



Law Society
of Scotland

Consultation Response

Proposal for Time Limited Care Certificate

May 2021



Introduction

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

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Scottish Government proposal for a Time Limited Care Certificate (“the proposal document”) shared under cover of email from the Team Leader Adults with Incapacity Legislation and Practice, Directorate for Mental Health and Social Care, dated 16 April 2021. The sub-committee has the following comments to put forward for consideration.

General Comments

In February 2021, we commented on Scottish Government proposals for a short term placement order. We highlighted a number of concerns in respect of these previous proposals, and we are pleased to note that many of these have been addressed in developing the current proposal document. Our general comments in that response in respect of the need for reform and the impact of longstanding resource issues continue to apply. In particular, we would emphasise that for reasons explained in that previous response, the requirement for a regime providing for ECHR-compliant authorisation of deprivations of liberty is now overdue and critically urgent. The proposal for a Time Limited Care Certificate, subject to the comments below, will be more satisfactorily brought into force if integrated in such an overall scheme. It remains appropriate for such a scheme to be put in place ahead of completion of the Scott Review, as Scottish Government undertook would be done in the announcement of the establishment of the Scott Review on 19th March 2019. The relevant paragraph of that announcement reads as follows:

“At the same time as the review takes place, we will complete the work we have started on reforms to guardianships, including work on restrictions to a person’s liberty, creation of a short term placement and amendments to power of attorney legislation so that these are ready when the review is complete.”¹

We welcome this further opportunity to comment on the proposed Time Limited Care Certificate. We reiterate that it is imperative that any new authorisation does not seek to undermine existing safeguards, or to provide procedural authorisation for current failures in upholding human rights. We recognise that there

¹ Scottish Government, Future Direction of Mental Health and Incapacity Law, 19 March 2019, available at <https://www.glasgowchildprotection.org.uk/CHttpHandler.ashx?id=44895&p=0>

are a small number of situations where a genuinely short-term solution is required to meet the needs of an adult, where no other suitable lawful mechanism is available. We support proposals for a Time Limited Care Certificate in those circumstances.

Our detailed comments on the proposal are set out below, using the headings provided in the proposal document. Reference to specific numbered paragraphs are references to paragraphs within the proposal document.

Background

Paragraphs 1- 7 of the proposal document set out relevant background information and narrate the recent history of the reform programme for AWI legislation, though they do not narrate the key existing proposal of 19th March 2019 quoted above.

We have had the benefit of ongoing engagement with the Scottish Government (and prior to devolution with UK Government) on issues relating to AWI and mental health law in Scotland over the course of many years. We responded to the 2016 consultation on the Scottish Law Commission's Report on Adults with Incapacity, and to the 2018 consultation on Adults with Incapacity Reform.² The 2016 consultation followed upon Scottish Law Commission Report No 240 on "Adults with Incapacity", which proposed a scheme of provision to address situations of deprivation of liberty in Scotland. Several members of the Mental Health and Disability Sub-Committee participated in the Commission's Advisory Group. We would emphasise the need to continue to carry forward all aspects of the existing review which commenced as a review of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"), including those addressed in the 2018 and preceding consultations, and in our response of April 2018. It remains important to proceed without unnecessary delay with the full range of reforms within the scope of the 2018 consultation and our response to it, and to make effective changes to relevant legislation, including in particular the 2000 Act.

We note that the Scottish Mental Health Law Review is now due to report in Autumn 2022. We have engaged with the work of that Review to date, including responding to the 2020 call for evidence.³

We share the view that legislation to implement AWI reform, and in particular to address gaps in the law relating to deprivation of liberty, cannot wait until the deliberations of the Scottish Mental Health Law Review are complete. Whilst our preference would be for comprehensive early reform as noted above, we recognise that limited parliamentary time may limit the scope of early amending legislation and accordingly we welcome and address these proposals for limited urgent reform on that basis.

² See Law Society of Scotland, Consultation response: Adults with Incapacity Reform, April 2018, (incorporating the Law Society of Scotland's response, March 2016, to Scottish Government consultation on the Scottish Law Commission Report on Adults with Incapacity) <https://www.laws Scot.org.uk/media/360115/18-04-30-mhd-consultation-awi-reform.pdf>

³ Law Society of Scotland, Written Evidence: Views and experiences of Mental Health Law in Scotland, May 2020 <https://www.laws Scot.org.uk/media/368929/20-05-29-mhd-mental-health-law-review.pdf>

Policy

Paragraphs 8-10 of the proposal document set out the policy objective.

We are broadly supportive of the policy objective.

We welcome the acknowledgement, at paragraph 9, that the proposals are not intended to address delayed discharges from the perspective for care providers, and the recognition that issues may also arise in community settings. We would suggest that consideration should also be given to the role of long-term hospital beds, and whether a decision to move an adult to one of these beds should also fall within the scope of the proposals where that goes beyond immediate medical assessment and treatment and will result in an adult being subject to continued supervision and control. Retaining the adult in a hospital setting in that way could, if not appropriately and competently authorised, amount to an unlawful deprivation of liberty just as much as transferring the adult to a care home.

We note that it is not intended that the Time Limited Care Certificate replace section 13ZA of the Social Work (Scotland) Act 1968. Whilst there may still be a role for section 13ZA in cases where community care services are to be provided to an adult in their own home or existing placement, existing guidance is clear that section 13ZA should not be used to move an adult who cannot give informed consent to a situation where they are deprived of their liberty. We would suggest that amending legislation giving effect to the proposed Time Limited Care Certificate should also repeal the provisions of section 13ZA which allow a local authority to move an adult to residential accommodation under the powers set out in the 1968 Act. This should mitigate any risk of section 13ZA being used to circumvent the procedural requirements of the Time Limited Care Certificate.

Guardianship and Intervention order Procedure

Paragraphs 11-14 of the proposal document set out the present system for obtaining a welfare guardianship or a welfare intervention order.

We note that paragraph 14 indicates that “Presently there are delays with getting such an order from the court and the average time to do so is 3 months”. Whilst we acknowledge that such timeframes are frequently encountered, we also have experience of orders being granted in much shorter timescales, particularly where there is an urgent need for decisions to be taken about appropriate support and accommodation for the adult. Apart from any occasional case-specific circumstances, it is our experience that the general reason for excessive periods taken to obtain guardianship orders is the failure of local authorities to comply with their statutory obligation under section 57(4) of the 2000 Act to provide a mental health officer report within 21 days of notification of intention to apply for the guardianship order. Currently such delays can substantially exceed the period quoted. That in turn is attributable to failure to provide adequate resources to enable the current serious shortfall in MHO provision to be rectified. If the system is adequately resourced it would normally be possible to obtain an interim guardianship order within 28 days of that multi-disciplinary discussion or, if there were to be some unavoidable delay, within the next 28 days.

No new procedure should be made available to accommodate failure by any local authority to comply with its existing statutory obligation under section 57(4), nor to accommodate any discriminatory failure by Government or otherwise to ensure that sufficient resources are made available to facilitate such compliance.

We welcome the acknowledgement within the proposal document that quicker procedures should still adhere to ECHR requirements.

Time limited care certificate procedure

Paragraphs 15-21 of the proposal document set out the proposed procedure for a Time Limited Care Certificate. Sub-headings below relate to sub-heading in the proposal document.

Multi-disciplinary meeting

We welcome the proposed emphasis on supported decision-making for the adult to enable them to be as involved as possible in the process and to ensure their will and preferences are taken account of. We also welcome the proposed right to independent advocacy for the adult.

Further clarity is required as to which family members will be entitled to attend the multi-disciplinary meeting. It may be appropriate to provide that this should include the nearest relative and perhaps one other family member. Where there is an existing guardian or attorney with welfare powers, they should be involved in the multi-disciplinary meeting. Where proposed arrangements have contractual implications, or actual or potential consequences for the adult's property or finances, any guardian or attorney with property or financial powers should also be involved. There should also be a clearly attributable duty on the Integration Authority to identify and involve family members and/or guardians and attorneys. References in this paper to guardians should also include appointees under intervention orders with relevant powers.

Certificate

We note the reference at paragraph 17 to a report from a Mental Health Officer or a social worker. We reiterate our view that a Mental Health Officer should be involved in all cases. There may be a role for trainee Mental Health Officers, subject to appropriate supervision by qualified MHOs. If social workers are to be involved in preparing reports, considerable additional training and guidance should be made available, a register of those who have successfully completed such training (and where relevant any update) should be maintained, and only social workers so registered should be able to provide such reports.

We welcome the reference to the principles of the Adults with Incapacity Act at paragraph 17. These principles are set out at section 1 of the 2000 Act. It is essential that any intervention in the affairs of an adult under these proposals must be expressly subject to these principles, and to the full range of remedies available under the 2000 Act.

We also welcome the proposed presumption against a temporary placement which will result in another move for the adult.

Contemporaneous part 6 application

We welcome the reference to Article 6 ECHR, however we have significant concerns regarding the proposal at paragraph 18 of the proposal document that the requirements of Article 6 ECHR may be fulfilled by initiating a guardianship application contemporaneously with a Time Limited Care Certificate.

Given the timescales for guardianship applications quoted above, and the proposed extension of the certificate (see below), this approach could result in an adult being subject to a Time Limited Care Certificate for some months without any independent judicial review.

We also note the proposal in the proposal document that “A decision at the time limited care certificate case conference to go ahead with a guardianship application must be a pre-requisite to granting of the time limited care certificate.” Whilst we recognise that the intention here is to ensure compliance with Article 6 ECHR and to avoid unnecessary duplication of process where a guardianship application is required, we would query whether a guardianship application will in fact be appropriate in all cases where a Time Limited Care Certificate may be in place. Many adults will have granted welfare Power of Attorney prior to supervening incapacity. Many of these Power of Attorney documents will contain express powers to consent to deprivation of liberty. Whilst the general view is that such powers cannot be used to authorise a move to a more restrictive environment, there is an argument that such powers can be used to allow the adult to remain in such a placement. If an adult is moved to a more restrictive environment under a Time Limited Care Certificate, and has a Power of Attorney with the necessary express terms regarding continued deprivation of liberty, then it could be argued that obtaining a guardianship order is not then the least restrictive option, and accordingly would not be consistent with the principles of the 2000 Act.

In light of the above, and following careful consideration, we have concluded that compliance with Article 6 ECHR and with the principles of the 2000 Act requires judicial oversight of all Time Limited Care Certificates at the point of granting and at the point of renewal, together with powers to appoint a solicitor to act as curator *ad litem* or safeguarder to report to the court or act to protect the interests of the adult where they may not be able to instruct a solicitor. Such judicial oversight would provide an opportunity for review of any existing Power of Attorney with express powers, and judicial determination as to whether it may be sufficient to authorise continued deprivation of liberty, or if a guardianship application is required.

Consideration should be given to making legal aid available on a non-means tested basis for participation in such proceedings, to avoid discrimination against people with relevant disabilities compared with people in other situations where they are at risk of being deprived of their liberty.

Where an unlawful deprivation of liberty is alleged, or in any situation where judicial review is sought, the right to apply to the Court of Session should be expressly preserved.

Intimation and appeal

We welcome the clarification provided in the proposal document regarding intimation and appeal, and particularly the indication that the adult should not be moved until the outcome of any appeal has been determined. As above, consideration should be given to addressing potential barriers for those who may wish to appeal a Time Limited Care Certificate, including the availability of adequate legal aid cover to allow solicitors to properly ascertain the instructions of the adult and the need for safeguards to protect the rights of an adult who may not be able to object to the certificate or instruct a solicitor.

Length of certificate

We note that it is proposed that the certificate should authorise a placement for no longer than 28 days, and that it can be renewed once for a further 56 days. An initial duration of 28 days would appear to be proportionate to the aims of the certificate. We recognise that an extension may be required in some cases, but we would suggest that 56 days is too long and that a single extension of 28 days authorised by a Sheriff, on special cause shown and notwithstanding an express presumption against extension in other than exceptional circumstances, would be appropriate. It is essential that extensions do not become the default, and that all necessary steps are taken within the initial 28 day period where possible, including an application for interim guardianship where appropriate. As above, proper resourcing and enforcement of the 21 day timescale for MHO reports would assist in this regard. It would be helpful to have further clarification as to the proposed position should an extended certificate expire prior to any alternative arrangement being put in place. The action requiring to be taken in order to ensure compliance with the adult's ECHR rights in that situation should be clearly set forth in statute.

BUSINESS

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