

COVID-19 COMMITTEE

SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

Dear Convenor,

During the committee session last week, the Deputy Convenor, Monica Lennon MSP asked me whether we had assessed the impact that the provisions of paragraph 11(1) of schedule 3 to the Coronavirus (Scotland) Act 2020 have had on adults with incapacity for the duration of the emergency legislation so far. She asked whether we have enough information, and whether there is any independent assessment or information gathering about how many people have potentially been affected by moves to reduced delayed discharge, for example. She referred to concerns expressed in the written submission of the Centre for Mental Health and Capacity Law at Edinburgh Napier University regarding possible hospital discharges without due legal process in apparent violation of Articles 5 and 8 ECHR and 12 and 14 UNCRPD. I undertook to refer these queries to our Mental Health and Disability Sub-Committee, who have now provided me with their views.

Paragraph 11(1) of schedule 3 of the Coronavirus (Scotland) Act 2020 has not been commenced, and accordingly it has had no impact on adults with incapacity. Had it been commenced, it would have modified section 13ZA of the Social Work (Scotland) Act 1968 to remove the requirement on the local authority to consult the adult and interested parties, including those authorised under a guardianship or power of attorney, when making decisions regarding community care services for adults who are incapable of making such decisions. To date, no changes have been made to section 13ZA of the Social Work (Scotland) Act. Any decisions which have been made regarding community care services for adults with incapacity have been made under the existing provisions of section 13ZA.

Local Authorities are not required to notify any independent monitoring body, such as the Mental Welfare Commission, when powers under section 13ZA are used. Guidance on the use of section 13ZA has been issued by the Scottish Government¹ and the Mental Welfare Commission.² We are not aware of specific publicly available data relating to the use of section 13ZA in the course of the coronavirus pandemic.

Data is available in relation to delayed discharges, which are monitored by the Scottish Government. Data indicates that as of 23rd July, delayed discharges had reduced by 45% (720 beds) since the 4 March baseline.³ We are not aware of data which would indicate how many of those discharged during this period are adults with incapacity, or how many of these discharges may have been facilitated using powers under section 13ZA. We do note that a report by Community Health and Social Care (Scottish Government) and Health and Social Care Scotland states that Health and Social Care Partnerships have not seen an increase in the use of section 13ZA during the

¹ https://www.sehd.scot.nhs.uk/publications/CC2007_05.pdf

² https://www.mwscot.org.uk/sites/default/files/2019-07/cheshire_west_draft_guidance.pdf

³ Scottish Government, Coronavirus Acts: second report to Scottish Parliament, August 2020 at para 7.1.3.5 <https://www.gov.scot/publications/coronavirus-acts-second-report-scottish-parliament/>

pandemic.⁴ The same report indicates that 22% of delays at 6 July were by reason of ‘adults with incapacity’.⁵

The written submission from Edinburgh Napier University’s Centre for Mental Health and Capacity Law highlights concerns that adults who lack capacity may have been discharged or moved without due legal process in what appears to be a violation of Articles 5 and 8 ECHR and 12 and 14 UNCRPD.

Article 5 of ECHR is breached whenever someone who has not capably consented to an arrangement is put somewhere where they are under continuous supervision or control and are not free to leave. That applies to anyone who is moved from one place to another, where they have not been able competently to consent to that move – whether they object or acquiesce, because acquiescence is irrelevant from someone who cannot capably consent. It also can arise in short-term situations, for example where someone is subjected to seclusion or restraint. Article 5 continues to apply with full force and effect during the pandemic, because the UK is not one of the European states that have derogated from Article 5 because of the pandemic.

Section 13ZA of the Social Work (Scotland) Act 1968 cannot, in accordance with relevant guidance, be used for any action that would amount to a deprivation of liberty. A deprivation of liberty may not always be identified as such by professionals.⁶ In this context, deprivation of liberty can arise in a wide variety of care situations, including potentially situations of physical restraint, isolation and where individuals’ ability to leave the care setting or have contact with family is restricted.

This latter situation often arises in conjunction with a breach of the rights to family and private life under Article 8 of ECHR; and where it arises by reference to factors such as disability or age, there is potentially unlawful discrimination under Article 14 of ECHR (and under domestic anti-discrimination legislation). Indeed, in such cases the principal breach may be that of Article 8, which has no less standing in its own right than Article 5 (see for example the *Neary* case⁷), though only Article 5 contains an explicit right to compensation for breach.

In the context of the pandemic, considerable efforts have been made to reduce delayed discharges, both in order to free up hospital capacity and create a better outcome for individuals at risk of acquiring infection in hospital.⁸ The concern expressed by Edinburgh

⁴Community Health and Social Care Scottish Government and Health and Social Care Scotland, LESSONS LEARNED FROM REDUCING DELAYED DISCHARGES AND HOSPITAL ADMISSIONS, 29 July 2020 at page 30

https://www.parliament.scot/S5_HealthandSportCommittee/Inquiries/20200901_Ltr_IN_from_SG_response_re_11_August_session.pdf

⁵ *Ibid*, at page 10

⁶ See for example the case of *Borders Council v AB SLT* (Sh Ct) 41: the main purpose of powers sought under a guardianship order was identified by the Sheriff to effect a deprivation of liberty, yet the reporting mental health officer did not recognise it as such.

⁷ [2011] EWCOP 1377, especially paragraphs 151 and 152 of the judgment

⁸ Community Health and Social Care Scottish Government and Health and Social Care Scotland, LESSONS LEARNED FROM REDUCING DELAYED DISCHARGES AND HOSPITAL ADMISSIONS, 29 July 2020 at page 7

Napier University's Centre for Mental Health and Capacity Law, which we share, is that some of those discharged to care placements may have been adults who were incapable of making decisions about their care and thus moved under section 13ZA powers. Some of those discharges may have resulted in deprivations of liberty which have not been authorised by an appropriate legal process. Without access to robust data, we cannot substantiate these concerns and we would therefore reiterate the call made by the Centre for Mental Health and Capacity Law for independent monitoring or review of these discharges.

Further changes to adults with incapacity legislation are made by paragraphs 11(2) and 11(3) of schedule 3 of the Coronavirus (Scotland) Act 2020 (the so-called 'stop the clock' provisions), and I would refer to the terms of our written submission on the potential adverse impact of those provisions on adults with incapacity in certain circumstances.⁹

I hope this is of assistance to the Committee.

Received: 15 September 2020

https://www.parliament.scot/S5_HealthandSportCommittee/Inquiries/20200901_Ltr_IN_from_SG_response_re_11_August_session.pdf

⁹ Law Society of Scotland, Consultation response COVID-19 Related Legislation: SSI2020/249: The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020 and The Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2020, 7 September 2020 at page 4 <https://www.lawscot.org.uk/media/369381/20-09-07-ppc-mhd-covid-19-committee-covid-19-related-legislation.pdf>