

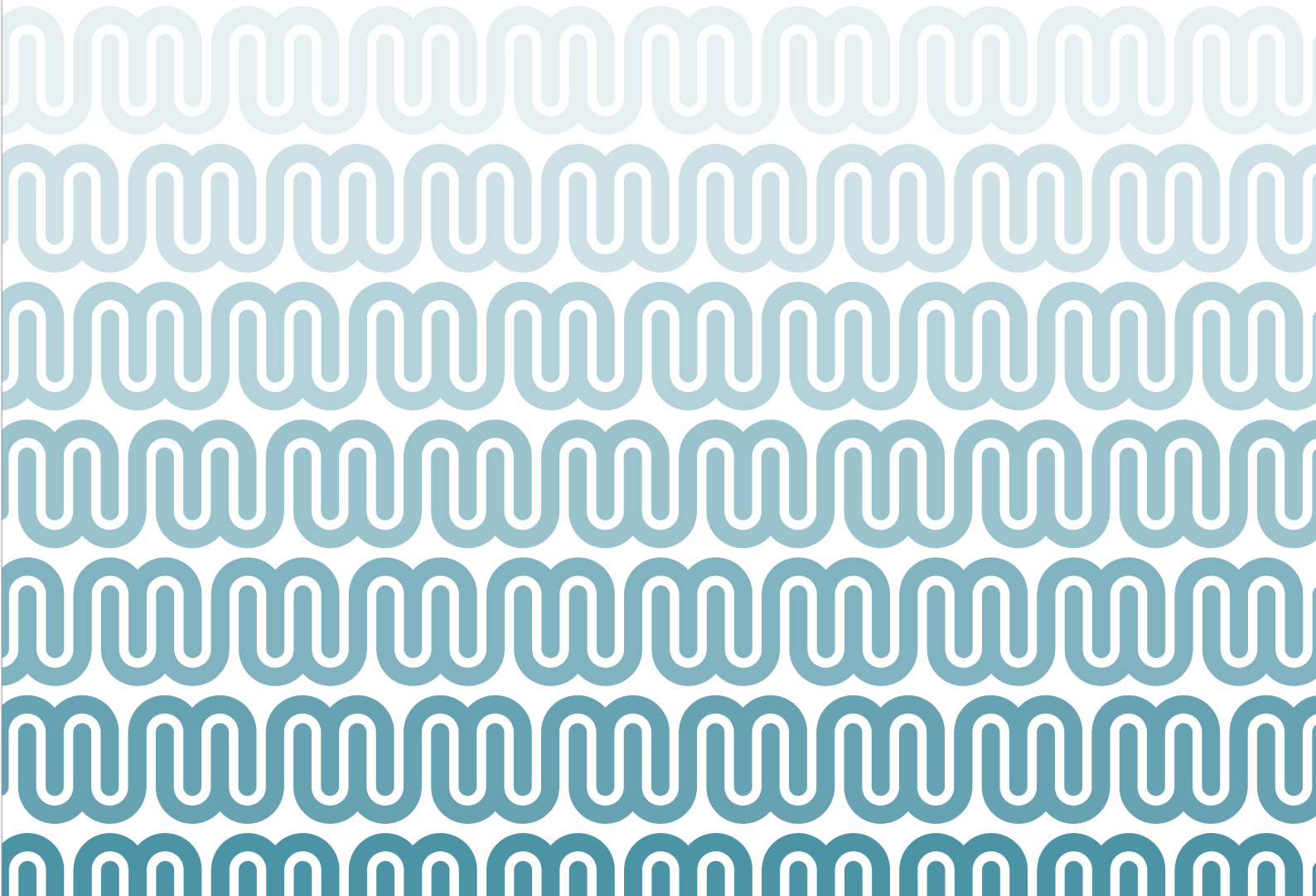


mental welfare
commission for scotland

Position Statement on Section 13ZA, Social Work (Scotland) Act 1968 in relation to Coronavirus

Position Statement

9 October 2020



Our mission and purpose

Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

The Mental Welfare Commission's Position Statement on Section 13ZA, Social Work (Scotland) Act 1968 in relation to Coronavirus, 9 October 2020

1.0 The Mental Welfare Commission's role

1.1 The Mental Welfare Commission for Scotland (the Commission) is an independent organisation set up by statute, working to safeguard the rights and promote the welfare of anyone with a mental illness, learning disability and related conditions.

1.2 The Commission has specific legal duties in relation to safeguarding the rights of people who are subject to the welfare provisions of the Adults with Incapacity (Scotland) Act 2000 (AWI Act).

1.3 Section 9 of the AWI Act details the Commission's safeguarding role in respect of adults whose capacity to make decisions or take actions to promote or safeguard their welfare is impaired due to a mental disorder. These duties are carried out by monitoring the use of the legislation, visiting adults subject to welfare guardianship, investigating where someone's welfare may be at risk or may have been at risk due to their incapacity and giving information and advice in respect of the use of the Act.

2.0 The Impact of the Coronavirus (Scotland) Act 2020

2.1 The Coronavirus (Scotland) Act received Royal Assent on 6 April 2020 and the Commission noted the significant changes to how s.13ZA might operate under emergency powers in this Act. The Scottish Government agreed that the Commission would be key to the transparent, scrutiny process if these emergency powers were introduced (also known as the easements to s.13ZA) to prevent any abuse of these emergency powers.

2.2 The Scottish Government subsequently confirmed that even at the height of the pandemic 'the fine balance between the right to life and the right to be consulted was not such that the provisions should be brought into force'.

2.3 Easement of s.13ZA has therefore not been introduced to date and on 29 September 2020 the provisions expired through The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020.

2.4 We do not anticipate that such provisions will be enacted in any future wave of this pandemic.

3.0 Existing Statutory Framework: Lawful authority

3.1 The easement of s.13ZA was not introduced as part of the response to coronavirus and it has now expired. Services therefore continue to need to operate within the existing statutory framework. If services are satisfied that a person who cannot consent will be deprived of their liberty, it is necessary to consider what lawful authority justifies that deprivation including the application of s.13ZA.

3.2 The principles of the 2000 Act must inform consideration in each case of the action to be followed. As well as applying to decisions under the AWI Act, it is explicit in s.13ZA of the 1968 Act that the general principles of the 2000 Act apply to whatever steps are taken by the local authority under the 1968 Act, in relation to the provision of community care services to an adult with incapacity.

3.3 Due legal process ensures the adherence of the European Convention of Human Rights (ECHR) and the United Nations' Convention on the Rights of Persons with Disabilities (UNCRPD)

3.4 The Commission has previously advised that it is essential to record the decisions about which power to use to provide services (supported by a holistic professional social work assessment) and the reason for taking this decision based on the unique circumstances of the individual.

https://www.mwcscot.org.uk/sites/default/files/2019-07/cheshire_west_draft_guidance.pdf

3.5 The Commission intends to work with Health and Social Care Partnerships to independently review the practice in recent months with specific reference to moves from hospital to care homes and to make further inquiries as to the rights based practice and legal authority supporting the moves.

October 2020



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Mental Welfare Commission 2020