

Scottish Council on Human Bioethics

15 Morningside Road, Edinburgh EH10 4DP, SCOTLAND, UK

Date: 18 August 2006 – Health Committee of the Scottish Parliament

Consultation Paper on the Adult Support and Protection (Scotland) Bill

Consultation response on behalf of the Scottish Council on Human Bioethics:

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

The SCHB subscribes to the principles 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 grateful to the Health Committee of the Scottish Parliament for this opportunity to respond to the consultation entitled **Adult Support and Protection (Scotland) Bill**. It welcomes the Health Committee of the Scottish Parliament's intent to promote public consultation, understanding and discussion on this topic.

In addressing the consultation, the SCHB has formulated the following responses:

Question 1: Do you support the general principles of the Bill and the key provisions it sets out?

SCHB response:

The SCHB supports the general principles of the Bill and the key provisions it sets out.

Question 2: Are there any omissions from the Bill that you would like to see added?

Powers of Attorney

Under the Adults with Incapacity (Scotland) 2000 Act (the 2000 Act), individuals can arrange for their welfare to be safeguarded and their affairs to be properly managed in future, should their capacity deteriorate. This can be done by giving another person (who could be a relative, carer, professional person or trusted friend) power of attorney to look after some or all of their property and financial affairs (continuing powers) and/or to make specified decisions about their personal welfare (welfare powers), including medical treatment. All continuing and welfare powers of attorney must be registered with the Public Guardian to be effective¹.

Over 64,000 powers of attorney have been registered in Scotland since the 2000 Act came into force, but the Scottish Executive believes a number of changes would help to enhance take up even more.

Obtaining a power of attorney

Currently, an individual who wishes to grant a power of attorney (the granter) must be capable of understanding what they are doing and what the impact of granting the powers will be. Thus, in order to be registered by the Public Guardian all powers of attorney must be accompanied by a certificate

¹ Scottish Parliament Information Centre Briefing on the Adult Support and Protection (Scotland) Bill, p: 12-13, <http://www.scottish.parliament.uk/business/research/SB06-32.pdf>

signed by a doctor, solicitor or advocate stating that the granter understands the implications of what they are doing. This is to protect the individual, particularly when they may be vulnerable or susceptible to pressures from others.

Before signing the certificate the doctor, solicitor or advocate must also be satisfied, either because of their own knowledge of the granter or because they consulted more than one person (who are named in the certificate) who have knowledge of the granter, that at the time the power of attorney is granted the granter understands the implications of what they are doing. The Bill (section 53) proposes to simplify this by proposing that whoever is signing the certificate need only confer with one other person who does have that knowledge of the granter².

Bill Proposals - Section 53 (2)(b)

Certificates accompanying powers of attorney: where the signatory does not have sufficient knowledge of the granter they would only require to consult one person who does have knowledge of the granter to ascertain that the granter understood the nature and extent of the power of attorney.

SCHB response:

The SCHB disagrees with this proposal.

If healthcare professionals, such as dentists and nurses, are required to undergo accredited training in the assessment of incapacity before treating a person who may have incapacity³, then persons such as solicitors and advocates or any other person being consulted, who do not have any training in the matter, may be incapable of being satisfied that the granter understands the implications of what he or she is doing.

The SCHB is indeed already aware of a Scottish lawyer who was brought before the Law Society of Scotland relating to a welfare power of attorney. This happened because the lawyer had provided a certificate stating that a person had understood the nature and extent of the welfare power of attorney which he was granting to someone else (see para 16 (1) (c) (ii) of the 2000 Act). However, the lawyer was then accused by healthcare professionals of not having adequately certified that the person in question was capable, at the time, of making such a decision. Indeed, the doctors in charge of the patient maintained that when the power of attorney had been granted, the person had already lost the capacity to make such a decision and that the power was, therefore, invalid.

² Scottish Parliament Information Centre Briefing on the Adult Support and Protection (Scotland) Bill, p: 12-13, <http://www.scottish.parliament.uk/business/research/SB06-32.pdf>

³ **The Adults with Incapacity (Requirements for Signing Medical Treatment Certificates)(Scotland) Regulations 2005** These regulations extend the authority to grant a certificate of incapacity under section 47(1) of the Act to dental practitioners, ophthalmic opticians and registered nurses who have successfully undertaken accredited training in the assessment of incapacity. Importantly, these additional categories of signatories can only authorise treatment within their specialism. At present, only 'registered medical practitioners' can sign a certificate of incapacity under section 47(1). The Explanatory Note accompanying the regulations provides background on the purpose and effect of the regulations.

The Executive is currently considering, with NHS Education for Scotland (NES) the issue of delivering enhanced training and education for healthcare professionals on the assessment of incapacity.

See also: **Section 35 (2)(b) of the Smoking, Health and Social Care (Scotland) Act 2005 - Explanatory Notes (paragraph 158)**

Subsection (2)(b) lists the healthcare professionals who will be able to issue a certificate, they are: the medical practitioner primarily responsible for the medical treatment of the adult; a dental practitioner; an ophthalmic optician; a registered nurse. This section also makes provision for others to be added by regulation as and when appropriate. The additional 'healthcare professionals' (dentists, ophthalmic opticians and registered nurses) will only be allowed to certify for treatment in respect of their own specialist area. The subsection also enables Scottish Ministers to prescribe requirements that would need to be met by the healthcare professionals before they could issue certificates, for example they will need to have undertaken accredited training in the assessment of incapacity.

Therefore, the SCHB agrees that when a solicitor or advocate is unsure about the capacity of an individual, he or she should consult a person who has been trained in the assessment of incapacity⁴ and who has examined the person.

When powers of attorney become operational

Welfare powers of attorney become operational at the point the granter becomes incapacitated and continuing powers can continue or start on incapacity. However, unless specifically stated in the authorisation document, there is no requirement for the attorney to obtain evidence, such as a medical certificate, that the granter has indeed lost the ability to have control over his or her own affairs.

There has been some concern raised about the ability of the attorney to make an assessment of incapacity. Some Scottish medical and ethics professionals believe that a medical certificate should always be given before the attorney takes control of the granter's affairs. At the time of the 2000 Act consultation, the Scottish Executive stated it was against such a move, because it believed it was a matter for the granter to dictate at what point the powers of the attorney should come into effect. Therefore, it suggested that there should only be 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.

Thus, the Scottish Executive proposes, in section 53 of the Bill, that all continuing and welfare powers of attorney becoming operational on incapacity must contain a statement to the effect that the granter has considered how incapacity should be determined⁵.

Bill Proposals – Section 53 (2)(a)

Powers of attorney becoming operational: all continuing and welfare powers of attorney becoming operational on incapacity must contain a statement to the effect that the granter has considered how incapacity should be determined

SCHB response:

The SCHB disagrees with this proposal.

If healthcare professionals, such as dentists and nurses are required to undergo accredited training in the assessment of incapacity before treating a person who may have incapacity⁶, then attorneys (who have a lot more power over the affairs of the granter than the aforementioned healthcare professionals and may not have had any training in the

⁴ The assessment should be able to determine whether or not an individual is capable of understanding and making a decision.

⁵ Scottish Parliament Information Centre Briefing on the Adult Support and Protection (Scotland) Bill, p: 12-13, <http://www.scottish.parliament.uk/business/research/SB06-32.pdf>

⁶ **The Adults with Incapacity (Requirements for Signing Medical Treatment Certificates)(Scotland) Regulations 2005** These regulations extend the authority to grant a certificate of incapacity under section 47(1) of the Act to dental practitioners, ophthalmic opticians and registered nurses who have successfully undertaken accredited training in the assessment of incapacity. Importantly, these additional categories of signatories can only authorise treatment within their specialism. At present, only 'registered medical practitioners' can sign a certificate of incapacity under section 47(1). The Explanatory Note accompanying the regulations provides background on the purpose and effect of the regulations.

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assessment of incapacity) may be incapable of being satisfied that the granter has lost capacity.

Instances of abuse may also take place if an attorney decides, on his or her own and for his or her own benefit, that the granter has lost capacity.

Therefore, the SCHB agrees that a medical certificate should always be provided by an independent authority (appropriate professional person or body) before the attorney takes control of the granter's affairs.

Question 3: Have you any comment on the practical implications of putting these provisions in place and the consideration of alternative approaches?

SCHB response:

The SCHB has no additional comments to make.

Question 4: Are the definitions of an "adult at risk of abuse" and "abuse" itself in the Bill sufficient?

SCHB response:

The SCHB agrees that the definition of an "adult at risk of abuse" defined "as adults who, because they are affected by disability, mental disorder, illness, infirmity, or ageing are

(a) unable to protect themselves from abuse, or

(b) more vulnerable to being abused than persons who are not so affected,

is appropriate.

Question 5: What views do you have on the role, structures and powers of the proposed Adult Protection Committees

SCHB response:

While equal opportunities are considered, there seems to be no mention of ethnic minorities where there may be issues of language, different cultures and family arrangements.

The SCHB would hope that the sum set aside for "raising awareness" would include provision for information to be available in other languages and consideration given to the problem of getting the information to vulnerable people in perhaps oppressive family situations.

£80,000 does not seem like a lot of money for this.