

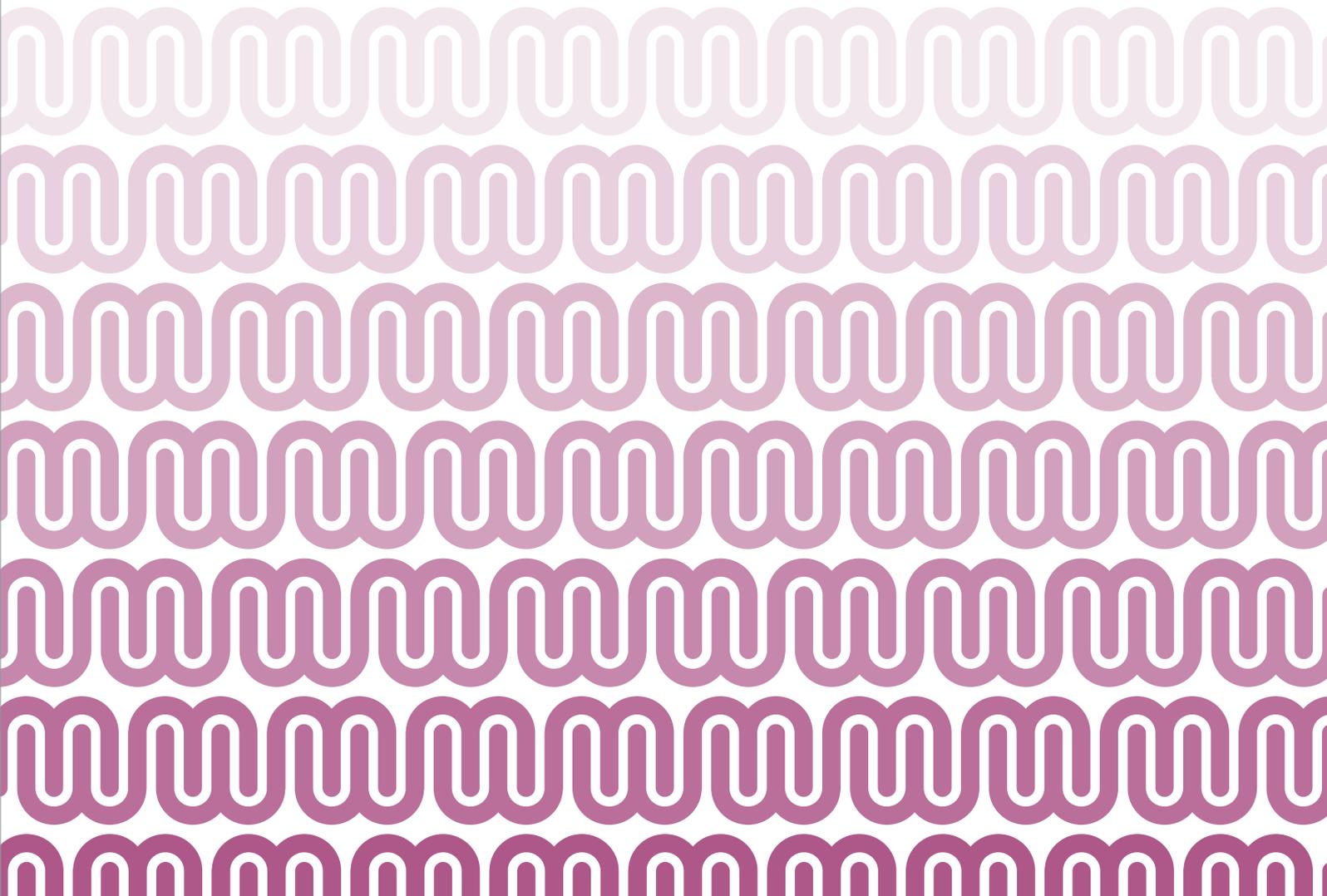


mental welfare
commission for scotland

Complaints about solicitors and tribunal hearings

Advice notes

12 June 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

What can be done where an appeal (or other application) has been made by a solicitor to the MHTS on behalf of a patient, if you believe the patient may not actually wish to appeal or is too unwell or disabled to instruct a solicitor?

It is important to remember that this may be a reasonable action by the solicitor, even if other people think the patient lacks capacity.

Capacity may vary, and even if the individual may not have sufficient capacity to make many decisions, they may still have capacity to instruct a solicitor. We understand the MHTS take a broad view of capacity to ensure that individuals subject to the Mental Health Act receive legal representation where this is their wish. The solicitor may have formed the view at the time of their meeting that sufficient capacity was present for the individual to make the decision to instruct a solicitor.

However, there are situations where there may be strong evidence of a lack of sufficient capacity, or even that a solicitor is improperly encouraging a patient to appeal, rather than being instructed by the patient.

If the person lacks capacity

Where it is felt that the person lacks capacity to instruct an appeal, the situation can be brought to the attention of the Mental Health Tribunal Service by the MHO or RMO. The Convenor may decide to appoint a curator (under Rule 55) in spite of the involvement of the solicitor, and may ask the solicitor to withdraw, or ask the solicitor and the curator to decide who is most appropriate to continue. Solicitors are held to a high standard of conduct and it may still be beneficial for all concerned if the solicitor is able to share their point of view. What may seem like undue influence to one party may in fact be the solicitor behaving appropriately and may be in accordance with their professional obligations to act in the best interests of their client.

If the person may have capacity but their wishes are not clear

Where the person may have capacity to make a decision about the appeal, but there is a question about what they really want, the individual could be assisted by advocacy to make an independent decision, without the influence of the solicitor. This may lead to their contacting the solicitor and/or the Mental Health Tribunal service to withdraw their appeal, if that is what they wish to do.

Law Society of Scotland guidance and code of conduct

The Law Society of Scotland has guidance for solicitors where there is the risk of vulnerability, undue influence, or where there may be a lack of capacity to make decisions. (<https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-5-vulnerable-clients-guidance/>).

Paras 8 and 9 say:

“A solicitor may, and in some circumstances should, seek and carefully consider expert guidance. However the solicitor retains responsibility for compliance with all relevant Rules and should not abdicate responsibility to the expert. Solicitors should not simply rely upon the legal presumption of capacity. On the contrary, they "must be satisfied when taking instructions, that his or her client has the capacity to give instructions in relation to that matter" (guidance related to Rule B 1.5).

“In cases of doubt as to the extent to which, and circumstances in which, capacity can be exercised, or conversely as to the extent to which incapacity prevents a contemplated act or transaction, the advice of a medical practitioner or clinical psychologist should be sought”.

The Law Society also has a Code of Conduct for Mental Health Work which clearly states that solicitors cannot approach patients, or tout for business.

<https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-f/division-g/guidance/code-of-conduct-for-mental-health-tribunal-work/>

It says:

“(b) A Solicitor shall not seek or accept instructions from a person who is in a hospital or other facility for the purpose of receiving care and treatment for mental disorder unless the solicitor has firstly been approached or contacted for that purpose by that person or by a third party who has the express authority of that person to do so.

(c) A Solicitor shall not directly exhibit or distribute in a hospital or other facility where persons receive care and treatment for mental disorder any material which promotes or advertises the services provided by the Solicitor and/or his Firm. Where a Solicitor seeks to have any such material exhibited or distributed in such a hospital or facility, the material shall be furnished by the Solicitor directly to the Managers of the hospital or facility to be dealt with by the Managers in terms of the protocols and procedures which exist for this purpose in the said hospital or facility.”

And

“Solicitors must be sensitive to the vulnerabilities of clients who have a mental disorder. Solicitors must not mislead or, by their actions or statements, lead such clients to have unreasonable expectations about the prospects or outcome of their case. Solicitors must not exert any pressure or undue influence on such clients to

embark on a course of action which has no reasonable prospects of success and is unlikely to be of benefit to the client.”

Raising the issue

If the problem persists or if there is evidence of a pattern of touting behaviour, you could consider formally raising the matter with regulatory bodies.

The first step might be to write formally to the solicitor setting out your concerns and suggesting that the solicitor seeks advice from the Law Society Professional Practice department on his or her actions and the application of its “vulnerable clients” guidance. (The Professional Practice department assist solicitors on a confidential basis in respect of matters of conduct, ethics and practice. They do not handle complaints but may be able to give guidance and support in challenging cases.)

Complaints

If this does not resolve the matter and you remain concerned, it may be appropriate to complain to the Scottish Legal Complaints Commission, an independent body set up by the Scottish Government to investigate complaints about the legal profession. Information and contact details are at www.scottishlegalcomplaints.com . This kind of complaint by a third party is called a ‘conduct complaint’ which they may refer to the Law Society for investigation, but it should initially be lodged with the SLCC.

Solicitors acting in a manner you consider inappropriate may be funded, or part funded, by the Scottish Legal Aid Board, who have expressed an interest in hearing about issues of concern.

Contact:

Applicant Investigations
SLAB
Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE

If you do take this situation to one or other of these bodies, please consider copying any correspondence to the Mental Welfare Commission.



Mental Welfare Commission for Scotland
Thistle House,
91 Haymarket Terrace,
Edinburgh,
EH12 5HE
Tel: 0131 313 8777
Fax: 0131 313 8778

Freephone: 0800 389 6809
enquiries@mwscot.org.uk
www.mwscot.org.uk

Mental Welfare Commission 2020