



Law Society
of Scotland

Scottish Parliament

Equalities and Human Rights Committee

Response to Inquiry on the Impact of COVID-19

26 May 2020



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

General comments

The impact of the COVID-19 pandemic emergency on our communities has been enormous. Every aspect of our lives, many of which we previously took for granted, including our freedom of movement, to socialise with our friends, get married, attend funerals and travel, have been significantly and adversely affected. While COVID-19 has provided opportunities, such as that for innovation, the speed of change to society has been on a previously unimaginable scale and comes at a cost. That COVID-19 has affected us all is certain, but all have experienced it differently. It is in that context that we welcome the Scottish Parliament's Equalities and Human Rights Committee's (the Committee) Inquiry (the Inquiry) announced on 8 April 2020.¹ The focus of the inquiry is:

“To consider what groups and individuals are disproportionately impacted by COVID 19; identify what the Scottish Government and other public bodies, including regulatory and oversight bodies, need to do to ensure that measures taken in relation to the pandemic minimise negative effects on equality and human rights; and examine measures taken by the Scottish Government and other public bodies and the impacts they may have on equality and human rights.”²

This Committee's inquiry is one of a range of inquiries being set up to consider the effects of COVID-19. The inquiry has inevitable overlapping and cross-cutting policy interests, specifically where considering “examining measures taken by the Scottish Government” with the work of other Scottish Parliament's Committees. This includes the Scottish Parliament's COVID-19 Committee set up “to consider and report on the Scottish Government's response to COVID-19 which includes legislative scrutiny.”³ Its scrutiny to

¹ <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114975.aspx>

² <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114975.aspx>

³ <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114991.aspx>

date has included the body of legislation which has completed its parliamentary passage, following the pandemic, that includes to date the Coronavirus Act 2020, Coronavirus Act (Scotland) Act 2020, Coronavirus (No 2) (Scotland) Act 2020 and The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. These statutes and regulations represent significant and extensive legislative which is unprecedented in Scotland in our lifetimes.

The Committee's work is crucially important and valuable given the Committee's powers to scrutinise legislation, question ministers and experts and call for evidence from affected groups as we continue to experience the effects of the virus and seek to return to the 'new normal'. The Inquiry is "open-ended" and will continue to run for some time, given we note that the Committee has published the Abstract of Responses received to date "for information purposes only and are not be regarded as a final summary of responses."⁴ Similarly, our response at this stage highlights issues emerging from the experience of our committees, of practitioners and of clients to a complex and developing situation.

Various of our policy committees including the Mental Health and Disability Committee, the Criminal Law Committee and the Health and Medical Law Committee have had interests in responding to the inquiry. The membership of these Committees represent those in legal practice, in-house and from both academia and healthcare practice.

Summary

The inquiry needs to reflect the magnitude and depth of the public's concerns regarding the effect of COVID-19. The scale of the inquiry is unique, taking place as these concerns continue as we live through its continuing effects, though the initial stages of the pandemic may be over. We are entering the four-phase route map,⁵ aimed at restarting our society while suppressing the virus, but concerns continue.

Our knowledge about COVID-19 has evolved since the lockdown commenced and is continuing to evolve. COVID-19 presents an "emerging science."⁶ It is against this background that specialist scientific advice and economic reports are required to help policy makers and decisions to be taken. We echo the observations expressed in the tripartite letter sent from the Equalities and Human Rights Commission, Scottish Human Rights Commission and the Children and Young Persons Commissioner Scotland, dated 16 April 2020 to the Committee, where it stated that it is "essential to collect robust information to fully

⁴ <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114975.aspx>
https://www.parliament.scot/S5_Equal_Opps/Covid_responses_18052020.pdf

⁵ 27 April -4 May 2020

⁶ <https://www.gov.scot/news/route-map-for-moving-out-of-lockdown/>

⁶ Dr J McMenamin Justice Committee Evidence session on Stage 1 Coronavirus (No2) (S) Bill 19 May 2020

understand the equality and human rights impacts of Coronavirus and related measures on people in Scotland.”⁷

The first role of the government is to protect the lives of its citizens and it is now to the future where the coming out of that first stage is more challenging than the initial and immediate response which may have been justified as an immediate response. This Inquiry is timely to reflect now on the virus’s impact and to seek to consider how to minimise the inevitable and continuing negative effects on equality and human rights that have arisen.

COVID-19 did not seek to discriminate among any of us in society. However, its impact has had adverse effects, the significance of which was recognised by the First Minister herself where she indicated that:

“The lockdown restrictions have been necessary to reduce and mitigate the massive harm caused by the COVID-19 virus, but the lockdown itself causes harm including loneliness and social isolation, deepening inequalities and damage to the economy.”⁸ (Our emphasis)

There have been unprecedented restrictions of our rights in order to stop the spread, protect lives and to reduce the pressure on the National Health Service. The body of legislation requires the Scottish Government to report on the use of its powers to the Scottish Parliament every two months and provides for possible extension of powers beyond the initial six months for a maximum of eighteen months. These powers can expire early if they are no longer necessary with the 2020 Regulations having a similar review.

We believe that the impact of Covid-19 on equality and human rights should be monitored in a range of different areas, including:

- As Part 2, Section 9 of the Coronavirus (Scotland) Act 2020 which requires that Scottish Ministers have regard “to opportunities to advance equality and non-discrimination”, that action is taken not merely to mitigate impacts on equality and human rights but also to promote these at this time of crisis
- The effect and need for legislation should be reviewed as and when that better-informed public health and scientific advice becomes available from the UK and as steps are taken to reduce the lockdown across Scotland
- Measures are taken as a matter of urgency to address issues around mental health and mental and intellectual disabilities (that is to say, disabilities resulting from cognitive and/or volitional impairments), including
 - A focus on what is happening to people in vulnerable and disadvantaged groups, and their families and carers, rather than upon official pronouncements as to what should happen or is about to happen. In particular, it should focus upon situations where such discrepancies appear currently to threaten fundamental rights, including the right to life;

⁷ https://www.parliament.scot/S5_Equal_Opps/Letter_to_Ruth_Maguire_-_Coronavirus_inquiry.pdf

⁸ <https://www.gov.scot/news/route-map-for-moving-out-of-lockdown/>

- Scottish Government and relevant other public bodies be urged (a) to provide and allocate sufficient resources to ensure that needs for access to justice, performance of statutory responsibilities of Mental Health Officers (MHOs), and fulfilment of functions of the Office of the Public Guardian (OPG) are fully met, and (b) to ensure, with immediate effect, the recruitment, training and retention of adequate staff to meet those needs, now and into the future;
- That Scottish Government and other public bodies ensure full and timeous compliance with all statutory requirements, and proper fulfilment of all responsibilities under statute within the field of equality and human rights;
- To the extent that a culture of de-personalisation has developed, to eradicate it;
- To ensure that clear and transparent policies are established and effectively communicated in matters of critical decision-making where, by default, *de facto* procedures are being adopted;
- To the extent that practices which discriminate against older people and people with vulnerabilities and disabilities have developed, to eradicate them wherever they occur;
- To promote and ensure full compliance with human rights requirements to the maximum extent that circumstances permit in each individual case;
- To promote the use of Key Information Summary (KIS) forms;
- That reforms are taken forward to the Adults with Incapacity (Scotland) Act 2000 (the 2000 Act) to ensure these protections, as we have suggested previously;
- That the Scottish Government confirm that it will not bring into force the proposed temporary modifications to section 13ZA of the Social Work (Scotland) Act 1968 (the 1968 Act).
- The wider use of technology in the justice system, such as hearings by telephone or video, does not reduce the outcomes available to people requiring access to justice, and that this is monitored to ensure effective participation in the justice system
- Supporting vulnerable groups through the current crisis, for instance by providing personal protective equipment to allow individuals to have the confidence to re-enter wider society

Our response highlights these and other issues and, around the specific and urgent issues around mental health and disabilities, additional detail and case studies have been provided as an annex to this paper. We would be happy to discuss the issues emerging from these in more detail for the committee, if helpful to scrutiny in this area.

Question 1: How have groups of people been affected by the virus?

COVID-19 is not an equal-opportunity disease.⁹ The outbreak has been more significant for those groups who are more marginalized within society such as those who experience poverty, have health inequities,

⁹ <https://www.scientificamerican.com/article/which-groups-are-most-at-risk-from-the-coronavirus/>

fall within an older age group, experience mental health issues, have learning disabilities and brain injuries and others with disabilities that impact upon their relevant capabilities. The effects have been especially brutal. Addressing the outbreak for these groups requires creative approaches and extensive collaboration among stakeholders, which includes those responsible for policymaking and health professionals as there may be an argument that the COVID-19 pandemic has impacted disproportionately and unnecessarily on the equalities and human rights within these groups

What is recognised as a complication as the inquiry progresses is that more information and knowledge is being gleaned and obtained which helps to understand the impact on specific groups. That evidence supports that these differing groups are at more risk than others (and which we consider more fully in response to Question 2.) Examples include those falling within the Black and Ethnic Minority Groups (BAME)¹⁰ where the Intensive Care National Audit and Research Centre found that 35% of almost 2,000 patients were non-white, nearly triple the 13% proportion in the UK population.

We have reflected above that there has been extensive use made of emergency powers, in the body of legislation that has now passed the UK and Scottish Parliaments to deal with the COVID-19. Such measures must be lawful, necessary, proportionate, time-limited and non-discriminatory. They should not overstep what is required in response to the pandemic emergency but inevitably have impacted more on some than others. The effect and need for legislation should be reviewed as and when that better-informed public health and scientific advice becomes available from the UK and importantly, elsewhere as time goes on, and we reach different stages of the pandemic emergency which requires our response to be tempered accordingly.

Inevitably, such sweeping controls on these aspects of our lives have and are disproportionately impacting on a range of aspects not only in relation to these groups but on social care, and restrictions on our movement and the introduction of international quarantine measures. A number of these areas have already been highlighted by the Scottish Human Rights Commission's response to the Committee, with which we fully agree.¹¹

The legislation introduced in response to Covid-19 may be said to impact upon the enjoyment of one's property. For example, individuals are restricted from travelling to a second home and there have been changes to provisions regarding tenancies. It is important to consider the terms of Article 1 of the first Protocol to the ECHR concerning protection of property. It would be for a Court to consider the Court whether Article 1 of the first Protocol is applicable to any given case, and if so, to determine the question of compliance with the law. If interference, deprivation or control of the rights under this Article are carried out lawfully and in the public interest, no violation of the right will have occurred. Under the Scotland Act 1998, if laws made in Scotland are found by a court not to be compatible with the rights identified in the ECHR, the law does not stand.

¹⁰ <https://www.theguardian.com/world/2020/apr/07/bame-groups-hit-harder-covid-19-than-white-people-uk>

¹¹ https://www.parliament.scot/S5_Equal_Opps/SHRC_Covid_response_FINAL_LETTER.pdf

The current circumstances raise issues for individuals who require to travel internationally for work. There is the potential for there to be disproportionate impacts of Covid-19 on such groups. An example of this is seafarers who typically travel between countries and are often required to embark and/or disembark in foreign ports. We note that the International Maritime Organization has issued guidance in relation to such circumstances¹².

On a related matter, we note the potential for challenges and risks associated with Covid-19 in connection with transport services within Scotland, for example the risks of transmission in connection with public transport provisions across the mainland and by ferry or air links serving island communities in Scotland. In connection with testing of workers, the nature of transport services in rural areas means that travelling to city hubs for regular testing is likely to be impractical, time consuming and financially burdensome.

We welcome the Committee's early interests under Question 4 in seeking how to mitigate or address these aspects now, and in looking to the longer term under Question 5. That too needs to reflect Part 2, Section 9 of the Coronavirus (Scotland) Act 2020 which requires that Scottish Ministers have regard "to opportunities to advance equality and non-discrimination" and which is subject to review and scrutiny.

Question 2: Which groups have been disproportionately affected by the virus and the response to it?

We understand the early COVID -19 analysis to date has highlighted a significant number of groups which have been disproportionately impacted,¹³ which include all of those groups falling within the "protected characteristics" within the Equality Act 2010 in a number of ways. These include:

- Children and young persons – with the schools that have been closed and with restrictions on their freedom.
- Women – who may be living with abusive partners and are experiencing domestic violence
- BAME communities
- Mental health and disability - those experiencing mental health and disability issues which we outline more fully below and with specific case studies in the appendix to this paper
- Prisoners - where the effect of the virus has impacted on the timescales of remand and contact with their families
- Older groups - the over 70 years old age group may be seen to have been treated potentially unfairly as, there has been an assumption made that all over 70 years old citizens are in the same

¹² <http://www.imo.org/en/MediaCentre/HotTopics/Pages/Coronavirus.aspx>

¹³ https://www.parliament.scot/S5_Equal_Opps/Covid_responses_18052020.pdf

category of vulnerability in that they are unfit, have health issues and are at the greatest risk of being a "victim" of COVID -19.

There are other categories or groups which appear to have been adversely affected, such as people with obesity, where they may be experiencing a more severe reaction from COVID-19.¹⁴ Some groups that have been deemed to be vulnerable have been instructed to self-isolate though others not (and some, as we ease into lockdown may continue to be advised to shield which will continue to have them potentially experience isolation and loneliness). Equally, there are many in the 70-year-old age category that are physically fit, without any underlying health conditions. Any blanket categorisation of age is recognised to be a challenge in its generalisation and is arguably ageist at setting an "over 70-year-old" classification. It does not take into account those other groups of risk from long standing health vulnerability. Such groups may consider that they have been treated differently just on account of their grouping.

The annex to this paper highlights particular challenges around mental health and disabilities. Some issues, such as the funding of mental health officer services, delays in the registration of powers of attorney despite the policy drive towards anticipatory care planning, or resource-led rather than care-led pressures to move people into residential care settings, often without their valid consent, existed before this crisis began, though have had a far more acute impact as a result of the current crisis. We believe that these have depersonalised and potentially infringed human rights. We have included several case studies indicating our concerns, and have proposed, in this response and elsewhere, measures that we believe are required to resolve these. We believe that these would address the discrepancies identified in this submission between what is actually happening to people in vulnerable and disadvantaged groups, and their families and carers, on the one hand, and the official position as to what should happen, on the other. These steps are especially crucial where such discrepancies appear currently to threaten fundamental rights, including the right to life; and thereafter, to monitor and address such discrepancies on an ongoing basis, using methods of monitoring including but not limited to work entrusted to the Mental Welfare Commission for Scotland.

Question 3: Have there been specific equality or human rights impacts on groups of people as a response to the virus?

Our submission, particularly in the context of mental health and disability, provides examples below of the ways in which measures taken by the Scottish Government and other public bodies, and failures by public bodies to follow and apply those measures, have impacted on equalities and human rights in relation to those identified above. We identify actions which may have unnecessarily and disproportionately violated human rights, and which in some cases appear to have been unlawful, or at least potentially unlawful. We

¹⁴ <http://www.science.org/article/obesity/coronavirus-covid19-obesity-risk-factor>

also identify ways in which the lack of clear and transparent policies from Scottish Government and/or other public bodies may have had similar impact.

COVID-19 has had a significant impact on NHS services. Many non-COVID services have been suspended. This has had an adverse impact on those with non-COVID healthcare needs, who may be unable to access the services and treatments they require. There has also been, as noted elsewhere in our response, a range of ethical guidance issued by different bodies which may have implications for older or disabled people with COVID-19 accessing critical care.

Across the justice system, there has been a move towards dealing with cases through technology, rather than through face-to-face hearings (and the points we raise in this justice context are applicable across online services more generally, both access to vital public services but also access to private services, such as online grocery shopping). The transition to technology has been a necessary response by the justice system to the current crisis, to ensure that access to justice can continue to be available. However, this change of means may have potential impacts on equality and human rights. We believe that the outcomes for this paradigm change should be monitored, to ensure that outcomes for individuals are not reduced as a result, and that people remain able to participate effectively in the decisions which affect them. There was some evidence before the current crisis that poorer outcomes might be seen for particular groups, such as in bail appeals in the area of immigration and asylum. For instance, in 2013, the Bail Observation project noted that of 211 immigration bail hearings observed, 50% of those heard via video link were refused bail, compared to 22% of those heard in person¹⁵.

There are also issues around a 'digital divide', between those able to use technology to participate and those unable to do so, whether because of a lack of information technology, literacy or numeracy skills, the need for interpretation, disability, geographic location or a range of other factors. The Office for National Statistics estimates that 10% of the population has either never used the internet or have not used it in the last three months¹⁶. In Scotland, it has been suggested that the digital divide is wider, with 21% of the population lacking basic digital skills¹⁷. These issues may be more acute during the current crisis, where some of the digitally assisted services, such as offered at local libraries, may be limited or unavailable. These issues have a direct impact on access to services, for instance, in 2018, the Department of Work and Pensions publication, *Universal Credit Full Service Survey*, recorded 30% of claimants were saying that they found on-line claiming difficult, and 25% were unable to submit an online claim¹⁸.

¹⁵ <https://bailobs.files.wordpress.com/2015/03/2nd-bop-report.pdf>

¹⁶ Office for National Statistics, *Exploring the UK's digital divide*, 2019 (<https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/articles/exploringtheuksdigitaldivide/2019-03-04/pdf>)

¹⁷ Scottish Council of Voluntary Organisations, *Tackling Digital Exclusion in Scotland*, 2017 (<https://storage.googleapis.com/digital-participation-charter/tackling-digital-exclusion-in-scotland-a4.pdf>)

¹⁸ Neville Harris, Ciara Fitzpatrick, Jed Meers and Mark Simpson, *Journal of Social Security Law*, 27(2), available at <https://ssrn.com/abstract=3607312> p 27 – Digital Exclusion

Access to online services can be challenging for more rural communities. For instance, Ofcom's Connected Nations 2019 Scotland report¹⁹ highlighted that it is estimated “that around 12,300 premises in Scotland cannot access either a decent fixed broadband service or get good 4G coverage indoors (from any operator).” While it appears that improvements are being made (for example, Ofcom’s report notes that “indoor 4G coverage from all four operators is available to 79% of premises in Scotland, up from 75% in 2018 and 57% in 2017”, it is clear that there remain areas where basic levels of connectivity coverage are not available.

As the lockdown reduces, some of the measures introduced to facilitate justice through technology may be continued and we believe that it is important to monitor, and possibly to research, around outcomes for individuals to ensure that justice remains effective for all. We note, for instance, the interim report from the Equality and Human Rights Commission from April 2020, *Inclusive Justice: A System Designed for All*, which raises issues around this wider use of technology²⁰.

Maintaining human rights and the rule of law remains crucial through the current crisis and the easing of lockdown. The challenges around face-to-face court and tribunal proceedings during a period of social distancing have seen many cases postponed or adjourned. In other situations, for instance, around housing, there has been a specific moratorium established to protect tenants. The backlog of cases as a result of these delays may have an adverse impact on particular vulnerable groups, for instance, individuals placed on remand.

Question 4: What do the Scottish Government and public authorities (e.g. local authorities, health boards etc.) need to change or improve: as a matter of urgency?²¹

There may be some actions which could be taken now to help address or improve the position of certain of these groups. With regard to the older groups or indeed, groups recognised as requiring shielding, defined as being those who should not leave their homes and should minimise all non-essential contact with other members of their household.²² We can highlight that advice has already been made available with helplines that offer support and help. These communication lines must continue to be supported as they will be even more vital to continue to support them to shop and be assigned a prioritisation to avoid the recurrence of shortage of food etc which marked the start of the pandemic emergency. There should be a continuing role, through the NHS and specifically, doctors’ surgeries to contact their patients to support their needs and avoid some of the immediate effects that were seen of the pandemic emergency. Practical

¹⁹ https://www.ofcom.org.uk/__data/assets/pdf_file/0028/186409/connected-nations-2019-scotland-report.pdf

²⁰ <https://equalityhumanrights.com/en/publication-download/inclusive-justice-system-designed-all>

²¹ We have split the Question 4 and 5 up following the style of the Abstract of Evidence submitted to date.

²² <https://www.gov.scot/publications/covid-shielding/>

considerations could be given to issuing such vulnerable groups with packs to include masks and plastic gloves for them to wear to encourage them to go out safely and more importantly, to help their mental health and issue of loneliness and isolation by providing them with a feeling of security and being part of our community.

Question 5: What do the Scottish Government and public authorities (e.g. local authorities, health boards etc.) need to change or improve: in the medium to long term?

There is a need to obtain advice, insight and relevant expertise from a range of organisations, including those that represent those groups which we recognise have been most impacted by the pandemic emergency. That needs to be coupled with the continued need to monitor and to challenge any abuse of power beyond a time when the effect of the response is no longer proportionate.

We are all facing new challenges from COVID-19 where we recognise that significant equality and human rights implications have arisen. Many strategic plans need to be revised to allow for decision to be made where a number of these organisations will have responsibilities under the Public Sector Equality Duties to account for and in making decisions in the future that represent lessons learned from experience, and to protect those groups impacted by COVID-19.

We would suggest that:

- There should be a focus on what is happening to people in vulnerable and disadvantaged groups, and their families and carers, rather than upon official pronouncements as to what should happen or is about to happen. In particular, it should focus upon situations where such discrepancies appear currently to threaten fundamental rights, including the right to life.
- That Scottish Government and relevant other public bodies be urged (a) to provide and allocate sufficient resources to ensure that needs for access to justice, performance of statutory responsibilities of MHOs, and fulfilment of functions of OPG are fully met, and (b) to ensure, with immediate effect, the recruitment, training and retention of adequate staff to meet those needs, now and into the future.
- That Scottish Government and other public bodies take prompt and effective steps:
 - to ensure full and timeous compliance with all statutory requirements, and proper fulfilment of all responsibilities under statute, within the ambit of this submission;
 - to the extent that a culture of de-personalisation has developed, to eradicate it;
 - to ensure that clear and transparent policies are established and effectively communicated in matters of critical decision-making where, by default, *de facto* procedures are being adopted;
 - to the extent that practices which discriminate against older people and people with vulnerabilities and disabilities have developed, to eradicate them wherever they occur;

- to promote and ensure full compliance with human rights requirements to the maximum extent that circumstances permit in each individual case; and
 - to promote the use of KIS forms.
- That Scottish Government and the Scottish Parliament be urged to ensure prompt enactment of the further statutory modifications proposed by the Law Society of Scotland
- That Scottish Government be urged to confirm that it will not bring into force the proposed temporary modifications to section 13ZA of the 1968 Act.

Annex – Mental Health and Disability

Underlying issues

Prior to Covid-19, under-resourcing of relevant services was already impairing the proper operation of existing legislation. That situation has been seriously exacerbated by the pandemic, rather than caused by the pandemic. In one respect, failure to legislate following upon a Scottish Law Commission (SLC) recommendation has now also exacerbated matters.

MHOs have several crucial roles under both mental health and adult incapacity legislation, and related areas. Over the period of five years to 31st March 2015, the workload of MHOs under the 2000 Act rose to 205% of its level at the beginning of that period, and responsibilities under the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) also produced substantially increased workload, yet the number of MHOs in post actually reduced (see MWC Monitoring Reports 2014-2015). MHO Reports are among the statutory preconditions for initiating procedure to obtain guardianship and intervention orders with welfare powers. It was recognised that delay at the stage of initiation of applications (only following which even applications for urgent interim orders may be made) would amount to a denial of justice and failure to respect human rights of adults assessed as requiring such orders, The Scottish Parliament accordingly included in the 2000 Act provisions for notification to local authorities of intention to apply for welfare powers, and a time limit of 21 days for production of the required MHO report. The 2000 Act contains no provisions for relaxation of that requirement. In practice, compliance has proved to be impossible. Even prior to the particularly urgent demands of the pandemic, general experience was that the 21-day statutory limit was routinely exceeded, usually substantially so, with waiting lists in excess of a year in some cases. That situation has been substantially exacerbated by the impact of social distancing upon processes of interview and assessment to produce the statutory MHO and medical reports required under such procedure, coupled with reductions in the availability of MHO services due to health effects of the pandemic, home-working arrangements, child-care demands and so forth.

The population is being urged to engage in anticipatory care planning. In many cases, members of the public have been encouraged (for example, by circulars from GP practices to all of their patients) to grant welfare powers of attorney and/or to consider executing advance directives. Powers of attorney do not become operable until they have been registered with OPG. Staffing levels at OPG had already led to long delays in processing applications for registration there. That situation has been exacerbated by deployment of most OPG staff to home working, and reduction in available staff time due to health issues, child-care requirements, and other consequences of the pandemic. In the case of advance directives, UK-level encouragement to grant them fails to take account of the fact that, especially since enactment of the Mental Capacity Act 2005 for England & Wales, the status in law of advance directives, and requirements for effectively granting and (where desired) terminating them, remain unclear in Scotland compared to the position in England & Wales, notwithstanding that statutory provision for Scotland to remedy these issues was published and recommended by the SLC in its Report No 151 of September 1995.

In relation to the issues summarised in the two preceding paragraphs, all concerned are making best efforts to pick out situations identified as being of particular urgency, and to accelerate relevant procedures. However, in the pandemic any application for an order under the the 2000 Act, or any need to operate a power of attorney that has already been executed, could arise randomly and immediately, with no time for delayed commencement even of urgent procedures.

Another underlying issue, also attributable to a significant extent to under-resourcing, has been the existence of resource-led rather than care-led pressures to move people into residential care settings, often without their valid consent. The 2000 Act and the 2003 Act contain carefully-structured procedures and safeguards for such situations. The European Convention on Human Rights (ECHR) requires their operation, and developing jurisprudence under ECHR has clarified obligations although, even then, it is currently questionable whether the 2000 Act, even where an appropriate welfare guardianship power is used, fully meets the requirements of Article 5 of ECHR. For example, the strict requirements of Article 5 of ECHR in respect of deprivation of liberty have been clarified by relevant jurisprudence as applying to any situation where an adult is moved into a situation where the adult is under continuous supervision or is not free to leave, except where the adult has validly consented to the arrangement. That exception does not apply to adults who are compliant but not capable of valid consent to the arrangements.

Further relevant issues are that Article 8 of ECHR assures the right to respect for private and family life, and Article 19 of the UN Convention on the Rights of Persons with Disabilities (the CRPD) - with which the United Kingdom has undertaken to comply - provide that adults should not be put under compulsion to move from one residence to another, have the right to reside where they choose, and the right to have necessary services delivered to them there. In practice, various methods are almost routinely used to try to pressurise adults with significant care needs into moving into care homes or similar. Already, proper procedures have not always been followed. To a significant extent, some of those providing local authority services fail to understand deprivation of liberty requirements and the circumstances in which they apply. As recently as October 2019, a sheriff had to point out to a local authority that proposed guardianship powers would entail a deprivation of liberty even though an MHO had asserted that they did not (see *Scottish Borders Council v AB*, 2020 SLT (Sh Ct) 41).

Prior to the pandemic, there were already concerns about the operation of section 13ZA of the Social Work (Scotland) Act 1968 (inserted into that Act in 2007). That section confers upon local authorities powers to “take any steps which they consider would help [an adult with impairment of relevant capabilities] to benefit from [provision of a community care service assessed as necessary to meet the adult’s needs]”. This explicitly extends to moving such an adult to residential accommodation provided in pursuance of the 1968 Act. Exercise of the power is however subject to various requirements and limitations. It is subject to the general principles contained in section 1 of the 2000 Act, which are designed to assure minimum ECHR compliance. It is also subject to the requirement under section 5 of the 1968 Act that local authorities must act under the general guidance of Scottish Ministers and comply with their directions and, in accordance with that provision, the guidance entitled “Guidance for local authorities: provision of community care

services to adults with incapacity”, under which procedure under section 13ZA should not be followed where it would result in a deprivation of liberty. The Mental Welfare Commission for Scotland commented in similar terms in its 2014 “Mental Welfare Commission response to queries related to when to use s13ZA v Guardianship following the Cheshire West Supreme Court decision”. Clearly, there is a risk that this will not be complied with if understanding of what situations amount to a deprivation of liberty is unduly limited.

Temporary modifications – the emergency legislative framework

Temporary modifications to existing legislation have been introduced by the UK Parliament in the Coronavirus Act 2020, and by the Scottish Parliament in the Coronavirus (Scotland) Act 2020. Some of these are helpful towards meeting the deficiencies identified in the preceding section of this submission, but do not go far enough. One of them is cause for serious concern. Proposals sent by the President of the Law Society of Scotland to the Cabinet Minister for Health and Sport on 15th April 2020 seek to address remaining deficiencies. They include text for statutory modifications drafted by our Mental Health and Disability Law committee, and the text of the proposed statutory section recommended by SLC regarding advance directives (mentioned above).

Assistance with the immediate pressures is provided by temporary modifications extending or removing time limits applicable to orders, thus reducing demands upon resources required to renew such orders where they would otherwise expire, and renewal might be considered appropriate. However, that removes requirements for review of such arrangements, even where a court has explicitly set a specified time limit required for compliance with ECHR Article 5 (an example being the recent case, mentioned above, of *Scottish Borders Council v AB*). Moreover, existing temporary modifications do not alleviate, except to that limited extent, the log-jam effects of under-resourcing explained in the preceding section.

The seriously worrying change is the disapplication from the statutory requirements for procedure under section 13ZA of the 1968 Act (described in the preceding section) of the requirement under the section 1 principles of the 2000 Act to take account of “the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (of an interpretative nature or otherwise) appropriate to the adult”. This is an absolute obligation, not limited by the “insofar as it is reasonable and practicable to do so” qualifications to the other consultation requirements of the section 1 principles. The temporary modification to section 13ZA removes all of the consultation requirements under the principles in section 1 of the 2000 Act. Those requirements are not removed or even modified for any other relevant procedure. Fortunately, and apparently as a result of representations, that provision has not been brought into force and cannot be brought into force without further action by Scottish Ministers. If it were to be brought into force, it would open the way to serious and unnecessary violations of fundamental human rights. As it stands, it contributes to a culture of serious de-personalisation of individuals affected by relevant measures, substituting powers to do whatever relevant authorities find necessary or convenient for any obligations to treat affected people as individual human beings entitled to respect, at least for residual and most important human rights.

Other examples of reinforcement of that culture include Schedule 28 to the Coronavirus Act 2020, which permits local authorities to dispose of dead bodies (that is the language used) without any obligation to attempt to ascertain the views of the deceased individual or close family in matters such as appropriate funeral arrangements and even whether burial or cremation is to be preferred. That culture of unnecessary de-personalisation is reflected in some of the case histories that follow in this submission.

Responses to the pandemic – other relevant issues

In addition to issues identified above, including excessive de-personalisation and disregard of basic human rights, another serious concern, derived from experience generally and the case histories narrated below, is an almost complete and unnecessary denial of access to justice in the civil justice sphere. Case histories D, E and F below speak for themselves. In our view, at a time when such stringent restrictions upon individual rights and liberties are imposed, prompt and if necessary immediate access to justice becomes even more important, rather than something which can in any way be dispensed with. It would appear that the deficit here is between official pronouncements and policies, on the one hand, and what actually happens in experience “on the ground”, on the other.

One slight oddity noted by members of our Mental Health and Disability committee is that general urging for anticipatory care planning does not seem to publicise the appropriateness of having KIS (Key Information Summary) forms completed by general practitioners. Strangely, the experience of such members of our Mental Health and Disability committee as have had contact with the system is that GPs welcome the opportunity to put a KIS in place. Once in place, in any emergency any healthcare provider can electronically access key information instantly, without any need to identify and go to the relevant GP practice. This includes current medications and any counter-indications for particular medications, so that treating practitioners may with confidence make decisions about appropriate medication in a particular case. Particular relevant wishes of the individual are recorded, and contact details for any attorney are provided, along with other key information. The KIS system helps to ensure respect for rights including rights to autonomy and self-determination.

Experience in practice – the case histories

Case A

A is detained in a hospital rehabilitation unit under a civil order in terms of the 2003 Act. He is recovering well, with a good prognosis to return to the community within the next 12 months. He has well-controlled Type 2 Diabetes and some non-progressing cognitive deficits, secondary to his mental illness. He is

described as engaging in all aspects of his care and treatment, and enjoying an optimal quality of life with semi-independent activities of daily living. He has feasible plans for the future.

A developed mild Covid-19 symptoms and went into self-isolation. He developed more serious symptoms and was referred to a local general hospital. Following admission there, he tested positive for Covid-19. His symptoms improved and he was discharged back to the care of the rehabilitation unit. The consultant responsible for his care there (“the consultant”) discovered that a “Do Not Attempt Cardio-Pulmonary Resuscitation” form (DNA-CPR form) had been completed by the general hospital medical team. That surprised him. A’s condition then worsened again, and he was referred back to the general hospital. The consultant spoke to the medical senior registrar at the general hospital and expressed concern about the DNA-CPR form. The consultant was alarmed to discover that the form was not the result of any miscommunication or misunderstanding. He was informed that the practice of that hospital, which he has since discovered to be a general practice, is to identify all patients upon admission as either suitable for full escalation or not. All those not identified for full escalation automatically had a DNA-CPR form issued. Those in the “full escalation” category qualified for access to a ventilator. The others did not. The basis of allocation depended upon the number of ventilators available in the unit in question at the time. Thus if ten patients were admitted one day, when only four ventilators were available, four would qualify for “full escalation” and the other six would have a DNA-CPR form completed. If a patient for whom a DNA-CPR form has been issued subsequently returns (as A did) there is no re-assessment. The DNA-CPR remains in place.

Comment on Case A, and subsequent developments

The procedure described above gives rise to the following concerns:

1. The procedure is apparently secretive, and simply “made up as we go along” rather than resulting from a properly taken policy decision, clearly and publicly proclaimed, with such reasons as might be necessary to justify it.
2. It is particular cause for concern that a consultant in another discipline had to discover that policy, rather than being openly made aware of it.
3. In such “life-or-death” situations, and notwithstanding pressures of time and practicalities, decision-making processes that are lawful and ethical should be followed as far as reasonably possible, including crucial elements such as engagement with the patient and others having status on the patient’s behalf.
4. If for any reason lawful and ethical decision-making processes have not been followed to the full initially, the first opportunity should be taken to make good such initial deficiencies. There should in particular be full review upon any re-admission.
5. Particularly of concern is that once a label such as a DNA-CPR is attached to a particular patient, it sticks even if the patient presents again later.

6. There have to be concerns whether patient A would have been similarly diverted away from “full escalation” but for his mental health problems and secondary cognitive deficits.

The consultant made further enquiries and representations. The position has been clarified in a letter of 5th May 2020 from the Interim Principal Medical Officer, Scottish Government, to Chief Executives and Medical Directors of Health Boards, for distribution to all clinical teams, and copied to the Mental Welfare Commission for Scotland, the Royal College of Psychiatrists in Scotland and the Royal College of General Practitioners in Scotland. It addresses the use of DNA-CPR “with younger patients, those with a stable long-term physical need, learning disability or autism”. It is stated to apply to all clinicians. It includes the following:

“To provide absolute clarity, a stable long-term physical need, learning disabilities or autism should never be a reason for issuing or encouraging the use of a DNACPR order. Social care needs, health conditions or disabilities that are unrelated to a person’s chance of benefiting from treatment must not be a part of clinicians’ decision making regarding accessing treatment.”

“Decisions regarding appropriateness of admission to hospital and for assessment and treatment for people with learning disabilities and/or autism must be made on an individual basis and in consultation with their family and/or paid carers. These should take into account the person’s usual physical health, the severity of any co-existing conditions and their frailty at the time of examination. Treatment decisions should not be made on the basis of the presence of learning disability and/or autism alone.”

This is an improvement, but leaves significant causes for concern. Firstly, it refers only to patients with a stable long-term physical need, learning disabilities or autism, and thus by omission excludes patients with other characteristics or conditions rendering them vulnerable, such as old age, dementia, head injury, an unstable long-term physical health condition, and so forth. There should be governing ethical and legal principles applicable to when a DNA-CPR form is completed for everyone, irrespective of the individual patient’s characteristics or condition. Secondly, there is a requirement for consultation with family and/or paid carers but, startlingly, not with the patient. Those two features appear respectively to identify unlawful discrimination against some groups and, as regards failure to consult the individual, violations of human rights and potentially of relevant statutory principles.

These concerns appear to be linked to those arising in cases B and C.

Cases B and C

B and C are two care homes. A solicitor has clients in both. Upon enquiry, the solicitor has been advised that upon blanket decisions by the general practitioners serving those homes, the records of all residents have been marked “not for hospital transfer”. Thus, they will all be denied referral to hospital in

circumstances where persons not resident in those care homes, or otherwise in a situation where such policies apply, would be referred.

Comment on Cases B and C

As in Case A, the practice identified here results in people being denied healthcare treatment because they have been put into a particular category, without any individual assessment beyond such categorisation. In Case A there was an initial assessment, but it was clearly deficient, and what was denied was access to full treatment, including access (if needed) to a ventilator. In Cases B and C, all residents are denied access to any hospital treatment for no reason other than that they reside in those care homes, and with no individual assessment at all. This is a violation of rights to treatment and to non-discrimination and would also point to breach of key requirements for consultation in relevant legislation.

Case D

Adult D resides in D's own home. The local authority applied for a welfare guardianship order, with power to move D into care. D was and remains opposed to the move. D's opposition was accurately recorded in the statutory reports accompanying the application.

The application was lodged in court as a matter of urgency. In the light of D's opposition, the sheriff appointed a safeguarder (an experienced solicitor advocate), but at the same time granted an interim welfare guardianship order as sought. The safeguarder sought an assurance from the local authority that a short period would be allowed for investigation by the safeguarder, before steps were taken to move D. The local authority's legal department failed to respond. They refused to discuss the matter by telephone. They said that they would only communicate by emails, but did not do so.

The safeguarder nevertheless immediately commenced urgent enquiries with relevant professionals and D, and instructed an independent social work report. The safeguarder's concerns included the relatively high levels of incidence of Covid-19 infections and resulting deaths in care homes such as that to which it was proposed to move D. The safeguarder proceeded on the basis that robust enquiry was required.

Four days after the interim appointment, the MHO advised that D was due to be moved in three days' time. As the safeguarder still did not have any agreement from the Council to allow a short period for investigation, and in particular to obtain the independent social work opinion, the safeguarder tried to contact the relevant court to obtain an order for directions under section 3 of the 2000 Act. The safeguarder made countless attempts to contact the relevant sheriff court hub, other hubs, the direct email addresses for two clerks, and extension numbers of relevant clerks, with no success. An email to the Scottish Court Service enquiry lines remains unanswered.

Following urgent requests for help to the Law Society and other bodies to which the safeguarder had access, the safeguarder was provided with yet another email address for another clerk, on the basis that the address would not be shared. That then resulted in the matter being actioned and allocated to a clerk to phone the safeguarder. That clerk then advised that clerks were working only by email. In the meantime, the independent social worker had called at D's home and met D urgently there. D confirmed to the independent social worker D's opposition to several points in the local authority application. However, in view of two incidents which occurred during the preceding few days, the independent social worker concluded, and advised the safeguarder verbally, that on balance a move to a nursing home "would comply with the general principles" of the 2000 Act.

Comment on Case D

Several features of this case clearly violated basic human rights, including rights assured by ECHR. Any proposal to move a non-consenting adult from the adult's own home to another location where the arrangements are such that they will be subject to continuous supervision and control or not free to leave (or for that matter to keep the adult there) is a deprivation of liberty in terms of Article 5 of ECHR. It must be recognised as such, all the safeguards required by Article 5 must be complied with, and there must be procedural fairness in terms of Article 6. It is understood that Covid-19 was not a feature in this case, therefore the only relevant aspects of emergency legislation were those to facilitate electronic and other distant interactions. The failure of Scottish Courts and Tribunals Service (SCTS) to respond to the safeguarder's multiple attempts to contact the court clearly amounted to a denial of access to justice in contravention of Article 6 of ECHR. In accordance with SCTS "Sheriff Court Civil Business – Guidance effective from 1 May 2020" issued on 29th April 2020, a facility should have been available to enable the safeguarder to make precisely the type of emergency application sought in this case. The gap between theory and practice was substantial.

Moreover, the only lawful way in which a decision of a guardian regarding place of residence of an adult can be enforced, in the face of non-compliance, is by a constable authorised under section 70 of the 2000 Act. It appears that no such authorisation was sought. Any actual attempt to enforce removal, if that indeed occurred or is planned, would be unlawful.

Crucially, no attempt appears to have been made to ensure that D had the benefit of legal representation, again in breach of Article 6.

It is also relevant to note that Article 19 of CRPD, duly ratified by the United Kingdom Government, confers on everyone the right to reside where they choose and to have relevant services provided to them there. The proposed action by the local authority in this case would have violated Article 19 of CRPD, as well as Article 8 of ECHR (particularly interpreting Article 8 in the light of the United Kingdom's commitment to CRPD).

Case E

An MHO sought an urgent warrant under section 292 of the 2003 Act. There was serious risk to the adult and the warrant was urgently required. When the MHO arrived at court, an attempt was made to turn him away at the door. He was advised that there were no clerks in the building. He insisted, and eventually it transpired that after all there was a clerk there. The papers were passed over to the clerk. A warrant was granted. The sheriff saw fit to convey apologies to the MHO that, despite the serious circumstances of the adult, the MHO had encountered such difficulties over access.

Comment on Case E

Given that this matter related to an adult said to be at serious risk, the breach of relevant human rights was obvious and substantial.

Case F

Adult F had a welfare guardian. The local authority sought to move F to supported accommodation without the guardian's consent. The move did occur and the guardian was negotiating regarding arrangements for contact with F. The local authority submitted an application to court, by way of Minute, seeking directions under section 3 of the 2000 Act designed to suspend the operation of the guardian's powers to determine residence and care. The application named the guardian's solicitor, but the guardian's solicitor was not provided with a copy of the application. The guardian's solicitor was informed by a clerk of court that the sheriff wished to hold a telephone hearing the next morning to consider the application and to allow the participation of the guardian's solicitor. The sheriff then granted the order sought on an interim basis without a hearing. No safeguarder was appointed.

Comment on Case F

This appears to be another case where, one suspects for budgetary reasons, a local authority apparently attempted to take advantage of current circumstances to move an adult in clear violation of human rights. In any event, the procedure followed appears to have been incompetent. Section 3 of the 2000 Act can be utilised to seek an order from the court directing a guardian how to exercise powers held by the guardian. It cannot be used to suspend those powers. The appropriate procedure for that, which apparently was not followed, is procedure to vary a guardianship order under section 74 of the 2000 Act.