scheme could take a variety of forms. The relevant local authority in Scotland could harness the willingness of individuals in the community, who may reside close to a relevant adult, to provide a personal approach to

⁶⁵ Standing Committee on Social Issues, Report 43, Substitute decision-making for people lacking capacity, 2010.

⁶⁶ The Public Advocate WA website, community guardianship page <http://www.publicadvocate.wa.gov.au/C/community_guardianship.aspx>; Office of the Public Advocate VIC, community guardianship page <<http://www.publicadvocate.vic.gov.au/services/106/>>

guardianship. Community Guardians can provide greater attention to a specific individual and the proper exercise of a specific order, with lower resource implications for Government than the appointment of a public authority as guardian.

‘Community guardians’ might be paid a nominal amount to offset the time and cost associated with being a guardian. Payment may also encourage people to take part in the regime. If the burden on community guardians can be appropriately managed (perhaps through the appointment of two or more supporters/guardians) it is possible that a significant number of people might be interested in taking part in the program. There are potential social capital and community benefits along with opportunities for intergenerational connection.

Suggestion 1-19

Consider the implementation of ‘community guardianship’ as an alternative to the appointment of the local authority as guardian.

Scotland

Section 59 of the *Adults With Incapacity (Scotland) Act*, entitled ‘who may be appointed as guardian’, outlines the necessary criteria for the appointment of a guardian, providing broadly at s59(1)(a) and (b) that:

The sheriff may appoint as guardian any individual whom he considers to be suitable for appointment and who has consented to being appointed,

Where the guardianship order is to relate only to the personal welfare of the adult, the chief social work officer of the local authority.

S.59(3) requires that the Sherriff be satisfied that the proposed Guardian is aware of both:

the adult’s circumstances and condition and of the needs arising from such circumstances and condition; and

the functions of a guardian

In determining the suitability of the proposed guardian, the Sherriff shall have regard to-

- (a) the accessibility of the individual to the adult and to his primary carer;
- (b) the ability of the individual to carry out the functions of guardian;
- (c) any likely conflict of interest between the adult and the individual;
- (d) any undue concentration of power which is likely to arise in the individual over the adult;
- (e) any adverse effects which the appointment of the individual would have on the interests of the adult;
- (f) such other matters as appear to him to be appropriate.

Special mention is made to specify that paragraphs (c) and (d) above ‘shall not be regarded as applying to an individual by reason only of his being a close relative of, or person residing with, the adult.’

There is also provision for joint guardianship in s.60.

Interestingly there is no specific mention in s.59 that the adult's preferences and wishes need to be taken into account. However, the 'general principles and fundamental definitions' in s.1 require that:

the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult...

and that these principles

...shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act...

It is unnecessary, legally, to reiterate the need to take the adult's opinions into account when appointing a guardian. However, for practical purposes, for clarity and for emphasis, there may be some value in reiterating the need for appointments to be in keeping with the general principles, or in restating the need to regard the adult's wishes.

On the face of the considerations for appointment there is no emphasis on interpersonal requirements. The personalities of the adult and guardian, and their relationship, have a significant impact on the manner in which an order is implemented. Implementation is obviously crucial to whether the arrangement is, in practice, one that is least restrictive and respects the will and preferences of the adult.

Suggestion 1-20

Consider possible additional criteria regarding the suitability of the proposed guardian in the *Adults with Incapacity (Scotland) Act 2000*, and the benefit of referring to interpersonal, emotional compatibility of the guardian and the adult.

There is also no specific obligation that Sheriffs favour private guardians over a public authority. However, the Scottish regime fares relatively well in this regard, with 75% of all guardians appointed being private guardians. In Tasmania, there has traditionally been a trend towards appointing the Public Guardian, though the proportion of private guardianship has increased in recent years – 36% in 2013-2014.⁶⁷

New South Wales

Under the s.17 of the *Guardianship Act 1987* (NSW) a person may only be appointed as a guardian if the Tribunal is satisfied that:

- the personality of the proposed guardian is generally compatible with the adult,
- there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and

⁶⁷ Tasmanian Guardianship and Administration Board, 2013-2014 Annual Report, Page 17.

- the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.

Although succinct, the criteria quite interestingly focus on the compatibility of the parties on an interpersonal (personality) level. For such an important relationship, covering significantly private matters, this focus appears to be well placed. From a legal perspective such a consideration by the court is difficult to prescribe and standardise and appears quite subjective. However, that is not an argument to remove it, just an issue that points to the difficulty of legislating in this intensely private space that guardianship often covers.

The NSW Review noted the inconsistency between the above criteria and that which applies to financial managers, only requiring that they are a 'suitable person'. The review suggested amending the laws relating to financial managers to bring them into consistency with the criteria regarding guardians - that is, equivalent to welfare guardians in Scotland.

Monitoring

Monitoring of the operation and implementation of each regime is a critical component of those regimes. Not only is it critical that the implementation of orders and use of powers is effective, and in accordance with the relevant principles, but it is equally critically to monitor the effectiveness of the legislation itself and the management of the rolls of all actors in the regime. The effectiveness of monitoring arrangements themselves requires monitoring over time through, for example, oversight by the administering Department and through law commission reviews.

Law reform commission reviews of guardianship focus a great deal of attention on the nuances of language in provisions, their meaning and context. Equally important is ensuring that the crafted words flow through into the desired practical outcomes. Guardianship regimes manage intensely private and domestic relationships that may occur outside the view of those who may be in a position to bring issues to the attention of appropriate authorities. The adults subject to guardianship orders may be, by virtue of their disability, less able to adequately ensure the appropriate implementation of their order or to raise issues.

All regimes in Scotland and Australia have some form, multiple forms, of oversight and monitoring. Monitoring differs among the regimes.

The importance of continuous monitoring of the regime is highlighted in the MWC's annual review of the use of the *Adults with Incapacity (Scotland) Act*. These reviews provide a range of data and information about the granting of orders across Scotland, including the types of orders granted, the length of the order, and number of orders. What this useful analysis demonstrates is the difference in application of the Act, and the outcomes that flow from this, across Geographical areas in Scotland. For example, in some regions indefinite orders are granted at a much higher rate than in others, also some 'local authorities' initiate guardianship proceedings and are appointed as welfare guardian in higher percentages than others.⁶⁸ What this demonstrates is the fact that the same words in legislation, regardless of how carefully they are crafted, can have different 'real world' outcomes.

Indefinite orders

One of the key differences in monitoring between the Scottish regime and Australia regimes is the existence in Scotland of indefinite orders. Indefinite orders for welfare, or personal matters, are not possible in Australian regimes. Financial guardianship (or 'administration'/'financial management') in New South Wales is the only 'guardianship' mechanism in Australia for which there is no mandated statutory maximum length. Legislation in all other Australian jurisdictions proscribes a maximum period for orders. The New South Wales Review of guardianship recommended that the legislation should be amended to provide a maximum length for financial guardianship orders.

Scotland should consider removing the potential for indefinite orders. Without the valuable safeguard of periodic judicial oversight, guardianship orders are only monitored by the local

⁶⁸ Mental Welfare Commission for Scotland, *Adults with Incapacity Monitoring 2012/13*, pp 7.

authority (that is obliged to oversee each order) and the more sporadic oversight of the MWC and Care Inspectorate.

Scotland

Section 10 of the *Adults With Incapacity (Scotland) Act* requires the 'local authority' to supervise guardianship orders with powers relating to the personal welfare of an adult, also to investigate complaints and any circumstances that become known to them in which the personal welfare of an adult seems to them to be at risk.

Monitoring by the Local Authority is designed to ensure that guardians do not abuse their powers. Mental Welfare Commission documentation indicates that supervisory visits to the guardians and the adult subject to guardianship occur at intervals of no longer than six months,⁶⁹ This regular oversight of guardianship orders, if implemented properly by local authorities, is a positive aspect of the regime in Scotland that does not appear to have an equivalent in Australian regimes. However, a troublesome aspect of this oversight arrangement is that fact the chief social worker of the local authority is also the public guardian appointed for welfare matters in the absence of an appropriate private guardian.⁷⁰ In such instances, the local authority is monitoring itself.

The MWC annual monitoring reports highlight the fluctuating number of applications, the 2012/13 report stating that this:

demonstrates how difficult it must be for local authorities to plan and ensure an adequate mental health officer response when they have to react to such dramatic and unanticipated changes, usually increases, in the number of applications, most of which (74%), are from private applicants.⁷¹

That is, it is very hard for Local Authorities to plan to ensure that oversight obligations are adequately met. This must be especially difficult to manage in smaller local authorities.

The Office of the Public Guardian oversees guardians and interveners appointed under the act with powers relating to the property and financial affairs of the adult. The Office investigates complaints where property or financial affairs are at risk, provides advice and a range of other functions, including maintaining a public register of guardianship and other orders. Under supervisory arrangements, a financial guardian may be required to provide a variety of information to the Office of the Public Guardian, including annual reporting, provision of a management plan and Inventory of Estate.⁷²

The MWC monitors the guardianship regime and orders made under that regime in a number of ways – through visits to hospitals and care facilities where people under guardianship may reside, and by specific visits to a number of individuals under guardianship each year.

⁶⁹ Mental Welfare Commission for Scotland, *Working with the Adults with Incapacity (Scotland) Act: Information and guidance for people working in adult care settings*, Page 13,

⁷⁰ *Adults With Incapacity Act*, section 1(b) and (2).

⁷¹ Mental Welfare Commission for Scotland, *Adults with Incapacity Monitoring 2012/13*, pp 4

⁷² Mental Welfare Commission for Scotland website, <<http://www.mwscot.org.uk/the-law/adults-with-incapacity-act/office-of-the-public-guardian/>>

The Care inspectorate

The Inspectorate is an independent authority that regulates and inspects care services and social work services in Scotland. The Care Inspectorate inspects all local authorities with regard to their delivery of social work services, including with respect to guardianship. Care services in Scotland must be registered with the Inspectorate. The Inspectorate inspects those services, grades them and deals with complaints.

Length of the order and judicial overview

As mentioned, a key difference between the regimes in Australia and Scotland is the absence of mandatory judicial oversight and review in Scotland, due to the possibility of indefinite orders. Of great concern was the former trend towards granting most orders on an indefinite basis. MWC's annual report from 2009/10 reported that 71% of all Welfare Guardianship orders were granted on an indefinite basis. This highly concerning trend appears to demonstrate that Sheriff Courts were not adequately applying the least restrictive, last resort approach to guardianship embodied in the legislation. MWC has lobbied for a change in this trend and the percentage of indefinite orders granted has dropped significantly. In 2010/11 the percentage fell to 63%; then to 45% in 2011/12, to 35% in 2012/13.

However, this is still an aspect of the regime where fundamental change to the law is required. At 31 March 2013 there were 4,415 adults on indefinite welfare guardianship orders, 453 of whom were under the age of 25 and 1108 under 45 years of age.⁷³

Suggestion 1-21

Legislate to include a mandatory maximum period for guardianship orders.

Queensland

The maximum length of time for orders in Queensland is 5 years. A guardian for restrictive practices can only be appointed for a maximum of two years.

The new 'Office of the Public Guardian' (into which the powers of the former Adult Guardian were transferred on 1 July 2014) plays a key role in oversight of the proxy decision making regime in Queensland and protecting the rights and interests of adults with impaired capacity. The Office of the Public Guardian is provided with a range of investigative and protective powers. The new Office is a combination of the former Adult Guardian and the former Commission for Children, Young People and Child Guardian. The combination of the two authorities '...means the Office of The Public Guardian will be able to share resources and so better protect the rights and wellbeing of vulnerable Queenslanders of all ages'.⁷⁴

The change of name and governance structure does not change the service provided under the former Adult Guardian. The function of the Office of the Public Guardian with respect to adults

⁷³ Mental Welfare Commission for Scotland, Adults with Incapacity Monitoring 2012/13, pp 7

⁷⁴ Queensland Government, Fact Sheet, New Office of the Public Guardian, <http://www.justice.qld.gov.au/__data/assets/pdf_file/0020/262415/The-new-Office-of-the-Public-Guardian-fact-sheet.pdf>

includes investigation of complaints and mediation of disputes about care arrangements and other matters. The office of the Public Guardian is an independent statutory body.⁷⁵ The Office acts as a guardian of last resort, if no alternative is available. In this respect, the same conflict exists for the office of the Public Guardian as does for local authorities in Scotland – they can be placed in a position where they are policing themselves as guardians.

Community visitors undertake visits to three types of ‘visitable sites’ within Queensland. The visitors make inquiries and make complaints for, or on behalf of, residents of these sites. Community visitors can also refer complaints to an ‘external agency’ such as the Department of Communities or Queensland Health. The three types of visitable sites are:

1. Disability accommodation provided or funded by the Department of Communities.
2. Authorised mental health services.
3. Private hostels (level 3 accreditation).⁷⁶

Visits are unannounced and regularly conducted to more than 1,000 sites. A report is sent to the service provider after every visit. The powers of inquiry and the method for visiting and reporting has significant similarities to visits conducted by MWC to mental health and disability services in Scotland.

The Public Advocate undertakes systemic advocacy to promote and protect the rights and interests of adults with impaired capacity.⁷⁷ Subsection 209(2) specifies that ‘...it is not the function of the public advocate to investigate a complaint or allegation that concerns a particular adult with impaired capacity for a matter.’ However, the legislative functions of the Advocate require it to monitor and review the delivery of services and facilities to the adults.⁷⁸

Civil society

General monitoring and advocacy is also undertaken by vibrant civil society organisations at State, Territory and national level in Australia. Community organisations were assisted via government funding to prepare a ‘shadow report’ ahead of Australia’s first appearance before the UN Committee on the Rights of Persons with Disabilities in September 2013, and also to send a delegation to the appearance in Geneva.

Education

Education within the community, and for carers, guardians and supporters is crucial to ensuring that principles in legislation flow through into practice. The recent review into supported decision

⁷⁵ Queensland Government, Fact Sheet, New Office of the Public Guardian, <http://www.justice.qld.gov.au/__data/assets/pdf_file/0020/262415/The-new-Office-of-the-Public-Guardian-fact-sheet.pdf>

⁷⁶ Public Guardian website, Community Visitors, <<http://www.publicguardian.qld.gov.au/adult-guardian/adult-community-visitors>>

⁷⁷ QCAT Website, Important Links, <<http://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters/important-links>>

⁷⁸ Section 209(1)(e), Guardianship and Administration Act 2000

making in Canada (discussed in Part 2) undertaken by the Canadian Centre for Elder Law highlighted the lack of appropriate understanding of the regime as being of primary concern:

People do not even understand substitute decision-making, let alone supported decision-making. Supported decision-making is a good idea, but without focused, ongoing and excellent public and professional education, the systems matter little. Every single expert informant identified the lack of training and education across the professional and community spectrum about decision making in general to be of primary concern.⁷⁹

The lack of education about how to play the role of ‘supporter’ had a role in ‘slippage’, where ‘supported’ decision making became substitute decision making in practice.⁸⁰

Education is also required within the community. The fact that third party institutions ‘feel uncomfortable’ with supported decision making arrangements is seen as a motivator for subsequent applications for guardianship.⁸¹

The Victorian Review also emphasised the key role of education in the successful practical implementation of the regime. The ‘apparent widespread’ lack of awareness about the guardianship regime created a variety of issues:

- Limited use of personal appointment such as ‘power of attorney’
- Confusion among users of the system about their ‘roles, rights and responsibilities’.⁸²

⁷⁹ Law Commission of Ontario, 2014, *Understanding the Lived Experiences of Supported Decision-Making in Canada*, pp. 8

⁸⁰ *Ibid*, pp. 8

⁸¹ *Ibid*, pp. 8

⁸² Victorian Law Reform Commission, *Guardianship, Executive Summary*, Pp. xxxi

Part 2 - SUPPORTED DECISION MAKING

There is disagreement about what form of decision making assistance is permitted under Article 12 of the CRPD for persons with decision making disability. The debate featured in negotiations on the CRPD. Australia and Canada made interpretive declarations with respect to Article 12 to clarify their interpretation of the obligations and how they relate to 'substitute' and 'supported' decision making.

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en

There is also some confusion and debate about what actually amounts to substituted and supported decision making, and whether these are useful terms at all.

At a general level it is accepted that the CRPD and Article 12 encourage maximisation of autonomy and self-determination for persons with decision making disability as well as retention of legal capacity.

There is significant advocacy for 'supported decision making' in reports, reviews and commentary on guardianship and proxy decision making. Recent reviews by the Australian Law Reform Commission, the QLD Law Reform Commission, the Victorian Law Reform Commission and the NSW Parliamentary Standing Committee on Social Issues all favour supported decision making. Although there is support for a move to supported decision-making various commentators and submissions to the abovementioned reviews have urged caution – highlighting a lack of empirical evidence, a lack of conceptual clarity and the need for further consideration of various practical issues. A number of 'thoughts to consider' are discussed later in this Part.

The Australia Law Reform Commission discussion paper includes a very useful discussion about definitional and semantic issues, the confusion about 'substitute decision making' and 'supported decision making', including the distinct between them.

Ultimately, there is general acceptance that some form of substitute decision making is necessary. Various Australian civil society organisations argued this point during public consultations prior to Australia's ratification of the CRPD. Civil society organisations requested the interpretive declaration that was subsequently made by Australia with respect to Article 12.⁸³ The declaration is provided below and reserves the right to retain substitute decision making as a measure of last resort and subject to safeguards. Analysis by leading Australian peak body People with Disability Australia argues that the proper and necessary interpretation of Article 12 requires some form of substitute decision making. The paper outlines why the maintenance of substitute decision making assists in

⁸³ Phillip French, 'Final Report to the Australian Government Department of FaHCSIA, and the Attorney-General: Consultations with Australian Representative Organisations Governed by Persons with Disability, Disability Advisory Councils, and the Disability Legal Services Network on the Impact of Ratification of the *Convention on the Rights of Persons with Disabilities*' (Report, Disability Studies and Research Institute for the Australian Taskforce on CRPD Ratification, June 2009), pp 21.

the realisation of other human rights.⁸⁴ The UN Committee on the Rights of Persons with Disabilities published a General Comment on Article 12 in April 2014. The General Comment argued that no form of substitute decision making was permissible under Article 12. Scottish stakeholders I spoke to thought that an unequivocal opposition to substitute decision making was not practically feasible and would not ensure a net benefit to persons with a disability.

The best approach to Article 12 and the associated ‘paradigm shift’ appears to be:

1. Reviewing and monitoring existing arrangements to ensure they operate in practice as a measure of last resort; and
2. Investigating, researching, discussing and testing options for supported decision making.

It is important that each regime considers how any new supported decision making measures would operate within the unique circumstances, structures and services that exist in that regime.

Various Australian jurisdictions are currently having the conversation through a variety of reviews, research and supported decision making pilots and through the involvement of law reform commissions, public advocates and civil society. The Mental Welfare Commission is starting to consider whether, and how, supported decision-making may work for Scotland. The conversations and forums being led by Dr Jill Stavert and the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University appear to be a strong starting point.

The ultimate test for any measures, and for the system as a whole, should not only be whether the law says the right things, but has the right outcomes in practice.

What is supported decision-making?

The Australian Law Reform Commission Report on ‘Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124)’ contains very useful discussion from page 49 of Chapter 2, ‘Conceptual Landscape – the Context for Reform’ about definitional issues relating to ‘substituted’ and ‘supported’ decision making.

There is some confusion and blurring of the concepts of ‘substitute’ and ‘supported’ decision-making. The ALRC have recommended a movement away from that terminology altogether:

Interwoven in the discussion about ‘substitute’ and ‘supported’ decision-making is a lack of conceptual clarity about the role that a person’s wishes and preferences play when another acts for them as a ‘substitute’ decision-maker; and the role that a ‘supporter’ plays in assisting a person to make decisions. Conceptual confusion is also exacerbated when models use ‘best interests’ language, but expressed in terms of giving priority to the person’s wishes and preferences. Given the tensions around the usage and understanding about ‘substitute’ decision-making—and the blurring between ‘substituted judgment’ and ‘substitute decision-making’—the ALRC considers that it might be preferable to move away from this language

⁸⁴ People with Disability Australia, 2009, ‘Everyone, Everywhere: Recognition of Persons with Disability as Persons Before the Law’

altogether. The terms the ALRC recommends are ‘supporter’ and ‘representative’ contained in the Commonwealth decision-making model set out in this Report.⁸⁵

Modern **substitute decision making** is an evolution on the long legal tradition of appointing a ‘guardian’ to make decisions for an adult with incapacity in their ‘best interests’ - a paternalistic approach to managing decision making disability. The concept has evolved to include a greater focus on the adult’s wishes and preferences. The UN Committee on Persons with Disabilities General Comment on Article 12, argued that:

Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where

- (i) legal capacity is removed from a person, even if this is in respect of a single decision;
- (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and
- (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.⁸⁶

The difficulty with this understanding of substitute decision making is that element 3 does not accurately reflect current regimes in many countries, including Australia and Scotland. As outlined in above, and in Part 1 of this report, the “person’s own will and preferences” play a key role in modern legislation, especially through the ‘principles’ outlined in each Act. The adult’s own interests form part of many legislative definitions of ‘best interests’.

The ALRC report sites Dr Mary Donnelly on the hybrid nature of modern guardianship legislation, suggesting that it ‘attempts to mitigate the consequences of a loss of capacity while staying within a best interests framework’.⁸⁷

Ultimately, the primary distinguishing feature of ‘substitute decision making’ is that decisions are made by the substitute decision maker, not the adult. Decisions are made with reference to a range of factors, usually including the wishes of the adult, but also objective considerations of their interests.

Supported decision making covers a broad range of models ‘...in theory, practice and Legislation that have different degrees of alignment with the normative aspects discussed above in terms of maximising autonomy, retaining legal capacity, and exercising self-determination’.⁸⁸ The ultimate distinction between supported decision making and substitute decision making is that supported decision making focusses on assisting the adult to make their own decision, with the

⁸⁵ Australian Law Reform Commission, 2004, ‘Equality, Capacity and Disability in Commonwealth Laws, Final Report’, Pp 52.

⁸⁶ UN Committee on the Rights of Persons with Disabilities, General Comment No.1 (2014), Article 12: Equal recognition before the law, Pp 6.

⁸⁷ Dr Mary Donnelly, 2004, in Australian Law Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws, Final Report, pp 51.

⁸⁸ Office of the Public Advocate, 2014, ‘A journey towards decision making autonomy, supported decision making in theory and practice: a review of literature’, Pp 10.

ultimate decision being that of the adult. The extent to which models of ‘supported’ decision-making achieve this aim in legislation and practice is debated. A variety of models used in international practice are outlined below, and a range of related resources are provided. Links are provided to information about pilot projects of supported decision-making in Australia.

AUSTRALIA

States and Territories are responsible for guardianship legislation under the Australian Constitution. Various pilots and trials have been undertaken by States and Territories, or are underway. Significant research and consultation has been undertaken through reviews by law reform commissions and public advocates. The Australian Law Reform Commission has undertaken an inquiry into equality, capacity and disability in Commonwealth Laws. The Australian Law Reform Commission’s discussion paper and final report includes interesting analysis of issues relating to Article 12 and supported decision-making. The Commission’s final report encourages the adoption of an approach to proxy decision making that is focussed on the supports a person needs to make their own decisions – on a scale from no support to full support.

Australia’s interpretive declaration made on advice from civil society is as follows:

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.

Australia Law Reform Commission

[Inquiry into equality, capacity and disability in Commonwealth Laws](http://www.alrc.gov.au/inquiries/legal-barriers-people-disability)

<http://www.alrc.gov.au/inquiries/legal-barriers-people-disability>

South Australia

[SA Public Advocate \(info on the SA pilot and other research\)](http://www.opa.sa.gov.au/resources/supported_decision_making)

http://www.opa.sa.gov.au/resources/supported_decision_making

Australia Capital Territory

[ACT Supported Decision-Making Pilot \(and other info\)](http://www.adacas.org.au/decision-support)

<http://www.adacas.org.au/decision-support>

New South Wales

[NSW Supported decision-making pilot](http://www.adhc.nsw.gov.au/data/assets/file/0003/279039/SDMP_fact_sheet_Oct2013.pdf)

http://www.adhc.nsw.gov.au/data/assets/file/0003/279039/SDMP_fact_sheet_Oct2013.pdf

[NSW Parliamentary Committee Enquiry – Supported Decision Making](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/EEDCC12FC63D6EC7CA2575EC00003769)

<http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/EEDCC12FC63D6EC7CA2575EC00003769>

Victoria

[Victorian Supported Decision-Making Pilot](http://www.publicadvocate.vic.gov.au/file/file/Research/Current%20projects/SDM%20project%20final%20FINAL.pdf)

<http://www.publicadvocate.vic.gov.au/file/file/Research/Current%20projects/SDM%20project%20final%20FINAL.pdf>

[Victorian Law Reform Commission – Guardianship](http://www.lawreform.vic.gov.au/all-projects/guardianship) (Part 3 of the consultation paper includes an interesting discussion)

<http://www.lawreform.vic.gov.au/all-projects/guardianship>

CANADA

Canada is regarded as a leader in supported decision-making. Interestingly Canada has made the following interpretive declaration/reservation with respect to the CRPD. It appears to be mainly an interpretive declaration with a qualified reservation, that is, if Article 12 is taken to mean X:

Declaration and reservation:

“Canada recognises that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.

To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal.

Canada interprets Article 33 (2) as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones.”

Each of the provinces outlined below have passed legislation that references supported decision-making. Each jurisdiction maintains a system of guardianship.

British Colombia

The regime in British Colombia is an interesting one to examine. The *Representation Agreement Act* came into effect in February 2000 and created an alternative to guardianship – though guardianship still exists in British Colombia.

The UN ‘enable’ website contains a *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*. Legal capacity and supported decision-making is covered in chapter 6. The Handbook lauds the ‘representation agreement’ regime and states that ‘The Province of British Columbia in Canada is one of the leading jurisdictions in incorporating supported decision-making into law, policy and practice’.

Interestingly, British Colombia still retains a system for guardianship as a last resort, and the ‘representation agreement’ regime still involves conferral of decision-making power on a substitute.

In various resources, the *Representation Agreement Act* is credited with inspiring Article 12 of the CRPD.⁸⁹

[UN Handbook for Parliamentarians, section on legal capacity and supported decision-making](http://www.un.org/disabilities/default.asp?id=242)

<http://www.un.org/disabilities/default.asp?id=242>

[Nidus 'Personal planning and registry', Representation agreement overview](http://www.nidus.ca/?page_id=50)

http://www.nidus.ca/?page_id=50

Alberta

Two additional forms of decision making exist alongside a substitute decision-making regime – 'supported decision-making authorisations' and 'co-decision-makers'. The new options were established by the *Adult Guardianship and Trusteeship Act* in 2009, which also modernised the guardianship and 'trusteeship' regimes. Supported decision making authorisations are personal appointments by the adult, while co-decision making orders are court ordered.

[Supported decision making authorisations](http://humanservices.alberta.ca/guardianship-trusteeship/opg-guardianship-supported-decision-making.html)

<http://humanservices.alberta.ca/guardianship-trusteeship/opg-guardianship-supported-decision-making.html>

[Co-decision making](http://humanservices.alberta.ca/guardianship-trusteeship/opg-guardianship-co-decision-making.html)

<http://humanservices.alberta.ca/guardianship-trusteeship/opg-guardianship-co-decision-making.html>

[Guide to supported decision making](http://www.health.alberta.ca/documents/ElderAbuse-DecisionMakingGuide.pdf)

<http://www.health.alberta.ca/documents/ElderAbuse-DecisionMakingGuide.pdf>

[Supported decision making brochure](http://humanservices.alberta.ca/documents/opg-guardianship-brochure-opg5609.pdf)

<http://humanservices.alberta.ca/documents/opg-guardianship-brochure-opg5609.pdf>

Saskatchewan

A regime for co-decision making (personal and property) is established under the *Adult Guardianship and Co-decision Making Act* which came into force in 2001. Co-decision makers are appointed by the Court.

[Ministry of Justice – Guardianship and Co-decision-making Act](http://www.justice.gov.sk.ca/Adult-Guardianship-and-Co-decision-making-Act)

<http://www.justice.gov.sk.ca/Adult-Guardianship-and-Co-decision-making-Act>

[Adult Guardianship in Saskatchewan – Application Manual \(includes co-decision-making\)](http://www.justice.gov.sk.ca/adx/asp/adxGetMedia.aspx?DocID=128,117,113,81,1,Documents&MediaID=83&Filename=Applicationpkg.pdf)

<http://www.justice.gov.sk.ca/adx/asp/adxGetMedia.aspx?DocID=128,117,113,81,1,Documents&MediaID=83&Filename=Applicationpkg.pdf>

[The Adult Guardianship and Co-decision-making Act – publications centre](http://www.publications.gov.sk.ca/details.cfm?p=392)

<http://www.publications.gov.sk.ca/details.cfm?p=392>

⁸⁹ For example, Nidus: Personal Planning Resource Centre and Registry website
<http://www.nidus.ca/?page_id=240>

[Public Guardian and Trustee – guardianship \(including co-decision making\)](#)

<http://www.justice.gov.sk.ca/Guardianship>

Yukon

The *Decision Making, Support and Protection to Adults Act* provides for supported decision making agreements and representation agreements. The Act commenced in 2003.

[Substituted and Supported Decision Making](#)

<http://yplea.com/seniors-education/substitute-supportive-decision-making/>

[Adult Protection and Decision-Making Act - Supported Decision-Making Agreements](#)

http://www.hss.gov.yk.ca/supported_agreements.php

[Overview of Yukon Decision-Making Legislation](#)

http://www.hss.gov.yk.ca/pdf/decision_making_leg.pdf

Manitoba

Although the *Vulnerable Persons Living with a Mental Disability Act* references support networks and supportive decision-making it does not create a statutory regime for supported decision-making. The [Understanding the lived experiences of supported decision-making in Canada](#) report contains a useful discussion of the supported decision-making in practice in Manitoba.

[The Vulnerable Persons Living with a Mental Disability Act](#)

<http://www.gov.mb.ca/fs/pwd/vpact.html#info>

http://www.gov.mb.ca/fs/pwd/vpact_decision.html#what

Understanding the lived experiences of supported decision-making in Canada

<http://www.lco-cdo.org/capacity-guardianship-commissioned-paper-ccel.pdf>

The Law Commission of Ontario commissioned the Canadian Centre for Elder Law to undertake research on the lived experience of supported decision making in Canada. The review was limited in its scope, needing to be completed in 4 months. The research involved a variety of interviews with participants in the supported decision making regime, including adults under guardianship, carers, supportive decision makers, government experts, independent authorities, advocates and NGOs.

Due to the short timeframe for completing the project, and the limited number of interviews, the report indicates that it should be used predominately as a scoping document of issues. The research was able to identify a number of practical issues for potential future research. Overall, the research advocates for the use of supported decision making for some people (it was not considered to work well for a majority of adults) but indicates that education and practical implementation is key. It was found that there was confusion about making and implementing supported decision making, and that there was ‘slippage’ between ‘supported’ decision making and ‘substitute’ decision making in practice. Third parties were seen to be sceptical and uncomfortable in working with supported decision making arrangements and this served as an incentive to apply for guardianship arrangements. It was found that ‘supported’ arrangements currently worked well for those with committed and engaged support networks who had ‘mild to moderate’ intellectual disabilities.

The report made the point that there was a difference between ‘good law’ and ‘good uptake’, that is, the difficulties in implementation did not negate the ‘rightness’ of the law or approach.

SWEDEN

Swedish law provides for the appointment a mentor ‘god man’ (decision making supporters) and a trustee (similar to guardianship). Interestingly, mentors are paid by the State. Sweden has also established a significant system of social support, including personal assistance, for people with functional disabilities. Sweden established a nationwide system of Personal Ombudsman in 2000 which provides support in decision-making for persons with severe mental or psychosocial disabilities.

A list of secondary resources in the absence of English versions of Swedish Government websites:

[Sweden - Legal capacity and proxy decision making](http://www.alzheimer-europe.org/Policy-in-Practice2/Country-comparisons/Legal-capacity-and-proxy-decision-making/Sweden)

<http://www.alzheimer-europe.org/Policy-in-Practice2/Country-comparisons/Legal-capacity-and-proxy-decision-making/Sweden>

[Self-Determination, Autonomy and Alternatives for Guardianship](http://www.ruralinstitute.umd.edu/transition/handouts/self-Determination.Herr.pdf)

<http://www.ruralinstitute.umd.edu/transition/handouts/self-Determination.Herr.pdf>

[PO-Skåne](http://www.po-skane.org/The_Swedish_Personal_ombudsmen_system(Maths_Comments).php)

[http://www.po-skane.org/The_Swedish_Personal_ombudsmen_system\(Maths_Comments\).php](http://www.po-skane.org/The_Swedish_Personal_ombudsmen_system(Maths_Comments).php)

[A New Profession is Born – Personligt ombud, PO](http://www.personligtombud.se/publikationer/pdf/A%20New%20Profession%20is%20Born.pdf)

<http://www.personligtombud.se/publikationer/pdf/A%20New%20Profession%20is%20Born.pdf>

OTHER COUNTRIES

The Czech Republic, Germany, Norway, Japan, Denmark, Latvia, the Netherlands and others are described as having also implemented legal regimes that give greater focus to ‘supported decision making’.

THOUGHTS TO CONSIDER

Supported decision making is an attractive alternative option to substitute decision making in theory, however, various risks and issues have been identified that should be considered when developing any new approach for Scotland. Given the weight of advocacy for supported decision-making the references below have been included as food for thought – not to advocate the opinions outlined in the resources. These sources discuss supported decision making but highlight some of the critiques and issues. This should not be interpreted as a bias against supported decision making.

[Evolution and Innovation in Guardianship Laws: Assisted Decision-Making: Sydney Law Review](http://sydney.edu.au/law/slr/slr_35/slr35_1/06_Then.pdf)

http://sydney.edu.au/law/slr/slr_35/slr35_1/06_Then.pdf

[Supported decision-making: a viable alternative to guardianship?](http://www.pennstatelawreview.org/print-issues/117-penn-st-l-rev-1111-2013/)

<http://www.pennstatelawreview.org/print-issues/117-penn-st-l-rev-1111-2013/>

[Part 3 of the Victoria Law Reform Commission Review of Guardianship – consultation paper](http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_CP_Part_3.pdf)

http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_CP_Part_3.pdf

[Office of the Public Advocate Systems Advocacy – review of literature](http://www.justice.qld.gov.au/data/assets/pdf_file/0005/249404/Decision-making-support-for-Queenslanders-with-impaired-capacity-A-review-of-literature-March-2014.pdf)

http://www.justice.qld.gov.au/data/assets/pdf_file/0005/249404/Decision-making-support-for-Queenslanders-with-impaired-capacity-A-review-of-literature-March-2014.pdf

Net widening

A key concern about ‘supported decision-making’ is that it could extend formalised decision making to a broader population than is currently covered by guardianship, through a lower bar for entrance into the regime. There is concern that supported decision making could create an extended ‘de facto’ guardianship regime – especially because the line between substituted and supported decision making can be difficult to draw, particularly in practice. The abovementioned review of the lived experience of supported decision-making in Canada highlighted this danger.

Informal relationships between adults and carers can result in the adult losing power to make decisions, even though they formally maintain legal capacity. The influence or power that a carer may have over the adult can make it difficult to distinguish between the adult’s decision and the carer’s. In such cases there may be an argument for bringing informal supported/substituted decision making within formal structures. The formalisation of relationships enlivens associated safeguards and review mechanisms.

An ill-defined concept

Commentators raise concerns about a lack conceptual and theoretical clarity surrounding the debate about, and implementation of, supported decision making. Supported decision making has ‘been interpreted as spanning everything from targeted legal powers and authorities through to facilitation of the normal interactions of daily family or social intercourse’.⁹⁰ It is difficult and dangerous to conclusively support ‘supported decision making’ while there is confusion about what supported decision making specifically entails. The conversation within jurisdictions about alternatives to substitute decision making should be nuanced and specific.

Lack of empirical evidence

There is a lack of empirical evidence about how supported decision making regimes operate in practice. Even the abovementioned study into the ‘lived experience’ in Canada was very limited in its scope. This highlights the need to proceed cautiously with the introduction of supported decision making in any particular regime, undertaking research and pilots, as have been pursued in various Australian jurisdictions.⁹¹ Submissions to the Victorian Review also highlighted this point and the need for further research about how supported decision making would work in the Victorian context.⁹²

⁹⁰ Terry Carney, ‘Participation, Rights, Family-Decision making and Service Access: A Role for Law?’ (Legal Studies Research Paper No 12, Sydney University Law School, 2012) in pp. 26, Office of the Public Advocate, ‘A journey towards autonomy? Supported decision-making in theory and practice: A review of literature’, 2014.

⁹¹ Office of the Public Advocate, ‘A journey towards autonomy? Supported decision-making in theory and practice: A review of literature’, 2014.

⁹² Victorian Law Reform Commission, Guardianship: Consultation Paper 10, Part 3: Supported Decision Making, 2011, pp 126

Absence of appropriate supporters

Submissions to the Victorian Review highlighted the limited application of supported decision-making where the adult does not have an appropriate support network. This can be alleviated if Government is able to commit resources to provide sponsored supporters. A variation of the Community guardians program established in various jurisdictions (discussed in Part 1) could be considered.⁹³

Other concerns

- That formalised supported decision making would add another layer of complexity to existing regimes.⁹⁴
- Concerns about risk of abuse, exploitation and undue influence if appropriate safeguards are not implemented. This risk is most prevalent in privately appointed supported arrangements.⁹⁵

Suggestion 2-0

Continue to research and consider options for the use of supported decision-making in the Scottish context.

Suggestion 2-1

Carefully consider the definitional and theoretical issues to determine specifically what any reform regarding 'supported' decision making is attempting to achieve.

Suggestion 2-2

Consider running pilots of 'supported' decision making in consultation with community and civil society organisations, and users of the existing guardianship system.

⁹³ Ibid, pp 126

⁹⁴ Ibid, pp 128

⁹⁵ Ibid, pp 129

Part 3 - MWC GUARDIANSHIP VISITS ANALYSIS

Introduction and overview

The Mental Welfare Commission for Scotland plays an important role in monitoring the guardianship regime in Scotland - including guardianship orders made under that regime and the adults subject to them. The Commission's inspections of particular 'places' (such as care homes) through 'focussed' and 'themed' visits are one way in which adults under guardianship are indirectly visited by the Commission. Some people under guardianship reside in these places and benefit from the Commission's oversight in this way. The Commission also directly and specifically visits a sample of adults under guardianship each year wherever they reside - the Commission aims to visit 600 individuals on new guardianship orders each year.

The Commission uses a matrix of priorities to allocate visits, for example, visiting all young people on indefinite orders. The survey/form that Commission visitors complete after each visit includes a section for recording information about various forms of restriction of liberty - whether they are present and whether they are sanctioned by guardianship powers. The Commission does not currently have a system or process for proactively targeting visits to people who may be deprived of their liberty or subject to certain forms, and degrees, of restriction of liberty. Part 3 describes the project to create a system for prioritising visits in this way.

The original intention was to create a process for targeting visits based on deprivation of liberty. This focus was due to my interest in the Commission's role as part of the UK National Preventive Mechanism established under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). However, the same process for targeting visits towards deprivation of liberty could also be used to target visits towards significant/considerable restriction of liberty and particular types of restriction of liberty, such as 'restrictive practices'. For a variety of reasons outlined in Part 3, the ability to target a portion of guardianship visits towards deprivation of liberty and restriction of liberty would assist the Commission in the fulfilment of its aim:

...to ensure that care, treatment and support are lawful and respect the rights and promote the welfare of individuals with mental illness, learning disability and related conditions.

Adults under guardianship may have their liberty restricted or deprived as part of efforts to provide them with the best care, however, these circumstances also make them vulnerable to maltreatment. As the Public Advocate in Victoria outlined in a 2009 paper on supported decision making, it is important not to demonise guardianship.

An unfortunate aspect of the current discussion about supported decision-making, in Australia as well as overseas, has been the denigration and criticism of guardianship that has frequently accompanied it, even in United Nations CRPD publications. Whilst serious accusations of human rights abuse can be levelled against guardianship in some countries, this is not generally the case in Australia.⁹⁶

⁹⁶ Barbara Carter, Office of the Public Advocate (Victoria), Supported Decision Making: Background and Discussion Paper (November 2009), 4 <<http://www.publicadvocate.vic.gov.au/research/132/>>

As discussed in previous parts of this report, monitoring and reviewing arrangements are critical to ensuring that orders benefit the adult subject to them and protect their human rights. Where arrangements significantly restrict an adult's liberty, even deprive them of liberty, the balance between fostering the enjoyment of rights and curtailing them becomes particularly precarious. If the Commission can better identify and reach these individuals it is in a position to ensure their rights are upheld and their welfare ensured.

The project involved significant investigation of data already available to the Commission about adults under guardianship in Scotland. This data was matched with a new capacity to word search guardianship interlocutors and applications. This collective information was used to develop indicators for restriction/deprivation of liberty that can be built into the current system for allocating visits. As the project progressed, it became clear that a rigorous analysis of the data provided an opportunity to investigate additional issues - including the Commission's process for collecting data about restriction of liberty and also trends and general practice regarding the form and content of guardianship orders in Scotland. The process of investigation adapted to incorporate these additional issues and the report includes a number of related suggestions.

The analysis below describes the method currently used by the Commission to allocate visits, discusses the concept of 'deprivation of liberty' and outlines the benefit of allocating visits based on restriction/deprivation of liberty. The analysis describes the process used for investigating data and provides a range of findings and suggestions. Detailed information is provided about the search for indicators relating to specific forms of restriction on liberty – for example, 'restriction' and 'seclusion'.

How the Commission currently allocates visits

Visits are allocated from a list of new orders created during a period – for example, a particular month. A list is compiled at regular intervals of new orders created during the period following the previous visit allocation. A matrix is currently used to prioritise visits to individuals in particular categories - for example, the Commission attempts to visit all younger adults who are on indefinite orders.

The 'Process' section below outlines new measures that have been taken to broaden the amount of usable data available for allocating visits and new ways of using the data that is already available to the Commission.

Deprivation of liberty

Certain circumstances unequivocally amount to deprivation of liberty and are not contentious, such as incarceration in a prison. The difficulty is in setting the outer limits of what is understood to be 'deprivation of liberty' and determining when it might occur outside traditional settings.

There are interesting questions from a policy perspective about the purpose or intent of applying the legal construct of 'deprivation of liberty' to certain circumstances and in certain contexts. Why is it useful to debate whether a person with a significant disability, residing with their parents is deprived of their liberty? What benefit is derived from debating and mapping out the line where restriction of

liberty ends and deprivation of Liberty begins for an elderly resident of a nursing home? How are these decisions made in practice and what for?⁹⁷

'Deprivation of Liberty' shapes the work of the Commission in two key ways – through Article 5 of the *European Convention on Human Rights* (ECHR) and the Commission's role as part of the UK National Preventive Mechanism established under the OPCAT. Applying 'deprivation of Liberty' in less traditional contexts is a contentious issue with respect to both of these instruments. Courts have struggled to determine when people with decision-making disability are 'deprived of their liberty' under Article 5 of the ECHR as a result of their care arrangements. There are questions regarding OPCAT about the types of places that need to be inspected by virtue of them being 'places where people are deprived of their liberty'. What types of care facilities meet the definition of a 'place of detention' under OPCAT?

- ***Deprivation of Liberty in Article 5 of the ECHR***

The ECHR has been implemented in domestic Scottish law by virtue of the Human Rights Act 1998 and the Scotland Act 1998. Article 5 of the ECHR provides that 'no one shall be deprived of his liberty' except in particular circumstances and 'in accordance with a procedure prescribed by law'. One of the permissible circumstances is the detention of 'persons of unsound mind'.

The Convention does not elaborate about what constitutes 'deprivation of liberty' or a 'procedure prescribed by law'. Case law has developed around these concepts through decisions of the European Court of Human Rights and the UK Supreme Court.

The Courts have struggled to apply the concept of 'deprivation of liberty' to individuals with decision making disability and who 'lack capacity' under law. The resulting jurisprudence is highly contentious and still somewhat unsettled. There is a real possibility of further evolution of the principles.

Caselaw requires that 'deprivation of liberty' be determined by examination of the concrete situation of the individual. A variety of factors must be taken into account in making the assessment, including the 'type, duration, effects and manner of execution of the penalty or measure in question'.⁹⁸

In *Storck v Germany* the European Court of Human Rights required that both objective and subjective elements be satisfied. There is required to be the objective element of confinement '...in a particular restricted space for a not negligible length of time', but also the subjective element that the person '...has not validly consented to the confinement in question'.⁹⁹

To satisfy Article 5, the deprivation of liberty must also be imputable to the state. This raises questions about whether individuals in care in private homes can be deprived of their liberty. However, as a result of provision of care, welfare and treatment in Scotland, the Scottish Law Commission takes the view that '...it is very unlikely that there could be a deprivation of liberty in

⁹⁷ Lucy Series, 2012, The Small Places Blogspot, 'Deprivation and the struggle for meaning', <<http://thesmallplaces.blogspot.com/2012/07/deprivation-of-liberty-and-struggle-for.html>>

⁹⁸ Mental Welfare Commission for Scotland, 2013, 'Good Practice Guide, Deprivation of Liberty', pp 8.

⁹⁹ Scottish Law Commission, 2014, Report on Adults with Incapacity, Scot Law Com No 240, pp 8

any residential establishment in Scotland which could not be imputed to the State. In any event, there is a responsibility to maintain legal provisions which protect citizens against unjustified deprivations of liberty.¹⁰⁰

For individuals who lack capacity under law to validly consent to a deprivation of liberty, the subjective element described above is irrelevant. The only relevant considerations in determining deprivation of liberty are objective. This principle was firmly stated by the European Court of Human Rights in the *Bournewood* case.¹⁰¹ After the *Bournewood* case admission of a person with incapacity to long-stay hospitals could no longer be regarded as voluntary and informal because the adult did not specifically object or try to leave.¹⁰² The case prompted a Scottish Law Commission inquiry into Scotland's domestic law regarding deprivation of liberty for adults with incapacity. The question for the Law Commission was whether Scottish law provided the appropriate 'procedure prescribed by law' for deprivation of liberty of persons with incapacity as a result of care arrangements.

To be an appropriate 'procedure prescribed by law' any requirements of domestic law must be followed, and the criteria in *Winterwerp v Netherlands* must be satisfied. The *Winterwerp Case* provides three requirements:

- The individual must have been reliably shown to be of "unsound mind", according to medical evidence from an objective expert.
- The mental disorder must be of a kind or degree warranting compulsory confinement.
- Such a mental disorder must persist throughout the period of confinement.

The latest decision about what constitutes 'deprivation of liberty' was provided by the UK Supreme Court in *Cheshire West*. The judgement in this case was handed down on 19 March 2014 and was viewed generally as broadening the scope of people who would be deemed to be deprived of their liberty. The 'acid test' provided in the leading judgement for the objective element of deprivation of liberty was that a person be under 'continuous supervision and control' and 'not free to leave'.

Another important principle from jurisprudence on deprivation of liberty is that the distinction between restriction of liberty and deprivation of liberty is a matter of intensity and degree. The distinction can be viewed as resting along a scale or spectrum. Finding this threshold on the scale can be very difficult in practice. Lady Hale provided the main judgement in *Cheshire West*, and the 'acid test' above, in part to simplify the process for applying the principles in practice.¹⁰³

The *Bournewood Case* highlights a number of key elements for deprivation of liberty under Article 5 at para 89:

"...in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in

¹⁰⁰ Scottish Law Commission, 2012, [Discussion Paper](#) on Adults with Incapacity, Discussion paper No 156, pp 91

¹⁰¹ Mental Welfare Commission for Scotland, 2013, 'Good Practice Guide, Deprivation of Liberty', pp 17.

¹⁰² Scottish Law Commission, 2012, [Discussion Paper](#) on Adults with Incapacity, Discussion paper No 156, pp 1

¹⁰³ [2014] UKSC 19 *On appeal from: [2011] EWCA Civ 1257; [2011] EWCA Civ 190*, para 48.

<https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf>

question. The distinction between a deprivation of, and a restriction upon, liberty is merely one of degree or intensity and not one of nature or substance..." (para 89)

- ***Deprivation of liberty under the OPCAT***

The Mental Welfare Commission forms part of the United Kingdom's National Preventive Mechanism established under the OPCAT. As outlined in Article 1 of the Optional Protocol:

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Deprivation of Liberty is therefore a key determinant of which places should be visited under OPCAT obligations. As outlined in Article 1, the OPCAT requires the establishment of a system of visits by both independent international bodies and national bodies. The system of national bodies is referred to in the OPCAT as the National Preventive Mechanism ("NPM"). The UN *Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* ("SPT") is the relevant international body that undertakes visits of places of detention.

The UK ratified the OPCAT in 2003 and designed its NPM in 2009. The UK's NPM is currently comprised of 20 bodies that visit a variety of places, including prisons, police custody and immigration detention centres. The NPM is coordinated by HM Inspectorate of Prisons (HMIP) in London.

There is some confusion and debate about what 'deprivation of liberty' means in the context of the OPCAT and which places of detention are subsequently required to be visited in accordance with it.

Article 4 of the OPCAT provides some detail about what types of 'places' are to be visited.

Article 4(1) provides that:

Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

Article 4(1) is worded with the obvious intention of covering a broad range of 'places'. It does this by including places where persons 'may be' deprived of their liberty and by including those places where people are deprived of their liberty by virtue of the States 'acquiescence'. 'Deprivation of liberty' is specifically defined in Article 4(2) of the OPCAT in the following terms:

For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

There are a number interesting elements to this definition. There is a focus on whether a person is free to leave at will, which again provides a broad scope to the definition. This element alone would appear to cover all manner of institutions from prisons to dementia wards. However, there is also some apparent logical conflict between Article 4(1) and 4(2) and there has been some debate about whether Article 4(2) potentially limits the scope of Article 4(1). In particular, Article 4(2) does not include the same broad references to detention by ‘acquiescence’ of the State. Article 4(2) refers specifically to orders ‘by order of any judicial, administrative or other authority’, with ‘other authority’ perhaps intended as a catch-all. The phrase ‘custodial setting’ might also appear on its face to narrow the focus to places that are more traditionally considered to be a place of detention, such as police cells and prisons. This has been a more prominent issue with respect to the Russian language version of the OPCAT, which uses a phrase that translates to ‘holding someone under (armed) guard’.¹⁰⁴

Under the Vienna Convention on the Law of Treaties of 1969, treaties must be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. When interpreting ambiguity, travaux préparatoires and the circumstances of the treaty’s conclusion can be taken into account. On the basis of treaty negotiations, OPCAT has become generally interpreted as covering a broad spectrum of places such as those outlined by the Association for the Prevention of Torture below:

NPMs and the SPT can visit any type of places where persons are, or may be, deprived of their liberty by public authorities, or with State consent or acquiescence. Places include, but are not limited to: prisons, police stations, pre-trial facilities, transport vehicles, hospitals, immigration centres, psychiatric institutions, children’s homes, military facilities, airports, etc.¹⁰⁵

During negotiations there was some debate and disagreement about the proper reach of the OPCAT inspection regime and issues that may impact on implementation, including resourcing. However, the broader concept that includes ‘de facto places of detention’ appears to have gained favour and has been supported in practice by States Parties such as the UK. The collection of 20 bodies that currently comprise the UK’s NPM inspect a broad range of places, from prisons to mental health facilities.

The benefit of allocating visits & collecting data based on restriction/deprivation of liberty

The genesis of the project was an interest in the Commission’s role as part of the UK’s National Preventive Mechanism under OPCAT. However, the case law regarding ‘deprivation of liberty’ under Article 5 of the ECHR that was chosen as the basis for creating indicators for restriction/deprivation of liberty and for assessing the collection of data by the Commission in relation to restriction/deprivation of liberty. The detail and specificity of criteria in jurisprudence related to Article 5 provided a strong basis for analysis and creating indicators.

¹⁰⁴ University of Bristol, Human Rights Implementation Centre, 2011, ‘Deprivation of liberty’ as per Article 4 of OPCAT: the scope’, pp 2.

¹⁰⁵ Association for the Prevention of Torture, website, ‘OPCAT FAQ’, < <http://www.ap.t.ch/en/opcat-faq-1/#preventive-visit>>

The types of restriction in section 6 of the Commission's visit form are congruous with the concept of deprivation of liberty related to Article 5 of the ECHR. The utility of the bank of visit data for the creation of indicators is another reason why 'deprivation of liberty' as it relates to Article 5 of the ECHR was the most useful starting point. In addition, 2014 was a significant year in relation to Commission's work regarding Article 5 of the ECHR - with the handing down of the judgement in *Cheshire West* (providing the UK Supreme Court's latest view of deprivation of liberty under Article 5) and the Scottish Law Commission report into particular Article 5 issues in Scotland.

Basing inspections on the criteria developed in case law regarding Article 5 of the ECHR also benefits the Commission in its role as part of the National Preventive Mechanism under the OPCAT, as explained below.

Benefits of targeting guardianship visits and collecting data based on Deprivation of Liberty as per Article 5 of the ECHR

- Allows MWC to assist in identifying instances where Article 5 might be triggered by deprivation of liberty of an adult under guardianship, and help to ensure appropriate legal authority is in place - enlivening related rights and safeguards.

As mentioned, the provision of appropriate legal authority for deprivation of liberty (in accordance with Article 5 of the ECHR) is currently the subject of debate in Scotland. The Scottish Law Commission released its report on 1 October 2014 about whether Scot law satisfies the requirement that deprivation of liberty for people of 'unsound mind' only occur 'in accordance with a procedure prescribed by law'. The Law Commission's 2012 discussion paper cites Hilary Patrick's work for MWC and her comments regarding the general acceptance in Scotland that welfare guardianship orders provide the appropriate legal authority for deprivation of liberty.

"It seems generally accepted that the Adults with Incapacity Act guardianship can constitute the lawful procedure required by ECHR law if an adult is to be deprived of his or her liberty on the grounds of mental disorder."¹⁰⁶

The Scottish Law Commission disagrees with this general 'general acceptance'. The Law Commission argues that there is a lack of clarity about whether deprivation of liberty can lawfully be sanctioned under guardianship legislation and insufficient scope for review under guardianship legislation as required by Article 5(4) of the ECHR.

Given the general consensus that the decision in *Cheshire West* broadens the cohort of people under guardianship who might be considered to be deprived of their liberty, the question of settling a method for providing legal authority becomes all the more poignant and will likely be a significant issue in 2015.

¹⁰⁶ "Autonomy, Benefit and Protection" 2008 Discussion Paper for the Mental Welfare Commission for Scotland ("2008 Discussion Paper") p 32, in Scottish Law Reform Commission, 2012, [Discussion Paper](#) on Adults with Incapacity, Discussion paper No 156, para 6.5.

- The ability to identify individuals for which deprivation of liberty might be at issue provides an opportunity for the Commission to provide information and education to Guardians and carers about legal requirements and best practice in care. The Commission's focus on visiting individuals on new orders creates an opportunity to provide this foundation guidance at the outset of the order. A new order may pertain to an adult and guardian who have been the subject of previous orders, however, a visit provides the opportunity to reassess approaches to care and legal safeguards and to tailor existing arrangements to any changes in powers and other matters in the new order.
- Although adults may be 'deprived of their liberty' in order to ensure their safety or to provide appropriate care and treatment, those who are deprived of their liberty are subsequently made vulnerable to maltreatment or to infringement of their human rights. In fact, care that amounts to deprivation of liberty, and the extent of disability that might result in such care, are likely to also mean that the adult is less able to safeguard their own rights and welfare or to raise issues. Certainly, there is a fine line between care that fosters the enjoyment of rights and that which impinges upon rights. Systems established to benefit individuals can sometimes lead to harm, for example physical and other abuse or neglect by carers. There are obvious benefits from a welfare perspective if the Commission is better able to target and visit individuals in this situation.
- The risk of maltreatment or unnecessary imposition on human rights does not commence at the point at which restriction upon liberty meets the legal threshold of 'deprivation of liberty'. Any person whose liberty is impinged upon in a significant way, or in certain specific ways (for example, through use of restraint) is in a similarly vulnerable position. As mentioned, the difference between restriction and deprivation of liberty is a matter of intensity and degree, on a scale. From a welfare perspective it is ideal if the Commission not only targets those deprived of their liberty but those whose liberty is restricted to a significant degree or in particular ways. Given that 'deprivation of liberty' requires consideration of a range of circumstances about an adult's life and treatment, a range of restrictions upon liberty, the creation of indicators for deprivation of Liberty necessarily also becomes a process of developing indicators for significant restriction of liberty. Indicators for deprivation of liberty will flag certain restrictions on liberty or circumstances that relate to restriction on liberty. Whether restrictions flagged for an individual are found to be present in practice and combine in a way that amounts to restriction, significant restriction or deprivation of liberty can only be determined during the subsequent visit.
- The Scottish Law Commission report favours a new approach to providing legal authority for deprivation of liberty based on 'significant restriction of liberty'. Much will depend on how the debate progresses, how 'significant restriction of liberty' is defined in law and how any new regime is implemented. However, if the Commission develops experience now in targeting inspections towards particular restriction on liberty, significant or considerable restriction of liberty, and deprivation of liberty, it will be in a good position to tailor its approach to any new regime. The Commission will be better able to assist in monitoring whether legal authority is in place and that education is provided to adults under guardianship, and their guardians, about law, rights and appropriate care. Please note that where this report has previously referred to

‘significant restriction of liberty’ it is not referring to the Scottish Law Commission’s definition (or any other) but meaning more than low level restriction. As outlined in the section below ‘Using Deprivation of Liberty indicators for allocating guardianship visits’, it is suggested that visits are prioritised towards individuals presenting with multiple ‘liberty’ flags.

- When creating indicators for deprivation of liberty it is useful to include indicators for use of restrictive practices. Restrictive practices are a significant form of restriction of liberty that are relevant to determining deprivation of liberty. However, restrictive practices including ‘restraint’ and ‘seclusion’ are also particularly precarious forms of treatment with associated risk of significant harm and impact upon human rights. Therefore, it is valuable to inspect for these forms of restriction of liberty in their own right, apart from their role in determining deprivation of liberty.

Seclusion and restraint are a priority focus of the UK National Preventive Mechanism, as described in recent annuals reports. Better targeting of visits towards instances where such practices do, or may, occur also assists the Commission to meet this priority and fulfil its role as part of the UK NPM.

- Another focus of the UK NPM is ‘de facto detention’. The definition provided in the NPM annual report for 2012/13 is congruous with the broad jurisprudence regarding deprivation of liberty under Article 5 of the ECHR. The project to create indicators will assist in uncovering instances where individuals are ‘de facto detained’ and again helps the Commission to satisfy this NPM priority. There is also scope to share lessons learned with other NPM members.
- Any set of indicators for deprivation of liberty or significant restraint of liberty should necessarily include indicators relating to whether the adult is free to leave their residence at will. This element is fundamental to the definition of deprivation of liberty relating to Article 5 of the ECHR and is also a key focus of the definition of deprivation of liberty in Article 4(2) of the OPCAT. Coverage of inspections by the National Preventive Mechanism in Scotland is very comprehensive, and based on a broad definition of a ‘place of detention’. ‘Places of detention’ are largely (if not completely) known to Government. However, targeting inspections to individuals who might be deprived of their liberty, especially those who are not free to leave at will, might help to uncover previously unknown ‘places of detention’ that appropriately fall within the NPM’s visiting jurisdiction.

The impact of the unsettled nature of the definition of ‘deprivation of liberty’

Deprivation of liberty is a complex, unsettled and contentious area of law. There is real potential for further evolution of the concept beyond *Cheshire West*, even a regression to a pre-*Cheshire West* position and/or a general narrowing of scope. The judgement of the Supreme Court in *Cheshire West* was not unanimous on key points that dramatically impact on the nature of the ‘deprivation of liberty’ concept and the cohort of individuals it would apply to. The European Court of Human Rights has not decided a case on the facts presented in *Cheshire West*. If the court does adjudicate such a matter and comes to a different conclusion, the UK Supreme court is would be obliged to follow suit.

The somewhat unsettled definition of deprivation of liberty, and the complexity of applying the concept to adults with incapacity, are not insurmountable issues for the project. It is possible to develop indicators that can be used to target visits towards instances of deprivation of liberty and for these indicators to remain useful over time. It is also possible for MWC to collect useful data regarding deprivation of liberty despite the fact that the definition may continue to evolve over time.

As previously outlined, a determination about deprivation of liberty requires consideration of a variety of circumstances regarding the living conditions of an individual and the manner in which they are treated. As also mentioned, the distinction between restriction of liberty and deprivation of liberty is a matter of intensity and degree. The judgement in *Cheshire West* simplified the process of consideration through its focus on 'continuous supervision and control' and 'freedom to leave'. Developing indicators for deprivation of liberty is actually a process of developing indicators for circumstances and treatment that restrict liberty but could combine, and be applied, in a manner that amounts to deprivation of liberty. Whether there is a restriction of liberty or a deprivation of liberty will depend upon the prevailing definition of deprivation of liberty and the associated weight given to different factors.

Any indicators that are developed to direct visits towards deprivation of liberty will remain useful because they are indicators for restriction of liberty at the very least. This remains true even if the definition of deprivation of liberty evolves to exclude consideration of particular elements. As previously explained, there are significant benefits to targeting visits towards any significant restriction on liberty and also to particular forms of restriction on liberty such as seclusion and restraint.

The above is also true from a data collection and analysis perspective - that is, to collect data about particular forms of restriction of liberty that could amount to deprivation of liberty. The key appears to be maintaining the approach currently used in section 6 of the MWC visit report. The visit report sensibly focuses on the collection of data about specific forms of treatment (and circumstances) that restrict liberty but can combine, or be applied, to deprive liberty. This is preferable to asking visitors to make and record only an assessment about whether there is a deprivation of liberty. The current approach provides scope for the definition of deprivation of liberty to evolve over time. Using this approach, MWC will continue to develop a bank of information about restriction of liberty and can make assessments about whether deprivation of liberty is/was/might be present based on the prevailing definition and the weight given to different factors.

Nevertheless, the types of treatment currently inspected for in section 6 of the visit report (restraint, seclusion, correspondence, freedom to leave unassisted, visitors and CCTV) will likely remain directly relevant to the definition of 'deprivation of liberty' regardless of the manner in which it evolves. These factors were relevant prior to the decision in *Cheshire West* and continue to be so – going to both questions of 'continuous supervision and control' and 'freedom to leave'. I recommend maintaining the current list of treatment inspected for in section 6 of the visit report, and adding to it as necessary over time.

MWC could consider discussing whether additional elements should be added to section 6 (in

addition to restraint, seclusion, correspondence, freedom to leave unassisted, visitors and CCTV) to better target the type of treatment and circumstances that would amount to 'continuous supervision and control' as per the test in *Cheshire West*. For example, CCTV is a very specific form of observation and it might be beneficial to include other forms of observation and supervision or a broader category such as 'continuous supervision and control'.

Process

- *Using Optical Character Recognition and word searches*

Key to the search for indicators outlined in this report is the newfound capacity to successfully run Optical Character Recognition (OCR) on scanned pdf versions of guardianship interlocutors and applications that the Commission receives. This allows for word searching of interlocutors and applications for key terms and phrases, and matching this against data already contained in relation to individuals under guardianship.

Using OCR on scanned documents was discussed during early meetings about Commission processes. Questions arose as to whether the process could be used on interlocutors and applications and if this might help to develop a bank of information the Commission could use to proactively identify, and visit, individuals for which deprivation of liberty might be at issue. OCR was successfully used on interlocutors - thank you to Callum MacLeod from the Commission for his assistance. Initial testing using key word searches of interlocutors identified instances where particular treatment that restricted an individual's liberty was sanctioned by the order in the interlocutor. However, the broad language used in orders contained in interlocutors restricted the utility of these searches.

As an example, 'restrain' (covering 'restrained, restraint, restrains etc) was identified in 113 of the 5,920 new interlocutors created during the period of investigation – the three year period from 1 April 2011 to 31 March 2014. The use of restraint was clearly sanctioned in the orders of these 113 adults. It was then possible to identify that under current allocation processes 70 of these individuals had not been visited, and were unlikely to be visited under current processes that focus on new orders. The relatively small number of instances from the total population, and the absence of other direct words that could be tested for, demonstrated that there would be significant benefit in attempting to run OCR on applications in order to broaden the net.

The process to run OCR on applications (a much larger a varied set of documents) and to then import them into the excel spreadsheet was time consuming and difficult – an even greater thank you to Callum Macleod for this. The OCR of applications was not as successful as it was for interlocutors, due to the fact that some documents that form part of applications are handwritten. However, the process produced an abundance of additional word searchable information about individuals that could be used in determining whether restriction or deprivation of liberty was at issue for them. As a simple example, 'restraint' was found in 200 applications, therefore, bringing an additional 87 individuals to the attention of the Commission.

Running OCR does not produce perfect results. For instance, I noted one instance at least where the program had incorrectly read the word 'restraint' as a word that was unrecognizable. However,

what was clear was the great value in the information that was made available by the OCR process. The ability to relatively accurately word search interlocutors and applications is useful not only for the project to allocate visits based on restriction or deprivation of liberty, but for various other Commission work. For example, this information was used recently to identify individuals for which autism was at issue – information the Commission did not currently have at hand. The ability to word search interlocutors and applications was also used in this project to allocate visits based on issues such as ‘abuse’, ‘adult protection’ being at issue. There are many various applications for this new bank of information that is now in usable form.

To improve the accuracy of word searches of interlocutors and applications it would be ideal if Courts could provide pdfs of the documents rather than hardcopies that then need to be scanned. It would also be ideal if the use of handwritten information in applications was minimized. My understanding is that professional reports are the types of documents provided in this way. It would be ideal if medical professionals could be encouraged to provide material in typed form – it would certainly provide more usable information to the Commission, which will ultimately benefit their patients.

Suggestion 3-0

Inquire about whether interlocutors and applications could be supplied to MWC as electronic pdfs. Encourage the use of typed material in applications and interlocutors.

- Focus on restrictions of liberty in section 6 of the visit report

A large variety of circumstances can impinge upon the liberty of an adult under guardianship and contribute to determining whether they are, under law, deprived of their liberty. Developing indicators for deprivation of liberty can therefore become quite a broad project.

The search for indicators focussed on the types of treatment outlined in section 6 of the Commission visit report (restraint, seclusion, correspondence, freedom to leave unassisted, visitors and CCTV) in order to utilise the data already collected in IMP. The search for indicators used data relating to individuals on orders created in the 3 year period 01 Apr 2011 to 31 Mar 2014. This period was chosen because it is the period within which data was collected in section 6 of the visit report regarding restrictions of liberty.

In addition, the forms of treatment in section 6 of the visit report focus on core circumstances through which the liberty of adults under guardianship is restricted or deprived. These forms of treatment are key elements in the determination of deprivation of liberty in both the *Cheshire West* test and previous incarnations. The exception is that CCTV is perhaps quite specific and could be supplemented by a broader term regarding the level of supervision and monitoring – as discussed above. While searching for indicators for these specific forms of treatment I also looked for other indicators for deprivation of liberty more broadly as appropriate. For example, when looking for indicators of CCTV use, I focussed more broadly on indicators for ‘continuous supervision and control’.

- ***The four step process of searching for indicators***

I experimented with many different ways of investigating the data to determine the best process for finding indicators for deprivation of liberty.

As mentioned, when I began experimenting with the data it became clear that there were additional benefits to the search for indicators – for example, I could look at the way in which MWC visitors used section 6 of the visit form and also the substance and form of orders in interlocutors. I therefore adjusted the process to investigate these additional issues.

The four step process I settled on is as follows:

1. Investigating available section 6 data
2. Looking for section 6 data using direct terms
3. Using section 6 (of the visit form) to find alternative words deemed to sanction seclusion
4. Looking for words associated with the type of treatment

Where there was sufficient data, and it appeared potentially useful, I undertook additional investigations on the data and looked for trends, such as 'primary diagnosis'. Where there were strong indications for particular treatment, for example 'restraint', I searched within the cohort of individuals presenting with that indicator to see whether a particular primary diagnosis appeared in a significantly greater percentage than in the total population under review, that is the three year period to 31 March 2014. As an example, I searched within the cohort of people with 'restrain' in their interlocutor. In this cohort, Learning Disability was the primary diagnosis in 62.83% of cases, as opposed to 40.68% in the whole population under review. Other things I looked for and recorded, out of interest, included the number of people in particular cohorts who had the Local Authority as their guardian as opposed to a private guardian.

Looking for 'primary diagnosis' as a trend was an attempt to broaden the range of indicators, rather than relying solely on key search terms. Although looking for trends was quite laborious, I found that it developed relatively unhelpful indicators. The most common 'trend' was the primary diagnosis of 'learning disability'. Given that learning disability is the primary diagnosis for approximately 41% of all individuals within the total population under review, it is likely that 'learning disability' as an indicator will flag around half of all new orders created. This type of indicator is therefore only ever useful as a 'secondary' rather than 'strong' indicator.

Step 1 Investigating available section 6 data

I looked at the available section 6 data for each type of treatment. I could then comment on how often data existed and what this might mean about visiting practices. I could look at the way in which visitors used section 6 of the form – for example, completing the second section but not the first. If there was sufficient data available in section 6 I could look for trends – for example, whether there was a predominant primary diagnosis among adults for whom restraint was 'in place'.

Example of information collected:

Search	Number
How many times seclusion was found to be 'in place'	11
How many times seclusion was found to be 'sanctioned'	4
How many times seclusion was found to be 'not sanctioned'	43
How many times seclusion was found to be 'in place' and 'sanctioned'	2
How many times seclusion was found to be 'in place' and 'NOT sanctioned'?	4
How many times seclusion was found to be 'in place' but there was no information recorded about whether it was sanctioned?	5
How many times seclusion was found to be 'not sanctioned' but not 'in place' or no information about whether it was 'in place'	39
How many times seclusion was found to be 'sanctioned' but not 'in place' or no information about whether it was 'in place'	2

Step 2 Looking for section 6 data using direct terms

I looked at direct and unequivocal terms that described the type of treatment, including a discussion about whether there were any direct/unequivocal terms available.

It was important to be cognisant of the fact that interlocutors and applications are different types of documents for different purposes. The word 'visitor' has very few possible meanings in an interlocutor and is highly likely to be used in a particular context, that is, the regulation of the adult's visitors. Applications are a collection of various documents with a variety of purposes and authors. The same word 'visitor' is used in a variety of contexts, for example to describe how often an adult receives visitors, and is unlikely to be a good indicator for restriction or deprivation of liberty. For this reason, I tested the veracity of any findings at every stage. One method used for testing terms was to separate out instances where, for example, 'restrain' appeared in an interlocutor but where a MWC visitor had found that 'restraint' was not sanctioned. I could then read the interlocutor to test for the context in which the word was used.

If there were enough instances of direct/unequivocal words I tested for trends and made other investigations on the data.

This second stage of searches also allowed for comment on the number of times certain types of treatment were specifically sanctioned in interlocutors.

Step 3 Using section 6 to find alternative words deemed to sanction seclusion

I then looked for alternative words that might commonly be used to, or taken to, sanction the form of treatment. I separated out all instances where, for example, 'restraint' was deemed to be sanctioned but where direct/unequivocal words ('restrain') were not present in the interlocutor. I then investigated the interlocutors to see what phrases might have been relied upon by the MWC visitor to find that 'restraint' was sanctioned and whether these words/phrases might be useful

search terms and indicators. I tested any results. Where there were sufficient results I investigated again for trends and other information of interest.

This stage of searches allowed me to look at the types of words/phrases in interlocutors that are taken to sanction certain treatment, and how broad or vague these might be.

Although applications do not sanction any treatment, I also investigated whether any words/phrases found in interlocutors were useful search terms of applications. Again, I tested terms and looked for any trends where relevant.

Example of search within interlocutor text:

Interlocutor Text	Possible terms
(d)to consent to or withhold consent to any healthcare or other treatment relating to the Adult's wellbeing; (e)To open and read any mail or other communications addressed to or received by or on behalf of the said Adult and to attend to or, as appropriate, reply to same. Authorises the public guardian to issue a certificate of appointment; and Decerns	'open and read any mail'
Adult's personal welfare:- (a) decide where the Adult shall live and to decide what supervision and guidance is necessary and appropriate; (b) decide on the type of care services the Adult requires; (c) consent or withhold consent to medical treatment; and	<i>Unsure what would have been relied upon here. Perhaps those highlighted</i>
viii. to consent to any health care that is in her best interests; Elizabeth Clark ix. to open and read any mail or other communications addressed to or received by or on behalf of her; x. to make normal day to day decisions on her behalf including as to diet and dress	'open', 'read', 'mail', 'other communications',

Step 4 Looking for words associated with the type of treatment

I looked for any other words that might be associated with the type of treatment, including any words, behaviours et cetera that are possible precursors to the form of treatment be used – for example, for 'restraint' and 'seclusion' I looked for such terms as 'violent', 'challenging behaviour', 'distress'. I also used common sense, guesswork, and some reading of interlocutors and applications. One of the more targeted search processes I used was to separate out instances where, for example 'restraint', was present in the interlocutor but not the application. I read some portions of the related applications to discover why 'restraint' may have become included in the

interlocutor. I also looked at some applications where treatment was found to be 'in place' or 'sanctioned' to see if there was anything useful.

I also ran a quick search on particular terms such as 'abuse' and have built them into the system for allocating visits as 'welfare flags'. This demonstrates that visits can be targeted based on a wide range of issues under this same process. Indicators can be added, removed, changed over time as appropriate.

General findings and suggestions

- It is possible to find indicators for a variety of issues using available information

The availability of a variety of data in IMP (including data collected in section 6 of visit reports) and the ability to OCR interlocutors and applications made it possible to find a good set of indicators for restriction and deprivation of liberty.

I hope that the analysis outlined in this report will provide useful food-for-thought if MWC decides to target visits and inspections based on other issues. Recently, the OCR word search capability was used to identify instances where autism was at issue with respect to various individuals under guardianship.

- Additional benefits of detailed investigation

A detailed approach was taken to investigating the available information and data. I was weary of 'overcooking' the analysis, but found that an in depth and systematic approach to investigating the data had broader benefits in addition to the primary goal of searching for indicators. The detailed approach allowed for review of the way data is collected, including providing insight into the way section 6 of the visit form is used by MWC visitors. The approach highlighted potential options for reviewing visiting/reporting practices and insight into how section 6 could be improved. A detail approach provided insight into the nature of powers in interlocutors and the way they are expressed. The systematic approach to investigation and description in this report provides some ideas and approaches should MWC wish to target inspections in other ways.

- Reducing instances where adults slip through the MWC visit net

Where there were good indicators for treatment that impinged upon, restricted, deprived liberty, a significant number of related individuals have not been visited. Under current visiting allocation processes, which focus on new orders rather than extant orders, these individuals are unlikely to ever be visited by MWC except through visits to places such as mental health and learning disability hospitals.

For example, the word 'restrain' (covering restraint, restrained, restrains etc) was present in 113 interlocutors. Of the 113 related adults 70 have not been visited.

'Restrain' (covering restraint, restrained, restrains etc) was also mentioned in 200 applications. Of

the 200 related adults 136 not been visited. This trend is evident across all indicators outlined in the detailed reports in sections 3.1 to 3.6.

Using the indicators outlined in this Part to assist in the allocation of guardianship visits should increase the number of MWC visits to people for whom deprivation of liberty is at issue, significant restriction of liberty is at issue, or (at least) where certain precarious forms of treatment are at issue. There are significant benefits to this, outlined above under the heading 'The benefit of allocating visits & collecting data based on restriction/deprivation of liberty'.

Suggestion 3-1

To implement the use of indicators outlined in this Part as a component of the system for allocating guardianship visits.

- Options for reviewing the way particular treatment is inspected for and reported – more data and more consistent data

There was a much smaller amount of section 6 data than expected. Interestingly there was more data with respect to 'freedom to leave unassisted' than other forms of treatment outlined in section 6 of the visit form. 'Cctv' was not found to be 'in place' for any of the 1,512 individuals that have been visited from the total cohort of the 5,920 new orders created in the 3 year period to 31 March 2014.

It is difficult to know what the reason for this is, for example:

- Are certain types of treatment are very rarely used?
- Is certain treatment rarely used on people under new orders?
- Is certain treatment is difficult to inspect for?
- Are current lines of inquiry or interview questions not focused on certain types of treatment?
- Is there definitional confusion about when particular treatment should be deemed to be 'in place' and 'sanctioned'?
- Could the section could be elevated in the form to remove the impact of reporting fatigue and increase focus on section 6?

The above questions are perhaps a topic for discussion within MWC.

Discussion with staff demonstrated that there is some definitional confusion, for example 'freedom to leave unassisted' was often not selected when a person was not physically able to leave without help or where they, for care purposes, shouldn't leave unassisted. See item 3.6 'freedom to leave residence unassisted' for discussion. To better match reporting with the guidance in cases such as *Bournewood* and *Cheshire West* it might be beneficial to discuss each item and agree on criteria for finding that it is 'in place' or 'sanctioned'.

It might also be beneficial to amend section 6 of the visit form to increase clarity of the 'restrictions' being referred to – for example, changing 'visitors' to 'restriction/regulation of visitors' and 'freedom to leave unassisted' to 'not free to leave', and 'correspondence' to 'regulation and management of correspondence'.

It might be useful if the visit form is also amended so that visitors specifically select whether the type of treatment is 'in place', 'not in place' and an option for 'uncertain'. Likewise an option for 'uncertain' could be inserted for use in reporting whether the treatment is sanctioned.

The small amount of data made it more difficult to search for indicators with respect to some forms of treatment.

Suggestion 3-2

MWC visitors discuss why there is a small amount of data recorded in section 6 of the visit form with respect to most forms of treatment listed, and whether there are options to remove obstacles (if uncovered) to accurate and consistent collection of data.

Suggestion 3-3

Discuss and record criteria/definitions for types of treatment in section 6 of the visit form – that is, when treatment should be found to be 'in place' and 'sanctioned'.

Suggestion 3-4

Amend the visit form to reduce confusion (ie. changing 'freedom to leave unassisted' to 'not free to leave') – see fig 3.1.

Suggestion 3-5

Amend the visit form to providing an option for visitors to select whether they are 'uncertain' about treatment being 'in place' or 'sanctioned' – see fig 3.1.

I found that there was some variation in the use of section 6 of the visit form. The form is currently configured so that visitors first look to whether a particular form of treatment is 'in place', then 'if so' whether it is 'specifically sanctioned'. Quite consistently, with all forms of treatment, there were instances where certain treatment was listed as 'sanctioned' or 'not sanctioned' without it having been found to be 'in place'. Also items were found to be 'in place' but there was no information about whether it was sanctioned. This observation is not to criticise, but just to note that some discussion may be useful about how and when this part of the form should be filled out, and ways to standardise protocols for completing section 6 of the visit form. This makes the data more useful for analysis. As mentioned above, I would suggest that the form is changed so that visitors have an option to select when there is uncertainty about whether treatment is 'sanctioned' or 'in place'.

I also suggest the form is amended, and protocols changed so that visitors always record whether treatment is 'in place', 'not in place' or 'uncertain'. Also I suggest that visitors always record whether treatment is 'sanctioned', 'not sanctioned' or 'uncertain' regardless of whether they are in place. This will hopefully make data more consistent and provide MWC with more data and more consistent, useful data. For example, at present, it is impossible to tell whether a visit form with no data in section 6 indicates with certainty whether all forms of treatment are not present and not sanctioned, or if the visitor ran out of time to complete the form. If there is an expectation that section 6 will be completed even where treatment is not present and not sanctioned, it will be easier to tell what the form indicates. The additional data would also allow MWC to better target inspections in future and potentially monitor situations where certain treatment is being used – such as 'restraint'. It also provides more data with which to analyse trends et cetera - for example, how often treatment is used when it is specifically sanctioned. At present this is impossible because

visitors only record when treatment is sanctioned after having found it to be 'in place'.

At first instance it is worth checking that the findings described above are not the result of an error in transporting information from forms into IMP. There might be situations where the visitor has completed the first and second parts of section 6, but the system is not registering the second entry.

Suggestion 3-6

Amend the visit form and protocols to require that visitors always indicate whether treatment is 'in place', 'not in place' or 'uncertain', also whether treatment is 'sanctioned', 'not sanctioned' or 'uncertain' – see suggested amendments to section 6 of the form in fig 3.1.

Check whether findings above are the result of errors in transporting data from visit forms into IMP.

- Broad language in orders - not specifically sanctioning certain treatment

Certain types of treatment are rarely specifically sanctioned in interlocutors. It is concerning that this is particularly the case regarding treatment such as restraint and seclusion. There is some disagreement about whether the *Adults with Incapacity (Scotland) Act* was intended to be used to sanction such forms of treatment. The terms 'restraint' and 'seclusion' are very specific and highly unlikely to be used in any other context in interlocutors or applications than to refer to the 'restraint' or 'seclusion' of individuals. They are therefore very good search terms. However, both terms appear on relatively few occasions in interlocutors and applications. Comparatively, courts are much more specific when they grant powers with respect to the regulation, restriction, and management of the individual's mail. This does not appear entirely logical given the more potentially harmful impact of restraint and seclusion and the need for it to be monitored.

It might be that courts are only intending to grant rights to restrain or seclude in a small number of cases, or that such forms of treatment are rare. However, I'm not convinced that restraint and seclusion are quite as rare as the figures suggest. MWC's *Good Practice Guide: The use of seclusion* (2014 version) indicates that restrictive practices such as seclusion are used in both hospital and community settings.¹⁰⁷ It is problematic if courts are unwittingly sanctioning restraint and seclusion through broad powers. It is also problematic if courts are satisfied that broad language can sanction forms of treatment such as restraint and seclusion. From a policy perspective, it would be ideal if the power to 'restrain' and 'seclude' were more specifically dealt with by courts and in interlocutors and applications. In New South Wales, for example, a 'restrictive powers function' must be specifically applied for and specifically granted by the Tribunal if restrictive practices are to be legally used. Tribunal guidance highlights the questionable legality of such practices in the absence of these specific powers being sanctioned by the Tribunal – amounting to assault, false imprisonment and detainment (withholding a person's possessions) unless the defence of 'consent by a guardian' with a

¹⁰⁷ Mental Welfare Commission for Scotland, 2014, 'Good Practice Guide: The Use of Seclusion', pp 3 and 5.

restrictive practices function is available.¹⁰⁸

My search for indicators highlighted the trend of accepting broad language as sanctioning quite severe and potentially harmful forms of treatment, such as restraint and seclusion. One avenue I pursued when looking for indicators was investigating for specific alternative words and phrases deemed to sanction certain types of treatment, that is, as opposed to direct words like 'restraint' – this is outlined in stage 3 of the process above. I could not find any such words or phrases for seclusion or restraint. The words that appeared to have been relied upon to sanction restraint or seclusion in a variety of cases were very broad and vague. In a number of cases where treatment was found to be 'sanctioned' I had trouble working out what power would have been relied upon to make this finding. The trend of accepting broad language as sanctioning particular treatment (especially considerable and possibly harmful restrictions such as 'seclusion') creates uncertainty about the intention of the court. For example, in 94 instances 'restrain' appears in an application but not a subsequent interlocutor. It is difficult on the face of the interlocutor to know whether the court considered the restraint and deliberately decided to exclude it as a power, or whether the court was satisfied that the use of restraint was granted through broad language in the interlocutor. Regardless of what terms appear in an application, the trend of using broad language in interlocutors makes it difficult to know what treatment the Court is intending to rule in or out.

MWC could consider/continue lobbying for the use of more specific grants of power, especially where there is an intention by the court to sanction treatment such as restraint and seclusion. I suggest looking at Australian models such as that in New South Wales and Queensland as potential examples. Perhaps changes to legislation or regulations could be considered that mandate processes for considering certain treatment – is it in, out and why?

Suggestion 3-7

Suggest lobbying for more specific/less broad powers in orders – particularly regarding restrictive practices such as restraint and seclusion. Perhaps legislation or regulations could be considered that require Sheriffs to indicate whether certain treatment is sanctioned or not and if so 'why'. This would assist the Commission in its work, especially with respect to allocating visits based on particular treatment or restriction/deprivation of liberty in general.

As previously mentioned, there would be some benefit in MWC holding an internal discussion to determine what type of language MWC accepts as sanctioning, for example, 'restraint' or 'seclusion' when visitors complete section 6 of the visit form. In this discussion particular attention could be paid to what broad language will be deemed to sanction such powers.

Suggestion 3-8

¹⁰⁸ NSW Civil and Administrative Tribunal, 2014, 'Fact Sheet: Restrictive practices and guardianship', pp 1. <http://www.ncat.nsw.gov.au/agdbasev7wr/_assets/ncat/m771022l8/guardianship%20and%20restrictive%20practices.pdf>

As part of discussions under *Suggestion 3-3* - about what criteria/definitions are to be used in determining whether treatment should be found to be 'in place' and 'sanctioned' - I suggest speaking about what broad language should be accepted as sanctioning treatment. In this context, the prevailing test will have to be what broad language is accepted by Courts as sanctioning this treatment.

Where a visitor finds treatment to be sanctioned, I suggest they are then prompted to indicate whether it is sanctioned by broad or specific words. In conjunction with this, I recommend that section 6 of the form be amended to replace 'are they sanctioned by specific guardianship powers' with 'are they sanctioned by guardianship powers' so as to remove any possible confusion about interpretation of the current question – see fig 3.1 for how I suggest the whole question is framed. This would improve data collected on this issue. It would also provide data with which to lobby for change – that is, being able to demonstrate how often broad language is used which could be deemed to sanction particular treatment, and how unclear the Court's intention is when such broad language is used.

Suggestion 3-9

Suggest adding an element to section 6 of the visit form that asks visitors to record whether treatment is sanctioned by 'specific' or 'broad' language, where it is found to be sanctioned. For clarity, I suggest changing the current lead-in sentence in section 6 from 'are they sanctioned by specific guardianship powers' to 'are they sanctioned by guardianship powers'.

- Benefit of allocating visits among extant orders when rigorous data is available

As mentioned, visits are currently allocated using a list of new orders created during a particular time period. There is significant benefit to allocating a portion of visits to extant orders, especially given the existence of indefinite or long term guardianship orders in Scotland. Under the current guardianship regime in Scotland those on indefinite orders may never be safeguarded by MWC review after a potential initial visit. There are various forms of oversight of guardianship orders in Scotland, as outlined in Part 1 of this report under 'monitoring'. Local authorities are charged with monitoring the implementation of guardianship orders, the Care Inspectorate and MWC also monitor a variety of individuals through their visiting and monitoring work. However, there is no mandated review of every individual under guardianship by courts or any other judicial body. The use of indefinite orders has been decreasing and MWC has been advocating for the diminished use of indefinite orders. There will arguable, and hopefully, be less need to monitor extant orders because they will be reviewed by courts at a reasonable interval and new orders created at the end of the designated period. This would bring a particular adult/guardian relationship within the scope of 'new' orders visited by the Commission. However, at present, the real risk still exists that an individual might fall through the monitoring net due to the existence of indefinite orders.

By monitoring a portion of extant orders (especially for those individuals for whom deprivation of liberty, significant restriction of liberty or restrictive practices are at issue) the Commission can play a role in closing this gap. Although visiting adults and guardians subject to new orders provides a

valuable opportunity for providing education, guidance and for setting strong foundation at the outset, there is an obvious potential for circumstances to change over time that may impact on the Guardian's ability to carry out their duties or a change in the adult's capacity to manage all or particular issues. There may also be deterioration in the management or enthusiasm of the Guardian over time or the development of complacency. For a variety of reasons, there is benefit in monitoring extant orders to some extent.

The section below entitled 'Using Deprivation of Liberty indicators for allocating guardianship visits' provides some initial thinking about how to allocate visits to extant orders using indicators and other existing data. This report does not go into great detail about a system for allocating visits to extant orders because there are currently issues with the quality of the data that the Commission has on extant orders. When the existing data is cleaned up I recommend the Commission look into the issue and this report contains some food for thought.

Suggestion 3-10

Suggest undertaking more work to consider allocating a proportion of guardianship visits to extant order rather than solely to new orders.

Only a small portion of individuals who are flagged by restriction/deprivation of liberty indicators have been visited under current methods for allocating visits. This situation is outlined above under the heading 'reducing instances where adults slip through the MWC visit net under the heading'. Given the importance of monitoring 'restrictive practices' in their own right, as well as for the role they play in determining deprivation of liberty, I suggest retrospectively visiting some individuals flagged by strong indicators for 'restraint' and 'seclusion'. As mentioned, there are 70 individuals with orders created in the three years to 31 March 2014 who have the term 'restrain' in their interlocutor but have not been visited. The presence of 'restrain' in an interlocutor means that 'restraint' it is highly likely to be specifically sanctioned in the order. There may be some value in allocating some retrospective visits to individuals who present with strong indicators for both regulation of 'freedom to leave' and other indicators representing 'continuous supervision and control' - such as regulation of correspondence and visitors. However, considering resourcing constraints, I recommend focussing on those instances where 'restraint' and 'seclusion' are clearly at issue.

Suggestion 3-11

Retrospectively visit some individuals for whom 'restraint' and 'seclusion' are clearly at issue.

If possible, retrospectively visit some individuals who present with a variety of indicators, including restriction on 'freedom to leave'.

Fig 3.1 (on the following page) displays suggestions for amending the current visit form based on the above general findings. I am concerned to maintain the utility of existing data, so have made suggested amendments with this in mind. I hope that the suggested edits will allow new data to be used in conjunction with existing data to the greatest extent possible.

Fig 3.1 - SUGGESTED CHANGES TO SECTION 6 VISIT FORM

Are any of the following restrictions being placed on the adult ...		
Restraint	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	<i>i - The use of physical means, including management of aggression techniques to control or restrict behavioural challenges</i>
Seclusion	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	<i>i - The use of the person's bedroom or other identified area to isolate the person and prevent contact with peers as a means of managing significant behavioural challenges</i>
<u>Monitoring using Cctv</u>	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	<u><i>i - other than in public areas of accommodation</i></u>
<u>Regulation and management of correspondence</u>	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	<u><i>i - Including mail, e-mail, telephone</i></u>
<u>Restriction/regulation of visitors</u>	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	
<u>Not Freedom to leave residence unassisted</u>	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	<u><i>i - see guidance from Cheshire West and Bournemouth cases</i></u>
<u>Other continuous monitoring or control</u>	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	
<i>i - if yes to any of the above are they sanctioned by specific guardianship powers?</i>		
Restraint	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	
<u>If yes, by specific or broad powers?</u>	<u><input type="radio"/> Specific <input type="radio"/> Broad</u>	
Seclusion	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	
<u>If yes, by specific or broad powers?</u>	<u><input type="radio"/> Specific <input type="radio"/> Broad</u>	
Cctv	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	
<u>If yes, by specific or broad powers?</u>	<u><input type="radio"/> Specific <input type="radio"/> Broad</u>	
Correspondence	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	<u><i>i - Including mail, e-mail, telephone</i></u>
<u>If yes, by specific or broad powers?</u>	<u><input type="radio"/> Specific <input type="radio"/> Broad</u>	
Visitors	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	
<u>If yes, by specific or broad powers?</u>	<u><input type="radio"/> Specific <input type="radio"/> Broad</u>	
Freedom to leave residence unassisted	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	
<u>If yes, by specific or broad powers?</u>	<u><input type="radio"/> Specific <input type="radio"/> Broad</u>	
<u>Other continuous monitoring or control</u>	<input type="radio"/> Yes <input type="radio"/> No <u><input type="radio"/> Uncertain</u>	
<u>Is there deprivation of liberty?</u> <input type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Possibly <input type="radio"/> Uncertain		
Comments		

Specific findings

Restraint

- There was a small amount of section 6 data available.
- There was a variety of use of section 6 of the visit form by MWC visitors.
- 'Restrain' is a good search term for use of 'restraint' due to its specific and unequivocal meaning.
- 'Restrain' was found in interlocutors and applications fewer times than expected - indicating a lack of specific consideration by courts and specific grants of power.
- Words and phrases deemed to have sanctioned restraint were very broad – this is concerning given the nature of the treatment.
- Apart from the direct term 'restrain' it was only possible to find search terms that indicate possible precursory behaviour that might lead to use of 'restraint'.

Suggested Indicators

Search terms of interlocutors:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• Restrain	<ul style="list-style-type: none">• challenging behaviour• aggress (covering variations)• violen (covering variations)• agitated• distressed

Suggested search terms of applications:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• restrain	<ul style="list-style-type: none">• challenging behaviour• aggress (covering variations)• violen (covering variations)• distressed• agitated

Other 'secondary' indicators:

- 'Learning disability' as a primary diagnosis appears to be somewhat indicative for use of 'restraint'. On its own it should not be regarded as a strong indicator.

Specific suggestion

Suggestion 3.1-1 consider whether to collect data on the use of chemical restraint and what criteria would be used for determining when it is 'in place' and 'sanctioned'.

Seclusion

- There was a small amount of section 6 data which was surprising given reports of its use.
- There was a variety of use of section 6 of the visit form by MWC visitors.
- 'Seclu' is a good search term due to the specific and unequivocal meaning of the terms 'seclusion', 'seclude' et cetera.
- 'Seclu' was found in interlocutors and applications fewer times than expected – possibly indicating a lack of specific consideration by courts and specific grants of power.
- Words and phrases deemed to sanction seclusion were very broad – this is concerning given the nature of the treatment.
- Apart from the direct term 'seclu' it was only possible to find search terms that indicate possible precursory behaviour that might lead to use of 'restraint'.

Suggested Indicators

Search terms of interlocutors:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• Seclu	<ul style="list-style-type: none">• environmental restraint• challenging behaviour• aggress (covering variations)• violen (covering variations)• agitated• distressed

Suggested search terms of applications:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• seclu	<ul style="list-style-type: none">• environmental restraint• challenging behaviour• aggress (covering variations)• violen (covering variations)• distressed• agitated

CCTV and general 'continuous supervision and control'

- CCTV has never been found to be in place, which is surprising.
- There was a variety of use of section 6 of the visit form by MWC visitors.
- CCTV was found to be sanctioned once, though powers in the interlocutor are worded very broadly and CCTV was not found to be 'in place'.
- The term 'CCTV' was not found in any interlocutors. The term 'CCTV' was found in 13 applications but was used in a number of contexts so it is not a good indicator for searching

applications.

- It was very difficult to find indicators specifically for CCTV usage, but it was possible to find indicators that could indicate CCTV but do indicate 'continuous supervision and control'. In essence, searching for indicators for use of CCTV became about searching for general indicators for 'continuous supervision and control'.

Suggested indicators for CCTV

Suggested search terms of interlocutors

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• CCTV	<ul style="list-style-type: none">• Constant supervision• Supervision at all times

Suggested search term of applications

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• Nil	<ul style="list-style-type: none">• CCTV

Search terms for 'continuous supervision and control'

Suggested search terms of interlocutors

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• CCTV• 24 hour• 24 hr• Constant supervision• Supervision at all times• CCTV	<ul style="list-style-type: none">• Close supervision

Suggested search terms of applications

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• Constant supervision• Supervision at all times	<ul style="list-style-type: none">• CCTV• 24 hour• 24 hr• Close supervision

Correspondence

- There is a very small amount of section 6 data which was surprising given that I subsequently found that there are a significant number of interlocutors that grant the power to regulate and deal with an adult's correspondence. Perhaps there is some confusion about the circumstances

that require 'correspondence' to be deemed to be 'in place' or 'sanctioned' in visit reports – on my part or the part of visitors.

- There was a variety of use of section 6 of the visit form by MWC visitors.
- Correspondence was found to be a good search term.
- It was possible to find a range of good search term indicators for regulation of correspondence.
- Given the number of strong search term indicators for correspondence, I decided not to include search term indicators of applications – especially due to the range of possible uses of search terms within applications and also the desire not to cast the search net too broadly.

Suggested search terms of interlocutors

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none"> • Correspondence • Correspondance (deliberate misspelling) • open and read any mail • read (<i>with space after</i>) • read, • open and read • open, read • communications addressed to • other communications • communicates • communicate 	<ul style="list-style-type: none"> • mail

Freedom to leave unassisted

- There is a larger amount of section 6 data for this item – which is promising considering its central importance to the *Cheshire West* test for deprivation of liberty.
- There is a variety of use of section 6 of the visit form by MWC visitors.
- 'Freedom to leave' was not found on any occasions in interlocutors or applications. 'Leave' was found in 864 interlocutors and 2737 applications. When test, 'leave' was found to be a strong predictor for restriction of 'freedom to leave unassisted' in interlocutors. 'Leave' is not a useful search term for applications given its use in a broader variety of contexts.
- It was possible to find a range of strong indicators for restriction on freedom to leave.
- Given the number of strong search term indicators, I decided not to include search term indicators of applications – especially due to the range of possible uses of search terms within applications.

Suggested search terms of interlocutors:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none"> • Leave • require the adult to reside • return him there 	<ul style="list-style-type: none"> • Nil

<ul style="list-style-type: none"> • return her there • return the adult • power to restrict the adult from leaving • place of residence unaccompanied • unaccompanied • entry alarms • require him to reside • require her to reside • absenting • abscond • restrict the adult from leaving • Unaccompanied • Wander • Locking of doors 	
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Other 'secondary' indicators:

- Alcohol Related Brain Disorder

Restriction/regulation of visitors

- There was a small amount of section 6 data available.
- There was varied use of section 6 of the visit form by MWC visitors.
- The direct term 'visitor' is used in only 16 interlocutors but 622 applications. When tested, it was a strong predictor for restriction on 'visitors' in interlocutors but not in applications, given the term was used in a variety of contexts in applications.
- 'Consort' and 'has contact' were found to be very useful predictors for interlocutors, but only 'consort' was found to be a useful predictor in applications.
- Learning disability appeared to be a reasonable predictor for this treatment.

Suggested Indicators

Suggested search terms of interlocutors:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none"> • Visitor • Consort • Has contact 	<ul style="list-style-type: none"> • Nil

Search terms of applications:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none"> • Consort 	<ul style="list-style-type: none"> • Nil

Other 'secondary' indicators:

- 'Learning disability' as a primary diagnosis appears to be somewhat indicative for restriction of 'visitors'.

Welfare flags

A range of welfare flags were suggested for inclusion in the visit allocation system. The following are a list of useful indicators along with the number of times they were found to be present.

Term	Application	Interlocutor
Abuse	544	6
Mistreatment	4	0
Exploitation	1091	22
Homeless	153	2
self-harm	63	5
self harm	117	0
deficiency in care	1	0
Neglect	751	0
adult protection	172	0

‘Homelessness’ was used in the wrong context, to describe the type of accommodation. Other terms and phrases could also be tested and possibly included, such as ‘sexual’.

Using Deprivation of Liberty indicators for allocating guardianship visits

There are a variety of options for using the indicators in the process for allocating visits.

My preference is that when a list of new orders is created at any given time, the form of treatment (for example ‘restraint’) appears in a designated field if it is flagged using associated indicators. In a separate field I envisage the indicator/s, for example ‘challenging behaviour’, being shown.

Some indicators do not specifically point to restrictions outlined in such as ‘restraint’ but generally towards ‘continuous supervision and control’. When this occurs, I envisage a category appearing in the designated field called ‘continuous supervision and control’. Flags and indicators can be added and adapted over time.

It is important to note that some indicators will point to various liberty ‘flags’ – for example, flags for CCTV usage are sometimes also flags for ‘continuous supervision and control’ more generally.

When the flagging system was initially tested, the indicators flagged too many individuals in the list of new orders. If most people become flagged by indicators the tool becomes less useful for allocating and prioritising visits.

I revisited the indicators, removed some and divided them into ‘strong’ indicators and ‘secondary’ indicators. I now suggest, as outlined below, that four columns are used. The first set of two columns will refer to strong indicators and the second set of two columns will refer to secondary indicators and flags.

This information should help the person allocating the visits to assess any flags for restriction and deprivation of liberty and make a judgement about whether the particular adult should be visited or not.

My hope is that the process provides a useful visual queue to assist in prioritising visits to individuals in the list. An individual for whom there are many indicators for restriction/deprivation of liberty will have a larger and fuller box in the indicators field. When a person allocating visits runs their eye down the list of new orders for a given period the intention is that the priority individuals become relatively obvious. However, other considerations should also factor in to whether an individual receives a visit. I suggest that all individuals who are flagged for 'restraint' and 'seclusion' should be visited, regardless of how many other issues they are flagged for.

Based on conversations with staff, I conducted a number of word searches for indicators of 'welfare' issues, as outlined above. I did not rigorously test the results, but the unequivocal nature of the terms mean they at least raise an issue from a welfare perspective when they are present in interlocutors or applications. Such words include: 'abuse', 'adult protection'. These indicators, when present, will result in the flag 'welfare' appearing alongside other 'liberty' flags in the left hand column – see below. These can be developed and adapted over time.

I would also suggest including a search for 'autism' which was identified as a useful indicator, using the indicator 'autis'.

STRONG LIBERTY FLAGS + STRONG WELFARE FLAGS	STRONG INDICATORS	SECONDARY LIBERTY + SECONDARY WELFARE FLAGS	SECONDARY INDICATORS
		[seclusion] [leave]	['aggress' in app] ['challenging behavior' in app] [Alcohol related brain disorder]
<u>[continuous supervision and control]</u>	<u>['constant supervision' in interlocutor]</u> <u>['Supervision at all times' in interlocutor']</u>	[correspondence] [CCTV] [welfare]	['mail' in interlocutor] ['constant supervision' in interlocutor] ['Supervision at all times' in interlocutor'] ['abuse' in app]

I have previously suggested that some portion of visits be allocated to extant orders – when the data is rigorous enough and 'cleaned up'. Each time visits are allocated, I envisage a similar flagging system to that described above. However, for extant orders, there will be additional indicators that will be relevant for allocating and prioritising visits. For example, data already in IMP could be used to nominate cases for which particular treatment has been found to be 'in place' and 'sanctioned'. For extant orders it will also be useful to indicate whether a person has been visited – potentially in another column next to the 'indicators' column. Whether a person has been visited is important with respect to extant orders. If a person is showing flags for liberty or welfare issues but has never been visited, then they should probably be deemed a priority – depending upon the nature of the indicators that are presenting. If a person has been visited and certain treatment was found to be 'in place' then they should still be considered for a visit because treatment can change overtime. Practices already exist within the Commission for following up on issues that were presented during visits.

When data regarding extant orders is available, these issues should be explored, and may need to be developed over time. In fact, the allocation system for both new and extant orders should be monitored and developed overtime on the basis of experience and practice. The suggestions in this analysis are based predominantly on theory alone, they hopefully provide a framework and food-for-thought that can be referred back to and used to guide future work.

A possible, simplified table is provided below. Again, there may be a need for additional columns that split indicators into 'strong' and 'weak'.

LIBERTY + WELFARE FLAGS	INDICATOR	PREVIOUSLY VISITED
[seclusion] [leave]	[seclusion 'in place'] ['aggress' in app] ['challenging behavior' in app] ['absenting' in interlocutor]	<u>Yes</u>
[correspondence]	['open and read' in interlocutor] ['correspondence' in interlocutor]	<u>No</u>

3.1 RESTRAINT

Section 6 of the visit form looks at restraint by physical means, including management of aggression techniques to control or restrict behavioural challenges. 'Restraint' (outside section 6 of the visit form) is also commonly used to refer to forms of chemical restraint. There is potentially some value in the Commission discussing whether information should be collected around the use of chemical restraint.

Suggestion 3.1-1 consider whether to collect data on the use of chemical restraint and what criteria would be used for determining when it is 'in place' and 'sanctioned'.

❖ Section 6 data on restraint

How many times restraint was found to be 'in place'	49
How many times restraint was found to be 'sanctioned'	27
How many times restraint was found to be 'not sanctioned'	57
How many times restraint was found to be 'in place' and 'sanctioned'	24
How many times restraint was found to be 'in place' and 'NOT sanctioned'?	18
How many times restraint was found to be 'in place' but there was no information recorded about whether it was sanctioned?	7
How many times restraint was found to be 'not sanctioned' but not 'in place' or no information about whether it was 'in place'	39
How many times restraint was found to be 'sanctioned' but not 'in place' or no information about whether it was 'in place'	3

The small number of section 6 entries: 1,512 individuals have been visited from the total cohort of the 5,920 new orders created in the 3 year period 01 Apr 2011 to 31 Mar 2014. There is a comparatively small amount of data that has been collected about restraint in section 6 of the visit forms. It is difficult to know what the reason for this might be. It would be useful for the Commission to discuss the reasons for this and attempt to remedy them, unless the low numbers are an accurate reflection of the rarity of this form of treatment – see suggestions 3-2 to 3-5 in the general findings section at the beginning of Part 3.

Varied use of section 6 of the visit form: Section 6 of the form is designed so that visitors first look to whether the item is 'in place', then 'if so', whether it is 'sanctioned by specific guardianship powers'. Restraint was found to be 'not sanctioned' on 39 occasions where it was not first recorded as being 'in place' – that is, restraint was found to be 'not in place' or the first part of the form was left blank. On 3 occasions restraint was found to be 'sanctioned' without first having been found to be 'in place' or where no information was recorded about whether it was 'in place'. In 7 of the 49 cases where restraint was found to be 'in place' there was no data subsequently recorded about whether restraint was or was not sanctioned. These figures indicate that there are quite a number of instances where the form has not been completed as per the intended process, and where there is a variety of ways in which the form is being completed - see related suggestion 3-6.

- Further investigations into section 6 data for restraint

There is no value in further analysis on the data due to the small amount of data collected.

❖ Looking for section 6 treatment using direct terms

Are there useful direct/unequivocal search terms for 'restraint'?

Searching for variations of the word restrain (restraint, restrained) using the search term 'restrain' is unproblematic. The term is highly unlikely to be used in any other context in a guardianship application or interlocutor other than to refer to the restraint of the adult. 'Restrain' may possibly be used in an interlocutor or application to indicate chemical restraint, in addition to the physical restraint which is the focus of section 6 of the visit form. Chemical restraint is a consideration in any determination of restriction or deprivation of liberty. The use of chemical restraint also comes with similar dangers and concerns to physical restraint from a welfare perspective. Therefore, it is theoretically possible that the term 'restraint' could be used in an interlocutor/application in a context that does not indicate the type of treatment focussed upon in section 6 of the visit form – that is, physical restraint. However, the term will always be relevant from the perspective of developing indicators for restriction and deprivation of liberty, as well as for treatment that is beneficial to focus upon from a welfare perspective.

Interlocutor search

How many individuals have interlocutors that feature the word 'restrain' (covering restraint, restrained etc)	113
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The direct term is present in a reasonable number of interlocutors. However, my feeling is that the use of restraint is somewhat more prevalent than the figures describe. Given the way that broad words are often used in interlocutors, I believe there are likely to be many more instances where the power to restrain, or to permit others to restrain, was intended to be sanctioned and/or used, but the specific term 'restrain' is not mentioned in the interlocutor.

Given the potential impact of restraint on both liberty and welfare it would be ideal if courts referred more specifically to this power if it is intended to be granted. This is not to imply that the use of restraint is always improper, inappropriate or used with mal intent – see related suggestion 3-7.

- *Testing the interlocutor terms/phrases*

I read a sample of interlocutors to confirm that the word 'restrain' was only being used to refer to 'restraint' of the adult.

There were two instances where the word 'restrain' was present in an interlocutor, but restraint was found to be 'not sanctioned' when the adult was visited. I reviewed the two interlocutors and found that the orders clearly granted the right to authorise restraint, and even seclusion in one case. The finding that restraint was not sanctioned seems to have been an error.

- ***Investigations into interlocutor search results***

The numbers are relatively small, but further investigation of the data is possibly useful.

How many individuals with 'restrain' in their interlocutor are on indefinite orders?	20 of 113 or 17.7%
How many individuals with 'restrain' in their interlocutor have their Local Authority as guardian?	52 of 113 or 46%
Is there a prominent diagnosis for people with 'restrain' in their interlocutor?	Learning disability – see table 3.1.2
How many individuals with 'restrain' in their interlocutor have NOT been visited?	70 of 113
How many individuals with 'restrain' in their interlocutor have been visited?	43 of 113
<i>For how many of these people was 'restrain' found to be in place?</i>	13 of 43
<i>For how many of these people was 'restrain' found to be sanctioned?</i>	14 of 43
<i>For how many of these people was 'restrain' found to be NOT sanctioned?</i>	2 of 43
<i>For how many of these people was 'restrain' found to be 'in place' and NOT sanctioned?</i>	1 of 13

Interestingly, and encouragingly, the number of these individuals on indefinite orders is lower than for the whole population of orders in the 3 year period under review – 17.7% as opposed to 37.18%. This may be coincidence or because the Sheriff has deemed the circumstances of the order appropriate for judicial oversight. Learning disability is a prominent diagnosis and possible indicator.

Application search

How many individuals have applications that feature the word 'restrain' (covering restraint, restrained etc)	200
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Again, the term appears in relatively few applications.

In 94 instances 'restrain' appears in the application but not in the interlocutor. Again, this figure is interesting, but it is difficult to draw an inference from it. It could be that the 'restraint' was introduced to the court and the court decided not to award a subsequent power, or it could be that the court intended to award the power but did not see it necessary to specifically refer to it in the interlocutor. The current process, and trends towards broad wording in orders, creates a lack of clarity as to the intention of the court. If restrictive practices such as restraint were required to be specifically applied for and granted, this lack of clarity would be removed – see suggestion 3-7.

- ***Testing the interlocutor terms/phrases***

Reviewing a number of applications demonstrated that 'restrain' is a good predictor for when restraint of the adult (particularly physical restrain) is at issue.

- ***Investigations into application search results***

The numbers are very small so any rigorous search on the data is not very useful. I have input the results of one search for interest.

How many individuals with 'restrain' in their application are on indefinite orders?	38 of 200 or 19%
How many individuals with 'restrain' in their application have their Local Authority as guardian?	79 of 200 or 40%
Is there a prominent diagnosis for people with 'restrain' in their application?	Learning disability – see table 3.1.3
How many individuals with 'restrain' in their application have NOT been visited?	136 of 200
How many individuals with 'restrain' in their application have been visited?	64 of 200
<i>For how many of these people was 'restrain' found to be in place?</i>	15 of 64
<i>For how many of these people was 'restrain' found to be sanctioned?</i>	13 of 64
<i>For how many of these people was 'restrain' found to be NOT sanctioned?</i>	5 of 64
<i>For how many of these people was 'restrain' found to be 'in place' and NOT sanctioned?</i>	3 of 15

Again, indefinite orders are used in a lower percentage of cases than in the whole population of new orders under focus of this analysis – 19% as opposed to 37.18%.

❖ **Using section 6 to find alternative words deemed to sanction restraint**

Investigating interlocutors

How many INTERLOCUTORS do not mention 'restrain' but the related adult was visited and 'restraint' was found to be 'sanctioned'?	13
<i>Are there any possible key terms/phrase of use in the interlocutor?</i>	See table for details

As described above, 'restraint' was listed as sanctioned in 27 of the 1,512 individuals visited in the time period. There were only 13 of these instances where 'restraint' did not appear in the interlocutor text. This low number of instances somewhat limits the utility of this search technique – that is, investigating the interlocutor to see what (if not the term 'restraint') might have been relied upon to find that 'restraint' was sanctioned.

Unfortunately I could not find any useful additional search terms in the interlocutors. Given that restraint is such an unequivocal term, with few alternatives to describe the treatment being referred to, it is perhaps not unsurprising that specific alternative words were found.

In a number of instances it was difficult to determine what powers could have been relied upon to sanction restraint, they are certainly very broad and vague.

- ***Occurrence of search terms***

No search is possible because no useful terms were found.

- ***Testing the interlocutor terms/phrases***

No testing is required.

- ***Investigations based on indicative interlocutor search terms***

No further investigation is required.

Investigating applications

No useful search terms.

- ***Occurrence of search terms***

No testing is required.

- ***Test the application terms/phrases***

No testing is required.

- ***Investigations based on indicative interlocutor search terms***

No need for further investigation.

❖ Other words associated with 'restraint'

The following words and phrases were selected because they represent possible precursors to the use of restraint.

- challenging behaviour
- aggress (*covering variations*)
- disrupt (*covering variations*)
- violent (*covering variations*)
- distress (*covering variations*)
- agitated

Interlocutor Search

Total number of interlocutors that mention the search terms	12
challenging behaviour	2
aggress (<i>covering variations</i>)	3

disrupt (<i>covering variations</i>)	0
violen (<i>covering variations</i>)	2
distress (<i>covering variations</i>)	5
Agitated	0

Unfortunately the terms were not very useful search terms of interlocutors.

- ***Test the terms/phrases***

The small number of occurrences reduces the value of testing. Distress was found in a number of both related and unrelated contexts and is probably not useful as an indicative search term of interlocutors. 'Aggress' was quite a good indicator that alludes to behaviour that could lead to restraint. In fact, the term was used in the context of the phrase 'CALM (Crisis, Aggression, Limitation, Management)', which is a training programme and approach to aggression management – which includes physical restraint and other management. 'Violen' and 'Challenging behaviour' were used in a context that described behaviour that could lead to the use of restraint. Other terms did not appear in the sample so could not be tested. Based on testing with respect to applications (below) I suggest removing 'disrupt'

The suggested list after testing is:

- challenging behaviour
- aggress (*covering variations*)
- violen (*covering variations*)
- agitated

- ***Investigations based on indicative interlocutor search terms***

Given the small amount of data there is no need for further analysis.

Application Search

The following words and phrases were primarily selected because they represent possible precursors to the use of restraint. 'Environment restraint' was chosen because I have seen it being used to refer to 'restraint'.

- challenging behaviour
- aggress (*covering variations*)
- disrupt (*covering variations*)
- violen (*covering variations*)
- distress (*covering variations*)
- agitated

Total number of applications that mention the search terms	4294
challenging behaviour	576
aggress	1205

disrupt	264
violen	293
distress	3637
agitated	817

- ***Test the application terms/phrases***

I read a sample of applications that included the term 'distress'. I discovered that the term 'distress' was used as part of the legal definition for 'mental disorder' that appears in many applications. The term 'distressed' was found to be a better search term because it was used in applications to refer the nature of the particular adult's behaviour.

'distressed' appeared in 756 applications. Reading a sample of the applications, 'distressed' appears to be a reasonable indicator for the type of behaviour that might lead to restraint, though not a strong one.

'disrupt' appeared in a variety of contexts, including with respect to sleep disruption and disruption of the adult's routine or care. It is not a good indicator for 'restraint'.

I tested the other indicators above which also appeared to be reasonable indicators for the type of behaviour that may lead to restraint. Some indicators are better than others. 'Violen' and 'aggress' are indicators of more severe behaviour, whereas 'agitated' or 'distress' are indicative of a broader range of behaviour.

I experimented with using adverbs in connection with 'challenging behaviour', 'agitated', 'distress', by including 'very', 'severely' to help delineate between different severity of behaviour and to potentially help to prioritise visits. Adding 'very', 'severely' was not helpful because words sometimes appear, for example, as 'very anxious and agitated', which will not be picked up by the search term 'very agitated'. In any case, the words/phrases 'challenging behaviour', 'agitated', 'distress' are good general indicators for behaviour, or tendencies, that may lead to the use of restraint.

The utility of the search terms increases when they are used together. Various words in this set often appear together in the same application and this provides an immediate visual flag for which cases present a greater risk from a restraint perspective.

The suggested list after testing is:

- challenging behaviour
- aggress (*covering variations*)
- violen (*covering variations*)
- distressed
- agitated

'Restrictive practice' was also later tested and was shown to be present in one application that was already highlighted by other search terms. Nonetheless the term should be included as a search term indicator due to the unequivocal way in which it points to practices such as restraint and

restraint and for the impact on restriction of liberty, deprivation of liberty and the desirability of visiting people that are subject to such practices from a welfare perspective.

- ***Investigations based on indicative application search terms***

To save time, I will investigate results for the full list at once. There are 2,340 applications that include at least one of the words in the search term list.

How many individuals with at least one of the words in their application are on indefinite orders?	860 or 36.75%
How many individuals with at least one of the words in their application have <u>only</u> their Local Authority as guardian?	707 or 30%
Is there a prominent diagnosis for people with at least one of the words in their application?	No
How many individuals with at least one of the words in their application have NOT been visited?	1755 or 75%
How many individuals with at least one of the words in their application have been visited?	585 or 25%

Members of the cohort of 2,340 people had the Legal Authority as their guardian in 30% of cases as opposed to 25% of cases in the total cohort.

‘Restraint’ was only found to be in place 8 times, however, ‘restraint’ was only found to be in place 11 times in the full cohort of new orders during the whole period. This comparison bodes well for the list of search terms. The indicators can be used to more specifically look for the use of restraint during a visit, and this greater focus will test the utility of the indicators over time. In any case, the indicators provide an opportunity to give more specific information and education to carers and guardians regarding restraint during the visit.

❖ **Any specific suggestions about ‘restraint’**

There is potentially some value in discussing whether the Commission should also collect information about chemical restraint – to provide more complete data about what is generally considered to be a restrictive practice. Restrictive practices (in the more holistic sense) are relevant from a restriction/deprivation of liberty perspective but also from a welfare and CRPD perspective. Chemical restraint, as a restrictive practice, was a point of interest to the UNCRPD during Australia appearance before the Committee in September 2013.

❖ **Conclusion**

Given the word ‘restraint’ is only used in a small number of interlocutors and applications, but is a direct term that unequivocally indicates that form of treatment, it is a useful term to include in the word and phrase search, but needs to be supplemented with additional words/phrases.

Search terms of interlocutors:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• restrain	<ul style="list-style-type: none">• challenging behaviour• aggress (covering variations)• violen (covering variations)• agitated• distressed

Suggested search terms of applications:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none">• restrain	<ul style="list-style-type: none">• challenging behaviour• aggress (covering variations)• violen (covering variations)• distressed• agitated

Other 'secondary' indicators:

- 'Learning disability' as a primary diagnosis appears to be somewhat indicative for use of 'restraint'. On its own it should not be regarded as a strong indicator.

❖ TABLES - RESTRAINT

Table 3.2.1

Row Labels	Not in place or blank	In place	Total
No sanc'd info	5829	7	5836
Sanctioned	3	24	27
Not Sanctioned	39	18	57
Total	5871	49	5920

Table 3.1.2

Row Labels	In place	% for in place	% total popn
Acquired Brain Injury	6	5.31%	5.03%
Alcohol Related Brain Disorder	3	2.65%	3.73%
Dementia/ Alzheimer's Disease	29	25.66%	47.06%
Error	0	0	0.02%
Inability to comm due to phys	0	0	0.07%
Learning Disability	71	62.83%	40.68%
Mental Illness	3	2.65%	2.48%
Other	1	0.88%	0.93%
Grand Total	113	100.00%	100.00%

Table 3.1.3

Row Labels	In place	% for in place	% total popn
Acquired Brain Injury	9	4.50%	5.03%
Alcohol Related Brain Disorder	4	2.00%	3.73%
Dementia/ Alzheimer's Disease	54	27.00%	47.06%
Error	0	0	0.02%
Inability to comm due to phys	0	0	0.07%
Learning Disability	128	64.00%	40.68%
Mental Illness	3	1.50%	2.48%
Other	2	1.00%	0.93%
Grand Total	200	100.00%	100.00%

3.2 SECLUSION

The MWC's view of seclusion is "the restriction of a person's freedom of association, without his or her consent, by locking him or her in a room. Seclusion can only be justified on the basis of a clearly identified and significant risk of serious harm to others that cannot be managed with greater safety by any other means". MWC's view is that the same principles should still apply in situations where someone prevents a person from leaving a room, for example, by physically blocking the exit.

❖ Section 6 data on seclusion

How many times seclusion was found to be 'in place'	11
How many times seclusion was found to be 'sanctioned'	4
How many times seclusion was found to be 'not sanctioned'	43
How many times seclusion was found to be 'in place' and 'sanctioned'	2
How many times seclusion was found to be 'in place' and 'NOT sanctioned'?	4
How many times seclusion was found to be 'in place' but there was no information recorded about whether it was sanctioned?	5
How many times seclusion was found to be 'not sanctioned' but not 'in place' or no information about whether it was 'in place'	39
How many times seclusion was found to be 'sanctioned' but not 'in place' or no information about whether it was 'in place'	2

The small number of section 6 entries: 1,512 individuals have been visited from the total cohort of the 5,920 new orders created in the 3 year period 01 Apr 2011 to 31 Mar 2014. There is a comparatively small amount of data that has been collected about seclusion in section 6 of the visit forms. It is difficult to know what the reason for this might be. It would be interesting to know whether the numbers are small because this type of treatment is rare for people under guardianship (it would appear that it is not as rare as the numbers indicate), rare for people on new orders, difficult to inspect for, whether there is definitional confusion, or whether perhaps new lines of questioning and investigation could be used during visits to uncover instances where it does and could occur. Evidence indicates that seclusion can be very harmful and should be used as minimally as possible.¹⁰⁹ Helping to ensure that instances of seclusion are identified is beneficial from a data analysis and trend analysis perspective, as well as for utilising opportunities to ensure that carers and guardians are educated as to the appropriate use of seclusion – see suggestions 3-2 to 3-5 in the general findings section at the beginning of Part 3.

Varied use of section 6 of the visit form: Section 6 of the form is designed so that visitors first look at whether the item is 'in place', then 'if so', whether it is 'sanctioned by specific guardianship powers'. Seclusion was found to be 'not sanctioned' on 39 occasions despite not being recorded as being 'in place' – that is, seclusion was found to be 'not in place' or the first part of the form was left blank. On 2 occasions seclusion was found to be 'sanctioned' without having been found to be 'in place' or where no information was recorded about whether it was 'in place'. In 5 of the 11 cases

¹⁰⁹ Mental Welfare Commission for Scotland, 2014, 'Good Practice Guide: The Use of Seclusion', pp 13.

where seclusion was found to be 'in place' there was no data subsequently recorded about whether seclusion was or was not sanctioned. This indicates that there a quite a number of instances where the form has not been completed as per the intended process - see related suggestion 3-6.

- Further investigations into section 6 data for seclusion

There is no value in further analysis on the data due to the small amount of data collected.

❖ Looking for section 6 treatment using direct terms

Are there useful direct/unequivocal search terms for 'seclusion'?

Searching for variations of the word seclusion (seclusion, seclude and so on) using the search term 'seclu' is unproblematic. The term is highly unlikely to be used in any other context in a guardianship application or interlocutor other than to refer to the physical seclusion of the adult.

Interlocutor search

How many individuals have interlocutors that feature the word 'seclu' (covering seclusion, secluded etc)	13
--	----

The direct term is present in very few applications and interlocutors. This is surprising, especially given the common usage of the term to describe the particular treatment and the small chance the term would be used to describe anything other than the seclusion of the adult. The small number is surprising given reports that seclusion is not a rare form of treatment. Given the potential impact of restraint on both liberty and welfare it would be ideal if courts referred more specifically to this power if it is intended to be granted – see related suggestion 3-7.

- Testing the interlocutor terms/phrases

Due to the small number of interlocutors I could eyeball them to confirm that the phrase 'seclu' was only being used to refer to 'seclusion' of the adult.

- Investigations into interlocutor search results

The numbers are very small so any rigorous search on the data is not very useful. I have input the results of one search for interest.

How many individuals with 'seclu' in their interlocutor are on indefinite orders?	N/A
How many individuals with 'seclu' in their interlocutor have <u>only</u> their Local Authority as guardian?	N/A
Is there a prominent diagnosis for people with 'seclu' in their interlocutor?	N/A
Is there a prominent year of the order commencement?	N/A
How many individuals with 'seclu' in their interlocutor have NOT been visited?	6 of 13 interlocutors
How many individuals with 'seclu' in their interlocutor have been visited?	N/A

<i>For how many of these people was 'seclu' found to be in place?</i>	N/A
<i>For how many of these people was 'seclu' found to be sanctioned?</i>	N/A
<i>For how many of these people was 'seclu' found to be NOT sanctioned?</i>	N/A
<i>For how many of these people was 'seclu' found to be 'in place' and NOT sanctioned?</i>	N/A

Application search

How many individuals have applications that feature the word 'seclu' (covering seclusion, secluded etc)	27
---	----

Again, the term appears in very few applications.

In addition, the term appears in 14 applications for which it was not subsequently mentioned in the interlocutor. This is unfortunate given the unequivocal nature of the term 'seclusion' in the context of both interlocutors and applications – see related suggestion 3-7.

- **Testing the application terms/phrases**

Due to the small number of application I could read the relevant interlocutors to confirm that the phrase 'seclu' was only being used to refer to 'seclusion' of the adult.

- **Investigations into application search results**

The numbers are very small so any rigorous search on the data is not very useful. I have input the results of one search for interest.

How many individuals with 'seclu' in their application are on indefinite orders?	N/A
How many individuals with 'seclu' in their application have <u>only</u> their Local Authority as guardian?	N/A
Is there a prominent diagnosis for people with 'seclu' in their application?	N/A
How many individuals with 'seclu' in their application have NOT been visited?	15 of 27 applications
How many individuals with 'seclu' in their application have been visited?	N/A
<i>For how many of these people was 'seclu' found to be in place?</i>	N/A
<i>For how many of these people was 'seclu' found to be sanctioned?</i>	N/A
<i>For how many of these people was 'seclu' found to be NOT sanctioned?</i>	N/A
<i>For how many of these people was 'seclu' found to be 'in place' and NOT sanctioned?</i>	N/A

❖ Using section 6 to find alternative words deemed to sanction seclusion

Investigating interlocutors

How many INTERLOCUTORS do not mention 'seclu' but the related adult was visited and 'seclusion' was found to be 'sanctioned'?	2
Are there any possible key terms/phrase of use in the interlocutor?	See table for details

As described above, 'seclusion' was found to be sanctioned in only 4 of the 1,512 individuals visited in the time period. This very low number of instances severely limits the utility of this search technique.

The following key terms/phrases were found in the related interlocutors that may be useful indicators:

- locking of doors
- restrict the Adult's access to any part of any property
- decide on the type of care services the Adult requires

In one of the two instances, it appears that the visitor has relied on very broad language in the interlocutor to find that seclusion was sanctioned.

- ***Occurrence of search terms***

Number of interlocutors that mention the key terms and phrases	1
--	---

The search terms are unfortunately not useful and are only found in the precise interlocutor from which they were taken.

- ***Testing the interlocutor terms/phrases***

No testing is required.

- ***Investigations based on indicative interlocutor search terms***

Given the search terms were not useful, there is no need for further investigation.

Investigating applications

Search term list:

- locking of doors
 - restrict the Adult's access to any part of any property
 - decide on the type of care services the Adult requires
- #### - ***Occurrence of search terms***

Number of applications that mention the key terms and phrases	1
---	---

The search terms are unfortunately not useful.

- ***Test the application terms/phrases***

No testing is required.

- ***Investigations based on indicative interlocutor search terms***

Given the search terms were not useful, there is no need for further investigation.

❖ **Other words associated with 'seclusion'**

The following words and phrases were primarily selected because they represent possible precursors to the use of seclusion. 'Environment restraint' was chosen because I have seen it being used to refer to 'seclusion'.

- environmental restraint
- challenging behaviour
- aggress (covering variations)
- disrupt (covering variations)
- violent (covering variations)
- distress (covering variations)
- agitated

Interlocutor Search

Total number of interlocutors that mention the search terms	13
environmental restraint	1
challenging behaviour	2
aggress (covering variations)	3
disrupt (covering variations)	0
violent (covering variations)	2
distress (covering variations)	5
agitated	0

Unfortunately the terms were not a very useful interlocutor searches.

- ***Investigations based on indicative interlocutor search terms***

Given the small amount of data there is no need for further analysis

- ***Test the terms/phrases***

The small number of occurrences reduces the value of testing. Environmental restraint was a good indicator for use of seclusion. Distress was found in a number of both related and unrelated contexts and is probably not useful as an indicative search term of interlocutors. 'Aggress' was quite

a good indicator that alludes to behaviour that could lead to restraint. In fact, the term was used in the context of the phrase 'CALM (Crisis, Aggression, Limitation, Management)', which is a training programme and approach to aggression management – which includes physical restraint and other management. 'Violen' and 'Challenging behaviour' were used in a context that described behaviour that could lead to the use of restraint. Other terms did not appear in the sample so could not be tested. Based on testing with respect to applications (below) I suggest removing 'disrupt'.

The suggested list after testing is:

- environmental restraint
- challenging behaviour
- aggress (*covering variations*)
- violen (*covering variations*)
- agitated

Application Search

The following words and phrases were primarily selected because they represent possible precursors to the use of seclusion. 'Environment restraint' was chosen because I have seen it being used to refer to 'seclusion'.

- environmental restraint
- challenging behaviour
- aggress (*covering variations*)
- disrupt (*covering variations*)
- violen (*covering variations*)
- distress (*covering variations*)
- agitated

Total number of applications that mention the search terms	4294
environmental restraint	1
challenging behaviour	576
aggress	1205
Disrupt	264
Violen	293
distress	3637
agitated	817

- **Test the application terms/phrases**

I read a sample of applications that included the term 'distress'. I discovered that the term 'distress' was used as part of the legal definition for 'mental disorder' that appears in many applications. The term 'distressed' was found to be a better search term because it was used in applications to refer to the nature of the particular adult's behaviour.

‘distressed’ appeared in 756 applications. Reading a sample of the applications, ‘distressed’ appears to be a reasonable indicator for the type of behaviour that might lead to seclusion, though not a strong one.

‘disrupt’ appeared in a variety of contexts, including with respect to sleep disruption and disruption of the adult’s routine or care. It is not a good indicator for ‘seclusion’.

I tested the other indicators above which also appeared to be reasonable indicators for the type of behaviour that may lead to seclusion. Some indicators are better than others. ‘Violen’ and ‘aggress’ are indicators of more severe behaviour, whereas ‘agitated’ or ‘distress’ are indicative of a broader range of behaviour.

I experimented with using adverbs in conjunction with the terms ‘challenging behaviour’, ‘agitated’, ‘distress’, by including ‘very’, ‘severely’ to help delineate between different severity of behaviour and to potentially help to prioritise visits. Adding ‘very’, ‘severely’ was not helpful because words sometimes appear, for example, as ‘very anxious and agitated’, which will not be picked up by the search term ‘very agitated’. In any case, the words/phrases ‘challenging behaviour’, ‘agitated’, ‘distress’ are good general indicators for behaviour, or tendencies, that may lead to seclusion.

The utility of the search terms increases when they are used together. Various words in this set often appear together in the same application and this provides an immediate visual flag for which cases present a greater risk from a seclusion perspective.

The suggested list after testing is:

- environmental restraint
- challenging behaviour
- aggress (*covering variations*)
- violent (*covering variations*)
- distressed
- agitated

‘Restrictive practice’ was also later tested and was shown to be present in one application that was already highlighted by other search terms. Nonetheless the term should be included as a search term indicator due to the unequivocal way in which it points to practices such as restraint and seclusion and for the impact on restriction of liberty, deprivation of liberty and the desirability of visiting people that are subject to such practices from a welfare perspective.

- ***Investigations based on indicative interlocutor search terms***

Given time constraints, I will investigate results for the full list at once. There are 2,340 applications that include at least one of the words in the search term list.

How many individuals with at least one of the words in their application are on indefinite orders?	860
How many individuals with guessed words in their application have <u>only</u> their Local Authority as guardian?	707 or 30%
Is there a prominent diagnosis for people with one of the words their application?	No

How many individuals with guessed words in their application have NOT been visited?	1755 or 75%
How many individuals with guessed words in their application have been visited?	585
<i>For how many of these people was seclusion found to be in place?</i>	8 of 11 instances found in full cohort
<i>For how many of these people was seclusion found to be sanctioned?</i>	4
<i>For how many of these people was seclusion found to be NOT sanctioned?</i>	21
<i>For how many of these people was seclusion found to be 'in place' and NOT sanctioned?</i>	4

Members of the cohort of 2,340 people had the Legal Authority as their guardian in 30% of cases as opposed to 25% of cases in the total cohort.

'Seclusion' was only found to be in place 8 times, however, 'seclusion' was only found to be in place 11 times in the full cohort of new orders during the whole period. This comparison bodes well for the list of search terms. The indicators can be used to more specifically look for the use of seclusion during a visit, and this greater focus will test the utility of the indicators over time. In any case, the indicators provide an opportunity to give more specific information and education to carers and guardians regarding seclusion during the visit.

❖ Conclusion

Given the word 'seclu' is only used in a small number of interlocutors and applications, but is a direct term that unequivocally indicates that form of treatment, it is a useful term to include in the word and phrase search, but needs to be supplemented with additional words/phrases.

Search terms of interlocutors:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none"> • Seclu 	<ul style="list-style-type: none"> • environmental restraint • challenging behaviour • aggress (covering variations) • violen (covering variations) • agitated • distressed

Suggested search terms of applications:

<i>Strong</i>	<i>Secondary</i>
<ul style="list-style-type: none"> • seclu 	<ul style="list-style-type: none"> • environmental restraint • challenging behaviour • aggress (covering variations) • violen (covering variations)

	<ul style="list-style-type: none"> • distressed • agitated
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❖ TABLES

Table 3.2.1

Row Labels	Not in place or blank	In place	Total
No sanc'd info	5868	5	5873
Sanctioned	2	2	4
Not Sanctioned	39	4	43
Total	5909	11	5920

3.3 CCTV AND GENERAL 'CONTINUOUS SUPERVISION AND CONTROL'

The use of CCTV to monitor adults under guardianship is a restriction of privacy and goes to the extent of continuous supervision and control. From a data collection perspective, it would be beneficial if some discussion was undertaken to clarify precisely when this item should be deemed to be in place, that is, when section 6 of the visit form should be completed. Is CCTV in place if CCTV is used in public areas of a facility and corridors? Is CCTV in place only if CCTV is used in bedrooms or other private areas?

The search for indicators specifically for CCV was not very successful, the investigation below became more specifically about looking for possible indicators of CCTV use, but reasonable indicators generally for 'continuous supervision and control' – which is probably more useful in the development of indicators for target inspections generally towards instances where deprivation of liberty is at issue.

❖ Section 6 data on CCTV

How many times CCTV was found to be 'in place'	0
How many times CCTV was found to be 'sanctioned'	1
How many times CCTV was found to be 'not sanctioned'	38
How many times CCTV was found to be 'in place' and 'sanctioned'	0
How many times CCTV was found to be 'in place' and 'NOT sanctioned'?	0
How many times CCTV was found to be 'in place' but there was no information recorded about whether it was sanctioned?	0
How many times CCTV was found to be 'not sanctioned' but not 'in place' or no information about whether it was 'in place'	38
How many times CCTV was found to be 'sanctioned' but not 'in place' or no information about whether it was 'in place'	1

The small number of section 6 entries: 1,512 individuals have been visited from the total cohort of the 5,920 new orders created in the 3 year period 01 Apr 2011 to 31 Mar 2014. There is an extremely small amount of data that has been collected about CCTV in section 6 of the visit forms. In fact, it has never been found to be in place. It is difficult to know what the reason for this might be. Certainly though, some discussion should be had about this situation. It would be interesting to know whether the numbers are small because this type of treatment is rare for people under guardianship, rare for people on new orders, difficult to inspect for, whether there is definitional confusion (ie. when CCTV should be found to be 'in place'), or whether perhaps new lines of questioning and investigation could be used during visits to uncover instances where it does and could occur. Perhaps CCTV is never used. The fact that CCTV was deemed worthy of including in section 6 of the visit form would appear to indicate that it is used in some circumstances with respect to adults under guardianship. I predict that definitional confusion could well be a factor – see suggestions 3-2 to 3-5 in the general findings section at the beginning of Part 3.

Varied use of section 6 of the visit form: Section 6 of the form is designed so that visitors first look at whether the item is 'in place', then 'if so', whether it is 'sanctioned by specific guardianship powers'.

CCTV was found to be 'not sanctioned' on 38 occasions and 'sanctioned' on 1 occasion without having first been found to be 'in place' – that is, CCTV was either found to be not in place or the first part of the form was left blank. This indicates that there are quite a number of instances where the form has not been completed as per the intended process – see suggestion 3-6.

- ***Further investigations into section 6 data for CCTV***

There is no value in further analysis on the data due to the small amount of data collected.

❖ **Looking for section 6 treatment using direct terms**

Are there useful direct/unequivocal search terms for 'CCTV'?

Searching for CCTV using the search term CCTV is unproblematic with respect to interlocutors – it is highly unlikely to be used in any other context in a guardianship interlocutor than to refer to the use of CCTV with respect to the adult. CCTV could be used in a range of circumstances in applications.

Interlocutor search

How many individuals have interlocutors that feature the word CCTV (covering CCTV, secluded etc)	0
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The direct term is present in no interlocutors. This is perhaps not unsurprising given the tendency of orders not to consider particular impositions on liberty in great detail. The fact that CCTV was deemed appropriate to include in section 6 of the visit form would indicate it is used. Given the imposition on privacy, the possible potential for abuse and unnecessary superfluous use, and the imposition on liberty, it would be ideal if courts perhaps considered this form of treatment more specifically. See recommendation 3-7.

- ***Testing the interlocutor terms/phrases***

No options for testing.

- ***Investigations into interlocutor search results***

No options for further investigation.

Application search

How many individuals have applications that feature the word CCTV	13
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The term appears in very few applications.

- ***Testing the interlocutor terms/phrases***

Due to the small number of applications, I could read them all to confirm the context in which the phrase was being used. CCTV was being used describe the use of CCTV for monitoring purposes, for example, in the home. However, CCTV was also being used in a number of other contexts, for example, instances where the adult worked as a CCTV operator, where they had been witnessed by

public CCTV committing acts or having acts committed against them. I was originally inclined to say that CCTV, as a search term of applications, was not a useful indicator. However, in the absence of other indicators (and the rarity of its use in applications, it might be worth including CCTV as a search term and making an assessment at a later time as to whether it is worth retaining.

- ***Investigations into application search results***

The numbers are very small so any rigorous search on the data is not very useful.

❖ **Using section 6 to find alternative words deemed to sanction CCTV**

Investigating interlocutors

How many INTERLOCUTORS do not mention CCTV but the related adult was visited and 'CCTV' was found to be 'sanctioned'?	1
<i>Are there any possible key terms/phrase of use in the interlocutor?</i>	-

As described above, 'CCTV' was found to be sanctioned in only 1 of the 1,512 individuals visited in the time period. This very low number of instances severely limits the utility of this search technique.

The language in the interlocutor is very broad. Possibly words in the phrase 'to decide what supervision and guidance is necessary and appropriate' might be relevant. Though this is a not specific enough to be a useful indicator, and the absence of data regarding CCTV will make it quite difficult to test any results. If not a relevant indicator for CCTV, words like 'supervision' might at least go to 'continuous supervision and control'.

- ***Occurrence of search terms***

Number of interlocutors that mention 'supervision'	548
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- ***Testing the interlocutor terms/phrases***

Although the term was sometimes used in the context of supervision orders regarding the adult's children, the term was general used in the context of providing the power to the guardian to take decisions regarding the appropriate level of supervision of the adult.

- ***Investigations based on indicative interlocutor search terms***

Given the tenuous utility of the search term, there is no great use in further investigation.

Investigating applications

Search term list:

- supervision

- ***Occurrence of search terms***

Number of applications that mention 'supervision'	3253
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- ***Test the application terms/phrases***

The term is generally used in the context of supervising the adult, but again, the term is so broad that it is a tenuous indicator for CCTV at best, and a possible indicator for 'continuous supervision and control'. I don't recommend it is used as an indicator for either.

- ***Investigations based on indicative interlocutor search terms***

Given the tenuous nature of the indicator, there is no need for further investigation.

❖ **Other words associated with 'CCTV'**

The following words and phrases were primarily selected because they represent possible indications of very close supervision and possible use of CCTV.

- 24 hour
- 24 hr
- Close supervision
- Constant supervision
- Supervision at all times
- Self harm
- One on one
- One to one

Interlocutor Search

Total number of interlocutors that mention the search terms	50
---	----

'24 hour' is the only search term that was found.

- ***Test the application terms/phrases***

The phrase was used to refer to supervision, support, accompaniment on a 24 hour basis. Even if it is a tenuous indicator for CCTV, '24 hour' is certainly a strong indicator for 'continuous supervision and control' and therefore for a good indicator for restriction and deprivation of liberty.

- ***Investigations based on indicative interlocutor search terms***

The small number of results reduces the benefit of further investigations.

Application Search

The following words and phrases were primarily selected because they represent possible precursors to the use of CCTV. 'Environment restraint' was chosen because I have seen it being used to refer to 'CCTV'.

- 24 hour
- 24 hr
- Close supervision
- Constant supervision
- Supervision at all times
- Self harm
- One on one
- One to one

Total number of applications that mention the search terms	3090
24 hour	2745
24 hr	87
Close supervision	101
Constant supervision	279
Supervision at all times	76
Self harm	117
One on one	1
One to one	262

- *Test the application terms/phrases*

'24 hour' and '24 hr' refer generally to instances where adults require 24 hour care and support or supervision. Sometimes '24 hour' refers to 'the delivery of a comprehensive, 24 hour a day, seven day a week, care plan'. It is highly unlikely that such a care plan or mode of support is strongly indicative of CCTV use, but may be indicative of 'continuous supervision and control'. I am unsure if such care and/or care plans are always strongly indicative of 'continuous supervision and control' or whether they may sometimes indicate the availability of support on a 24 hour basis, without necessarily amounting to 'continuous supervision and control'. The term '24 hour care' is present in 2745 applications – which is 46% of all orders created during the period. If the presence of the phrase '24 hour' is indicative of the type of treatment that would satisfy the 'continuous supervision and control' element of the *Cheshire west* test, there are quite a number of individuals on orders that may well satisfy the test in full. I recommend including '24 hour' and '24 hr' as secondary search terms for 'continuous supervision and control', though this may require some further discussion by MWC.

'Close supervision' is a weak indicator of CCTV usage and a good indicator for 'continuous supervision and control. Occasionally the phrase is used to refer to close supervision in particular instances (ie. during activities) which may not always amount to 'continuous supervision and control' but is at least indicative. I found one instances where the term was used to refer to supervision of the implementation of the guardianship order, which is obviously not relevant.

‘Constant supervision’ is a possible indicator of CCTV usage and a good indicator for ‘continuous supervision and control’. On one occasion I noticed the term being used in the negative – ie. that ‘constant supervision’ is not required.

‘Supervision at all times’ is a possible indicator of CCTV usage and a good indicator for ‘continuous supervision and control’.

‘Self harm’ is probably only a tenuous indicator of CCTV and a possible indicator for ‘continuous supervision and control’. I do not recommend it is used to indicate either.

‘One to one’ is an improbable indicator of CCTV but a possible indicator of ‘continuous supervision and control’. The phrase is sometimes used in the context of the adult’s ‘one to one’ contact with particular people. I do not recommend it as a search term of applications.

‘One on one’ (although only seen once in the whole cohort) is an improbable indicators for CCTV and a possible indicator for of ‘continuous supervision and control’. I do not recommend it as a search term of applications.

Recommend list of search terms after testing:

- 24 hour
- 24 hr
- Close supervision
- Constant supervision
- Supervision at all times

These are distributed in the conclusion as ‘weak’ or ‘secondary’ indicators for CCTV or ‘continuous supervision and control’. The absence of results in the interlocutor search made it impossible to test the utility of various terms and phrases as search terms for interlocutors. Some have been included in the list of indicators because they would appear to be reasonable indicators if they do present in interlocutors.

- ***Investigations based on indicative interlocutor search terms***

Given time constraints, I will investigate results for the full list at once. There are 3090 applications that include at least one of the words in the search term list.

How many individuals with at least one of the words in their application are on indefinite orders?	1149 of 3090 or 37%
How many individuals with guessed words in their application have <u>only</u> their Local Authority as guardian?	741 of 3090 or 24%
Is there a prominent diagnosis for people with search terms in their application?	No - see table 3.3.2
How many individuals with search terms in their application have NOT been visited?	2318 of 3090 or 75%
How many individuals with search terms in their application have been visited?	772
<i>For how many of these people was CCTV found to be in place?</i>	0 (though

	none have been found in full popn)
<i>For how many of these people was CCTV found to be sanctioned?</i>	0
<i>For how many of these people was CCTV found to be NOT sanctioned?</i>	21
<i>For how many of these people was CCTV found to be 'in place' and NOT sanctioned?</i>	0

Interestingly CCTV was found to be 'not sanctioned' in 21 cases. This is not problematic. The search terms only indicate what items may have been considered in the application. They indicate where something may be at issue, rather than what powers are provided in the order.

❖ Conclusion

It was very difficult to find indicators specifically for CCTV usage, but it was possible to find indicators that could indicate CCTV but do indicate 'continuous supervision and control'.

Suggested indicators for CCTV Suggested

search terms of interlocutors:

Strong

- CCTV

Secondary

- Constant supervision
- Supervision at all times

Suggested search term of applications:

Strong

- Nil

Secondary

- CCTV

Search terms for 'continuous supervision and control'

Suggested search terms of interlocutors

Strong

- CCTV
- 24 hour
- 24 hr
- Constant supervision
- Supervision at all times
- CCTV

Secondary

- Close supervision

Suggested search terms of applications

Strong

- Constant supervision
- Supervision at all times

Secondary

- CCTV
- 24 hour
 - 24 hr
- Close supervision

❖ TABLES

Table 3.3.1

Row Labels	Not in place or blank	In place	Total
Blank - no sanc'd info	5881	0	5881
Sanctioned	1	0	1
Not Sanctioned	38	0	38
Total	5920	0	5920

Table 3.3.2

Row Labels	(Cohort) Number individuals w/search term in app with particular prim diagnosis	% of Cohort	% of total Popn (5920)
Acquired Brain Injury	135	4.37%	5.03%
Alcohol Related Brain Disorder	102	3.30%	3.73%
Dementia/ Alzheimer's Disease	1408	45.57%	47.06%
Error	0	0	0.02%
Inability to comm due to phys	1	0.03%	0.07%
Learning Disability	1359	43.98%	40.68%
Mental Illness	51	1.65%	2.48%
Other	34	1.10%	0.93%
Grand Total	3090	100.00%	100%

3.4 CORRESPONDENCE

‘Correspondence’ in section 6 of the visit form refers to any restriction or regulation of correspondence sent or received by the adult under guardianship and various forms of communication between the adult and others. This may include where correspondence is opened and read on the adult’s behalf prior to them having access to it. This may also include regulation the adult’s telephone calls, emails and possibly social media.

❖ Section 6 data on correspondence

How many times seclusion was found to be 'in place'	12
How many times seclusion was found to be 'sanctioned'	10
How many times seclusion was found to be 'not sanctioned'	32
How many times seclusion was found to be 'in place' and 'sanctioned'	8
How many times seclusion was found to be 'in place' and 'NOT sanctioned'?	0
How many times seclusion was found to be 'in place' but there was no information recorded about whether it was sanctioned?	4
How many times seclusion was found to be 'not sanctioned' but not 'in place' or no information about whether it was 'in place'	32
How many times seclusion was found to be 'sanctioned' but not 'in place' or no information about whether it was 'in place'	2

The small number of section 6 entries: 1,512 individuals have been visited from the total cohort of the 5,920 new orders created in the 3 year period 01 Apr 2011 to 31 Mar 2014.

These results show that this particular part of section 6 has been completed very few times considering the 1,512 individuals who have been visited from the total cohort of the 5,920 new orders created in the 3 year period 01 Apr 2011 – 31 Mar 2014.

It is difficult to know precisely what the reason for this might be. Whether it be that very few adults under guardianship are subject to this form of restriction/regulation, whether it is difficult to inspect for, or whether this particular form of treatment is not something that has been the focus of visits – see suggestion 3-2 to 3-5.

Varied use of section 6 of the visit form:

Section 6 of the form is designed so that visitors first look at whether the item is ‘in place’, then ‘if so’, whether it is ‘sanctioned by specific guardianship powers’. Correspondence was found to be ‘not sanctioned’ on 32 occasions despite not being recorded as being ‘in place’ – that is, correspondence was found to be ‘not in place’ or the first part of the form was left blank. On 2 occasions correspondence was found to be ‘sanctioned’ without having been found to be ‘in place’ or where no information was recorded about whether it was ‘in place’. In 5 of the 12 cases where correspondence was found to be ‘in place’ there was no data subsequently recorded about whether correspondence was or was not sanctioned. This indicates that there a quite a number of instances where the form has not been completed as per the intended process - see related suggestion 3-6.

- ***Further investigations into section 6 data for ‘correspondence’***

There is no value in further analysis on the data due to the small amount of data collected.

❖ **Looking for section 6 treatment using direct terms**

Are there useful direct/unequivocal search terms for ‘correspondence’?

‘Correspondence’ is a term that is possibly used in a variety of contexts, especially in applications. The term will be tested below.

Interlocutor search

How many individuals have interlocutors that feature the word 'correspondence'	338
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- ***Testing the interlocutor terms/phrases***

I first tested the search term by isolating the one instance where ‘correspondence’ appeared in the interlocutor but ‘correspondence’ was deemed to be ‘not sanctioned’ when visited. The term appeared in the sentence ‘the power to access information and personal data on behalf of the Adult including opening and responding to all correspondence’. This appears to be the type of power that should probably result in the finding that restriction of liberty regarding correspondence would be ‘sanctioned’. I also read a sample of interlocutors containing ‘correspondence’ and the term was used in a good number of instances to confer powers to the guardian with respect to the adult’s correspondence – including rights of access, rights to respond to correspondence, and restrict correspondence. Therefore, ‘correspondence’ is a reasonable search term of interlocutors as an indicator for restriction of liberty regarding correspondence.

Note that the misspelled term ‘correspondance’ was also found and should be included in the search term list – sometimes the OCR process may also cause ‘correspondence’ to become ‘correspondance’.

- ***Investigations into interlocutor search results***

How many individuals with ‘correspondence’ in their interlocutor are on indefinite orders?	115 of 338 or 34%
How many individuals with ‘correspondence’ in their interlocutor have <u>only</u> their Local Authority as guardian?	67 of 338
Is there a prominent diagnosis for people with ‘correspondence’ in their interlocutor?	No. See table 3.4.2
How many individuals with 'correspondence' in their interlocutor have been visited?	72
<i>For how many of these people was 'correspondence' found to be in place?</i>	1
<i>For how many of these people was 'correspondence' found to be sanctioned?</i>	0

<i>For how many of these people was 'correspondence' found to be NOT sanctioned?</i>	1
<i>For how many of these people was 'correspondence' found to be 'in place' and NOT sanctioned?</i>	0

Application search

How many individuals have applications that feature the word 'correspondence'	902
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- **Testing the interlocutor terms/phrases**

I read a sample of applications and the term correspondence/ance was used in a variety of contexts in applications that did not regard the liberty of the adult with respect to correspondence. Given I found below a variety of other strong indicators for restriction of 'correspondence', I recommend not include 'correspondence' or 'correspondence' as a search term of applications.

❖ **Using section 6 to find alternative words deemed to sanction 'correspondence'**

Investigating interlocutors

How many INTERLOCUTORS do not mention 'correspondence' but the related adult was visited and 'seclusion' was found to be 'sanctioned'?	10
<i>Are there any possible key terms/phrase of use in the interlocutor?</i>	See table for details

In this instance, the term 'correspondence' did not appear in any of the 10 instances where 'correspondence' was deemed to be sanctioned when the adult was visited.

There were a number of terms in the interlocutors that appeared to quite specifically indicate the power to restrict liberty regarding correspondence, including regulating and restricting mail, and opening the adult's mail.

Of the 10 relevant interlocutors, 4 did not appear to obviously convey the power to restrict liberty regarding correspondence.

There could be some overlap between particular indicators for restriction of liberty regarding 'visitors' (discussed at 3.5) and restriction of liberty regarding 'correspondence'. This is not a problem and is understandable, given both 'visitors' and 'restriction' regard the restriction of the adult's liberty to interact with others. The term 'consort' gives rise to possible confusion. In one instance, the phrase 'The power to seek and obtain information and to provide guidance in respect of people with whom the adult consorts and communicates' appears to have been relied upon to sanction restriction of liberty regarding 'correspondence'. In another instance, the phrase 'To decide with whom the Adult should or should not consort' appears to have been relied upon to sanction restriction of liberty regarding 'correspondence'. Possibly 'consort' refers to a broader range of

interaction between the adult and another individual – that is, communication, visits, physical contact. Perhaps MWC may wish to discuss what the ‘consort’ power refers to. For safety’s sake I will include the term ‘consort’ and the phrase ‘contact with’ (found in 3.5 to refer to restriction of liberty regarding visitors) as indicators of both restriction of liberty regarding ‘correspondence’ and ‘visitors’ – see suggestion 3-8.

Possible indicators and terms:

- open and read any mail
- mail
- read
- open and read
- open, read
- communications addressed to
- other communications
- communicates
- communicate

- ***Occurrence of search terms***

Total number of interlocutors that mention the search terms	1322
open and read any mail	180
Mail	1262
read	263
open and read	183
read and open	0
open, read	814
communications addressed to	822
other communications	908
communicates	1
communicate	0

- ***Testing the interlocutor terms/phrases***

The terms were tested primarily by reading a sample of the interlocutors in which they appeared. All terms were good indicators for the power to restrict liberty with respect to correspondence. ‘Mail’ was the most likely to be used in a variety of contexts. However, I recommend maintaining it as a search term because it picks a number of variations of sentences and phrases that refer to dealing with mail but aren’t included above. If the term becomes a nuisance for returning false positives, it can be removed in the future. It should only be included as a secondary search term.

‘Read ’ (with a space) was included because the letters ‘read’ otherwise appear in other words or in the incorrect context. However, including a space next to ‘read’ also removes many legitimate entries because, for example, ‘open and read’ is often followed by a ‘,’. For this reason I recommend also including ‘read,’.

Suggested list of indicators:

- open and read any mail
- mail
- read (with space after)
- read,
- open and read
- open, read
- communications addressed to
- other communications
- communicates
- communicate

- ***Investigations based on indicative interlocutor search terms***

How many individuals with 'seclu' in their application are on indefinite orders?	490 of 1322 or 37%
How many individuals with 'seclu' in their application have <u>only</u> their Local Authority as guardian?	122 of 1322 or 9%
Is there a prominent diagnosis for people with 'seclu' in their application?	No. See table 3.4.6
How many individuals with search terms in their application have NOT been visited?	1050
How many individuals with search terms in their application have been visited?	272 of 1322
<i>For how many of these people was 'correspondence' found to be in place?</i>	5
<i>For how many of these people was 'correspondence' found to be sanctioned?</i>	5
<i>For how many of these people was 'correspondence' found to be NOT sanctioned?</i>	3
<i>For how many of these people was 'correspondence' found to be 'in place' and NOT sanctioned?</i>	0

Investigating applications

Given the promising number of indicators found for interlocutors, there is no need for additional searches. Due to the way in which interlocutors tend to be quite specific about sanctioning powers pertaining to regulation of correspondence, I am wary to cast the net too broad by searching in too much detail for additional indicators. Regulation of correspondence, on its own, is not the type of restriction of liberty that the Commission would want to specifically target visits for. This is in contrast to forms of restriction, such as restraint and seclusion, that amount to 'restrictive practices' and are a priority to monitor in their own right, apart from their relevance to any determination about deprivation of liberty. Regulation of correspondence is more important to create indicators for, primarily because of the role it may play in determining whether an individual adult is 'deprived of their liberty'. This item goes fundamentally towards the extent of 'continuous supervision and control', under the Cheshire West test.

❖ Other words associated with 'correspondence'

Given the promising number of indicators found, there is no need for additional searches.

❖ Conclusion

Search terms of interlocutors:

Strong

- Correspondence
- Correspondance (deliberate misspelling)
- open and read any mail
- read (*with space after*)
- read,
- open and read
- open, read
- communications addressed to
- other communications
- communicates
- communicate

Secondary

- mail

❖ TABLES

Table 3.4.1

Row Labels	Not in place or blank	In place	Total
No sanc'd info	5868	5	5873
Sanctioned	2	2	4
Not Sanctioned	39	4	43
Total	5909	11	5920

Table 3.4.2

Row Labels	(Cohort) Number individuals w/search term in app with particular prim diagnosis	% of Cohort	% of total Popn (5920)
Acquired Brain Injury	20	5.92%	5.03%
Alcohol Related Brain Disorder	11	3.25%	3.73%
Dementia/ Alzheimer's Disease	172	50.89%	47.06%
Error	0	0	0.02%
Inability to comm due to phys	0	0	0.07%
Learning Disability	127	37.57%	40.68%
Mental Illness	6	1.78%	2.48%
Other	2	0.59%	0.93%
Grand Total	338	100.00%	100%

Table 3.4.3

Row Labels	Not in place or blank	In place	Total
Blank - no sanc'd info	336	1	337
Sanctioned	0	0	0
Not Sanctioned	1	0	1
Total	337	1	338

Table 3.4.4

	Values	
Row Labels	Count of mwcNo	Count of mwcNo2
Acquired Brain Injury	61	4.61%
Alcohol Related Brain Disorder	21	1.59%
Dementia/ Alzheimer's Disease	588	44.48%
Inability to comm due to phys	1	0.08%
Learning Disability	618	46.75%
Mental Illness	24	1.82%
Other	9	0.68%
Grand Total	1322	100.00%

Table 3.4.5

Count of mwcNo	Column Labels		
Row Labels	0	1	Grand Total
0	1314		1314
1		5	5
2	3		3
Grand Total	1317	5	1322

3.5 VISITORS

This item regards the restriction of visitors to adults with incapacity, including the restriction and regulation of which persons the adult may consort with and in what circumstances.

❖ Section 6 data on visitors

How many times seclusion was found to be 'in place'	64
How many times seclusion was found to be 'sanctioned'	59
How many times seclusion was found to be 'not sanctioned'	36
How many times seclusion was found to be 'in place' and 'sanctioned'	56
How many times seclusion was found to be 'in place' and 'NOT sanctioned'?	1
How many times seclusion was found to be 'in place' but there was no information recorded about whether it was sanctioned?	7
How many times seclusion was found to be 'NOT sanctioned' but not 'in place' or no information about whether it was 'in place'	35
How many times seclusion was found to be 'sanctioned' but not 'in place' or no information about whether it was 'in place'	3

The small number of section 6 entries: 1,512 individuals have been visited from the total cohort of the 5,920 new orders created in the 3 year period 01 Apr 2011 to 31 Mar 2014. There is a comparatively small amount of data that has been collected about restriction of visitors in section 6 of the visit forms. It is difficult to know what the reason for this might be. It would be useful for the Commission to discuss the reasons for this and attempt to remedy them, unless the low numbers are an accurate reflection of the rarity of this form of treatment – see suggestions 3-2 to 3-5 in the general findings section at the beginning of Part 3.

Varied use of section 6 of the visit form: In 35 cases restriction on 'visitors' was found to be 'not sanctioned' but was not found to be 'in place', or there is no data about whether it is in place. In 3 cases restriction on 'visitors' was found to be 'sanctioned' but was not found to be 'in place', or there is no data about whether it is in place. Section 6 of the visit form is designed so that visitors first look at whether the item is 'in place', then 'if so', whether it is 'sanctioned by specific guardianship powers'. It appears that inspectors have used the form in different ways, and this impacts on the clarity of the data.

For the purposes of data analysis, I recommend that MWC look at ways to standardise protocols for completing section 6 of the form. It probably be beneficial to amend the form in order to encourage visitors to always look to whether particular treatment is sanctioned, rather than only where it is 'in place'. I would also recommend that the form is adjusted to provide the option for indicating whether seclusion (or any other form of section 6 treatment) is 'specifically' granted in the powers or covered under a 'broad' power. In general, I recommend some discussion be had as to what broad language can really be deemed to sanction particular forms of treatment and what forms of treatment require more specific language.

- ***Further investigations into section 6 data for ‘visitors’***

How many individuals for whom ‘visitors’ was ‘in place’ were on indefinite orders?	8 of 64 cases or 12.5%
How many individuals for whom ‘visitors’ was ‘in place’ had the Local Authority as their guardian?	56 of 64 cases or 87.5%
Where ‘visitors’ was found to be ‘in place’ was there a predominant primary diagnosis?	Learning disability 41 of 64 cases or 64%

The sample size is very small so it is difficult to draw anything conclusive from the results. However, it is encouraging that far fewer individuals for whom ‘restriction’ was in place were on indefinite orders than in the total population of 5,920 individuals, that is 37.20%.

A high proportion of individuals had the local authority as their guardian a significant proportion had ‘learning disability’ as their primary diagnosis.

What percentage of individuals where ‘visitors’ was ‘sanctioned’ were on indefinite orders?	6 of 59 cases or 10%
What percentage of individuals where ‘visitors’ was ‘sanctioned’ had the local authority as their guardian?	51 of 59 cases or 86%
Where ‘visitors’ was found to be ‘sanctioned’ was there a predominant primary diagnosis?	Learning disability 40 of 59 cases or 67.8%

Again, there is not a large amount of data, but the findings following the same general lines as with instances where restriction of ‘visitors’ is ‘in place’. A small number are on indefinite orders, a relatively large number have the local authority as guardian and a high number have a primary diagnosis of ‘learning disability’. I initially thought it might perhaps be worth experimenting with learning disability as an indicator for this type of restriction on liberty – removing the indicator if it becomes a nuisance or gives rise to too many false positives. However, the prevalence of people under guardianship with primary diagnoses such as ‘learning disability’ may need further consideration. At most, it should be included as a weak indicator.

❖ **Looking for section 6 treatment using direct terms**

Are there useful direct search terms for ‘visitors’?

Searching for the word visitor/s using the search term ‘visitor’ is relatively unproblematic. The term is highly unlikely to be used in any other context in a guardianship interlocutor other than to refer to the regulation of visitors. This will be tested and confirmed below. There is potentially greater scope for broader usage of the word in applications. This will again be tested. I will search for ‘visitor’, ‘regulation of visitor’, and ‘restriction of visitor’.

Interlocutor search

How many individuals have interlocutors that feature the word 'visitor' (visitor/s)	16
How many individuals have interlocutors that feature the word 'restriction of visitor', 'restriction on visitor', and 'regulation of visitor'	0

The direct term is present in very few applications and interlocutors.

Given the potential impact on both the liberty and welfare of this type of restriction, it would be ideal if courts referred more specifically to such a power if it is intended to be granted. This type of restriction was in place on the facts in the *Bournewood case* and it was contended that this restriction caused significant detrimental impact on related adult, certainly on the adult's carers.

- **Testing the term 'visitor' in the context of interlocutors**

Given the small number of hits, it is possible to scan through each instance visually to investigate false positives. In all cases the word 'visitor' and 'visitors' was used to refer to the power to regulate and restrict visitor contact with adult.

There is one instance outlined below where 'visitor' was in the interlocutor but deemed not to be sanctioned when visited. I have review the interlocutor and it restriction on visitors appears to be sanctioned, indicating inspector mistake in this instance.

- **Investigations into interlocutor search results**

The numbers are very small so any rigorous search on the data is not very useful.

How many individuals with 'visitor' in their interlocutor are on indefinite orders?	N/A
How many individuals with 'visitor' in their interlocutor have <u>only</u> their Local Authority as guardian?	N/A
Is there a prominent diagnosis for people with 'visitor' in their interlocutor?	N/A
Is there a prominent year of the order commencement?	N/A
How many individuals with 'visitor' in their interlocutor have NOT been visited?	11 of 16 interlocutors
How many individuals with 'visitor' in their interlocutor have been visited?	5
<i>For how many of these people was 'visitor' found to be in place?</i>	1
<i>For how many of these people was 'visitor' found to be sanctioned?</i>	1
<i>For how many of these people was 'visitor' found to be 'in place' and NOT sanctioned?</i>	0
<i>For how many of these people was 'visitor' found to be NOT sanctioned?</i>	1

Application search

How many individuals have applications that feature the word 'visitor/s'	622
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This number is more encouraging, but it will be necessary to test the term given the potential for it to be used in a variety of contexts in applications.

- ***Testing the term 'visitor' in the context of applications***

Results of the 'investigations into application search results', below, cast doubt on the utility of the term for application searches. Of the 124 visited individuals who have 'visitor/s' in their application, restrictions on visitors was only found to be 'in place' in 2 cases and 'sanctioned' in 1. This does not discount the utility of 'visitor/s' as an application search entirely. It could be that the restriction of visitors is at issue but is not being picked up using current visit protocols or is not being used and is not specifically listed in the interlocutor, but is still potentially at issue on the circumstances outlined in the application. A survey of a sample of these applications shows the term is used in a variety of contexts (for example, the risk the adult poses to patients and visitors or to describe the nature of their current living arrangements and whether family visits the adult or not. The term is therefore not recommended as an application search term.

- ***Investigations into application search results***

How many individuals with 'visitor' in their application are on indefinite orders?	N/A
How many individuals with 'visitor' in their application have <u>only</u> their Local Authority as guardian?	N/A
Is there a prominent diagnosis for people with 'visitor' in their application?	N/A
How many individuals with 'visitor' in their application have NOT been visited?	N/A
How many individuals with 'visitor' in their application have been visited?	124
<i>For how many visited people was 'seclu' found to be in place?</i>	2
<i>For how many visited people was 'seclu' found to be sanctioned?</i>	1
<i>For how many visited people was 'seclu' found to be 'in place' and NOT sanctioned?</i>	1
<i>For how many visited people was 'seclu' found to be NOT sanctioned?</i>	5

❖ **Using section 6 to find alternative words deemed to sanction the restriction of 'visitors'**

It is possible to separate out all instances where 'visitor' is not mentioned in the interlocutor, but 'visitor' was found to be sanctioned by a visitor.

Investigating interlocutors

Number of INTERLOCUTORS that do not mention 'visitor' but the related adult was visited and restriction of 'visitors' was found to be 'sanctioned'	58
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The following key terms/phrases were found in the related interlocutors that may be useful indicators:

- Consort
- Contact
- Has contact

<i>Number of interlocutors that mention the key terms and phrases</i>	5842
Consort	1153
Contact	5827
Has contact	27

- ***Testing the interlocutor terms/phrases***

There is a very high percentage of hits, which is concerning from the perspective of developing indicators.

‘Consort’ was found a significant number of times. Of the 1,153 interlocutors that mention the key terms, there were 9 instances where related adult was visited and ‘visitors’ deemed to be ‘not sanctioned’. When tested, all these instances appeared to be false negatives. That is, the power in the interlocutor appeared to contain powers that could be used to restrict visitors.

‘Contact’ was used in a variety of contexts and is not a good indicator. The indicator is also present in far too many interlocutors to be a useful indicator.

However, ‘has contact’ was deemed to be a useful indicator. The phrase appeared in 27 interlocutors and was used to grant powers to restrict those people with whom the adult has contact, therefore granting power to restrict ‘visitors’.

- ***Investigations based on indicative interlocutor search terms***

How many interlocutors mentioned refined search terms	1180
How many individuals with key words in their interlocutor are on indefinite orders?	382 of 1180
How many individuals with key words in their interlocutor have <u>only</u> their Local Authority as guardian?	351 of 1180
Is there a prominent diagnosis for people with key words in their interlocutor?	Learning disability – see table 3.5.1
How many individuals with key words in their interlocutor have NOT been visited?	863
How many individuals with key words in their interlocutor have been visited?	317
<i>For how many of these people was visitors found to be in place?</i>	40
<i>For how many of these people was visitors found to be sanctioned?</i>	38

<i>For how many of these people was visitors found to be 'in place' and NOT sanctioned?</i>	0
<i>For how many of these people was visitors found to be NOT sanctioned?</i>	10

Investigating applications

Search term list:

- Consort
- Has contact

<i>Number of interlocutors that mention the key terms and phrases</i>	1554
Consort	1310
Has contact	345

- ***Test the application terms/phrases***

I looked at a sample of the instances where 'consort' mentioned in the application but not in the interlocutor. In all cases the term was used to describe 'consorting' with people and issues related to this. On various occasions the power was asked for but doesn't appear to have been specifically granted, which is interesting. The phrase definitely appears to indicate where regulation of contact with others, and restriction of visitors is at issue.

'Has contact' appeared in a variety of contexts and is therefore not a useful indicator.

- ***Investigations based on indicative interlocutor search terms***

How many individuals with key words in their application are on indefinite orders?	438
How many individuals with key words in their application have <u>only</u> their Local Authority as guardian?	383
Is there a prominent diagnosis for people with key words in their application?	Learning disability. See table 3.5.3
How many individuals with key words in their application have NOT been visited?	958
How many individuals with key words in their application have been visited?	352
<i>For how many of these people was seclusion found to be in place?</i>	42
<i>For how many of these people was seclusion found to be sanctioned?</i>	40
<i>For how many of these people was seclusion found to be 'in place' and NOT sanctioned?</i>	0
<i>For how many of these people was seclusion found to be NOT sanctioned?</i>	9

❖ Other words associated with 'correspondence'

Given the promising number of indicators found, there is no need for additional searches.

❖ Conclusion

Suggested search terms of interlocutors:

Strong

- Consort
- Has contact

Secondary

- Nil

Search terms of applications:

Strong

- Consort

Secondary

- Nil

Other 'secondary' indicators:

- 'Learning disability' as a primary diagnosis appears to be somewhat indicative for restriction of 'visitors'.

❖ TABLES

Table 3.5.1

	Values	
Row Labels	Count of mwcNo	Count of mwcNo2
Acquired Brain Injury	46	3.90%
Alcohol Related Brain Disorder	54	4.58%
Dementia/ Alzheimer's Disease	384	32.54%
Learning Disability	657	55.68%
Mental Illness	27	2.29%
Other	12	1.02%
Grand Total	1180	100.00%

Table 3.5.2

Count of mwcNo	Column Labels		
Row Labels	0	1	Grand Total
0	1130	2	1132
1		38	38
2	10		10
Grand Total	1140	40	1180

Table 3.5.3

Row Labels	Count of mwcNo	Count of mwcNo2
Acquired Brain Injury	59	4.50%
Alcohol Related Brain Disorder	55	4.20%
Dementia/ Alzheimer's Disease	439	33.51%
Learning Disability	715	54.58%
Mental Illness	29	2.21%
Other	13	0.99%
Grand Total	1310	100.00%

Table 3.5.4

Count of mwcNo	Column Labels		
Row Labels	0	1	Grand Total
0	1259	2	1261
1		40	40
2	9		9
Grand Total	1268	42	1310

3.6 FREEDOM TO LEAVE RESIDENCE UNASSISTED

My presentation to MWC Practitioners on 15 October 2014 highlighted the fact that there is probably a need for discussion within MWC about what definitions and requirements for this item – especially in the context of the decisions in *Bournewood* and *Cheshire West*. There may be some need to refine the term and potentially to remove the word ‘unassisted’. ‘Freedom to leave’ would bring the term into better alignment with the law in both the *Bournewood* and *Cheshire West*.

The inclusion of the term ‘unassisted’ probably reduces the utility of the existing data from a Deprivation of Liberty perspective. It is not very likely that an adult will be considered ‘not free to leave’ under current law if they require assistance/help to go out but help is always, or usually available. Requiring and seeking assistance is different to needing to ask permission or be supervised while on leave. Not unsurprisingly, some practitioners identified that they have previously reported no restriction on ‘freedom to leave unassisted’ (ie. it is not ‘in place’) where a patient could not physically leave without help/assistance, regardless of whether that help/assistance is always or usually available on request. Reporting in this way does not reflect the ‘freedom to leave’ issue as it is currently stands in jurisprudence related to ‘deprivation of liberty’ under Article 5 of the ECHR. As mentioned, the key from a ‘deprivation of liberty’ standpoint is whether these adults who could not physically leave without help would be given assistance to go out if they asked or be permitted to leave with the assistance of a friend/family member.

The phrasing used on the form also makes it somewhat difficult to explain this point – ie. the form says ‘are any of the following restrictions being placed on the adult...’ then the option ‘freedom to leave unassisted’. However, ‘freedom to leave unassisted’ is not a restriction, so discussing the results becomes confusing on a semantic basis. I suggest that the item could be reworded as ‘not free to leave’ – and the test to be applied by visitors being that outlined in *Bournewood* and *Cheshire West*. Some discussion may need to be had, but I do not believe this will necessarily impact on the quality of the data already collected, because I think this test is what the original item was generally referring to. Also, from discussion, there seems to be some confusion, on current wording, about when to select this item, some interpretations that are at odds with *Bournewood* and *Cheshire West* (therefore the definition I suggest going forward) and some that appear more congruous with *Bournewood* and *Cheshire West*. Therefore, there are already discrepancies in the current data. See general suggestions 3-3 and 3-4 that highlight the need to discuss and agree definition and criteria for each item in section 6 of the visit form and to amend the wording of most items in section 6 of the visit form to more accurately reflect the ‘restriction’ they are referring to.

Quite legitimately, some argue that the focus on being free to leave and be provided with assistance to leave et cetera does not reflect the reality of caring for people with, for example, dementia. However, regardless of the caring intentions of staff, there is value in MWC creating indicators and collecting data based on the understanding of ‘freedom to leave’ as it is reflected in case law around Article 5. As outlined in section ‘benefit of allocating visits and collecting data based on restriction/deprivation of liberty’ there are a variety of benefits, including the capacity to ensure adequate legal authority is in place and providing education to carers.

Nb. any reference below to 'freedom to leave unassisted' should be read as 'restriction on freedom to leave unassisted'

❖ Section 6 data on 'freedom to leave unassisted'

How many times restriction on 'freedom to leave unassisted' was found to be 'in place'	327
How many times restriction on 'freedom to leave unassisted' was found to be 'sanctioned'	255
How many times restriction on 'freedom to leave unassisted' was found to be 'not sanctioned'	51
How many times restriction on 'freedom to leave unassisted' was found to be 'in place' and 'sanctioned'	246
How many times restriction on 'freedom to leave unassisted' was found to be 'in place' and 'NOT sanctioned'?	33
How many times restriction on 'freedom to leave unassisted' was found to be 'in place' but there was no information recorded about whether it was sanctioned?	48
How many times restriction on 'freedom to leave unassisted' was found to be 'not sanctioned' but not 'in place' or no information about whether it was 'in place'	18
How many times restriction on 'freedom to leave unassisted' was found to be 'sanctioned' but not 'in place' or no information about whether it was 'in place'	9

An encouraging amount of section 6 entries: 1,512 individuals have been visited from the total cohort of the 5,920 new orders created in the 3 year period 01 Apr 2011 to 31 Mar 2014. Of these individuals, 327 were found to have restriction placed on 'freedom to leave unassisted'. Given this form of restriction is anecdotally not uncommon, 327 represents a more promising amount of data. Of course, this is a difficult assessment to make. If restriction on freedom to leave unassisted is in place with respect to many, even most, people under guardianship, the numbers would still demonstrate underreporting against this item.

Varied use of section 6 of the visit form: Section 6 of the form is designed so that visitors first look at whether the item is 'in place', then 'if so', whether it is 'sanctioned by specific guardianship powers'. Restriction on 'freedom to leave unassisted' was found to be 'not sanctioned' on 18 occasions despite not being recorded as being 'in place' – that is, seclusion was found to be 'not in place' or the first part of the form was left blank. On 9 occasions restriction on 'freedom to leave unassisted' was found to be 'sanctioned' without having been found to be 'in place' or where no information was recorded about whether it was 'in place'. In 48 of the 327 times where restriction on 'freedom to leave unassisted' was found to be 'in place' there was no data subsequently recorded about whether seclusion was or was not sanctioned. This indicates that there are quite a number of instances where the form has not been completed as per the intended process. This means that the form is being completed in an inconsistent manner which reduces the quality and utility of the data produced. See related recommendation 3-6.

- ***Further investigations into section 6 data for ‘freedom to leave’***

Of all individuals for whom ‘freedom to leave unassisted’ was found to be ‘in place’, how many are on indefinite orders?	105 of 327 or 32%
Of all individuals for whom ‘freedom to leave unassisted’ was found to be ‘in place’, how many have a Local Authority as guardian?	146 of 327, or 45%
Is there a prominent diagnosis among people for whom ‘freedom to leave unassisted’ was found to be ‘in place’?	Alcohol Related Brain Disorder – see table 3.6.2

Interestingly, a significantly greater percentage had the Local Authority as guardian compared with the general population – 45% as compared to 25% in the general population. Perhaps this is to be expected given the greater potential for these individuals to be placed in formal care facilities. Alcohol Related Brain Disorder was also found in significantly larger percentage than in the general population.

Of all individuals for whom ‘freedom to leave unassisted’ was found to be ‘sanctioned’, how many are on indefinite orders?	84 of 255 or 33%
Of all individuals for whom ‘freedom to leave unassisted’ was found to be ‘sanctioned’, how many have a Local Authority as guardian?	118 of 255 or 46.27%
Is there a prominent diagnosis among people for whom ‘freedom to leave unassisted’ was found to be ‘sanctioned’?	Alcohol Related Brain Disorder – see table 3.6.3

Interestingly, a significantly greater percentage had the Local Authority as guardian compared with the general population – 46.67% compared to 25% in the general population. As outlined, above, this perhaps to be expected. Again, Alcohol Related Brain Disorder features more prominently than in the whole population.

❖ **Looking for section 6 treatment using direct terms**

Are there useful direct/unequivocal search terms for ‘freedom to leave unassisted’?

The word ‘leave’ could be used in a variety of contexts in both interlocutors and applications. ‘Freedom to leave’ is a more specific term.

Interlocutor search

How many individuals have interlocutors that feature the word 'leave'	864
Freedom to leave	0

The more direct and unequivocal term ‘freedom to leave’ isn’t present in any interlocutors. ‘Leave’ will need testing.

- ***Testing the interlocutor terms/phrases***

Only 191 of the 864 related individuals have been visited. Of these, restriction on 'freedom to leave' was found to be 'in place' in relation to 48 individuals. On 42 of these 48 occasions, restriction on 'freedom to leave unassisted' was deemed to be sanctioned. For people with 'leave' in their interlocutor, who have been visited (191 people) restriction on 'freedom to leave' was deemed to be 'unsanctioned' on 4 occasions. On 2 of these occasions restriction on 'freedom to leave unassisted' was deemed to be 'in place' and the other 2 occasions it was not, or there was no information about whether it was 'in place'. On all four occasions, the interlocutor contained powers that appeared to sanction restrictions on freedom to leave. I would be inclined to find that restriction on freedom to leave unassisted was sanctioned in some form, though this could be due to confusion on my part about the when it is appropriately deemed to be sanctioned. It could also reflect the different possible interpretations about when this item should be deemed to be 'in place' and 'sanctioned' and the value of discussing these matters within MWC – see general suggestion 3-3.

Relevant powers in interlocutors where 'freedom to leave residence unassisted' found to be not sanctioned:

To return the Adult to his place of residence should he leave or be removed by any person not authorised by the welfare guardian, if appointed

Decide where the Adult should live, taking account of her care needs, including power to move the Adult to new accommodation and to return here there should she leave it for any reason

The power to install assistive technology to the Adult's residence in order to alert care staff if the Adult attempts to leave his residence unoccupied between the hours of 11.00pm and 07.00am

To return the Adult to her place of residence should she leave or be removed by any person not authorised by the Welfare Guardians, if appointed

After reading a number of interlocutors it was clear that 'leave' was being used in interlocutors only as part of powers that authorise some restriction on freedom to leave. Example powers include:

Power to decide where the adult should live, taking account of her care needs, including power to move the adult to new accommodation and to return her there should she leave it for any reason.

To return the Adult to his place of residence should he leave or be removed by any person not authorised by the Welfare Guardian

To return the Adult to such an establishment should she leave and to prevent removal without the prior consent of the Guardian

'Leave' therefore appears to be a good indicator for restriction on 'freedom to leave unassisted' and for restriction on 'freedom to leave' in general.

- ***Investigations into interlocutor search results***

How many individuals with 'leave' in their interlocutor are on indefinite orders?	336 of 864 or 38.89%
How many individuals with 'leave' in their interlocutor have a Local Authority as guardian?	194 of 864 or 22.45%
Is there a prominent diagnosis for people with 'leave' in their interlocutor?	No – see table 3.6.4
How many individuals with 'leave' in their interlocutor have NOT been visited?	673 of 864
How many individuals with 'leave' in their interlocutor have been visited?	191 of 864
<i>For how many of these people was 'leave' found to be in place?</i>	48
<i>For how many of these people was 'leave' found to be sanctioned?</i>	43
<i>For how many of these people was 'leave' found to be NOT sanctioned?</i>	4
<i>For how many of these people was 'leave' found to be 'in place' and NOT sanctioned?</i>	2

Application search

How many individuals have applications that feature the word 'leave'	2737
Freedom to leave	0

- ***Testing the interlocutor terms/phrases***

'Leave' was used in a variety of circumstances in applications and is not a good indicator for restriction on 'freedom to leave unassisted' or 'freedom to leave' generally.

- ***Investigations into application search results***

Unnecessary because 'leave' is not a strong indicator as a search term of applications.

❖ **Using section 6 of the visit form to find alternative words deemed to sanction restriction on freedom to leave unassisted**

Investigating interlocutors

How many INTERLOCUTORS do not mention 'leave' but the related adult was visited and 'leave' was found to be 'sanctioned'?	212
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The following key terms/phrases were found in the related interlocutors and also during reading of other interlocutors in the course of broader reading. They may represent good indicators for where restriction on 'freedom to leave unassisted' or 'freedom to leave' more generally is at issue:

- require the adult to reside

- return him there
- return her there
- return the adult
- power to restrict the adult from leaving
- place of residence unaccompanied
- unaccompanied
- entry alarms
- require him to reside
- require her to reside
- absenting
- abscond
- convey
- restrict the adult from leaving
- Unaccompanied
- Wander
- Locking of doors

- ***Occurrence of search terms***

<i>Number of interlocutors that mention the key terms and phrases</i>	3233
require the adult to reside	461
return him there	230
return her there	245
return the adult	1391
power to restrict the adult from leaving	14
place of residence unaccompanied	51
Unaccompanied	137
entry alarms	1
require him to reside	53
require her to reside	63
Absenting	285
Abscond	707
Convey	2162
restrict the adult from leaving	29
Unaccompanied	137
Wander	359
Locking of doors	1

- ***Testing the interlocutor terms/phrases***

Various terms are unequivocally related to some sort of restriction on liberty to leave a place or be wherever the adult chooses. I think these terms are good indicators for restriction on 'freedom to leave unassisted' or 'freedom to leave' being at issue.

I only tested select terms, for example, those that might be used in a variety of contexts. The tested terms are those highlighted above.

The term 'convey' is not a good indicator and should be removed from the list because it is used in a variety of contexts other than in the context of conveying the adult to their accommodation should they leave. Convey is used to in reference to conveying the adult to appointments and conveying their property on another.

List of interlocutor search terms after testing:

- require the adult to reside
- return him there
- return her there
- return the adult
- power to restrict the adult from leaving
- place of residence unaccompanied
- unaccompanied
- entry alarms
- require him to reside
- require her to reside
- absenting
- abscond
- restrict the adult from leaving
- Unaccompanied
- Wander
- Locking of doors

- Investigations based on indicative interlocutor search terms

How many individuals have the search terms in their interlocutor?	2598
How many individuals with the search terms in their interlocutor are on indefinite orders?	888 of 2598 or 34%
How many individuals with the search terms in their interlocutor a Local Authority as guardian?	787 of 2598 or 30%
Is there a prominent primary diagnosis for people with search terms in their interlocutor?	No. See table 3.6.5
How many individuals with the search terms in their interlocutor have NOT been visited?	2020 of 2598 or 77.75%
How many individuals with the search terms in their interlocutor have been visited?	578 of 2598 or 22.25%
<i>For how many of these people was 'freedom to leave unassisted' found to be in place?</i>	139 of 2598

<i>For how many of these people was 'freedom to leave unassisted' found to be sanctioned?</i>	117 of 2598
<i>For how many of these people was 'freedom to leave unassisted' found to be NOT sanctioned?</i>	13 of 2598
<i>For how many of these people was 'freedom to leave unassisted' found to be 'in place' and NOT sanctioned?</i>	8 of 139

The above figures bode well for the accuracy of the indicators. In 131 of the 139 cases where the search terms were found to be present and the individual has been visited, restraint of 'freedom to leave residence unassisted' was found to be 'in place'. After reviewing all 8 instances, I am of the view that the powers in those interlocutors appear to provide the power to restrict the adult from leaving, though this is often couched in terms of the power to return the adult in the event they leave. In my view, if you have the power to return someone to accommodation against their will, this would appear to be a power to restrict the adult from leaving at their will, that is, a restriction on their freedom to leave. However, this view may not be shared and my recommendation is that these definitional issues be discussed, as per suggestion 3-3.

Investigating applications

Given the prevalence of interlocutor search terms, I suggest not including any application search terms. Search terms are more difficult to test in applications and there is a greater variety of context in which terms and phrases can be used.

❖ Other words associated with restriction on 'freedom to leave unassisted'

Given the success of the other indicator searches, there does not appear to be any reason to investigate further for possible, more tenuous, indicators such as those that might indicate circumstances that are precursory to having restrictions placed on freedom of the adult to leave the place where they reside. I cannot immediately think of any useful precursory search terms.

❖ Conclusion

Search terms of interlocutors:

Strong

- leave
- require the adult to reside
- return him there
- return her there
- return the adult
- power to restrict the adult from leaving
- place of residence unaccompanied
- unaccompanied

Secondary

- *nil*

- entry alarms
- require him to reside
- require her to reside
- absenting
- abscond
- restrict the adult from leaving
- Unaccompanied
- Wander
- Locking of doors

Other 'secondary' indicators:

- Alcohol Related Brain Disorder

❖ TABLES

Table 3.6.1

Row Labels	Not in place or blank	In place	Total
No sanc'd info	5566	48	5614
Sanctioned	9	246	255
Not Sanctioned	18	33	51
Total	5593	327	5920

Table 3.6.2

Row Labels	In place	% for in place	% total popn
Acquired Brain Injury	23	7.03%	5.03%
Alcohol Related Brain Disorder	51	15.60%	3.73%
Dementia/ Alzheimer's Disease	110	33.64%	47.06%
error	0	0%	0.02%
Inability to comm due to phys	1	0.30%	0.07%
Learning Disability	127	38.84%	40.68%
Mental Illness	9	2.75%	2.48%
Other	6	1.84%	0.93%
Grand Total	327	100.00%	100.00%

Table 3.6.3

Row Labels	'freedom to leave sanctioned'	Percentage of cohort	% total popn
Acquired Brain Injury	15	5.88%	5.03%
Alcohol Related Brain Disorder	43	16.86%	3.73%
Dementia/ Alzheimer's Disease	86	33.73%	47.06%
error	0	0	0.02%
Inability to comm due to phys	1	0.39%	0.07%
Learning Disability	97	38.04%	40.68%
Mental Illness	8	3.14%	2.48%
Other	5	1.96%	0.93%
Grand Total	255	100.00%	100.00%

Table 3.6.4

Row Labels	'leave' in interlocutor	Percentage of cohort	% total popn
Acquired Brain Injury	40	4.63%	5.03%
Alcohol Related Brain Disorder	31	3.59%	3.73%
Dementia/ Alzheimer's Disease	438	50.69%	47.06%
error	0	0	0.02%
Inability to comm due to phys	1	0.12%	0.07%
Learning Disability	325	37.62%	40.68%
Mental Illness	17	1.97%	2.48%
Other	12	1.39%	0.93%
Grand Total	864	100.00%	100.00%

Table 3.6.5

Row Labels	Search terms in interlocutor	Percentage of cohort	% of total popn
Acquired Brain Injury	118	4.54%	5.03%
Alcohol Related Brain Disorder	122	4.70%	3.73%
Dementia/ Alzheimer's Disease	1297	49.92%	47.06%
error	0	0.00%	0.02%
Inability to comm due to phys	2	0.08%	0.07%
Learning Disability	969	37.30%	40.68%
Mental Illness	62	2.39%	2.48%
Other	28	1.08%	0.93%
Grand Total	2598	100.00%	100.00%

Table 3.6.6

Row Labels	Not in place or blank	In place	Total of cohort
No sanc'd info	2451	17	2468
Sanctioned	3	114	117
Not Sanctioned	5	8	13
Total	2459	139	2598

ABBREVIATIONS

The Report attempts to avoid use of abbreviations. The few common abbreviations used in the report are outlined below.

MWC	Mental Welfare Commission for Scotland
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
OPCAT	Optional Protocol for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment