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Donald Cameron MSP
Convener
Covid-19 Committee

26 October 2020

Dear Convener,

COVID-19 COMMITTEE SESSION 16 SEPTEMBER: FURTHER INFORMATION ON VULNERABLE ADULTS PROVISIONS AND OPPORTUNITIES FOR CHILDREN AND YOUNG PEOPLE

During the session with the Committee on 16 September, I undertook to provide the Committee with further information in response to questions relating to the provisions within the Coronavirus (Scotland) Act 2020 covering vulnerable adults, and on the work being undertaken to assess where increased social interaction could be permitted for children and young people.

Vulnerable adults provisions: guardianships orders and section 47 certificates

Monica Lennon MSP enquired during the session about triggers in relation to the provisions in Schedule 3 paragraph 11(2) and 11(3) of the first Scottish Act, covering expiry of guardianship and section 47 certificates, which have been suspended through regulations which came into force on 30 September.

In considering triggers for reinstatement, it is important to consider the reasons the provisions were brought forward in the first place. For guardianships, there was a fear that those that were going to be renewed would expire before a renewal could be made. If an application for renewal is lodged with the court, the existing guardianship automatically continues from that point until the application has been determined. Therefore the renewal only has to be lodged in order to prevent expiry of the existing guardianship.

Renewals are less onerous than a new guardianship application, requiring less reporting. However, if the existing guardianship expires before renewal, then a new guardianship is required, meaning more reports and also - if the renewal had been made but was not able to be lodged with the court - a waste of the work already completed.

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The 'stop the clock' provisions in the Coronavirus (Scotland) Act 2020 were brought forward at a time, at the height of the pandemic, when conditions were such that renewals were unlikely to be lodged at court before the expiry of the original guardianship. These conditions were:

- The courts had all but closed and were only considering urgent interim guardianship cases.
- The Office of the Public Guardian had only a small number of staff working from home.
- Doctors were required to deal with other urgent matters relating to the pandemic and therefore could not complete the medical reports. Even when available, there were difficulties with face to face meetings.
- Mental Health Officers had similar constraints to doctors: having reduced numbers due to pandemic-related health issues, being redirected to pandemic-related work, and difficulties interviewing those involved in order to complete reports.

When considering what should happen with the guardianship provisions at the end of the six months that the Coronavirus (Scotland) Act 2020 had been in place, officials consulted with the Law Society of Scotland, Social Work Scotland (SWS), the Scottish Courts and Tribunals Service (SCTS), the Office of the Public Guardian (OPG), the Convention of Scottish Local Authorities (COSLA), the Mental Welfare Commission, Health and Social Care Scotland, and the Centre for Mental Health and Capacity Law at Edinburgh Napier University.

There were practical and human rights considerations when deciding whether the provisions should be suspended. Practically, SCTS and OPG advised that they were able to cope with the additional business that suspending the provisions would bring, and in fact continuing the provisions would be disadvantageous six months further on. There were mixed opinions from SWS, Mental Welfare Commission and Health and Social Care Partnerships via Health and Social Care Scotland on the working of the application system itself, in particular of the capacity of doctors and Mental Health Officers.

The human rights considerations involved in extending guardianships were put forward by human rights groups such as the Scottish Human Rights Commission, and also by the Law Society of Scotland and the Centre for Mental Health and Capacity Law at Edinburgh Napier University.

Ultimately, the ability of the judicial and administrative systems of SCTS and OPG to cope with the additional business that suspending the provisions would bring, the mixed view of how the system was operating, and the human rights considerations, resulted in Ministers deciding to extend but at the same time to suspend the provisions. However, it is clear that there is not one 'trigger' at which point the provisions would come into play again. There is a complex mix of human rights considerations and varying opinions on practical and operational concerns to take into account. In addition, it should also be noted that the provisions can only be revived at a future point (in the life of Part 1 of the Coronavirus (Scotland) Act 2020) through regulations, which would be subject to scrutiny by Parliament.

Although the above has referred to the guardianship provisions, as the application process is more complex, the same considerations apply to section 47 certificates for medical treatment.

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In order to keep abreast of the situation as time goes on, officials will continue to engage regularly with stakeholders to check how the system is operating and will update Ministers equally regularly.

At a later point in the Committee session, Sandra White MSP enquired about advocacy for children and adults subject to guardianship orders. Children are not generally subject to guardianship orders under the Adults with Incapacity (Scotland) Act 2000, however there is a difference in legislation regarding what age constitutes a child. The Adults with Incapacity (Scotland) Act 2000 states an adult is a person who attains the age of 16 years. The Children (Scotland) Act 1995 defines a child as anyone under the age of 18. Therefore, there is a period of two years after the age of 16 where a child (as defined under the Children (Scotland) Act 1995) could be subject to a guardianship under the Adults with Incapacity (Scotland) Act 2000.

In terms of advocacy, the Adults with Incapacity (Scotland) Act 2000 states that the Sheriff shall take account of the adult's wishes and feelings as they are expressed by a person providing independent advocacy services.

The principles of the Adults with Incapacity (Scotland) Act 2000 require the adult's wishes and feelings to be taken account of and, in addition to this, Scotland has ratified the United Nations Convention on the Rights of Persons with Disabilities. This states that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity and that the rights, will and preference of the person should be respected.

Scottish Government officials have been engaging with Health and Social Care Partnerships regarding their procedures when considering the discharge of adults from hospital. Officials have ingathered guidance with a view to producing a key messages document, reflecting good practice back to practitioners.

Part of this message is supported decision-making and states that adults who lack capacity should be given the maximum support to assist with decision-making, including: seeking guidance from speech and language therapy on communication needs, utilising Independent Advocacy, and developing informal circles of support. The purpose of supported decision-making is to ensure that the individual's will and preferences are central to, and fully respected in, decisions that concern them.

Opportunities for children and young people

During the Committee session, Alison Johnstone MSP raised the issue of children and young people having limited opportunities for social interaction due to the current restrictions on gatherings. I am sorry to have to report that since the Committee session, we have had to restrict social gatherings further as a result of increasing transmission of coronavirus.

The latest restrictions do not permit social gatherings between different households to take place inside private dwellings unless it is for one of the very limited exemptions set out, such as for the purpose of childcare. These restrictions are not welcome and we are sorry to be putting such measures in place but sadly they are necessary.

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Despite these new restrictions, we have carefully considered the impact on children and young people and have provided some scenarios where children and young people can benefit from different rules to allow more interaction with their peers to take place. The scenarios have been set out below and are illustrated on the enclosed graphic from Parentclub, which is a helpful reference.

Indoor public places

- Children under 12 do not count towards the 6 person limit but gatherings must only consist of 2 households.

Outdoors

- If there is no one aged 12 or older, there are no limits on the number of children or households who can meet. This means that children can play together with friends.
- If there is anyone aged 18 or older, there can only be 6 people and 2 households, however children under 12 are not included in either of those limits.
- If there are no adults present, and there are children aged 12-17, then the limit is 6 people for 6 households. In this case children under 12 do count and so you could only have four 12 year olds and two 11 year olds together.

Alison Johnstone raised important points in Committee in relation to the relative impact on children from different socio-economic backgrounds, highlighting the additional costs of participating in organised activities. This issue is addressed within the [Children's Rights and Wellbeing Impact Assessment](#) that we published on 25 September and on 9 October (<https://www.gov.scot/publications/crwia-stage-3-impact-covid19-restrictions-children-young-people-2/>) as we recognise the risk that the pandemic could serve to reinforce the existing inequalities that we have been working to end. Organised activities provide a framework and structure for situations to remain lower-risk; and we continue to fund organisations that offer low-cost and free activities for children and young people. For example, we have specifically amended the Community Play fund to ensure children from lower-income families can be equipped as necessary to enjoy outdoor play.

I can assure the Committee that we will be continuing to keep under review options to mitigate the impact of the restrictions on children and young people's wellbeing, remaining alive to the risks of perpetuating inequalities.

I hope this letter is helpful in providing more information on these matters discussed in the course of the session.

MICHAEL RUSSELL

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