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**Deprivation of Liberty**

Please note: this paper narrates the position in Scotland.

**Introduction**

The thorny question of deprivation of liberty (DoL) comes up regularly – what is it, what do you have to do if you think you are depriving someone of their liberty, what should we include in a power of attorney? Sadly, despite us being alert to this for many years there is still no definitive answer.

The background to DoL comes from a series of court cases, in various countries, including that, in the UK, of [‘Bournewood’](https://en.wikipedia.org/wiki/R_v_Bournewood_Community_and_Mental_Health_NHS_Trust) in 1999. The most frequently quoted is the case commonly referred to as [‘Cheshire West’](https://www.bing.com/ck/a?!&&p=96fbd0d4ae6cb33cJmltdHM9MTY4MTc3NjAwMCZpZ3VpZD0zMTJkOTEwMC0zYTZhLTY3MGYtMzk5NS04MzY2M2I0ZDY2NjUmaW5zaWQ9NTE5NA&ptn=3&hsh=3&fclid=312d9100-3a6a-670f-3995-83663b4d6665&psq=lady+hale+cheshire+west+judgement&u=a1aHR0cHM6Ly93d3cuc3VwcmVtZWNvdXJ0LnVrL2Nhc2VzL2RvY3MvdWtzYy0yMDEyLTAwNjgtanVkZ21lbnQucGRm&ntb=1). Each of the cases was about whether the living arrangements, for the respective mentally incapacitated persons, amounted to a deprivation of liberty. And if so, whether there was appropriate authorisation for this.

The soundbite that is oft quoted when referring to DoL is “*a gilded cage is still a cage”* this comes from the from the judgement issued by Lady Hale in the Cheshire West case. Essentially meaning that if the person is deprived of their liberty the quality of the surroundings is irrelevant. No matter how lovely the accommodation, how content the person may seem to be they are still deprived of their liberty if the accommodation meets the lawful definition of this and thus there needs to be some form of authorisation.

The Scottish Law Commission researched and [reported their views on DoL](https://www.scotlawcom.gov.uk/news/report-on-adults-with-incapacity/) in 2014. For various reasons there was no action taken following this. More latterly (2022) the [Scottish Mental Health Law Review](https://mentalhealthlawreview.scot/) was invited to make recommendations on DoL (see chapter 8, page 262 of their report). The Scottish Government has indicated they accept the recommendation of this Review but has yet to offer any more detail. What follows therefore is the current position, as far as one is able to state it.

**What is Deprivation of Liberty**

The accepted definition of DoL is when a person is under “continuous supervision and control and not free to leave”. We have yet to have this confirmed [by Scottish Government] as the applicable definition in Scottish law and we await detail as to what this means in practice. It is generally accepted however that “continuous supervision” does not mean one to one eyes on care; “control” does not mean, and is something more than, physical or chemical restraint; and “not free to leave” does not mean behind a locked door, rather it refers to the voluntariness of the person remaining, the person consenting to remain in the place in which they are residing.

Assent, or compliance, is not the same as consent. For example, a person in a care home may seem quite content to remain but they are ‘assenting’ to remaining not consenting if they do not understand that they are not free to leave because there is a coded door pad, to which they do not know the code, nor could input the code even if they did.

**Scottish Mental Health Law Review (SMHLR) recommendations**

The most recent recommendations on DoL are those of the SMHLR. They recommend that a DoL must:-

* be justifiable i.e. that the DoL is necessary for the safety or protection of the person.
* be proportionate – i.e. that the deprivation can only be to the extent needed to achieve the protection required.
* be in place only as long as is needed for the protection required.
* benefit the person (not the system) – for example, a person in hospital who cannot consent to a move to a care home, cannot be moved to that care home, if this deprives them of their liberty, simply to free up the hospital bed.
* be authorised.

**Authorisation**

As well as authorisation being required to move/transfer a person to a situation in which they are deprived of their liberty, authorisation will be needed to maintain the person in that situation and to return them there should they decide to leave, assuming this is required for their protection, is justifiable and that the person is not in a position that they can of their own will choose to leave.

An explicit power within a welfare guardianship can authorise a DoL but the SMHLR have recommended that such powers should only be granted where the need for a DoL is reasonably foreseeable i.e. DoL authority should not become a power that is granted as a matter of routine.

Where a DoL was not reasonably foreseeable, a variation to the guardianship, or an intervention order, could be used to offer the additional authority.

The SMHLR recognise that DoL authorisation may be needed with urgency and recommend a system which allows for this, acknowledging that the current guardianship process will not lend itself to authorising DoL in the way they envisage. The Review itself says no more on the system required as it is for the Government to determine what that system should be.

The SMHLR recommend that a granter of a PoA can give advance consent to being deprived of their liberty, by inclusion of an express clause within the PoA. Again, this would need to cover transfer, maintaining and returning. The recommendation is that, for clarity, the clause is prescribed i.e. that the law would state what the wording needs to be. The SMHLR do not offer a form of words, it is for the Government to determine what the prescribed wording should be.

The SMHLR suggested that some adjustment of Section 47 of the AWI – which authorises medical treatment, commonly referred to as “an AWI”, may offer at least an interim solution. Again, it is for the Government to agree any adjustment that needs to be made to extend section 47 to allow it to authorise a DoL.

**Appeal and Review**

The SMHLR recommend, howsoever a DoL is authorised, that there should be an accessible appeal process. This would allow any one with an interest, crucially including the person themselves who may be, or about to be, deprived of their liberty, to challenge the position.

The SMHLR recommend, howsoever a DoL is authorised, that the position is subject to regular review by an independent body. They make no comment on how this would work in practice or on whom the independent body should be as this too is a matter for the Government to determine.

**Next Steps**

It is accepted that this whole DoL issue needs attention with urgency. The SMHLR recommend, as an interim measure, an amendment to the AWI to address those recommendations made by them. We await more detail from Scottish Government.