

## Scottish Council on Human Bioethics

15 Morningside Road, Edinburgh EH10 4DP, Tel: 0131 447 6394 or 0774 298 4459

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### Briefing to Scottish NHS Trusts

## The Voluntary Euthanasia Society document entitled **Guidance for developing a Policy on Advance Directives**

### Clarification of the Legislation

In a document sent out by **The Voluntary Euthanasia Society** (document CB(2001)026) in 2001 entitled **Guidance for developing a Policy on Advance Directives** which was subsequently used by some NHS Trusts in Scotland as a basis for their own policy document for health professionals on advanced statements about medical treatment, the following paragraph on page 1 was used to define the current legal position of advance directives<sup>1</sup>:

#### "2.2. The current legal position of advanced directives

*An advanced directive is legally valid under common law and, providing it meets the criteria listed below, legal action could follow against the staff and medical facility concerned if it is knowingly ignored.*

- *The patient must be mentally able and over 18 years when he or she makes the advance directive.*
- *The person was fully informed about the nature and consequences of the advance directive at the time he or she made it.*
- *The patient was not pressurised or influenced by anyone else when he or she made the decision to sign the directive.*
- *The advance directive covers specific medical conditions identified by the patient. Unless these relate specifically to the patient's current situation, the advance directive will not apply.*
- *The advance directive has not been rescinded by the patient either verbally or in writing since it was drawn up.*
- *The patient is now incapable of making any contemporaneous decision because they are unconscious or otherwise unable to communicate their wishes."*

However, the **Scottish Council on Human Bioethics** would like to clarify that advance statements are not specifically covered by the Adults with Incapacity (Scotland) Act 2000 nor by any case law in Scotland. Indeed, it is only because case law in England suggests<sup>2</sup> that persons may refuse, in advance, undesired procedures if they become incapacitated, that a body of opinion believes that the courts in Scotland would not take a different approach. However, a definitive position does not exist.

Furthermore, in the Code of Practice of the Adults with Incapacity (Scotland) Act 2000 it is stated that:

*"A competently made advance statement made orally or in writing to a medical practitioner, solicitor or other professional person would be a strong indication of a patient's past wishes about medical treatment but should not be viewed in isolation from the surrounding circumstances. The status of an advance statement should be judged in the light of the age of the statement, its relevance to the patient's current healthcare needs, medical progress since the time it was made which might affect the patient's attitude, and the patient's current wishes and feelings. An advance statement cannot bind a medical practitioner to do anything illegal or unethical. An advance directive is a document which specifically refuses particular treatments or categories of treatment. Such documents are potentially binding. When the medical practitioner contemplates overriding such a directive, appropriate guidance should be sought."*<sup>3</sup>

Moreover, in Scotland, some treatment decisions may be taken by a proxy. The authority of a proxy to refuse treatment on behalf of an incompetent patient would, it is thought, depend largely on whether the refusal conformed with the patient's own wishes and whether those could be shown to be informed and applicable. However, no case of refusal by a proxy has yet been heard in Scotland.<sup>4</sup>

### Conclusion

Thus, since an advanced statement is only "*potentially binding*", as stated in the Code of Practice of the Adults with Incapacity (Scotland) Act 2000, the **Scottish Council on Human Bioethics** cannot support the statement in the document from the **Voluntary Euthanasia Society** that "*an advance statement is legally valid*". Instead, it would like to advise

physicians who are unsure about the course of action to be undertaken concerning an advance statement to seek appropriate guidance.

In an emergency, however, treatment should not normally be delayed in order to look for an advanced statement if there is no clear indication that one exists.<sup>5</sup>

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<sup>1</sup> In its report, the Voluntary Euthanasia Society did not make any distinction between 'advanced directives', 'living wills' and 'advanced statements'. Therefore, an 'advanced directive' in this report should be understood as a document containing instructions made by a competent person concerning future interventions in the event that the person becomes unable to decide or communicate them when decisions are being considered.

<sup>2</sup> No agreement has yet been reached in England concerning the full extent of case law relating to the legally binding nature of advance statements.

<sup>3</sup> [Paragraph 2.29 of the Code of Practice relating to the Adults with Incapacity \(Scotland\) Act 2000.](#)

<sup>4</sup> [British Medical Association, Medical treatment for adults with incapacity: guidance on ethical & medico-legal issues in Scotland](#)

<sup>5</sup> [British Medical Association, Medical treatment for adults with incapacity: guidance on ethical & medico-legal issues in Scotland](#)