



Law Society  
of Scotland

# Written Evidence

## Independent Review of Adult Social Care

December 2020



## Introduction

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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 Independent Review of Social Care's call for written evidence.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

## General Comments

We note that the principal aim of the review is to recommend improvements to adult social care in Scotland, primarily in terms of the outcomes achieved by and with people who use services, their carers and families, and the experience of people who work in adult social care. We also note that the review will take a human-rights based approach.

We note that the Review will consider and make recommendation in a number of areas. Whilst other organisations and individuals will be better placed to comment on many of these, we have a particular interest in the remit of the review as it relates to:

- The needs, rights and preferences of people who use services, their carers and families;
- Future policy developments that should be a focus for the Scottish Government and any recommendations regarding the legislation that currently underpins social care provision and regulation;

We have made a number of previous submissions which are relevant to matters within the remit of the Review. Rather than repeat these submissions, we have where possible cross-referenced to avoid repetition.

<sup>1</sup> <https://www.gov.scot/groups/independent-review-of-adult-social-care/>

## **The needs, rights and preferences of people who use services, their carers and families**

In our written submission to the Scottish Parliament's Equalities and Human Rights Committee available at [Inquiry on the Impact of COVID-19](#), we expressed concerns regarding a culture of de-personalisation within health and social care settings. Whilst COVID-19 has exacerbated these issues, under-resourcing of relevant services was already impairing the proper operation of existing legislation and thereby adversely impacting the needs, rights and preferences of people who use services and their carers and families.

One area where we have particular concerns is in relation to the existence of resource-led rather than care-led pressures to move people into residential care settings, often without their valid consent. We highlighted these concerns in our recent news release [Evidence required to show lockdown hospital discharges were lawful](#). In addition to the concerns mentioned there, there are concerns of failure to take steps to ensure compliance with article 19 of the UN Convention on the Rights of People with Disabilities.

We are also concerned that care settings which amount of deprivations of liberty in terms of Article 5 of the European Convention on Human Rights are not always recognised as such by health and social care professionals, and accordingly that appropriate legal processes to authorise such support arrangements are not always followed. We have particular concerns regarding the operation of section 13ZA of the Social Work (Scotland) Act 1968 in this context. We highlighted these concerns in our [letter to the COVID-19 Committee of the Scottish Parliament](#) of 15 September 2020.

## **Future policy developments that should be a focus for the Scottish Government and any recommendations regarding the legislation that currently underpins social care provision and regulation**

We note that the Review has developed links to other national reviews underway in Scotland, including the Independent Review of Mental Health Law in Scotland. We have previously provided [written evidence](#) to this review, setting out our views on reform of mental health, adults with incapacity and adult support and protection legislation. We consider that these pieces of legislation and reform in this area have an important role in underpinning future social care policy and legislation.

In order for any system of social care to function effectively, it is essential that all elements of it are properly resourced. We have previously highlighted our concerns in relation to resourcing for Mental Health Officers and the Office of the Public Guardian, and have called for Scottish Government and other public bodies both to ensure that sufficient resources are made available for the performance of statutory functions and to ensure recruitment, training and retention of adequate staff to fulfil these roles.<sup>2</sup>

It is also essential that those who use social care services are able to effectively enforce their rights and are afforded access to justice. We have previously highlighted access to justice concerns in relation to sections 25 and 26 of the Mental Health (Care and Treatment) (Scotland) Act 2003. These sections require a local authority to provide services for people with a mental disorder who are not in hospital, which should be designed to minimise the effect of mental disorder on people and enable them to live as full a life as possible.<sup>3</sup> However, we would suggest that these concerns in fact apply to the legislation underpinning social care more generally. Currently, those seeking to enforce their rights must generally do so by applying for judicial review in the Court of Session. Even that remedy largely operates in relation to procedural failings, such as failure to consult. A truly rights based approach would provide an effective remedy for substantive failures to deliver an acceptable level of provision to meet international human rights obligations, for example the right to independent living in Article 19 of the UN Convention on the Rights of Persons with Disabilities. Future reform of the legislation which underpins social care provisions and regulation should consider ways to ensure that there are accessible and proportionate mechanisms to enable individuals to enforce their rights within a social care context.

**For further information, please contact:**

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