



Law Society
of Scotland

Consultation Response

Clinical Guidance for NHS Scotland: Using Physical Restraint For Patients With Confirmed Or Suspected COVID-19 (version 1)

July 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 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.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Scottish Government guidance: *Clinical Guidance for NHS Scotland: Using Physical Restraint For Patients With Confirmed Or Suspected COVID-19* (version 1, 20/4/2020).¹ The sub-committee has the following comments to put forward for consideration.

General Comments

Our approach to policy issues is directed by our statutory aims under the Solicitors (Scotland) Act 1980, namely to represent the interests of the solicitors' profession in Scotland and the interests of the public in relation to that profession, and by the regulatory objectives of the Legal Services (Scotland) Act 2010, namely:

- supporting the constitutional principle of the rule of law and the interests of justice
- protecting and promoting the interests of consumers and the public interest generally
- promoting access to justice and competition in the provision of legal services
- promoting an independent, strong, varied and effective legal profession
- encouraging equal opportunities within the legal profession
- and promoting and maintaining adherence to professional principles

Integral to the constitutional principle of the rule of law is that the law must afford adequate protection of fundamental human rights². In our response to the policy issues arising from the COVID-19 pandemic, we

¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2020/04/coronavirus-covid-19-clinical-guidance---using-physical-restraint-for-patients/documents/covid-19-clinical-guidance-using-physical-restraint-for-suspected-or-confirmed-covid-19-patients/covid-19-clinical-guidance-using-physical-restraint-for-suspected-or-confirmed-covid-19-patients/govscot%3Adocument/COVID-19%2Bclinical%2Bguidance%2Bphysical%2Brestraint%2Bof%2Bpatients%2B-%2B20%2BApril%2B2020.pdf>

² Tom Bingham, *The Rule of Law*, 2011

have sought to emphasize the crucial importance of ensuring that the fundamental protections for people across Scotland through our framework of equality and human rights laws are maintained.³

We understand that the *Clinical Guidance for NHS Scotland: Using Physical Restraint For Patients With Confirmed Or Suspected COVID-19* (hereinafter referred to as ‘the guidance’) is high-level guidance intended to ensure clarity of approach and safe practice in cases where patients are known or suspected of having COVID-19. We note that this guidance has been prepared against the challenging background of the COVID-19 pandemic. We further note that this guidance is intended to operate alongside existing local and national guidance on supporting mental health and learning disabilities patients.

We are concerned, however, that the guidance as currently drafted does not sufficiently emphasize the existing legal and ethical considerations which apply to the use of physical restraint for mental health and learning disabilities patients. We envisage that the current emergency will necessitate that such patients, if they have diagnosed or suspected COVID-19, be treated in acute hospitals, where staff may not be as familiar with the relevant legal and ethical considerations as those working in mental health and learning disability services. Whilst we note that the Mental Welfare Commission’s guidance “Good Practice Guide: Rights, risks and limits to freedom”⁴ is referred to within the references, we would suggest that specific references to the relevant sections of that Mental Welfare Commission guidance where appropriate within the guidance would assist in highlighting the relevant legal and human rights issues, and the established decision-making processes that apply in cases where physical restraint is used.

We also note that the guidance appears only to apply to patients with mental illness and learning disabilities. This is not reflected in the title of the guidance, and it may be helpful to clarify this.

The following comments refer to specific sections of the guidance.

Section 3

Section 3 is headed 'Physical Restraint During COVID-19' but this is not descriptive of the section content, which sets out the principles and best practice for reducing the need for restraint. We would suggest that renaming this section would ensure greater emphasis on the ethical and legal context.

The list of bullets at 3.2 starting with 'Preventive approaches such as' appears to be incomplete. It should presumably say that such approaches 'are encouraged' or 'should be followed'.

It would be helpful to add a reference at 3.2 or 3.4 to anticipating the possible need for restraint and having a plan for it, including clarification about the legal justification for restraint. If the guidance is to be applied in relation to mental health and learning disabilities patients who are in general settings, it would be helpful to

³ See for example our Stage 1 briefing on the Coronavirus (Scotland) (No. 2) Bill, 12 May 2020: <https://www.lawscot.org.uk/media/368825/12-05-20-coronavirus-no-2-bill-stage-1-briefing.pdf>

⁴ https://www.mwscot.org.uk/sites/default/files/2019-06/rights_risks_2013_edition_web_version.pdf

make reference to the need to ensure there is a proper history of the patient and advice from mental health colleagues about their needs

3.4 refers to requiring patients to isolate, but again there is no reference to the legal basis that would be required for this. We would suggest that there should be a reference to the separate Mental Welfare Commission guidance “Use of seclusion: Good Practice”.⁵

Section 4

Whilst we would suggest that the issue of the legal basis for restraint, particularly for voluntary patients, needs more emphasis throughout the guidance, this is particularly so in the section on medication for acute disturbance.

Such medication would normally require to be authorised under the Mental Health (Care and Treatment) (Scotland) Act 2003 or Adult with Incapacity (Scotland) Act 2000, and the appropriate procedures for the relevant legislation followed. The lack of any reference to the provisions and principles of the 2000 Act anywhere in the document is a striking omission.

Section 7

We would suggest that advocacy services should also be involved in any post incident de-brief.

Section 8

It would be helpful to include links to specific resources.

For further information, please contact:

Jennifer Paton
Policy Team
Law Society of Scotland
DD: 0131 476 8136
JenniferPaton@lawscot.org.uk

⁵ https://www.mwscot.org.uk/sites/default/files/2019-10/Seclusion_GoodPracticeGuide_20191010.pdf