DELIMITING DETENTION

ESTHER ERLINGS* AND LAURA GRENFELL**

The detention of persons in residential care in Australia has received little recognition. Given also the absence of human rights frameworks in most Australian jurisdictions, it has been argued that Australian governments resist the idea of deprivation of liberty in social care settings. However, the South Australian case of Public Advocate v C, B ('Public Advocate Case') may signal a turning point. This article analyses developments in South Australia and nationally to consider whether Australia is resisting social care detention and associated deprivation of liberty. It engages with the complex legal landscape, covering federal-state care schemes, tort law, guardianship and human rights law, and makes two main arguments: first, that the Public Advocate Case can be read as a formative step in recognising social care detention in Australia; and, second, that subsequent developments leave care providers at risk of liability, and care receivers without the full protection of their human rights.

I INTRODUCTION

In the Supreme Court of the United Kingdom ('UK Supreme Court') case of *Surrey County Council v P* ('*Cheshire West*'),[1] Baroness Hale DPSC famously stated that 'a gilded cage is still a cage'.[2] The remark emphasised that deprivation of liberty can occur despite persons otherwise receiving high-quality care in settings like disability or aged care.[3] British scholar Lucy Series has since associated the *Cheshire West* case with the concept of 'social care detention': forms of detention that may be presented as safeguards for persons receiving care in institutional and community settings.[4] This kind of detention, often involving people deemed to

* Senior Lecturer in Law, Macquarie University.

** Associate Professor, The University of Adelaide. The authors would like to acknowledge the input of Matthew Boisseau (Howard Zelling Chambers) to discussions on the issues covered in this article. We also thank the anonymous reviewers for their helpful comments and the editors for their work on the article.

1 *Surrey County Council v P* [2014] AC 896 ('*Cheshire West*'). The authors refer to the second action in this case, better known by its medium neutral citation: *P v Cheshire West and Chester Council* [2014] UKSC 19.

2 *Cheshire West* (n 1) 919 [46].

3 This article is not concerned with other care arrangements, such as those for children.

4 Lucy Series, *Deprivation of Liberty in the Shadows of the Institution* (Bristol University Press, 2022) ch 2 <https://doi.org/10.56687/9781529212006> ('*Deprivation of Liberty*').

lack capacity, is directly linked with the human right not to be deprived of liberty where the detention is unauthorised. According to Series, following *Cheshire West*, a socio-legal shift has taken place in England and Wales with greater acknowledgement of the potential for deprivation of liberty in social care settings.[5] By contrast, Series argues that Australia 'resist[s] the very *idea* that social care settings could be associated with deprivation of liberty'.[6]

At first sight, the idea that Australia resists the association between social care and deprivation of liberty appears to characterise aptly Australia's post-carceral era, where community care arrangements for older persons and adults with disabilities living in residential care are generally regarded as benign,[7] and ideas of detention and deprivation of liberty are rarely paired with such settings.[8] However, this position may be shifting as a result of test cases brought to Australian courts and tribunals for decision-making. This article engages with Series' assertion by considering recent developments around social care detention in Australia, using South Australia ('SA') as a case study. In 2019, SA saw a ruling similar to *Cheshire West*, albeit considered under tort law.[9] The judgment and subsequent developments offer an opportunity to reflect on Series' assessment of Australia.

In considering social care settings, it should be kept in mind that Australia is a federal nation with interlinking federal and state or territory laws for aged and disability care.[10] Both areas are subject to federal regulation attached to funding, and the federal Parliament in Australia works together with sub-national parliaments on governance.[11] Australia's six states and two territories are

---

5 Ibid 1–5.

6 Ibid 98 (emphasis in original). As a basis of her assessment, Series offers a brief outline of Australian case law and Australia's interactions with UN treaty bodies.

7 This is not to say that opportunities for improvement were not identified. See, eg, Department of Health and Aged Care (Cth), *Living Longer. Living Better: Aged Care Reform Package* (Report, April 2012); Australian Human Rights Commission, 'Respect and Choice: A Human Rights Approach for Ageing and Health' (Paper, 8 August 2012).

8 See, eg, resistance to this pairing by Alzheimer's Australia: Alzheimer's Australia, Submission No 11 to Australian Human Rights Commission, *Optional Protocol to the Convention against Torture* (21 July 2017) 3.

9 *Public Advocate v C, B* (2019) 133 SASR 353 ('*Public Advocate Case*').

10 For SA there is the *National Disability Insurance Scheme Act 2013* (Cth) ('*NDIS Act*') and *Aged Care Act 1997* (Cth) ('*1997 Aged Care Act*') at the federal level, and the *Guardianship and Administration Act 1993* (SA) ('*Guardianship Act*') and *Disability Inclusion Act 2018* (SA) ('*Inclusion Act*') at the state level.

11 See especially arrangements under the National Disability Insurance Scheme ('NDIS') regulated by the *NDIS Act* (n 10) and its subsidiary legislation, with oversight by the NDIS Quality and Safeguards Commission, as well as the system set up under the *1997 Aged Care Act* (n 10) and its subsidiary legislation, with oversight by the Aged Care Quality and Safety Commission. For further information on joint schemes between the Australian federal and sub-national governments, and in particular the redistribution of taxation funds to states and territories via constitutionally supported grants (under section 96 of the *Australian Constitution*, and therefore also known as 'section 96 grants'), see, eg, Cheryl Saunders and Michelle Foster, 'The Australian Federation: A Story of the Centralization of Power' in Daniel Halberstam and Mathias Reimann (eds), *Federalism and Legal Unification: A Comparative Empirical Investigation of Twenty Systems* (Springer, 2014) 87, 98–9 <https://doi.org/10.1007/978-94-007-7398-1_3>; Matthew Stubbs, Adam Webster and John Williams, 'Persons with Disability and the Australian Constitution' (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 8 October 2020) 32–3.

often expected to fill in gaps by legislating aspects of disability and aged care consistently with federal laws, but the sub-national laws vary, and many predate the national schemes. One sub-national scheme key to the matter of social care detention is that of guardianship, as authorisation for detention may be obtained through use of provisions under guardianship legislation for 'protected persons' (adults under guardianship).[12] Where there is no relevant sub-national legislation, courts and tribunals must seek a solution to issues arising, and it is here that we find developments that may both support and challenge Series' assertion.

Noteworthy for Australia is also the lack of a national bill of rights, with only a minority of two states and one territory having adopted sub-national legislation.[13] The want of a legislative human rights framework likely plays an important role in respect of the absence of deprivation of liberty (and possibly detention) as an idea in Australian social care settings. Since direct protection of human rights is generally not available, associated terminology found in international treaty provisions is sometimes forgone in favour of homegrown concepts. Whilst, for example, deprivation of liberty is not a commonly used phrase, there has been a recognition for some years now that persons in social care settings may be subject to 'restrictive practices', which involve seclusion, and physical, environmental, mechanical (equipment-based) and chemical (drug-induced) restraint.[14] This terminology can nonetheless cover up the reality that detention in social care settings is prevalent,[15] and in certain cases properly characterised as deprivation of liberty under international human rights law.

Australian governments continue to display a reluctance to fully recognise detention and deprivation of liberty in social care settings – or at least are not keen on oversight. In 2023, a United Nations ('UN') treaty monitoring body terminated its visit to Australia due to obstruction to visiting places of detention including mental health wards at the sub-national level.[16] This is consistent with the federal government stance, articulated in 2020, that 'aged care facilities do not fit within

---

12 In SA, see *Guardianship Act* (n 10) s 32(1)(b). Notably, in some states like SA or Queensland (which uses 'containment' and 'seclusion'), detention orders must be explicitly obtained. In others like New South Wales ('NSW') and the territories, powers to detain should be spelled out in the guardianship order itself. See, eg, *Re SZH* [2020] NSWCATGD 28 ('*Re SZH*').

13 *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld); *Charter of Human Rights and Responsibilities Act 2006* (Vic). See for recent commentary Bruce Chen, 'If at First You Don't Succeed… A Critique of the Australian Human Rights Act Proposal and the Inquiry into Australia's Human Rights Framework' (2024) 47(2) *University of New South Wales Law Journal* 355 <https://doi.org/10.53637/EXTY3197>.

14 See Department of Social Services, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (Report, 1 May 2013); Bernadette McSherry and Yvette Maker (eds), *Restrictive Practices in Health Care and Disability Settings: Legal, Policy and Practical Responses* (Routledge, 2021).

15 Senate Community Affairs References Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (Report, November 2016) 169 [8.71] ('*Indefinite Detention*').

16 United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Australia Undertaken from 16 to 23 October 2022: Recommendations and Observations Addressed to the State Party*, UN Doc CAT/OP/AUS/ROSP/1 (20 December 2023) [1], [4]. See also Calina Ouliaris et al, 'OPCAT: How an International Treaty Regarding Torture Is Relevant

the concept of "places of detention"'.[17] The federal government has taken this position despite the 2016 findings of the Senate Community Affairs References Committee that 'indefinite detention of people with cognitive or psychiatric impairment is a significant problem within the aged care context'.[18] The Committee found that social care detention more generally is often 'informal, unregulated and unlawful'.[19] In making this statement, it relied on a 2016 observation from the then President of the Guardianship and Administration Board of Tasmania:

> Residential Aged Care Facilities continue to systematically detain people with dementia without clear authority to do so. ... *It seems that most facilities are prepared to 'risk it' that no-one will bring criminal or civil proceedings in relation to unlawful detention*.[20]

This statement has since proven to be one of great foresight. Absent the possibility to rely directly on human rights in most Australian jurisdictions, applicants have started to harness civil torts remedies to protect their rights.[21] Many common law torts are underpinned by values shared with human rights, such as liberty of the person or bodily autonomy,[22] and Australian courts are allowed to consider human rights when developing the common law or as aids to interpretation.[23] This is also true for the tort of false imprisonment, which is essentially the civil reflection of the right not to be arbitrarily deprived of liberty. The High Court of Australia authority of *Trobridge v Hardy* provides a classic statement on the foundation of false imprisonment: 'The mere interference with the plaintiff's person and liberty constituted prima facie a grave infringement of the most elementary and important of all common law rights.'[24]

---

to the Australian Mental Health System' (2024) 58(5) *Australian and New Zealand Journal of Psychiatry* 387, 388 <https://doi.org/10.1177/00048674231221419>.

17 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Supplementary Budget Estimates 2019–20* (Answers to Questions No 140, 4 February 2020) 2. In response to a question asked by Senator Nick McKim the government stated that 'aged care facilities do not fit within the concept of "places of detention" as set out in article 4 of *OPCAT* and there is presently no proposal to include them in any list of primary places of detention'.

18 *Indefinite Detention* (n 15) 169 [8.69]. It noted similar for disability contexts at 169 [8.71].

19 Ibid 169 [8.69].

20 Ibid 168 [8.65] (emphasis added).

21 See Sarah Joseph and Joanna Kyriakakis, 'Australia: Tort Law Filling a Human Rights Void' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing, 2022) 43, 46 <https://doi.org/10.5040/9781509947621.ch-003>. See also Ciara Murphy, 'Damages in the Australian Human Rights Context' (2022) 27(2) *Australian Journal of Human Rights* 311, 323–5 <https://doi.org/10.1080/1323238X.2021.1997093>.

22 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachment by Commonwealth Laws* (Interim Report No 127, July 2015) 455.

23 See, eg, *Public Advocate Case* (n 9) 366 [52] (Kourakis CJ). At common law it is also accepted that Australian courts may take international agreements into consideration in the process of interpreting legislation even though the legislation is not directed to giving effect to the agreement: see *Dietrich v The Queen* (1992) 177 CLR 292, 305–6 (Mason CJ and McHugh J), 321 (Brennan J). This is particularly the case where there is ambiguity: see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ); *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

24 (1955) 94 CLR 147, 152 (Fullagar J) ('*Trobridge*').

Although false imprisonment has previously been used to challenge social care detention,[25] a watershed moment occurred in 2019 when the Full Court of the Supreme Court of South Australia ('SASCFC') handed down an extensively reasoned judgment in which it found a protected person to have been falsely imprisoned in their care facility. In *Public Advocate v C, B* ('*Public Advocate Case*'),[26] the SASCFC notably considered the need to protect the rights of persons lacking capacity in care settings, and the principle of legality, which requires clear expressions for the abrogation of rights and/or judicial oversight.[27] The latter meant that, without relevant orders having been obtained under guardianship legislation, there was no lawful justification for the applicant's detention (in a locked dementia ward).

The decision prompted recognition of the issue of social care detention and had important practical implications: guardians had to obtain special orders under the *Guardianship and Administration Act 1993* (SA) ('*Guardianship Act*') if they contemplated detaining a protected person to avoid challenges under tort law in the civil courts. These orders are to be obtained from the South Australian Civil and Administrative Tribunal ('SACAT'),[28] which is then charged with a review of the detention orders within 6 months, and subsequent reviews at intervals of not more than a year.[29] Such tandem systems of two interlocking court/tribunal systems with independent decision-makers – tribunals in charge of guardianship who provide authorisation relevant for tort cases before civil courts – exist throughout Australia (and make the South Australian experience relevant more broadly). Even if Australian guardianship legislation is itself often considered to be at odds with Australia's international human rights obligations, notably under the *Convention on the Rights of Persons with Disabilities* ('*CRPD*'),[30] the tandem system requires both oversight and monitoring with remedies for breaches in ways akin to that

---

25 See *Skyllas v Retirement Care Australia (Preston) Pty Ltd* [2006] VSC 409; *Antunovic v Dawson* (2010) 30 VR 355; *Darcy v New South Wales* [2011] NSWCA 413; *White v Local Health Authority* [2015] NSWSC 417. In these cases, the detained persons were themselves opposed to the arrangements.

26 *Public Advocate Case* (n 9).

27 In Australia, the principle of legality requires statutes to be interpreted in the context of a legal framework in which they are enacted, including the rights of individuals against the state. Where Parliament intends to alter these rights and duties via statute, it must do so in unambiguous language. The principle of legality protects individuals' rights and freedoms from unintended legislative interference. See *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*').

28 The SACAT was established in 2015 as a 'super-tribunal', usurping a number of smaller tribunals and boards, including the South Australian Guardianship Board. It is a tribunal with limited jurisdiction, meaning that it can only take decisions specifically attributed to it by legislation. SACAT notably has jurisdiction under the *Guardianship Act* (n 10), *Advance Care Directives Act 2013* (SA) ('*ACDA*') and *Consent to Medical Treatment and Palliative Care Act 1995* (SA) ('*Consent Act*'). A full overview of jurisdiction can be found at 'Jurisdiction List', *South Australian Civil and Administrative Tribunal* (Web Page) <https://www.sacat.sa.gov.au/about-sacat/who-we-are/jurisdiction-list>. For an overview of the establishment and working of Australian civil and administrative tribunals, see, eg, Robin Creyke, 'Australian Tribunals: Impact of Amalgamation' (2020) 26(4) *Australian Journal of Administrative Law* 206.

29 *Guardianship Act* (n 10) s 57(1).

30 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*'). See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, August 2014) 277 [10.14]. For a different interpretation and a more positive reflection on compliance, see, eg, Shih-Ning Then, Ben White

expected under the human right not to be arbitrarily deprived of liberty.[31] Yet this requires that the guardianship and torts systems are aligned. By contrast, the upshot of the *Public Advocate Case* – a significant increase in the need for orders and reviews, combined with a reluctance of the Parliament of South Australia ('SA Parliament') to address the matter of detention in legislation[32] – has led to SACAT seeking to narrow its definition of detention under guardianship with reference to treatment and care. These developments signal a conceptual return to excluding the idea of detention from social care settings, potentially also falling short of civil law requirements.

Using the developments in SA as a case study, this article argues that an understanding of social care detention is emerging in Australian courts and tribunals. However, it observes that, unlike in the United Kingdom ('UK'), this understanding is not anchored in human rights law but in torts, and, furthermore, that the tandem system is developing divergent understandings of detention. For their part, sub-national parliaments in Australia show reluctance to legislate in the area of aged care, and possibly social care detention more broadly. For SA, this has meant that SACAT was forced to find clarity in the applicable rules itself. In doing so, the Tribunal has limited the notion of detention for the guardianship jurisdiction in ways that may be at odds with the tort of false imprisonment and the oversight required by human rights standards. Its jurisprudence may weaken the function of detention orders as safeguards and put protected persons at risk of a breach of the right not to be arbitrarily deprived of liberty (or falsely imprisoned) and care providers at risk of civil liability under torts.

Part II of this article outlines the *Public Advocate Case* and the first of the SACAT test cases that followed it. Part III analyses whether and how the SA Parliament responded to these cases, arguing that it left SACAT to find a solution. Part IV outlines SACAT's subsequent guardianship decision where it took a narrow approach to detention. Part V analyses the implications of these developments from the perspective of tort law, questioning whether the SA cases align with established law and give due regard to the rights-protective function of detention orders in social care. Before concluding, Part VI reflects on the reduction of oversight for those detained, and Australia's resistance to international calls to monitor social care detention through a preventative mechanism.

---

and Lindy Willmott, 'Adults Who Lack Capacity: Substitute Decision-Making' in Ben White et al, *Health Law in Australia* (Thomson Reuters, 4th ed, 2024) 221, 226–7.

31 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN Doc CCPR/C/GC/35 (16 December 2014) ('*General Comment No 35*'). See also Human Rights Council, *Older Persons Deprived of Liberty: Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons, Claudia Mahler*, UN Doc A/HRC/51/27 (9 August 2022) ('*Older Persons Deprived of Liberty*').

32 See below Parts III and IV.

II 2019 DETENTION CASES

A *Public Advocate Case*

On 24 May 2019, the SASCFC delivered a much-anticipated judgment in the *Public Advocate Case*. The action centred on the possibility that the 95-year-old applicant, identified by his initials BC (hereafter, Mr C), had been falsely imprisoned in the aged care facility where he was residing. Mr C had moderate dementia and issues with his vision.[33] It was uncontested that Mr C lacked legal capacity. Both his spouse and the Public Advocate had been appointed as his limited guardians in matters of health, and 'accommodation and lifestyle' respectively.[34] On the basis of its general powers of accommodation and lifestyle – and without applying for special *Guardianship Act* orders authorising detention under section 32(1)(b) – the Public Advocate had arranged for Mr C to live in a Memory Support Unit ('MSU'), a dedicated locked ward for residents with dementia.[35] Mr C could not leave the MSU on his own as he did not have a swipe card or the code for the keypad; he was only able to leave the ward with family members or carers who would accompany and supervise him.[36] The Public Advocate, as Mr C's guardian, also issued directions on how often Mr C could have outings and with whom.[37] These became contentious when the Public Advocate effectively barred Mr C's son, DC, from spending time with his father outside the facility after some apparent incidents with DC had taken place.[38] Mr C appeared content in the MSU, or at least had not actively objected to his living arrangements.[39]

The two main questions that arose in the *Public Advocate Case* were:

1. whether the Public Advocate could have relied on the general powers of guardianship to accommodate Mr C in the MSU with the directions issued,[40] or whether special orders authorising detention under section 32(1)(b) of the *Guardianship Act* should have been obtained; and

33 *Public Advocate Case* (n 9) 354 [1], 367–9 [63] (Kourakis CJ).

34 Ibid 354 [2]. Under South Australian law, guardianship can be full (covering all aspects of a protected person's life) or limited, whereby the person is only under guardianship for certain areas such as healthcare, accommodation or 'lifestyle' (social activities, etc). Where there is (family) conflict surrounding the appointment of a guardian, the Public Advocate can be appointed as a neutral decision-maker. In all instances, a guardian can only be appointed by SACAT in compliance with the *Guardianship Act* (n 10). For further information see 'About Guardianship Orders', *Office of the Public Advocate* (Web Page) <https://www.opa.sa.gov.au/information-service/about-the-information-service/about-guardianship>.

35 *Public Advocate Case* (n 9) 354 [1], 367–9 [63] (Kourakis CJ).

36 Ibid 367 [57], 367–9 [63]–[64]. This was principally for safety reasons, including related to his vision.

37 Ibid 367–9 [58]–[63].

38 Ibid 367–9 [62]–[63].

39 Ibid 367–9 [63]. This contrasts with earlier cases: see above n 25.

40 Under section 31 of the *Guardianship Act* (n 10), guardians can (subject to limitations imposed by SACAT) exercise 'all the powers a guardian has at law or in equity'. As suggested in the *Public Advocate Case*, the common law gives content to such powers 'at law': *Public Advocate Case* (n 9) 356 [11], 359–60 [25] ff (Kourakis CJ).

2. if such authorising orders were necessary, whether the restrictions placed upon Mr C amounted to a level of detention sufficient for his situation to constitute the tort of false imprisonment.[41]

Under South Australian law, false imprisonment requires an intentional, positive act that directly causes a person to be restrained within a certain area with no reasonable possibility of escape, and without lawful justification or valid defence.[42] Question (1) speaks to the lawful justification: the orders authorising detention would be the lawful justification for such detention if general powers of guardianship were insufficient. Question (2) speaks to being restrained to an area without reasonable possibility of escape, which is often simply referred to as detention.[43]

In response to the first question on the need for authorising orders, the Court held that section 32 of the *Guardianship Act* had abrogated any general powers of guardians to detain a protected person, insofar those powers had existed previously.[44] Writing for the Court, Kourakis CJ emphasised that detention would cause a change in rights and liabilities that only a court (or in SA, a tribunal) could occasion, and it was salient that the *Advance Care Directives Act 2013* (SA) did not allow substitute decision-makers under advance care directives to consent to forced detention.[45] His Honour further noted the 'progressive approach to safeguarding personal autonomy' in the care of persons with a mental illness in SA.[46] Importantly, the judgment made a link between the common law principle of legality, which operates at the national level, and the human right not to be deprived of liberty under article 9 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[47] which the SASCFC used in its interpretation of the *Guardianship Act* vis-a-vis the tort of false imprisonment. As noted by the Court, both the principle and provision contain a substantive liberty aspect, and aspect of supervision:

> A construction of s 32 of the [*Guardianship Act*] … which requires that an order be first obtained from the Tribunal which has supervisory jurisdiction over the powers of guardians, and that the guardian justify any constraint of the protected person's

41 A third issue that arose in the case was how to get Mr C's case before the court, as his incapacity meant that he lacked legal standing. To this effect, a (successful) writ of habeas corpus was employed: *Public Advocate Case* (n 9) 355 [4]–[5], 369–70 [66] (Kourakis CJ). This matter will not be further discussed here. See generally Esther Erlings, 'False Imprisonment in Locked Wards: *The Public Advocate v C, B*' (2019) 21(2) *Flinders Law Journal* 109, 110–14.

42 *White v South Australia* (2010) 106 SASR 521, 589–90 [414]–[422] (Anderson J) ('*White v SA*').

43 The other elements of the tort were seemingly taken as given by the Court, and not further discussed in the judgment. See, eg, ibid 590 [422].

44 *Public Advocate Case* (n 9) 366–7 [52]–[56] (Kourakis CJ).

45 Ibid 357 [15].

46 Ibid 363 [33].

47 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). Australia has ratified seven core international human rights treaties including the *ICCPR*. SA has not yet adopted sui generis human rights legislation nor implemented these relevant treaties beyond a few provisions. This means that human rights standards do not have any direct effect in either SACAT or the state's general court system. Reliance cannot, for example, be placed directly on the human right not to be arbitrarily deprived of liberty, as articulated by article 9 of the *ICCPR*. However, human rights may *indirectly* influence the interpretation and development of the applicable law.

> liberty, is consistent with Article 9 of the International Covenant on Civil and Political Rights. That article in turn reflects the common law principle of legality.[48]

Combined with 'the fundamental value the common law accords personal liberty',[49] the above arguments clearly spoke in favour of the need to obtain authorising orders. Also on a textual construction of the *Guardianship Act*: 'the very conferral of the power on the Tribunal to order detention suggests that the power to do so unilaterally has been withdrawn from the guardian'.[50] As a result, any guardian contemplating the detention of a protected person would need to apply for prior authorising orders under section 32(1)(b) of the *Guardianship Act*, and could no longer simply rely on general powers of accommodation and/or lifestyle. That is, the lawful justification necessary to detain a protected person without this constituting the tort of false imprisonment is encapsulated in the authorising order provided by SACAT under section 32 of the *Guardianship Act*. Absent such order, there may be false imprisonment *if* the protected person is relevantly detained.

The second question therefore concerned the matter of detention itself, and the principles applying in respect of the tort of false imprisonment that may be derived from case law. To this end, the SASCFC referred first to *Meering v Grahame-White Aviation Co Ltd* for the principle that a person does not need to be aware of their detention for there to be false imprisonment meaning someone can be detained without them knowing that they are.[51] What matters is whether the person can effectively leave a place, or whether there is 'restraint within a particular space'.[52] The latter is a wide notion, and includes being detained 'in the open field'.[53] It also applies to a situation where there may seem to be no immediate barriers, but an intervention will take place if the person attempts to leave.[54] This speaks to the rule on constructive detention, accepted by the Court with reference to *Bird v Jones*, from which it quoted the following:[55]

> Lord Coke … speaks of 'a prison in law' and 'a prison in deed:' so that there may be a constructive, as well as an actual, imprisonment: and, therefore, it may be admitted that personal violence need not be used in order to amount to it. … [I]f a person should direct a constable to take another in custody, and that [other] person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood.[56]

Where 'little may be said, [but] much is meant and perfectly understood', it does not matter that the person is detained in a 'public street', or that the person

48 *Public Advocate Case* (n 9) 366 [52] (Kourakis CJ) (citations omitted).
49 Ibid 366 [53].
50 Ibid 366 [51].
51 (1919) 122 LT 44, 53 (Atkin LJ) ('*Meering*'), quoted in *Public Advocate Case* (n 9) 370 [68] (Kourakis CJ).
52 *Meering* (n 51) 53 (Atkin LJ), quoted in *Public Advocate Case* (n 9) 370 [68] (Kourakis CJ).
53 *Meering* (n 51) 51 (Duke LJ), quoted in *Public Advocate Case* (n 9) 370 [67] (Kourakis CJ).
54 *Meering* (n 51) 51 (Duke LJ), quoted in *Public Advocate Case* (n 9) 370 [67] (Kourakis CJ); *Bird v Jones* (1845) 7 QB 742, 748 (Williams J) ('*Bird*').
55 *Public Advocate Case* (n 9) 370–1 [70] (Kourakis CJ) (emphasis omitted).
56 *Bird* (n 54) 747–8 (Williams J).

detaining them 'never touched' them;[57] material barriers or physical contact are not necessary for constructive imprisonment to arise out of an understanding that disobedience to expectations will have consequences. The Court further emphasised the principle related to the absence of a need for (physical) force through reliance on *Watson v Marshall*.[58] This case dealt with a plaintiff who was taken to hospital under a doctor's instructions for examination under the *Mental Health Act 1959* (Vic). The plaintiff had protested but otherwise cooperated.[59] Yet, as Walsh J held (and Kourakis CJ in the *Public Advocate Case* quoted),[60] although '[n]o physical force was used at any time by the defendant', the plaintiff would have had a justified apprehension that 'if he did not submit … he would be compelled by force to go to the hospital'.[61] Whilst the Court did not separately discuss the authority of *Symes v Mahon* cited by Walsh J in support, this SASCFC case had previously adopted the above principles for the South Australian jurisdiction,[62] meaning that by the time they were discussed in the *Public Advocate Case*, the principles already constituted established law in SA.[63]

With respect to the case at hand, the Court noted that at first instance the Court had found Mr C to have been unlawfully detained, and ruled that this assessment of the situation was 'plainly correct'.[64] There was no question that Mr C was detained when present in the locked ward, and 'on those occasions when he was allowed to leave whilst accompanied by another person, it is clear that if the Public Advocate's directions were followed, it would have been clearly conveyed to [him] … that he was required to return'.[65] During these outings Mr C thus 'remained in detention even though no physical force might have been required because of his submission'.[66] Even if the outings were not seen as detention (a contention that would fly in the face of accepted principles and not the primary view of the court), Mr C's time in the locked ward was sufficient for a finding of unlawful detention.[67] As a result – and because there was no lawful justification – Mr C had been falsely imprisoned in his care facility. This notably meant that the Public Advocate was liable to payment of compensation for infringement of rights, though a subsequent action seeking such compensation was ultimately abandoned.[68]

The decision in the *Public Advocate Case* had important consequences. First, it brought to the fore the importance of oversight and monitoring for the protection of the rights of persons under guardianship by means of special orders that are

57 Ibid.
58 (1971) 124 CLR 621 ('*Watson*').
59 Ibid 626 (Walsh J).
60 *Public Advocate Case* (n 9) 371 [71] (Kourakis CJ).
61 *Watson* (n 58) 626 (Walsh J).
62 *Symes v Mahon* [1922] SASR 447, 449, 453 (Murray CJ) ('*Symes*').
63 See also discussion of the case in a leading South Australian torts textbook: Julia Davis, *Connecting with Tort Law* (Oxford University Press, 1st ed, 2012) 144–5, 147.
64 *Public Advocate Case* (n 9) 371 [72] (Kourakis CJ).
65 Ibid.
66 Ibid.
67 Ibid.
68 The authors would like to thank an anonymous South Australian lawyer involved for providing information on the compensation case, which is not reported.

subject to regular reviews of the person's situation.[69] Second, the decision made it likely that a great many protected persons in SA were falsely imprisoned for lack of appropriate detention orders. This situation of likely de facto detention created much uncertainty for care providers, leading to an increase in applications for SACAT orders, which carried the potential to overwhelm the Tribunal, much like *Cheshire West* had done for English courts.[70] Third, it led to test cases in SACAT.

B *Re KF*

The *Public Advocate Case* immediately led to test cases brought by concerned guardians and providers, the first of which following just three months later: *Re KF*.[71] *Re KF* broadly considered restrictive practices regulated under the federal National Disability Insurance Scheme ('NDIS' – a federal scheme from which disability-related allowances are paid, including, for example, for services, equipment and accommodation),[72] but contained a focus on the possibility that such practices might constitute detention, necessitating *Guardianship Act* section 32 orders. It comprised three joint cases related to clients of a major disability and aged care provider in Australia who were under the NDIS. Involved were: (1) KF, who was from time to time non-forcibly fitted with a removable helmet to prevent injury to his head during behaviours like head-banging;[73] (2) ZT, who was for health reasons subject to an environmental restraint, namely restriction of access to places where food was stored as consumption of certain food items made her ill;[74] and (3) WD, who exhibited a range of 'challenging behaviours' and was therefore subject to both environmental restraint (access to places where food was stored as these triggered his behaviours) and mechanical restraint (occasional use of a seatbelt lock during vehicle transport).[75] In all three cases, the provider sought guardianship orders from SACAT, where necessary with special powers for detention under section 32 of the *Guardianship Act*. It argued that such orders were necessary because the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) ('*NDIS Rules*') required a guardian's consent to restrictive practices in their clients' cases.[76]

Sitting as the Tribunal, Executive Senior Member Rugless had limited tools available to provide a clear reasoning due to the 'confusing legislative landscape in South Australia'[77] – the discrepancy between the federal *NDIS Rules* and state

69 *Guardianship Act* (n 10) s 57(1). In the case of detention, an initial review must be conducted within 6 months and subsequent reviews should occur in intervals of not more than a year.

70 See Lucy Series, 'On Detaining 300,000 People: The Liberty Protection Safeguards' (2019) 25 *International Journal of Mental Health and Capacity Law* 82.

71 [2019] SACAT 37 ('*Re KF*').

72 For a definition of a restrictive practice, see *NDIS Act* (n 10) s 9; *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) r 6. For more information, see *NDIS* (Website) <https://www.ndis.gov.au>.

73 *Re KF* (n 71) Attachment 2 [12]–[13] (Executive Senior Member Rugless).

74 Ibid Attachment 1 [14]–[15].

75 Ibid Attachment 3 [13]–[16].

76 Ibid [14].

77 Ibid [45]–[48].

legislation, namely the *Guardianship Act* (with the *Public Advocate Case* in mind). While both pieces of legislation attempted to regulate restrictive practices, they did not marry well together, as the SA Parliament had not yet legislated to integrate restrictive practices into the *Guardianship Act*. Working around this disjuncture, SACAT instead employed an avenue offered by the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) ('*Consent Act*'), another act under SACAT's jurisdiction, by providing an extended definition of medical treatment via its attributes of 'healthcare' and 'physical therapy'.[78] This allowed the concept of medical treatment to capture mechanical, environmental and chemical restraint, with application of the law on consent to medical treatment under the *Consent Act* (instead of guardianship orders) if treatment was also supervised by a healthcare practitioner.[79] That is, some forms of practitioner-supervised restrictive practices would now count as medical treatment for which a 'person responsible' (a substitute decision-maker who can consent to medical treatment where a person lacks capacity, previously known as 'next of kin') could provide consent without the need for a guardianship order.[80] In respect of the use of chemical restraint, this approach could always apply, given that administration of medication must be supervised by a healthcare practitioner.[81] However, as NDIS or disability support workers are not registered practitioners in Australia,[82] and could thus not appropriately supervise 'the treatment' as required for consent by a person responsible, guardianship orders were still required for ZT and WD (but not KF, as the helmet did not restrict him).[83]

In its determination, SACAT held that none of the three clients were subject to detention under the *Guardianship Act*, and therefore would not need section 32(1)(b) orders.[84] This may seem especially surprising in respect of WD when fitted with a seatbelt lock that would have prevented him from leaving his car seat. However, the Tribunal interpreted detention as only relevant to residence in the care facility,[85] and vehicle transport took place outside the facility.

---

78 Ibid [85]–[113]. See also Esther Erlings and Laura Grenfell, 'Restrictive Practices: Disentangling the Laws of Consent, Guardianship and Restrictive Practices' (2022) 44(2) *The Bulletin* 22. Though note that a Senior Practitioner Scheme has since been adopted for the NDIS under the *Inclusion Act* (n 10) pt 6A.

79 *Re KF* (n 71) [107], [112], [123] (Executive Senior Member Rugless).

80 See for the rules around substitute decision-making by a person responsible *Consent Act* (n 28) ss 14–14D. On the rules around substitute decision-making in healthcare for adults without capacity generally, see Then, White and Willmott (n 30).

81 *Re KF* (n 71) [123]–[127] (Executive Senior Member Rugless). Beyond that, and as the Tribunal noted, supervision by a healthcare practitioner (eg, a nurse) is more likely in aged care than in disability care. See also Andrew Cashin, Amy Pracilio and Nathan J Wilson, 'A Proposed Remedy to the Inequitable Representation of Nursing in the Australian National Disability Insurance Scheme' (2023) 30(2) *Collegian* 394 <https://doi.org/10.1016/j.colegn.2022.11.002>.

82 The NDIS requires screening and has adopted a code of conduct. See 'NDIS Code of Conduct', *NDIS Quality and Safeguards Commission* (Web Page) <https://www.ndiscommission.gov.au/rules-and-standards/ndis-code-conduct>; *National Disability Insurance Scheme (Code of Conduct) Rules 2018* (Cth) r 6. In SA, screening is regulated under Part 5A of the *Inclusion Act* (n 10).

83 *Re KF* (n 71) Attachment 1 [30], Attachment 2 [15]–[16], Attachment 3 [35] (Executive Senior Member Rugless).

84 Ibid Attachment 1 [28], Attachment 2 [18], Attachment 3 [33].

85 Ibid [144].

Ultimately, SACAT narrowed down the remit of authorising orders under section 32 of the *Guardianship Act* as applying to particular accommodation decisions or situations involving the use of force, so that only:

> Accommodation decisions involving seclusion, detention or the need for directed or enforceable decision making … [and] [h]ealthcare and medical treatment decisions (all medical treatment and therapy, including chemical, mechanical and environmental restraint) involving any type of physical restraint (i.e. with the use of force) will need to be authorised by the Tribunal as a special powers order under s 32(1)(a) and (b).[86]

Through this delineation and the *Consent Act* approach, *Re KF* effectively limited and circumvented the interpretation of detention for the purposes of the *Guardianship Act*, and the concomitant need for special authorising orders. Thus, as a consequence of *Re KF*, guardianship orders are now needed in only few cases of restraint – and authorising orders for detention are available in only a handful of them. This minimises restraint-related oversight in social care.

Importantly, in her decision in *Re KF*, Executive Senior Member Rugless repeatedly appealed to the SA Parliament to address the gaps between legislative frameworks. She acknowledged that her adoption of the *Consent Act* approach 'may lead to some inconsistency between the application of the *NDIS Rules* and consent processes' but added that these were 'matters which require the attention of the SA Parliament'.[87] Similarly, in the *Public Advocate Case* two members of the bench flagged that the issues may merit attention from Parliament.[88]

III PARLIAMENTARY RESPONSE TO DETENTION CASES

In 2021, two bills were introduced into the SA Parliament to deal with the matters raised by the *Public Advocate Case* and *Re KF*; the first aimed at disability care, and the second aimed at aged care. Both bills concerned restrictive practices more broadly, but due to restrictive practices normally being the underlying basis for detention in social care, the debates would also necessitate discussion of detention. Ultimately only the first bill (on disability care) was passed, and it set up a complex relationship between the *Disability Inclusion Act 2018* (SA) ('*Inclusion Act*') and the *Guardianship Act*. This section starts by explaining the debate on that Bill and analyses how it interacts with the *Guardianship Act* and section 32 detention orders. It then briefly reflects on the second, unsuccessful Bill, and SA's reluctance to legislate in the field of aged care.

A First Bill: Disability Inclusion Amendments

Parliamentary debate suggests that the *Public Advocate Case*, *Re KF* and the problems around interpretation and harmonisation faced by SACAT were all on the radar of the executive and the legislature when new disability legislation was

86 Ibid [144]–[145].
87 Ibid [118]. See also at [48], [117].
88 See *Public Advocate Case* (n 9) 372 [73] (Kourakis CJ), 373 [78] (Hinton J).

considered. Debates on the first bill, the Disability Inclusion (Restrictive Practices – NDIS) Amendment Bill 2021 (SA) ('Inclusion Act Amendment Bill') were largely dominated by discussion of risks and the liability of those administering restrictive practices, namely providers and workers.[89] The Second Reading Speech in both Houses aimed to explain the common law torts position and how it could be altered by Parliament via legislation if providers were to be relieved of liability. For example, in the Lower House the Attorney-General explained:

> The common law does not authorise the use of restrictive practices. That lack of authorisation means that, unless there is a statutory scheme expressly authorising the use of restrictive practices … then restrictive practices are used unlawfully against a person. If restrictive practices cannot lawfully be used against the person, criminal liability or other civil liability may attach to the person or provider using them.[90]

In the Upper House, the Minister for Human Services explained that the Inclusion Act Amendment Bill would supplement the existing federal legislative framework for NDIS participants, and that it was seeking to address the 'gaps' in the SA system. She then referenced the *Guardianship Act*, noting that the act requires an additional application to SACAT for section 32 special powers where 'there is use of force or detention', though without at this stage commenting on what detention might entail.[91] The problems raised by the apparent gaps were more explicitly detailed by a crossbencher, the Hon Connie Bonaros, who observed the above-discussed cases and the interlocking federal-state law scheme, and argued that '[the] crossover is confusing and is creating a drain on resources for even the simplest of measures' since measures 'as simple as a seatbelt on clients' now required an application to SACAT, whereas historically 'their implementation was a relatively informal process made in close consultation with family members'.[92] Focusing on system efficiency rather than the problematic aspects of this unregulated past, Bonaros noted that 'it was clear SACAT was looking for guidance and simplification from parliament'.[93]

The parliamentary debates suggest that members were alive to the issue of liability, including in ways synergistic with human rights. When issues of liability were discussed during the Committee Stage, the Opposition asked the Minister for Human Services to elaborate on 'how many prosecutions there have been for that

89 South Australia, *Parliamentary Debates*, Legislative Council, 4 March 2021, 2861–5 (Michelle Lensink, Minister for Human Services); South Australia, *Parliamentary Debates*, Legislative Council, 18 March 2021, 3005–8; South Australia, *Parliamentary Debates*, Legislative Council, 1 April 2021, 3153–73; South Australia, *Parliamentary Debates*, House of Assembly, 11 May 2021, 5636–51. In an unscripted response to a question about liability, the Attorney-General mentioned that 'under our common law, … [w]e have, in the criminal context, false imprisonment … across to civil liability': at 5647 (Vickie Chapman, Attorney-General).

90 South Australia, *Parliamentary Debates*, House of Assembly, 11 May 2021, 5637 (Vickie Chapman, Attorney-General). See also South Australia, *Parliamentary Debates*, Legislative Council, 1 April 2021, 3161 (Michelle Lensink, Minister for Human Services).

91 South Australia, *Parliamentary Debates*, Legislative Council, 4 March 2021, 2861 (Michelle Lensink, Minister for Human Services). In 2021, the relevant state acts for restrictive practices were the *Guardianship Act* (n 10), *Consent Act* (n 28), *ACDA* (n 28), *Mental Health Act 2009* (SA) and *South Australian Civil and Administrative Tribunal Act 2013* (SA).

92 South Australia, *Parliamentary Debates*, Legislative Council, 18 March 2021, 3005–6 (Connie Bonaros).

93 Ibid.

type of behaviour [restrictions without proper authority] in the last 10 years and how many of those prosecutions have been successful?'[94] The Minister replied that they did not have 'that sort of information', but that:

> [W]e do know that it is a significant risk and [particularly providers] know they are exposed all the time. *SACAT is being utilised all the time because people seek guardianship orders so that they can reduce the legal risk to themselves. We cannot not address this significant gap that we have in our legislation.* To be honest, the commonwealth will give us a kick up the backside if we do not get on with it … *[t]here is a particular case that we often refer to as the 'locked door' case* [*Public Advocate Case*]. *It has thrown a lot of what was thought to be established practices in relation to restrictive practices and has meant that there is a much higher level of scrutiny.* I think from a human rights perspective you would say that is the right way to go. It is certainly something that needs to be addressed.[95]

Notwithstanding the awareness of the liability risks exposed by the *Public Advocate Case* shown by the Minister's response, no legislation was passed to explicitly and comprehensively address the problems raised by the case. Although the Inclusion Act Amendment Bill did ultimately involve references to detention, this was only to facilitate the exclusion of detention from the application of the bill (as discussed below). Overall, the Inclusion Act Amendment Bill was piecemeal, aimed at implementing the federal *NDIS Rules* by retrofitting them into the state framework through introduction of a state level authorisation scheme for the use of restrictive practices in line with the principles set out in the *NDIS Act*.[96]

Notably, although debates on the Inclusion Act Amendment Bill were replete with concerns about the rights of 'people with disabilities', the Bill's coverage was not extended to include *all* persons with disabilities.[97] It only applied to NDIS participants. However, the NDIS is only available to persons who apply before the age of 65.[98] Those who did not qualify for the NDIS because they had been over 65 at the time of application were not covered, creating an unusual discrepancy between older persons under the NDIS (who applied before the age of 65 and elected to continue) and older persons with disabilities outside the NDIS (who either encountered disabilities after the age of 65 or elected to leave the scheme at that age).[99] Neither in the Bill's Second Reading Speech nor in the debates was this situation acknowledged. As a result, any added protections under the Bill mostly would not extend to those in aged care. Furthermore, although an important

---

94 South Australia, *Parliamentary Debates*, Legislative Council, 1 April 2021, 3162 (Clare Scriven).

95 Ibid 3162 (Michelle Lensink, Minister for Human Services) (emphasis added).

96 *NDIS Act* (n 10) ss 4–5. The scheme includes two levels for authorisation: lower level (Level 1) restrictions to be approved by a designated officer of the provider, and higher level (Level 2) restrictions requiring independent authorisation from a Senior Authorising Officer. See *Inclusion Act* (n 10) ss 23N–23O.

97 Disability Inclusion (Restrictive Practices – NDIS) Amendment Bill 2021 (SA) s 5 ('Inclusion Act Amendment Bill').

98 *NDIS Act* (n 10) s 22.

99 A person under the NDIS has the option to remain under the NDIS or choose to instead be covered by aged care provisions once they reach the age of 65. However, moving into residential aged care funded by the Department of Health Aged Care System will cause a person to automatically leave the NDIS: see NDIS, *Leaving the NDIS* (Guideline, 10 February 2025) 3 <https://ourguidelines.ndis.gov.au/home/becoming-participant/leaving-ndis#download>.

objective of the Inclusion Act Amendment Bill was to respond to the matters raised by the *Public Advocate Case*, the amendments to the *Inclusion Act* would ultimately not cover cases of detention.

1 Detention and the Amended Inclusion Act

Despite the aim of simplification, the amended *Inclusion Act* did not do away with the role of guardianship. Section 23F(3) of the *Inclusion Act* provides that the *Inclusion Act* does not derogate from the *Guardianship Act* 'or any other Act or law that authorises the use of restrictive practices', and this provision was not amended. Moreover, the amended *Inclusion Act* only regulates the 'use of restrictive practices *other than detention*'.[100] For this purpose, both section 23C of the *Inclusion Act* and regulation 7 of the *Disability Inclusion (Restrictive Practices – NDIS) Regulations 2021* (SA) ('*Inclusion Regulations*') define detention.[101] Under section 23C, detention includes 'any direct or indirect curtailment of the person's ability to leave particular premises [or part thereof]', or a requirement that they remain at (part of) the premises, as well as limiting 'access to means of leaving' such as a wheelchair or 'any other act or omission of a kind declared by the regulations to be included'.[102] The regulations may also exclude acts from establishing detention.[103] Notably, an ability to leave only after obtaining permission 'does not … mean that the person is not detained'[104] and 'the detention of a person pursuant to another Act or law will be taken not to constitute detention for the purposes of this Part'.[105] The latter quote suggests that the *Inclusion Act* works as a self-contained system, unrestrained by other acts or laws. This means, for example, that the *Inclusion Act* does not have to adopt the same definition as tort law, and that it can capture – for its own purposes – situations that may constitute detention under these other laws, including common law rules on false imprisonment. The main reason this makes sense is because the *Inclusion Act* implements an extra oversight mechanism under which restrictive practices require different kinds of administrative authorisation.

That the *Public Advocate Case* was not entirely forgotten is indicated by the *Inclusion Regulations*, which exclude two situations from the scope of detention for the purposes of the *Inclusion Act*. The first is an emergency situation in which a person who is at risk of causing themselves or another person serious harm may be confined for up to two hours for de-escalation or self-regulation.[106] The second speaks more directly to closed doors and stipulates that the ambit of detention

100 *Inclusion Act* (n 10) pt 6A div 4 (emphasis added).

101 There is no Hansard debate on section 23C of the *Inclusion Act* (n 10), which was introduced by the Inclusion Act Amendment Bill (n 97). The *Disability Inclusion (Restrictive Practices) Regulations 2021* (SA) ('*Inclusion Regulations*') received scrutiny via the Legislative Review Committee, whose concerns are not recorded.

102 *Inclusion Act* (n 10) ss 23C(1)(a)–(d).

103 Ibid s 23C(1).

104 Ibid s 23C(2). For the purposes of this section, the fact that a person may leave premises or a part of particular premises, or access means of leaving premises or a part of premises, with the permission of a specified person does not, of itself, mean that the person is not detained.

105 Ibid s 23C(3).

106 *Inclusion Regulations* (n 101) reg 7(2)(b).

does *not* include the situation where a residential care premises that offers services on a 24 hour basis has locked doors and external gates and the person 'does not have such supports as may be reasonably necessary to enable [them] to safely leave the premises at their discretion'.[107] The *Inclusion Regulations* seek to classify this practice as an 'environmental restraint'.[108] This legislative attempt to redefine detention in the NDIS context might be read as an attempt to circumvent the *Guardianship Act* and to reduce the number of section 32 *Guardianship Act* orders. However, it should be read in conjunction with section 23F(3) of the *Inclusion Act*, which denies a derogation, meaning that authorising orders may still be necessary to comply with the *Guardianship Act*.

The *Inclusion Act* does not otherwise regulate detention. Detention thus remains fully regulated under the *Guardianship Act*. This is in line with the common law principle of legality that, given the gravity of detention and the change in rights and liabilities entailed by a detention order, it must be a decision authorised by a court or tribunal or clearly and unambiguously detailed in the law.[109] Regardless of whether the *Inclusion Act* seeks to redefine a form of detention as an environmental restraint, where there is ambiguity, it is arguable that as a result of section 23F(3) of the *Inclusion Act*, a section 32 *Guardianship Act* order must still be obtained.[110]

B Second Bill: Proposed Aged Care Extension

The Inclusion Act Amendment Bill was passed swiftly by both Houses in a period of 11 sitting days. Prior to its passing, one crossbencher, the Hon John Darley, released two media statements highlighting that residents of residential aged care facilities 'also needed strong safeguards'[111] against unauthorised use of restrictive practices, including those that might lead to detention. The media statements reminded the public of the events at SA's Older Persons Mental Health Service at Oakden, which sparked the *Royal Commission into Aged Care Quality and Safety* ('*RCAC*').[112] On the day the Inclusion Act Amendment Bill was passed, Darley asked whether the authorisation scheme would be expanded to cover 'aged care and other vulnerable groups'.[113] In her response, the Minister for Human Services explained that the Government had initially planned a broader Bill to cover all situations when restrictive practices might be applied.[114] This approach

---

107 Ibid reg 7(2)(a).

108 Ibid reg 5(1)(b). The practice would classify as a Level 2 Restrictive Practice, subject to authorisation by the Senior Authorising Officer.

109 See *Public Advocate Case* (n 9) [16], [30], [52] (Kourakis J); *Lacey* (n 27) 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

110 This is also the interpretation taken by SACAT which, in its August 2024 Factsheet, advised the public that 'only SACAT can authorise detention by making a special powers order': South Australian Civil and Administrative Tribunal, 'Special Powers: Applications to SACAT for Special Powers Orders' (Factsheet, August 2024) 2.

111 South Australia, *Parliamentary Debates*, Legislative Council, 27 October 2021, 4684 (John Darley).

112 Ibid. In Australia, Oakden has become a byword for serious systemic failures in social care, particularly the care of older persons with very severe or extreme dementia in closed care units. See Aaron Groves et al, *The Oakden Report* (Report, 20 April 2017).

113 South Australia, *Parliamentary Debates*, Legislative Council, 11 May 2021, 3403 (John Darley).

114 Ibid 3403 (Michelle Lensink, Minister for Human Services).

was not advanced because SA had already fallen behind in aligning its law with the *NDIS Rules* and the urgency to legislate meant that the piecemeal approach had been preferred.[115] She concluded by saying '[i]t's something that's very front of mind for us and is a very large work in progress at this stage'.[116]

Five months later, Darley introduced a private members bill, the Ageing and Adult Safeguarding (Restrictive Practices) Amendment Bill 2021 ('Aged Care Bill'), to effectively expand the authorisation scheme to residents of aged residential care in SA. Darley's Second Reading Speech mentioned that '[d]ementia is the leading cause of disability in older Australians' – but it will normally arise after the age of 65 so that the NDIS is not applicable, and cited evidence received by *RCAC* of excessive and 'inappropriate use' of chemical restraints and physical restraints in residential aged care.[117] Darley pointed out that under that the federal scheme (namely the *Aged Care Act 1997* (Cth)), '[i]t remained for the states to complete the next steps and require an authorisation process to oversee positive behaviour management plans, where restrictive practices are necessary in individual cases'.[118] Like the Inclusion Act Amendment Bill, the Aged Care Bill included a provision providing that it would not derogate from the *Guardianship Act*,[119] but it did not make any separate reference to detention.

The Aged Care Bill was passed in the Upper House with the assistance of the Opposition, but it failed to progress in the government-dominated Lower House. On behalf of the Government, the Minister for Health and Wellbeing explained that the Attorney-General's Department was 'undertaking a project to assess and develop a uniform approach to the regulation and authorisation of restrictive practices in South Australia across all settings – aged care and beyond'.[120] Yet, without progress, and given the failure of the Aged Care Bill to expand the authorisation scheme, older persons living in care facilities continue to enjoy a lower level of protection via oversight than NDIS participants, contrary to *RCAC* Recommendation 17, which specified that 'restrictive practices are to be prohibited unless recommended by an independent expert … or … in an emergency, to avert the risk of immediate physical harm'.[121] Moreover, *RCAC* recommended that 'any breach of the statutory requirements should expose the approved provider to a civil penalty at the suit of the regulator'.[122] In making this Recommendation, *RCAC* underlined 'the overall principle that people receiving aged care should be equally protected from restrictive practices as other members of the community.'[123]

115 Ibid.
116 Ibid.
117 South Australia, *Parliamentary Debates*, Legislative Council, 27 October 2021, 4683 (John Darley).
118 Ibid 4684 (John Darley).
119 Ageing and Adult Safeguarding (Restrictive Practices) Amendment Bill 2021 (SA) s 37G(2).
120 South Australia, *Parliamentary Debates*, Legislative Council, 17 November 2021, 4911 (Stephen Wade, Minister for Health and Wellbeing).
121 *Royal Commission into Aged Care Quality and Safety* (Final Report, 1 March 2021) vol 1, 221.
122 Ibid vol 1, 222.
123 Ibid vol 1, 221.

However, even a detailed review of SA's *Ageing and Adult Safeguarding Act 1995* (SA) in 2022 did not include consideration of detention or authorisation.[124]

All in all, SA appears reluctant to legislate in the area of aged care, presumably so as not to assume any direct responsibility in this care setting and possibly also because the federal government is in the process of changing the legal landscape via the new *Aged Care Act 2024* (Cth) ('*2024 Aged Care Act*').[125] A survey of other sub-national jurisdictions indicates that this reluctance is not confined to SA.[126] Moreover, while there have been calls for a national approach to detention in relation to guardianship,[127] the newly adopted federal *2024 Aged Care Act* does not intend to reach this far, despite its constitutional reliance on Australian's obligations under ratified human rights treaties.[128] The complexity of Australia's various legislative schemes for social care thus appears enduring, despite a Senate Committee describing it as creating 'an environment for abuse'.[129] Its report noted that the problem of de facto detention and the prevalence of indefinite detention in social care settings have been 'well-known to states and territories, and the Commonwealth, for some time'.[130]

In sum, notwithstanding recognition for the need for such guidance, the SA Parliament did not offer SACAT any direction but left it to the Tribunal to navigate

---

124 The 2022 Review was conducted by the South Australian Law Reform Institute ('SALRI'), a body with close connections to the Attorney-General's Department. In its lengthy report and 46 recommendations, SALRI made no mention of detention or of the need for an authorisation scheme by which to regulate the use of restrictive practices on persons over 65 years of age. This was despite the fact that SA's Adult Safeguarding Unit had been established with the intention to '"fill the gaps" … in the protection of vulnerable adults, notably in relation to elder abuse'. See South Australian Law Reform Institute, *'Autonomy and Safeguarding Are Not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)* (Report No 17, September 2022) xii.

125 See *Aged Care Act 2024* (Cth) ('*2024 Aged Care Act*').

126 Since the NDIS was created in 2013, no jurisdiction has enacted legislation that covers older persons in residential care. For example, Victoria's coverage of all persons with disabilities via its *Disability Act 2006* (Vic) ('*Vic Disability Act*') is a legacy of it being a pre-NDIS law. Section 3(1) of the *Vic Disability Act* indicates that the legislation continues to cover all persons with disabilities which means it includes those persons accessing state funded disability services and persons under the Commonwealth's Disability Support for Older Australians program. In terms of legislation enacted after 2013, the *Senior Practitioner Act 2018* (ACT) is very broad in its regulation of restrictive practices, but it exempts prisons, hospitals and nursing homes (unless the resident is under the NDIS): at s 8(1). Only the newly adopted *Aged Care Restrictive Practices Substitute Decision-Maker Act 2024* (Vic) deals explicitly with detention in aged care, but it specifies who can consent to restrictive practices on behalf of an older person, rather than introduce an authorisation scheme.

127 See, eg, 'Transcript of Roundtable: Best Practice Models of Guardianship' (Transcript, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 1 June 2022) 52 ('Royal Commission Roundtable').

128 Section 5(a) of the *2024 Aged Care Act* (n 125) explains that the legislation gives effect to Australia's obligations under the *CRPD* (n 30) and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), thus indicating that the federal Parliament intends to legislate at least in part under the external affairs power, section 51(xxix) of the *Constitution*. For commentary on earlier proposals vis-a-vis human rights, including that of detention, see Anita MacKay, Laura Grenfell and Julie Debeljak, 'A New Aged Care Act for Australia? Examining the Royal Commission's Proposal for Human Rights Inclusive Legislation' (2023) 46(3) *University of New South Wales Law Journal* 836 <https://doi.org/10.53637/ZMED8094>.

129 *Indefinite Detention* (n 15) 154 [8.8].

130 Ibid 169 [8.72].

through the issues raised by section 32 of the *Guardianship Act* in conjunction with tort law and restrictive practices regimes. This solution may seem expedient, but it does not factor in the increased workload for a tribunal fielding applications from concerned guardians and providers, or that SACAT's decisions on detention have a spillover effect into the civil jurisdiction via the tort of false imprisonment. These problems become apparent in Part IV(A), which analyses SACAT's most recent landmark case on social care detention.

IV SACAT'S NARROWING OF DETENTION

Whilst the SA Parliament continued to drag its feet on a response to the *Public Advocate Case*, and the regulation of detention and restrictive practices more broadly, the federal Parliament introduced mandatory behaviour support plans ('BSP') for NDIS participants in 2020, and for aged care residents in 2021.[131] A BSP is required if restrictive practices are contemplated, including where such practices contain elements of detention. Non-compliant providers risk sanctions or even loss of accreditation.[132] Importantly, a valid BSP requires that all relevant state/territory authorisations have been obtained.[133] For SA, this means that appropriate guardianship orders with any necessary special powers need to be in place. Within a context still characterised by legal uncertainty after the *Public Advocate Case* – and ultimately also a pandemic – a significant increase in guardianship orders arose.

Although SACAT does not maintain disaggregated data for appointments of guardians and administrators,[134] the years since 2019 have not seen real changes to the administration regime and it is therefore likely that increases in applications would have been principally in the field of guardianship.[135] This makes it salient that prior to the *Public Advocate Case*, applications for appointment of guardians hovered around 450 per quarter, with 1,813 applications for the 2017–18 financial year.[136] This jumped to 3,305 for 2018–19, and by the 2022–23 financial year had reached 5,086. New applications for existing cases (which may have been made to 'top up' with special powers) increased from 1,334 in 2017–18 to 3,832 in

131 See respectively the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) ('*NDIS Rules*'), which entered into force in 2020, and the *Quality of Care Principles 2014* (Cth) pt 4A div 5 ('*Care Principles*'), which entered into force in 2021. The latter is a subsidiary instrument to the *1997 Aged Care Act* (n 10).

132 Compliance with restrictive practices and behaviour support rules is notably a NDIS Compliance Priority for 2023–24. See for policy and priorities 'Compliance and Enforcement', *NDIS Quality and Safeguards Commission* (Web Page, 26 October 2023) <https://www.ndiscommission.gov.au/about/compliance-and-enforcement/our-compliance-and-enforcement-approach>.

133 *NDIS Rules* (n 131) rr 9, 20(2); *Care Principles* (n 131) s 15FA(1)(j).

134 The former are charged with aspects of life and the latter with the finances of persons deemed to lack decision-making capacity in either area.

135 The lack of disaggregated data is a serious hindrance to the conduct of research and means that the statements here made should be understood as containing high levels of uncertainty.

136 'Our Service Data', *South Australian Civil and Administrative Tribunal* (Web Page) <https://www.sacat.sa.gov.au/about-sacat/publications-and-resources/our-service-data>.

2022–23.[137] Again, it was left to SACAT to respond, which it did by narrowing the scope of detention. However, whilst this narrowing reduced the need for future *Guardianship Act* applications, it is not certain that either providers or protected persons will be truly aided by this development, which risks liability for providers and interference with fundamental rights for protected persons.

A *Re LOR*

The case of *Re LOR*[138] was presided over by two Members: Hughes P and Senior Member Lester. The general playing field was unlike *Re KF*, where, despite the significance of setting out the interaction between various key acts, none of the parties were represented and the Tribunal only obtained evidence from the provider's disability services coordinator, its specialist development educator/behaviour support practitioner and a parent of each protected person (the proposed guardian).[139] By contrast, in *Re LOR*, all parties (the Public Advocate as applicant guardian, the care providers and the protected persons) were represented and the Tribunal decided to appoint a contradictor to the Public Advocate's position to 'assist it to reach the correct or preferable decision'.[140] Critically, the protected persons themselves were deemed unable to participate in the proceedings.[141] There is no indication of persons having been heard or providing evidence beyond employees or representatives of the Public Advocate as appointed guardian, one of the providers (the second elected not to be heard or make submissions), the representative of the protected person and the contradictor. This may have limited the available evidence for SACAT to base its decision on.[142] By contrast, this was the first case where it is likely that SA care providers had a formulated litigation strategy, as the action was less 'on the run' than the *Public Advocate Case* and *Re KF*.[143] Additionally, SACAT would have had more time to reflect on the implications of previous cases.

Like *Re KF*, *Re LOR* involved three joint cases concerning protected persons in different situations. The first protected person, LOR, lived in a facility with an unlocked door, but with video surveillance in all common areas.[144] The evidence was that LOR was capable of indicating that he wanted to go outside and these requests were adhered to (at least, SACAT found that 'the evidence does not support the conclusion' that they were not).[145] Since LOR could '[not] go outside without

137 Ibid.
138 [2023] SACAT 59 ('*Re LOR*').
139 *Re KF* (n 71) Attachment 1 [4], Attachment 2 [4], Attachment 3 [4] (Executive Senior Member Rugless).
140 *Re LOR* (n 138) [36]–[41] (Hughes P and Senior Member Lester). This became especially relevant as a consensus arose between the Public Advocate, care providers' and protected persons' legal representatives on the absence of a need for special authorising orders: at [42].
141 Ibid [36].
142 It is beyond the scope of this article to consider in any depth the implications of this silence.
143 This strategy may have coalesced with that of the South Australian Public Advocate, Anne Gale, who called for a reconsideration of how detention should be interpreted as well as some national consistency. See 'Royal Commission Roundtable' (n 127) 52.
144 *Re LOR* (n 138) [81] (Hughes P and Senior Member Lester).
145 Ibid [83].

assistance … there has been no need to prevent him from leaving'.[146] LOR was unable to self-mobilise and spent his time in a tilt-in-space wheelchair. Although he was allowed to go outside (presumably on the facility's premises), he only received support to access the community two to four hours a day, for four days a week.[147] No information was provided on what would happen if LOR wished to leave facility premises to access the community beyond these moments, though it would not be far-fetched to presume that such wishes would not (normally) be acted upon. The second protected person, ONO, lived in the same accommodation as LOR in a mostly similar situation.[148] She was also incapable of self-mobilisation and her wheelchair had to be moved manually. Again, the Tribunal found no evidence that 'expressions of a desire to move' were or would be refused,[149] and noted that ONO's happy disposition and physical incapability meant she would not be acting in ways to create risk to her safety.[150] No information was provided on leaving the premises for outings, though the regime may have been similar to that for LOR.

The third protected person, SGN, lived in accommodation of a different provider. This accommodation, a supported independent living arrangement referred to as a house, was not specifically locked beyond that expected in daily life (eg, at night), and SGN had the ability to unlock it.[151] Unlike LOR and ONO, SGN's mobility was not restricted, and she was able to leave the facility on her own. However, because she had no sense of danger, she was considered very vulnerable if she left the house alone and a staff member would therefore accompany her.[152] SGN allegedly 'would not try to leave the premises without her support workers',[153] although there was also evidence that she did leave on occasion.[154] In such circumstances, if SGN 'tried to leave the accommodation, for example to go out onto the road or go for a walk, she would be supported to do so [but if] a staff member was not available, [SGN] would either be redirected or staff assistance would be sought from the affiliated SIL property next door'.[155] This meant that '[her] wishes to move from A to B are *usually* acceded to'.[156] There had also been instances where SGN had been distressed when in a car, and had to be prevented from trying to abscond (though this last happened some years prior to the proceedings).[157]

146 Ibid.
147 Ibid [81].
148 Ibid [86].
149 Ibid [88].
150 Ibid [90].
151 Ibid [94].
152 Ibid [94], [99].
153 Ibid [94].
154 Ibid [94]–[98].
155 Ibid [94]. It is not entirely clear from the way the decision is written whether this had already happened, or whether this is what would happen, should SGN try to leave. However, the later comment that SGN's wishes are usually (but not always) acceded to suggests that the comment is based on previous experience.
156 Ibid [96] (emphasis added).
157 Ibid [98].

At first instance, a section 32 authorisation order for detention had been made (or prolonged) for each protected person by various individual SACAT Members.[158] These decisions were subsequently set aside upon application for internal review by the Public Advocate who sought revocation of the special powers orders. In the joint case SACAT found that there was no need for a section 32(1)(b) order authorising detention in any of the cases.[159] This was in part due to SACAT's interpretation of the *Guardianship Act*, and in part to its definition of detention.

Notably, SACAT clarified that detention orders under the *Guardianship Act* do not exist in isolation.[160] Instead, residence and detention orders are connected. Under section 32(1)(a), the Tribunal may direct a protected person to reside in a certain place or with a certain person. This is normally done to solve any confusion around accommodation, in cases where the protected person objects, or where there is disagreement with third parties regarding living arrangements.[161] Section 32(1)(b) then states that the Tribunal 'may, by order, authorise the detention of the person in the place in which he or she will *so reside*'.[162] Section 32(1)(c) of the *Guardianship Act* is again a standalone provision and provides the Tribunal with authority to authorise reasonably necessary force to ensure the person's 'proper medical or dental treatment, day-to-day care and well-being'. Due to the addition of 'so resides' in the detention provision, on a normal interpretation of the *Guardianship Act*, the detention of the person is linked with an order for them to reside in the place determined by a section 32(1)(a) order. SACAT explained:

> It is significant that the authority to detain is not at large and is limited to the place of residence. One of the purposes of a direction under s 32(1)(a) (though not the only purpose) is to supply a defined area in which an authority to detain under s 32(1)(b) shall operate.[163]

As a result, SACAT made clear that detention orders cannot be granted independently under the *Guardianship Act*; an authorising order for detention can only be made in respect of the protected person's directed accommodation, and not some other place or space. In taking this approach that links detention and residence, SACAT agreed with the Public Advocate's argument that for each protected person 'accommodation was long-standing and permanent',[164] and it would be possible for consensual arrangements to be made.[165] This led SACAT to accept the Public Advocate's further submission that section 32(1)(a) directed accommodation orders would no longer be required, as such orders '[are] not usually made for uncontentious arrangements'.[166] As a necessary consequence of

158 Ibid [14], [22], [27].
159 Ibid [85], [92], [103].
160 Ibid [48]–[55].
161 Ibid [50]–[51].
162 *Guardianship Act* (n 10) s 32(1)(b) (emphasis added).
163 *Re LOR* (n 138) [51] (Hughes P and Senior Member Lester).
164 Ibid [106].
165 Ibid.
166 Ibid [50].

the removal of residence direction orders, there was subsequently no longer a basis for section 32(1)(b) orders authorising detention in this place of residence.[167]

Furthermore, the Tribunal highlighted that the *Guardianship Act* requires it to adopt the least restrictive order in respect of a protected person, and orders under section 32(1) (accommodation, detention, force) can only be made if the health or safety of the protected person or that of others would be 'seriously at risk' without the authorising order.[168] Seriousness is based on 'likelihood of a risk' and 'magnitude of the consequences' if it eventuated.[169] Here, SACAT found that:

> [W]hilst it cannot be said that there are no circumstances in which it can be envisaged that authority to detain might be acted upon in respect of any of the three protected persons, and perhaps more particularly in relation to SGN, it also cannot be established that detention is reasonably foreseeably needed for any of them.[170]

It is important to stress at this point that this decision meant that LOR, ONO and SGN could therefore not be detained at all (and SGN's wishes to leave, for example, would always need to be honoured).[171] This is because absent authorising orders there would be no lawful justification for detention, even if the need to retain the protected persons were to arise at some point in the future. That is, any future detention without a common law defence would be illegal.

SACAT also considered the meaning of detention within the context of disability care in a way to (potentially) limit its scope. To do this, it adopted, as a starting point, many of the general tort law principles: the rules around a defined space, albeit that the 'defined space' would consist of the accommodation; the actions of the person restraining being the determining factor; it not being determinative that the detained person is unaware of the detention, or that they do not or cannot resist or consent to the detention; it not being necessary for the person to have the 'physical ability to act independently on a desire to exercise liberty to move';[172] and the possibility that detention arises even if the person does not resist or try to escape, notably where acquiescence is based on known consequences of opposing.[173] The limitation would need to be complete (ie, without reasonable escape), but need not be enduring.[174]

However, SACAT subsequently added a new imperative proposed by the Public Advocate: that there may be matters that should not count as detention, because they are instances of care.[175] Although the Tribunal sided with the contradictor

---

167 Ibid [106]. This contrasts with the approach taken in, for example, NSW, where the NSW Civil and Administrative Tribunal has been alive to the nature of false imprisonment as a tort of strict liability and the need for orders as both lawful justification and a means to ensure the least restriction on liberty. See, eg, *Re SZH* (n 12) [138]–[160] (Principal Member Fougere, Dr Jamieson and Prof Foreman); *Re SHG* [2024] NSWCATGD 2.

168 *Guardianship Act* (n 10) s 32(2); *Re LOR* (n 138) [52] (Hughes P and Senior Member Lester).

169 *Re LOR* (n 138) [53] (Hughes P and Senior Member Lester).

170 Ibid [103].

171 Though this does not mean that staff would need to be made available to go anywhere with SGN. Rather, SGN had a right to leave independently.

172 *Re LOR* (n 138) [72] (Hughes P and Senior Member Lester).

173 Ibid [68]–[74].

174 Ibid [75].

175 Ibid [60]–[63].

on finding that 'the extent of assistance that [could] be taken from' the authority proposed for this new rule, *South Australia v Lampard-Trevorrow* ('*Lampard-Trevorrow*'),[176] was 'limited' since it concerned parental care of children and not guardianship over adults.[177] SACAT appeared willing to adopt care by guardians or service providers as a limitation on detention as a general principle in guardianship cases. The question, according to the Tribunal, is 'whether the person restricting another's freedom of movement is undertaking an act that may merely be an incident of care and not properly characterised as detention'.[178] This is a question of fact and requires 'an assessment of all the circumstances of the protected person and of the care arrangements' that

> will necessarily entail consideration of the protected person's expressed wishes to exercise liberty, and their other physical conditions affecting their ability to act on their own wishes. It will also necessarily entail an assessment of the guardian's or carer's approach to the protected person's wishes and whether those wishes are acceded to or thwarted and how that is effected. It may entail a consideration of the nature of the care and control being effected arising from the relationship between the two persons.[179]

Accordingly, SACAT held that two questions, one related to the establishment of an otherwise prohibited restriction and one related to the exception of care, 'must be asked in relation to each of the protected persons':

> (a) Does the evidence before the Tribunal support a finding that the freedom of movement of any of the protected persons is any of them [sic] has been wholly restricted by the actions of those responsible for the person's care?
> (b) If yes, does the evidence support a conclusion that the restriction, by it [sic] circumstances, amounts to detention or is it an incident of care arising from the relationship of guardian and protected person?[180]

As SACAT answered the first question in the negative, it was not necessary 'to explore further the point or points at which lawful incidents of care, and detention, meet' under the second question.[181]

In *Re LOR,* SACAT thus placed a limitation on what counts as detention via the notion of instances of care, which do not historically form part of detention considerations. In doing so, the Tribunal pushed the notion of detention part way out of social care settings, thereby signalling a potential return to the position that detention is not to be associated with social care in Australia. Moreover, when considering its questions, it appears that SACAT will take matters into account that are explicitly excluded under tort law, such as expression of wishes, and the person's physical condition or ability to act on their wishes. There may thus be a growing divergence between the *Guardianship Act* and torts jurisprudence, as further commented on below.

176 (2010) 106 SASR 331 ('*Lampard-Trevorrow*').
177 *Re LOR* (n 138) [76] (Hughes P and Senior Member Lester).
178 Ibid.
179 Ibid [77].
180 Ibid [78].
181 Ibid [76].

V TORTS PERSPECTIVE ON DETENTION IN CARE

The *Public Advocate Case* and the developments that have followed it raise some important issues from a torts perspective, pointing to significantly increased liability for care providers and an uncertain situation for protected persons. It is in this respect important to recognise that tort law works with general principles that are applicable to everyone (bar children),[182] and that social care detention is not a separate area of torts. As mentioned in the introduction, tort law is also increasingly employed in Australia to protect human rights in the absence of a human rights charter, as its concepts often speak to fundamental values or rights.[183] This notion was reiterated in the *Public Advocate Case*, where the Court quoted the lower court on the ability of tort law to provide protection for 'the most important fundamental rights':

> Fundamental assumptions deeply embedded in the foundational structure and rules of the common law recognise that certain rights and freedoms are not to be infringed except by clear lawful authority. Some of the most important fundamental rights are the rights to enjoy personal liberty, freedom of movement and privacy (at least in the sense of freedom from invasive searches).[184]

With that in mind, some SA developments are problematic, either from the perspective of guardians and facilities seeking to provide care in good faith, or the perspective of protected persons who stand to lose important means of protection of their rights and liberty. These issues can be divided into the 'residence-detention link', and the definition of detention. Both can be discerned in the SACAT cases that followed the *Public Advocate Case* and subsequent legislative inaction.

A 'Residence-Detention' Link

The first issue arising from recent decisions is the possibility to obtain detention orders at all, now that SACAT has expressly limited section 32(1)(b) of the *Guardianship Act* to the protected person's place of residence, and made it clear that residence orders will only be granted sparingly, notably in case of existing conflict.[185] As a result of the residence-detention link, it is now impossible for guardians to obtain the 'lawful justification' (via section 32(1)(b) authorising orders) that averts false imprisonment for any detention outside the scope of the protected person's residence. This means that any potentially warranted detention during outings, social activities, day programmes or other pursuits out-of-doors cannot (or can no longer) be authorised by a *Guardianship Act* detention order. For example, use of a seatbelt lock aimed at preventing someone from leaving a car can no longer be authorised, because vehicle transport happens outside the residence.[186] However, without detention orders, the use of such a lock where it

182 See *McHale v Watson* (1966) 115 CLR 199 ('*McHale v Watson*').

183 See Joseph and Kyriakakis (n 21) 46.

184 *Public Advocate Case* (n 9) 362 [30] (Kourakis CJ), quoting *BC v Public Advocate* [2018] SASC 193, [29] (Stanley J).

185 See above nn 160–7 and accompanying text.

186 Notably, the NDIS does not regard seat belt locks or seat belt guards as restrictive practices when applied during transport due to the legal requirement to wear a seatbelt in a moving vehicle: NDIS Quality and

impedes the ability to exit the vehicle becomes false imprisonment if no other justifications or defences can be relied upon.[187] The same would be true for, for example, social activities in closed venues other than the residence, or supervised outings that amount to constructive detention. It is in this respect noteworthy that relevant authorisation also cannot be obtained for NDIS participants under the Senior Authorising Officer Scheme, because this scheme excludes relevant forms of detention.[188] Furthermore, although *Re KF* applies the rules on medical consent to numerous restrictive practices for those under guardianship outside the residence (meaning that a guardian can consent to them as a person responsible, providing lawful authorisation for the *treatment*), such general powers of consent cannot provide a lawful justification where the proposed practice leads to a *detention* under tort.[189]

One reading of the *Guardianship Act* could be that authorising orders may instead be derived from section 32(1)(c), which states that the Tribunal can 'authorise the persons from time to time involved in the care of the [protected] person to use such force as may be reasonably necessary for the purpose of ensuring the proper medical or dental treatment, day-to-day care and well-being of the person'. Whilst seemingly capable of capturing some situations of detention outside the residence, there are two key hurdles to this reading. The first relates to the general rules of interpretation: section 32(1)(c) does not mention detention, whereas section 32(1)(b) does. This suggests that section 32(1)(c) was probably not meant as a detention provision, or otherwise the term would have been used.[190] The second hurdle relates to words section 32(1)(c) *does* use: to 'use … force'. As noted above, in the *Public Advocate Case* the Court emphasised the general rule of tort law that false imprisonment does not require any use of force.[191] If a person willingly puts up with a seatbelt lock they cannot open or complies with a constructive detention because they like being around their carers, that person is still detained, and without lawful justification falsely imprisoned. As case law suggests, there is no requirement that the protected person be aware that they are detained.[192] The need for force more generally sits ill with constructive detention, where a person submits because non-compliance will lead to intervention, even if

---

Safeguards Commission, *Restrictive Practice Guide: Safe Transportation* (Report, February 2023). In *Re KF*, Executive Senior Member Rugless disagreed with this finding and described a seat belt lock as a restrictive practice, but one to which a guardian without special powers can agree: *Re KF* (n 71) Attachment 3 [18].

187 See *Zanker v Vartzokas* (1988) 34 A Crim R 11 on false imprisonment inside a moving car from which the person could not reasonably escape.

188 *Inclusion Act* (n 10) s 23C, pt 6A div 4; Department of Human Services (SA), *Restrictive Practices Guidelines* (Report, 6 January 2022).

189 *Re KF* (n 71) [136] (Executive Senior Member Rugless). See also *Public Advocate Case* (n 9) 367 [56] (Kourakis CJ).

190 See Jeffrey Barnes, 'Contextualism: "The Modern Approach to Statutory Interpretation"' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1091–4 <https://doi.org/10.53637/PRVR3704>.

191 *Public Advocate Case* (n 9) 370–1 [70]–[72] (Kourakis CJ).

192 Ibid 370 [67], citing *Meering* (n 51) 51 (Duke LJ). See also *Re LOR* (n 138) [71] (Hughes P and Senior Member Lester) with reference to obiter statements in *Lampard-Trevorrow* (n 176) 394 [299] (Doyle CJ, Duggan and White JJ).

force may be implied in the intervention itself (for example, holding on to a person trying to 'escape').[193] In these cases, the detention happens well before any force may be applied, because it is caused by the prior understanding of an intervention following non-compliance.

In cases where force is not applied, this seemingly leaves only one other option:[194] the common law defence of necessity. Necessity allows for a lawful detention where such detention is a reasonable response to a situation of imminent peril (danger or harm), or in today's parlance, an emergency.[195] Although there were some (unanswered) questions raised around emergency situations in the *Public Advocate Case*,[196] necessity is a well-established defence to trespass torts. The defence, however, comes with strict requirements: amongst others, the act must be truly necessary and not merely convenient,[197] and there must be an urgent situation of imminent peril, not an ongoing situation (which would not be an emergency).[198] Most forms of social care detention outside the residence would therefore not qualify as such, because they are generally preventative in respect of harms that may be foreseen but are not imminent. For example, if a protected person opened the door of a driving car in order to get out, and their carer intervened at that moment, necessity would apply. Conversely, applying a seatbelt lock for every car trip is not a matter of necessity. In most situations, the defence would not apply.

Ultimately, the residence-detention link has two important implications: bar the limited cases covered by prior obtained section 32(1)(c) orders authorising force, the defence of necessity, or any specifically legislated exceptions, it is no longer possible to obtain lawful justification for detention of persons under guardianship outside the residence. Secondly, any guardians or providers who detain a protected person outside the residence without the presence of an emergency (necessity),

193 See above nn 55–63 and accompanying text. *Re LOR* (n 138) [74] (Hughes P and Senior Member Lester).

194 It is possible to envisage an argument stating that the exclusion of situations from the definition of detention under regulations 7(1)(a) and (b) of the *Diversity Inclusion (Restrictive Practices – NDIS) Regulations 2021* (SA) thereby provides lawful justification for these matters. Currently, these are restraint up to two hours in an emergency (where the length is greater than that ordinarily required) and the locking of doors where persons do not have the physical means to leave. Yet, it is salient that SACAT did not rely on the provision in *Re LOR* (n 138) which came close to the second situation, and it is likely that the mere exclusion 'for the purposes of' the *Inclusion Act*'s authorisation scheme is not a clear enough expression of lawful justification to limit rights under the principle of legality. In any case, the *Inclusion Act* provisions only apply to NDIS participants and not, eg, to aged care: *Inclusion Act* (n 10) s 23A(3).

195 *Illert v Northern Adelaide Local Health Network Inc (Modbury Hospital)* [2016] SASC 186 [38]–[70] (Hinton J) ('*Illert*'); *New South Wales v Riley* (2003) 57 NSWLR 496, 513–16 [75]–[85] (Hodgson JA). The term 'emergency' has been adopted in the *Consent Act* (n 28) and was employed by the Court in the *Public Advocate Case* (n 9). Though, historically, as noted in the English case of *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, a distinction between emergency as the cause, and necessity as the defence has been made.

196 *Public Advocate Case* (n 9) 372 [73] (Kourakis CJ).

197 *Murray v McMurchy* [1949] 2 DLR 442 (British Columbia Supreme Court). Whilst Canadian, this case is widely considered persuasive law in Australia. See, eg, Sam Boyle and Nikola Stepanov, 'Providing Emergency Medical Care without Consent: How the "Emergency Principle" in Australian Law Protects against Claims of Trespass' (2021) 33(3) *Emergency Medicine Australasia* 575, 575–6 <https://doi.org/10.1111/1742-6723.13772>.

198 *Illert* (n 195) [38]–[70] (Hinton J), citing *Southwark London Borough Council v Williams* [1971] Ch 734; *New South Wales v McMaster* (2015) 91 NSWLR 666.

or other legislative authorisation are liable to charges of false imprisonment and accompanying compensation claims.[199]

B Definition of Detention

The second issue arising from the SACAT cases is the definition of detention. It is in that respect important to remember that SACAT and the civil jurisdiction operate independently, and the civil courts are under no obligation to adopt SACAT's increasingly limited definition of detention. Through its decisions, the Tribunal has reduced the need for orders in the guardianship jurisdiction, but this may jeopardise the fundamental rights tort law seeks to protect, and leave guardians and providers exposed in the civil jurisdiction when facing a false imprisonment suit. Two issues arise here: a more general limited understanding of the scope of detention, and the proposed care-exception to detention.

In respect of the more general understanding of detention, apparent inconsistency appears to be arising between the scope, duration and requirements of detention in guardianship versus tort law. In respect of scope, we have commented elsewhere on the seemingly restricted scope of actions that can lead to detention under guardianship, when compared with torts.[200] For example, under tort law, sedation to the point of unconsciousness or immobility would classify as detention sufficient to cause false imprisonment.[201] Yet in *Re KF*, SACAT deemed chemical restraint a 'less intrusive' restriction capable of consent by a person responsible.[202] Although tort law may acknowledge the consent to treatment (thereby avoiding battery), this would not excuse the detention caused by the same. Tort law also recognises constant supervision with an inability to leave as a form of detention, notably within the context of constructive detention.[203] For example, the Court in the *Public Advocate Case* suggested that even on his outings Mr C was detained, because it was conveyed that he had to remain with the persons supervising him and return to the facility, without the freedom to leave this arrangement.[204] This aligns with the key case on social care detention in the UK, *Cheshire West*, in which the UK Supreme Court found that there would be a deprivation of liberty if a person were under continuous supervision and control, and not free to leave.[205] In Australia, the *Disability Act 2006* (Vic) states explicitly that to 'detain … includes … constantly

199 Erlings (n 41) 119; Mark A Robinson, 'Damages in False Imprisonment Matters' (Paper, NSW Legal Aid Commission Seminar, 22 February 2008).

200 Erlings and Grenfell (n 78) 24–5.

201 See *Herron v HarperCollins Publishers Australia Pty Ltd (No 3)* [2020] FCA 1687, [550]–[567], [647]–[651] (Jagot J), citing *Hart v Herron* [1984] Aust Torts Reports ¶80–201, 67, 810.

202 *Re KF* (n 71) [77] (Executive Senior Member Rugless).

203 *Public Advocate Case* (n 9) 371 [72] (Kourakis CJ); *Symes* (n 62) 449, 453 (Murray CJ) (in this case the supervision was indirect, as the two people involved even travelled in separate train compartments). See also *Indefinite Detention* (n 15) 167, quoting Global Action on Personhood, Submission No 26 to Senate Standing Committee on Community Affairs, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* which quotes previous policy of the South Australian Office of the Public Advocate defining detention to include 'constant supervision and escorting of a person': at 1.

204 *Public Advocate Case* (n 9) 371 [72] (Kourakis CJ).

205 *Cheshire West* (n 1) 920 [49] (Baroness Hale DPSC). A deprivation of liberty is the human rights equivalent of false imprisonment.

supervising and escorting a person to prevent the person from exercising freedom of movement'.[206] By contrast, SACAT found that the protected persons in *Re LOR*, who were subject to surveillance via cameras and constant supervision, were not detained. This was so even in the case of SGN whose wishes to leave the premises could in any case not always be accommodated due to staffing limitations.[207]

It is important to remember that false imprisonment is not a matter of relativity or reasonableness: *any* infringement of right is too much, given the importance of individual liberty under the common law.[208] The protected rights apply equally to persons with disabilities and/or reduced legal capacity.[209] Non-relativity also means that no distinction can be made in terms of time or duration, so that protected persons asked to wait a little before given their liberty are falsely imprisoned from a torts perspective.[210] In the case of *New South Wales v Le*, a detention of only seconds was found capable of amounting to false imprisonment in the absence of lawful justification.[211] This is because tort rules apply generally and to everyone. In an alternative context of trying to fight off a hostage taker, even 20 seconds would feel like an eternity!

In the determination of detention in *Re LOR*, SACAT notably placed emphasis on the expressed wishes of the protected person,[212] finding no detention because requests to go outside were on the evidence adhered to.[213] From a torts perspective, this consideration would be irrelevant: if a person does not even need to be aware that they are detained, it is not hard to see that asking them to express a wish to go anywhere cannot be a requirement of the regime, and consequently cannot speak to whether or not a person is detained (it would, instead, have an impact on the amount of damages to be obtained in compensation).[214] The generalisability of tort rules further implies that tort law is 'blind' to matters such as inexperience, incapacity or physical inability,[215] which must be disregarded for the question of detention. It is on this point that the references to protected persons' physical immobility jar significantly with the tort rules for detention and false imprisonment, including as

206 *Vic Disability Act* (n 126) s 3(1).

207 *Re LOR* (n 138) [94]–[96] (Hughes P and Senior Member Lester).

208 *White v SA* (n 42) 590 [420] (Anderson J); *Trobridge* (n 24) 152 (Fullagar J).

209 *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218 ('*Marion's Case*').

210 Whilst not included in the judgment, this was a matter discussed the case of *Re LOR* (n 138).

211 *New South Wales v Le* [2017] NSWCA 290, [9] (Basten, Leeming and Payne JJA) ('*Le Court of Appeal*'). The lower court had found false imprisonment (*Le v New South Wales* (2017) 24 DCLR(NSW) 180) which was overturned on appeal only because the Court of Appeal ruled that a lawful justification was present: *Le Court of Appeal* (n 211) [23] (Basten, Leeming and Payne JJA).

212 The Tribunal here considered expressed wishes for the determination of detention in ways contrary to tort law. This is different from the obligation SACAT is under to consider the person's wishes when making decisions for them under section 5(b) of the *Guardianship Act* (n 10).

213 *Re LOR* (n 138) [77], [83], [90], [96] (Hughes P, Senior Member Lester).

214 By contrast, tort law recognises that, if a person deliberately stays in a particular place for their own purposes there is no false imprisonment even if objective restrictions have been put in place, as long as there is a means of egress. See *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250, 275–8 [90]–[113] (Warren CJ, Nettle and Redlich JJA) ('*McFadzean*') (logging protesters deliberately stayed in their camp – although loggers were obstructing the main route out, the protesters could have left via the forest).

215 *McHale v Watson* (n 182); *Morriss v Marsden* [1952] 1 All ER 925 ('*Morriss*').

identified by the Tribunal itself. In *Re LOR*, SACAT reiterated the longstanding rule that '[t]he physical ability to act independently on a desire to exercise liberty to move is not necessary'.[216] However, it then noted in respect of the two protected persons in wheelchairs that there was no need for detention orders because: (1) since LOR could '[not] go outside without assistance … there [had] been no need to prevent him from leaving';[217] and (2) ONO, '[b]y reason of her [happy] disposition … rarely has wishes that are inconsistent with her own safety … [and] [b]y reason of her physical capability … is physically incapable of acting on her wishes such as creates a risk to her own safety'.[218] From a torts perspective the relevant question is: had the person not been in a wheelchair, but able to freely walk around, would they have been stopped if they had attempted to leave the area in which they were expected to stay? The answer to that question would turn on the facts, but the evidence suggested that the protected persons in *Re LOR* could not always leave the premises.[219] If physical inability were accepted, the prospect of abuse would be significant. For example, a person capable of operating an electric wheelchair may simply be given a manually pushed one and then told that they are not detained because they are physically incapable of wheeling themselves out of the building.[220]

Amidst the matter of physical ability and the other issues mentioned above, a gap is growing between SACAT's delimitation of detention for which the Tribunal is willing to provide authorising orders, and the general rules of tort law where such orders are necessary as lawful justification to prevent a claim of false imprisonment. This gap may widen even further if the care exception becomes established. Under the care exception proposed in *Re LOR*, there would not be a detention for the purposes of guardianship if a restriction of movement can be characterised as an 'incident of care arising from the relationship of guardian and protected person'.[221] The exception turns on two things that cannot currently play a role under tort law. First, regarding consideration of the suggested facts to determine that there is an instance of care and not detention, it is proposed that considerations including wishes, physical ability and motivations of the carer play a role.[222] However, as noted above (and also true for motivations),[223] these matters have long been established as incapable of playing a role in tort law.

---

216 *Re LOR* (n 138) [72] (Hughes P and Senior Member Lester), citing *Lampard-Trevorrow* (n 176) 394 [297] (Doyle CJ, Duggan and White JJ). See also at 392 [289].

217 *Re LOR* (n 138) [83] (Hughes P and Senior Member Lester).

218 Ibid [90].

219 See above nn 138–57 and accompanying text.

220 Note that the definition of detention under the *Inclusion Act* includes the limitation of access to mobility means without which the person cannot reasonably leave, such as a wheelchair: *Inclusion Act* (n 10) s 23C(1)(c). However, this is not to say that someone should be provided with these means if they do not already have them.

221 *Re LOR* (n 138) [78] (Hughes P and Senior Member Lester). As an aside, false imprisonment is not concerned with (positive) freedom of movement, but freedom to leave: *Bird* (n 54) 751 (Patterson J), quoted in *McFadzean* (n 214) 274 [85] (Warren CJ, Nettle and Redlich JJA).

222 *Re LOR* (n 138) [77] (Hughes P and Senior Member Lester).

223 *Marion's Case* (n 209).

The second aspect of the social care exception is the required relationship: the exception arises out of the relationship between a guardian and a protected person, and this relationship exists because of the person's incapacity. Yet, as also noted above, incapacity is not a relevant consideration in tort law.[224] Tort law only makes an exception for children, because the experience of childhood is common to humanity.[225] Incapacity is *legally* regarded as idiosyncratic under tort law. For example, in the UK case of *Morriss v Marsden*, which has since been adopted in Australia,[226] the respondent had attacked the plaintiff during a psychotic episode in a state of accepted incapacity, yet was still held liable for trespass to person because incapacity is irrelevant.[227] In that case, the capacity question arose on the side of the respondent, but it would be both incoherent and unfair if a plaintiff could not benefit from a rule that would be held against them if they were the respondent. In *Lampard-Trevorrow*, the SASCFC held accordingly that 'it should not matter that the victim of the alleged unlawful restraint lacks the mental capacity, permanently or temporarily, to choose to resist the restraint in question'.[228] Attempts to bring in capacity via a care exception would thus need to overcome decades of precedent holding that capacity cannot play a role in trespass torts. It is thus hard to see how the civil courts could embrace the care exception. Crucially, this means that facilities may find themselves between a rock and a hard place: they are incapable of obtaining detention orders from SACAT due to the care exception, but without the orders they do not have the lawful justification needed to escape liability in the civil courts.

In *Re KF* and *Re LOR*, SACAT highlighted the importance of adopting 'the least restrictive order',[229] as is also required under the *Guardianship Act*.[230] Detention orders are considered particularly restrictive, and should be avoided if possible.[231] While there is much truth to this, it is also important not to lose sight of the reality that detention orders exist because sometimes they are considered warranted.[232] Notably, such orders are *permissive*; they act as a security for when detention is unavoidable (as a last resort),[233] not a reason to detain without cause. It may be that, at the end of the day, a seatbelt lock is the lesser of all evils where it allows a protected person to go on outings with their friends. Yet, the practical result of the

224 This is regarded as different from involuntary conduct as, eg, caused by an unexpected epileptic fit: *Carrier v Bonham* [2002] 1 Qd R 474, 486 [32] (McPherson JA) ('*Carrier*'); *Morriss* (n 215).

225 *Lampard-Trevorrow* (n 176) 394 [298] (Doyle CJ, Duggan and White JJ); *McHale v Watson* (n 182). This explains the existence of the care exception for children.

226 *Carrier* (n 224) 485 [30], 486 [32] (McPherson JA).

227 *Morriss* (n 215).

228 *Lampard-Trevorrow* (n 176) 393 [295] (Doyle CJ, Duggan and White JJ). See also *Carrier* (n 224) 485 [30], 486 [32] (McPherson JA).

229 *Re LOR* (n 138) [102]–[103] (Hughes P and Senior Member Lester); *Re KF* (n 71) [19] (Executive Senior Member Rugless).

230 *Guardianship Act* (n 10) s 5(d).

231 *Re LOR* (n 138) [12], [102]–[103] (Hughes P and Senior Member Lester).

232 Views diverge on this matter. The *CRPD* rejects all detention where the underlying basis is disability: *CRPD* (n 30) art 14. However, this is not the case for other human rights frameworks, even if disability per se cannot be the sole consideration. Within Australia, the latter approach is prevalent and illustrated by the case of *NLA (Guardianship)* [2015] VCAT 1104, decided under the framework of the Victorian Human Rights Charter.

233 This aligns with the legal framework for BSPs. See above nn 131–3 and accompanying text.

residence-detention link and limitation of the definition of detention is that it may now not always be possible for guardians and providers to obtain the orders needed to avoid liability for false imprisonment due to lack of lawful justification, even where they act in good faith.

From the perspective of the protected person, the emphasis on reducing detention orders is at first sight very welcome. Ideally, all forms of restrictive practices should be eliminated. However, whether a protected person stands to benefit from the above developments depends on whether there will indeed be less detention (without reduction of activities by providers who may now choose to simply forgo outings and other events), or whether detention endures in practice, but is now losing oversight.

VI REDUCED OVERSIGHT?

De facto detention, where a person is in practice deprived of their liberty without authorisation, is widespread in social care settings in Australia, in particular aged care.[234] There is evidence that this has long been known to Australian governments.[235] Detention orders are a safeguard to ensure that the situation of those who are detained in practice is subject to appropriate review and oversight by courts and tribunals. In the *Public Advocate Case*, Kourakis CJ explained that 'the public interest in the making of detention orders by the independent and transparent decisions of courts and tribunals is so obvious that it requires no explanation'.[236]

To fully recognise the right not to be deprived of liberty, Australia must not only protect the substantive values of liberty involved – as tort law is capable of doing to some extent – but also comply with oversight and monitoring standards.[237] However, in *Re KF*, SACAT noted that by bypassing the *Guardianship Act* and using the *Consent Act* pathway, oversight would be reduced as persons responsible could now consent to matters previously requiring Tribunal orders.[238] In *Re LOR,* the Tribunal similarly recognised that by limiting the scope of detention for the purposes of the *Guardianship Act*, it would remove situations that would have historically counted as detention from its scrutiny. SACAT observed that 'there is a conflict of policy objectives at play' as:

> [T]he legislative scheme … places the most significant decisions involving the liberty of protected persons in the hands of the Tribunal as an independent overseer of guardians' actions. In [deciding LOR] some oversight of these protected persons … is lost.[239]

---

234 *Indefinite Detention* (n 15) 169 [8.69].

235 Ibid 167–9 [8.64]–[8.72]. At 169 [8.72] the Senate Committee Report stated that it was 'clear to the committee that evidence for this problem has been well known to states and territories, and the Commonwealth, for some time'.

236 *Public Advocate Case* (n 9) 361–2 [29].

237 *General Comment No 35* (n 31); *Older Persons Deprived of Liberty* (n 31); *Report of the Committee on the Rights of Persons with Disabilities*, UN Doc A/72/55 (2017) annex.

238 *Re KF* (n 71) [124] (Executive Senior Member Rugless).

239 *Re LOR* (n 138) [110] (Hughes P and Senior Member Lester).

It subsequently called on the legislature to consider whether current legislation achieved 'the appropriate balance of personal autonomy of disabled persons and transparency of care providers' actions'.[240] So far, the SA Parliament has not responded.

The *Public Advocate Case* has done much to raise awareness of the problem of de facto detention in care settings, but as identified by the Queensland Office of Public Advocate in 2017, tort law comes after the fact. Hence, '[b]ringing actions against aged service providers under tort law may result in compensation for mistreated residents but *would not necessarily serve as a preventative measure* or raise the standard of care for people subject to restrictive practices'.[241]

Much needed preventative measures could be emerging. In late 2017, Australia signed onto an obligation to monitor all places of detention via the *Optional Protocol to the Convention Against Torture* ('*OPCAT*'),[242] which sets up a scheme for preventative detention monitoring via a visiting scheme.[243] In its preventative focus, the scheme does not require complaints to be made or actions to be commenced in courts or tribunals by individuals. Instead, a system of regular visits, announced or unannounced, conducted by an independent team of experts is designed to spot risks of ill treatment, including risks of unlawful detention. As a human rights treaty, the *OPCAT* does not add any additional substantive rights, but it is a means of partially implementing key rights, like article 9 of the *ICCPR* (deprivation of liberty) to prevent arbitrary detention.[244] However, the impact of the *OPCAT* for social care hinges on the scope of its application.

Article 4(2) of the *OPCAT* defines deprivation of liberty as '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'. This must be read together with article 4(1) which applies the visiting scheme to places where persons 'are or *may be* deprived of liberty, either by virtue of an order given by a public authority or at its instigation or with its consent *or acquiescence*'.[245] 'Acquiescence' is broadly interpreted by *OPCAT*'s monitoring body, the United Nations Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('SPT'), and means

240 Ibid (citations omitted).

241 Office of the Public Advocate (Qld), *Legal Frameworks for the Use of Restrictive Practices in Residential Age Care: An Analysis of Australian and International Jurisdictions* (Report, June 2017) 7 (emphasis added). The report also highlights that actions for false imprisonment or other torts in care settings are rare, because they require significant resources beyond the reach of most parties.

242 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) ('*OPCAT*').

243 Through the system of preventative visits, the *OPCAT* (n 242) monitoring scheme requires that Australia establish independent mechanisms to monitor all places of detention regardless of whether the detention is de jure or de facto.

244 Other relevant rights include articles 7 (prohibition of ill treatment) and 10 (requirement for humane treatment when deprived of liberty) of the *ICCPR* (n 47).

245 *OPCAT* (n 242) art 4(1) (emphasis added).

> tacit consent, allowing the deprivation of liberty in question to happen and not exceeding the powers of authority to avoid it. This would include situations in which the state should regulate deprivation of liberty and chooses not to do so ... *this may concern situations in which the state tolerates, allows or in any other form chooses to turn a blind eye to deprivation of liberty caused by any other entity or person*.[246]

The SPT has confirmed that article 4 covers non-traditional places of detention such as 'nursing homes … [and] centres for persons with disabilities'.[247] This broad interpretation is supported by other international bodies,[248] and indicates that the SPT recognises – and *OPCAT* covers – social care detention.[249] It is in that respect important to reiterate that *OPCAT* thus requires *preventative* monitoring of social care settings where people *may* be detained.

However, the Australian Government is showing resistance to calls to set up and resource the independent monitoring of social care settings under *OPCAT*.[250] It has chosen to take an idiosyncratic approach to implementing *OPCAT* by designating traditional places of detention such as prisons as 'primary places of detention', relegating social care detention as secondary and beyond the government's current implementation strategy.[251] This is even though these federally funded and regulated social care settings may be unlawfully depriving residents of their liberty with government 'acquiescence'. The arrangement flies in the face of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*'s recommendation in 2023 for the Government to broaden '[the] definition

---

246 United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Draft General Comment No 1 on Places of Deprivation of Liberty (article 4)' (Consultation Paper) [34] (emphasis added).

247 Ibid [38]. See also *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023) vol 11, 106–10 ('*Disability Royal Commission Final Report*').

248 The UN Working Group on Arbitrary Detention includes 'social care contexts' as a context in which detention can take place and it advises against narrow interpretations of the term deprivation of liberty: Human Rights Council, *Arbitrary Detention: Report of the Working Group on Arbitrary Detention*, UN Doc A/HRC/51/29 (21 July 2022) [57]–[58]. See also judgments of the European Court of Human Rights, such as *Stanev v Bulgaria* [2012] I Eur Court HR 1, where applicants lived in social care facilities and were deprived of their liberty contrary to article 5 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). The regional counterpart of the SPT, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, visits social care establishments and has published a factsheet on social care detention: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Persons Deprived of Their Liberty in Social Care Establishments' (Factsheet, 21 December 2020).

249 Series, *Deprivation of Liberty* (n 4) 104.

250 The federal government has indicated the focus will initially be on monitoring 'primary places of detention' such as immigration detention facilities and prisons. See Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 3 March 2020, 159 (Sarah Chidgey, Deputy Secretary, Integrity and International Group, Attorney-General's Department); Australian Human Rights Commission, *Road Map to OPCAT Compliance* (Report, 17 October 2022) 11. See also Laura Grenfell, 'Aged Care, Detention and OPCAT' (2019) 25(2) *Australian Journal of Human Rights* 248 <https://doi.org/10.1080/1323238X.2019.1642998>.

251 This approach of prioritising so-called 'primary places of detention' was explained in 2017 by the then federal Attorney-General George Brandis: 'Torture Convention: The Australian Government OPCAT Announcement' (Speech, 22 February 2017) <https://hrlc.squarespace.com/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement>.

of "places of detention" to enable all places where people with disability may be deprived of their liberty to be monitored'.[252] It is also out of step with Australia's international counterparts as close to 20 *OPCAT* State Parties (all developed nations like Australia) have set up systems to monitor social care detention.[253] Given the reluctance to comply with these internationally mandated preventative measures, it is especially problematic that the SACAT cases have now also removed quasi-judicial oversight for numerous cases involving social care detention.

VII CONCLUSION

The *Public Advocate Case* and its aftermath suggest that Australian courts and tribunals are beginning to develop an understanding of social care detention. However, this understanding is not anchored in human rights standards, but in the prospect of unauthorised detention causing the tort of false imprisonment. Even so, the *Public Advocate Case* arguably matches Series' characterisation of *Cheshire West*,[254] namely that it 'has a transgressive quality, identifying care arrangements for older and disabled people that are widely accepted and relied upon throughout Western societies, as forms of detention'.[255] At least for the SASCFC, a clear association exists between social care settings and liberty rights, including – indirectly – the right not to be arbitrarily deprived of liberty.

Nonetheless, Series' evaluation of Australia as resisting the idea of deprivation of liberty being associated with social care retains some weight. The SA Parliament is tiptoeing around the issue, and at federal level there is significant resistance to resourcing preventative detention monitoring (and other oversight) for social care settings. Defiance in this context appears deliberate. That is perhaps less so for tribunals like SACAT who have become inundated with guardianship applications and are pushing back against a broad definition of detention in response. SACAT's approach to detention is nonetheless problematic because, with characterisation of restrictions as treatment and dissociation of social care from detention under the proposed care exception, it blocks avenues to obtain orders that impose requirements for regular review and may serve as lawful justification under torts for care providers. The approach, moreover, exposes persons in care settings to a greater risk of de facto detention without the safeguard of oversight provided by courts and tribunals. When it comes to detention orders made under guardianship laws, courts and tribunals should not lose sight that there is an 'obvious' public interest that transparency and accountability be central when detention takes place,[256] regardless of how benign the care settings purport to be.

---

252 *Disability Royal Commission Final Report* (n 247) vol 11, 14. On 30 July 2024 the federal government responded to the Royal Commission and 'accepted in principle' this recommendation: Australian Government, *Australian Government Response to the Disability Royal Commission* (Report, 30 July 2024) 251.

253 Series, *Deprivation of Liberty* (n 4) 96–7.

254 *Cheshire West* (n 1), the UK's equivalent case, decided on the basis of deprivation of liberty.

255 Series, *Deprivation of Liberty* (n 4) 5.

256 *Public Advocate Case* (n 9) 362 [29] (Kourakis CJ).