Law Society of Scotland

Consultation Response

National Clinical and Practice Guidance for Adult Care Homes in Scotland during the COVID-19 Pandemic (version 1.3)

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's guidance: *National Clinical and Practice Guidance for Adult Care Homes in Scotland during the COVID-19 Pandemic* (version 1.3 dated 15 May 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 rights.[2] 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/2020/03/coronavirus-covid-19-clinical-and-practice-guidance-for-adult-care-homes/documents/clinical-guidance-for-nursing-home-and-residential-care-residents/clinical-guidance-for-nursing-home-and-residential-care-residents/govscot%3Adocument/National%2BClinical%2BGuidance%2Bfor%2BCare%2BHomes%2BCOVID-19%2BPandemic-%2BMASTER%2BCOPY%2B-%2BFINAL%2B-%2B15%2BMay%2B2020.pdf

2 Tom Bingham, The Rule of Law, 2011

have sought to emphasis 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 *National Clinical and Practice Guidance for Adult Care Homes in Scotland during the COVID-19 Pandemic* (hereinafter referred to as 'the guidance') is intended to provide advice and support for those working with adults in care homes during the COVID-19 pandemic. 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 guidance from Health Protection Scotland. Our comments are made specifically in the context of the sub-committee's remit covering all aspects of mental health and disabilities, with a primary focus in the case of disabilities on mental and intellectual disabilities. In our response, we have concentrated on sections of the guidance most relevant to these areas.

We have recently provided written evidence, including case histories, to the Scottish Parliament's Equalities and Human Rights Committee's inquiry on the impact of COVID-19. Our submission[4] should be referred to for further information on the matters addressed below.

The following comments refer to specific sections of the guidance.

Section 4: Engagement of Residents and their families in discussion care and treatment

The need for appropriate support for decision-making in order for residents to make ACP decisions that reflect their rights, will and preferences should be restated, in accordance with Articles 12, 15, 16 and 17 of the UN Convention on the Rights of Persons with Disabilities, and Articles 3 and 8 of the European Convention on Human Rights.

Section 5: Receiving care and treatment in hospital settings

We are concerned that this section of the guidance in effect creates a general presumption against going to hospital, for understandable reasons, but we know from the case histories that we have identified[5] that what is happening in at least some care homes is a blanket prohibition on transferring any resident to hospital for any reason. That represents a major violation of rights. Those who drafted the guidance may not be aware of that situation. We recommend as a matter of urgency that clear advice be given that there

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 Law Society of Scotland, Response to the Scottish Parliament's Equalities and Human Rights Committee's Inquiry on the Impact of Covid-19, https://www.lawscot.org.uk/media/369002/2020-05-25-equalities-and-human-rights-committee-submission-regarding-covid-19.pdf

5 Law Society of Scotland, Response to the Scottish Parliament's Equalities and Human Rights Committee's Inquiry on the Impact of Covid-19, https://www.lawscot.org.uk/media/369002/2020-05-25-equalities-and-human-rights-committee-submission-regarding-covid-19.pdf

should never be any such "blanket" prohibition. The guidance should expand on the penultimate sentence of this section to make it clear that where someone needs to go to hospital, they should. The focus should be on individual decisions, not blanket decisions. In this context, as well as in the context of section 6, the importance of compliance with the guidance from the Interim Principal Medical Officer referred to in our comments on section 6 should be stressed.

The reference to "best interest" in the penultimate sentence of this section is wrong in law and requires to be replaced. This aspect should be expanded upon to explain to care home staff that they must always be aware of the basis of decision-making. If the person themselves can make a decision, that should settle the matter, and they should be given all necessary support to do that. If there is an appointee with relevant powers, the appointee must be consulted. If section 47 of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") is being applied, then decisions must be made in accordance with the principles of the 2000 Act. In all situations, those principles should be followed and matters should not be decided on a "best interests" basis.

Section 6: Do Not Attempt Cardiopulmonary Resuscitation (DNACPR)

We refer to our submission to the Scottish Parliament's Equalities and Human Rights Committee.[6] Any appointees should be included in discussions. Where a resident has gone to hospital and returned, the care home should check whether a DNACPR has been put in place by the hospital. If so, it would seem wise to re-check in the recommended way once the resident has returned, and to ensure that the hospital removes it unless it seems relevant for it to remain in place. There seems to be a disconnection between this guidance and the terms of the Interim Principal Medical Officer's "*Letter to NHS Boards to ensure clarity in relation to the use of the Clinical Frailty Scale (CFS) and the use of Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) with younger patients, those with a stable long term physical need, learning disability or autism"*.[7]

The guidance states at 6.2 that "It is important to note that there is no specific requirement to have a DNACPR discussion as part of this ACP conversation, unless the individual raises this and wishes to discuss it, or the clinician feels strongly that they need to discuss it." However, the ACP form which is to be completed (and which is linked to in the guidance) specifically asks a Yes or No question about whether the person is to have CPR. There is no section for 'not discussed'. Given the comment at 6.2 that 'CPR has a very low chance of success when cardiopulmonary arrest is in the context of severe COVID illness', we are concerned that this may lead to cases where the form may indicate that CPR should not be

6 Law Society of Scotland, Response to the Scottish Parliament's Equalities and Human Rights Committee's Inquiry on the Impact of Covid-19, https://www.lawscot.org.uk/media/369002/2020-05-25-equalities-and-human-rights-committee-submission-regarding-covid-19.pdf

7 https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2020/05/coronavirus-covid-19-use-of-clinical-frailty-scale---letter-from-principal-medical-officer/documents/coronavirus-covid-19-use-of-clinical-frailty-scale---letter-from-principal-medical-officer/coronavirus-covid-19-use-of-clinical-frailty-scale---letter-from-principal-medical-officer/govscot%3Adocument/JM%2BLetter%2Bto%2BCEs%2BMDs%2B-%2BClinical%2BFrailty%2BScale%2B-%2B05%2B05%2B20-KM.pdf

attempted, when that has not in fact been discussed with the patient. That approach would not seem to be consistent with how the Supreme Court has set out requirements relating to medical consent,[8] or English caselaw on DNACPR forms and Article 8 of the European Convention on Human Rights.[9]

There is also a need for appropriate support for decision-making in order for residents to make DNACPR decisions that reflect their rights, will and preferences, and this should be restated in accordance with Articles 12, 15, 16 and 17 of the UN Convention on the Rights of Persons with Disabilities, and Articles 3 and 8 of the European Convention on Human Rights.

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8 *Montgomery v Lanarkshire Health Board* [2015] UKSC 11

9 See *Tracey v Cambridge University Hospital* [2014] EWCA Civ 822 and *Winspear v City Hospitals Sunderland* [2015] EWHC 3250 (QB).