

## Scottish Council on Human Bioethics

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4 November 2005

### Consultation response to the Scottish Executive - Health Department

#### Adults with Incapacity (Scotland) Act 2000 - Improving with Experience

The **Scottish Council on Human Bioethics** (SCHB) is an independent, non-partisan, non-religious registered Scottish charity composed of doctors, lawyers, psychologists, ethicists and other professionals from disciplines associated with medical ethics.

The principles to which the Scottish Council on Human Bioethics subscribe are set out in the **United Nations Universal Declaration of Human Rights** which was adopted and proclaimed by the UN General Assembly by resolution 217A (III) on 10 December 1948.

The SCHB is very grateful to the Health Department of the Scottish Executive for this opportunity to respond to the consultation on the **Adults with Incapacity (Scotland) Act 2000 - Improving with Experience: Consultations**. It welcomes the Department's intent to promote public consultation, understanding and discussion on this topic.

In addressing the consultation, the SCHB has formulated the following responses (not all questions have been answered):

#### POWERS OF ATTORNEY, INTERVENTION AND GUARDIANSHIP ORDERS

##### Powers of Attorney

###### Certification of incapacity

4.1 Under sections 15 and 16 of the Act, individuals can make provision for someone of their choosing to manage their affairs or look after their welfare, if they become unable to do so themselves. It is clear that this is one of the early successes of the Act with over 47,000 powers of attorney already registered with the Public Guardian. Since, in general, this part of the Act is working well, we will not be proposing any major changes.

4.2 A power of attorney to manage financial affairs can be drafted so that it continues or comes into effect after the person granting it loses the capacity to manage his or her affairs. A welfare power of attorney cannot come into effect until the person granting it loses capacity. Both continuing and welfare powers of attorney must be registered with the Office of the Public Guardian before they can come into effect. They can be registered once they have been signed, and before they are required, unless there is a clause in the document stating that it cannot be registered until a specified event has occurred.

4.3 There is a high rate of rejection of powers of attorney by the OPG when sent for registration because of errors in 25% of the documents. We intend, therefore, to retain the possibility of registering powers of attorney as soon as they are signed, except where the deed states otherwise, so that granters can be sure that their powers of attorney are valid and will operate as intended should they lose capacity. If a power of attorney is not registered until capacity has been lost, and it contains mistakes, there is nothing which can be done to rectify it.

4.4 Currently, in cases where the power of attorney is to become operational on the granter's incapacity, i.e. all welfare powers of attorney and financial powers where this is specified, it is not necessary to have a medical certificate of incapacity to define the time from which the attorney has authority, unless the document specifically states that this should happen. Where the need for a medical certificate, or other evidence, is not stipulated, the attorney can decide when the granter has lost the ability to make certain decisions. A concern has been raised about the ability of attorneys to make an appropriate assessment of incapacity. It has been suggested that for all powers of attorney which take effect on the granter's incapacity it would be desirable for attorneys to be required to obtain a medical certificate of the granter's incapacity before operating their powers.

4.5 We take the view that powers of attorney are written by individuals who have capacity and who, therefore, should be free to decide how and when they want their powers of attorney to come into effect. We are not minded to make it a requirement that incapacity must be evidenced by a certificate of incapacity.

4.6 However, we consider that for powers of attorney which are intended to come into effect on incapacity, how and when capacity is deemed to be lost is something the granter should, at the very least, have considered. This could be achieved by a check in the registration process to ensure that thought has been given to whether the decision about capacity should be left to the judgement of the attorney or whether the attorney's authority should be dependent on a medical certificate of incapacity. This is less prescriptive than requiring a certificate of incapacity in every case but would ensure that individuals considered how and by whom their incapacity should be determined, whilst still allowing freedom of choice.

**We are not minded to introduce a requirement for certificates of incapacity in every case where a power of attorney is to become effective on incapacity, but propose to include a check in the registration process to ensure that the granter has considered how and by whom incapacity is to be determined.**

**Question 10: Do you support the proposal to include a check in the registration process for powers of attorney to ensure that the granter has considered how and by whom incapacity is to be determined?**

*SCHB response:*

The SCHB agrees that concern exists about the ability of attorneys to make an appropriate assessment of incapacity. The SCHB believes that attorneys should be required to obtain, in every case, a medical certificate of the granter's incapacity before operating their powers.

This is because welfare attorneys often do not have the appropriate experience or expertise to determine when a person has lost capacity. A prospective welfare attorney could, for example, decide that he or she has got welfare powers of attorney and then come into conflict with the views of a medical practitioner primarily responsible for the medical treatment of an adult.

The SCHB is of the opinion that a check in the registration process to ensure that thought has been given to whether the decision about capacity should be left to the judgement of the attorney or whether the attorney's authority should be dependent on a medical certificate of incapacity is not sufficient and could lead to unforeseen abuse or conflict.

#### Certificates to accompany powers of attorneys

4.7 In order to grant a power of attorney an individual must be capable of understanding what he/she is doing and what the impact of granting the powers will be. All powers of attorney must be supported by a certificate signed by a doctor, solicitor or advocate stating that the granter understands the implications of what he/she is doing. A power of attorney cannot be registered without a supporting certificate. The purpose of the certificate is to protect the individual, particularly when he/she may be vulnerable or susceptible to pressures from others.

4.8 Under sections 15(3) and 16(3) two separate supporting certificates by an approved person are required for a power of attorney which contains both continuing and welfare powers. This is a frequent cause of mistakes with only one certificate being provided when the power of attorney is sent for registration. If only one supporting certificate is provided, the power of attorney cannot be registered by the OPG. Stakeholders have asked for a single certificate to be sufficient in these circumstances. We see no reason, in the light of experience, to maintain a requirement for two certificates and propose to provide that a single certificate should be permitted in these circumstances.

**We propose to amend the Act to provide that only one supporting certificate by an approved person is required when a power of attorney contains both continuing and welfare powers.**

**Question 11: Do you support the proposal to amend the Act to provide that only one supporting certificate by an approved person is required when a power of attorney contains both continuing financial and welfare powers?**

*SCHB response:*

The SCHB supports the proposal to amend the Act to provide that only one supporting certificate by an approved person is required when a power of attorney contains both continuing financial and welfare powers.

The SCHB is also concerned that a certificate may be signed by a doctor, solicitor or advocate granting power of attorney to himself or herself and that this could lead to unethical behaviour.

#### Medical reports where the adult is outside Scotland

4.20 When the cause of incapacity is mental disorder, it is necessary for one of the medical reports which must be lodged with the guardianship or intervention order application to be signed by a medical practitioner approved for the purposes of section 22 of the Mental Health (Care and Treatment) Act 2003 (which comes into force in October 2005). We are aware that there can be difficulties and significant additional costs in obtaining a report from the approved medical practitioner in cases where the adult lives outside Scotland.

4.21 A possible solution would be for the examination of the adult to be carried out by an appropriately qualified medical practitioner, recognised by the country in which he/she works, who has the knowledge and ability to assess the adult. To ensure that the requirements of the 2000 Act are met, we propose that the examining medical practitioner should then discuss that examination with a medical practitioner approved under section 22 of the 2003 Act or with a medical commissioner or medical officer of the Mental Welfare Commission for Scotland before providing a report on the adult's capacity in relation to the measures sought. This would enable guidance on the requirements of Scottish law to be provided,

and at the same time ensure an appropriate and timely assessment of capacity without the need to bring the adult to Scotland, or for a Scottish doctor to visit the adult.

**Question 14: Do you support the proposal to deal with situations where the adult for whom the report by the approved medical practitioner is required lives outwith Scotland, to enable an appropriately qualified medical practitioner with experience recognised by the country in which he/she works to:**

- **make an examination of the adult;**
- **discuss that examination with a medical practitioner approved under section 22 of the 2003 Act, or with a medical commissioner or medical officer of the Mental Welfare Commission for Scotland;**
- **provide a report on the adult's capacity in relation to the measures sought?**

*The SCHB agrees with these proposals.*

#### Recall

4.23 Guardianships can be recalled if the grounds of appointment are no longer fulfilled or if the adult's welfare is adequately protected in some other way. The sheriff and the PG can recall financial guardianships and the sheriff, local authority and the MWC can recall the powers of a welfare guardian. Currently, a local authority cannot recall a welfare guardian's powers where the Chief Social Work Officer is the welfare guardian. It has been suggested that local authorities should be able to recall their own guardianships to ensure that they are able to act in accordance with the principle of least restriction and that there should be no delay in recalling a guardianship when it is no longer needed. **We agree with this and propose to amend the Act accordingly.**

4.24 In addition, stakeholders have suggested that there is a need to simplify recall procedures. We will consider the procedures with the four bodies which can recall guardianships and, if appropriate, will bring forward adjustments. We would be interested to hear of areas of specific operational difficulty in the recall procedures.

**Question 16a: Do you support the proposal that local authorities should be able to recall their own guardianships?**

*SCHB response:*

The SCHB supports the proposal that local authorities should be able to recall their own guardianships

#### Certification of incapacity

5.7 Currently only a medical practitioner can sign certificates of incapacity under the Act. There are provisions in the Smoking, Health and Social Care (Scotland) Act 2005 to extend the range of professionals beyond medical practitioners who can sign certificates of incapacity under Part 5. However, this extension only relates to the fields in which these individuals practise and is for the purpose of giving treatment within their area of expertise. In terms of indemnity these practitioners are covered because the certification would occur in the course of work in their own field.

5.8 There could therefore be a question as to whether certification under other parts of the Act should be extended to other professionals. We do not have a firm view on this but do not think it would be possible to use the extended signatories under Part 5 because those who will be able to sign under Part 5 will be doing so in the course of their work for the limited purpose of providing care and treatment within their own area of expertise. This would not be the case in relation to other parts of the Act.

**Question 18a: Would it be appropriate to consider widening the categories of professionals who sign certificates of incapacity under the Act?**

*SCHB response:*

The SCHB concurs that it would be preferable that a single healthcare professional have overall responsibility and oversight of any medical interventions being considered and that the medical practitioner primarily responsible for the adult with incapacity is the best person to do so since he or she has the competence to assess the capacity and the needs of the person concerned. Thus, the SCHB is of the opinion that, at present, it would not be appropriate to consider widening the proposed categories of professionals who sign certificates of incapacity under the Act.