

Consultation on The Scottish Law Commission Report on Adults with Incapacity Response

Independent advocacy organisations report that the findings of the Scottish Law Commission reflect the experience of many individuals supported by them. Advocacy organisations have dealt with many Adults with Incapacity and Mental Health cases where, in their experience, it depends on the interpretation of the use of 13ZA by Social Workers, Mental Health Officers and Responsible Medical Officers as to how this section of legislation is implemented. They often come across cases where the legislation has been 'manipulated' in order for someone to be moved or detained.

The following case study from a member organisation provides an illustration

After leaving hospital Mr G moved into a Step-down bed in Q Nursing home. The Local Authority held an AWI meeting and decided to apply for Guardianship. The chair of the meeting told John that he had to stay in Q Nursing Home because they didn't have the power to keep him anywhere else (he had refused to go into care placement under 13za). Mr G was told at the meeting that he couldn't leave Q until after the AWI hearing. After checking this out with the Mental Welfare Commission his advocate confirmed with social work that no one had legal power to hold Mr G there. The advocate explained his rights to Mr G however insight into his own care needs meant that Mr G decided that he would not leave the care home without assistance as he didn't know the area. Social work and family refused to provide this assistance and therefore Mr G stayed in Q Nursing Home, he began to settle in and said he was happier to stay there on a temporary basis but ideally he wanted to be at home.

Mr G was insistent that he was able to make decisions for himself and appeared to have a good understanding of what was going on around him. His advocate asked his Consultant to do an up to date capacity assessment, he has now been found to have capacity to make decisions and shortly after that left the care with a support package. However if these tests hadn't been done or if he had failed them he would have been in the care home potentially for months while awaiting the guardianship application with no legal power to keep him there.

Because of this and other reports from member organisations we believe the Bill will be important to ensure that the rights of individuals in such situations are upheld, that their views and wishes, where it is possible to obtain these, are heard and taken fully into account and that there is a method to ensure the prevention of unlawful detention. However we believe that, in order to ensure that those affected have their rights upheld and are

effectively supported to voice their views and wishes, the Bill should emphasise the need for access to independent advocacy for those affected.

The following case study is an illustration of a situation where, despite the fact that the individual was known to have advocacy support, efforts appear to have been made to block this.

T is a 47 year old man who has Huntington's disease. He had his own tenancy; however he became unwell and was subsequently detained in hospital. He was there for over a year, but not under any detention latterly. No one had Power of Attorney or Guardianship for him.

His choice of accommodation on discharge from hospital was a Bungalow in the grounds of a particular nursing home. The Bungalow was an option however; he was told there weren't staff available to cover it and provide care.

His advocate arranged to visit him to discuss what he wanted and to inform him that no powers were in place to make him stay somewhere he didn't want to. Before the advocate was able to meet with him, within 4 days, the MHO had arranged a 'pass out' to the nursing home.

The MHO described it as a 'pass out' however, staff at the hospital believed that he had moved permanently to the nursing home.

Concerns identified by advocacy were:

- *He was not told about his rights in the situation by his MHO*
- *No other options were discussed with him.*
- *Despite the fact that he was known to have independent advocacy support it appeared that advocacy were not being kept in the loop*
- *The meeting to look at how he had settled in was attended by the MHO and two other people involved in his care. He attended on his own without advocacy as they were not informed.*
- *He is considered vulnerable and it is conceivable that he would feel unable to disagree with anything that was suggested*
- *Other less restrictive options were not discussed with him, and his advocate was not informed of actions being taken until after they had been done. This prevented his advocate from informing him of his rights and choices prior to any move*

We believe that it is important that the Bill includes an emphasis of the use of Advocacy to represent the views of the person, in particular when the use of 13ZA is being considered.

We also believe the Bill should include a requirement for mandatory Case Conferences when 13ZA is being considered under AWI so that the person can be made aware of their rights and so that there is the proper forum for their rights to be safeguarded and for their views to be considered and represented.