



Law Society
of Scotland

Consultation Response

Recommendations for reform of the Adults with
Incapacity (Scotland) Act 2000

April 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Mental Health and Disability sub-committee welcomes the opportunity to put forward recommendations for reform of the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”). The following comments are an updated and augmented version of some of the recommendations first set out in our response to the 2016 consultation on the Scottish Law Commission’s Report on Adults with Incapacity, and annexed to our response to the 2018 consultation on Adults with Incapacity Reform.¹

General Comments

The twin-track law reform process

After a delay following upon responses to the 2018 consultation, Scottish Government announced a twin-track process for reform of the 2000 Act, in “Future Direction of Mental Health and Incapacity Legislation” dated 19th March 2019.² Matters relating to the crossover between adult incapacity legislation and mental health legislation, including any possible need for convergence of the legislation, “could not be considered in isolation from wider mental health legislation”.³ The announcement in that paper of what has now become known as the Scottish Mental Health Law Review (“the Scott Review”)⁴ would give Scottish Government “the opportunity to consider all of these matters together”.⁵ The work of the Scott Review could reasonably be described as a long-term project, generally considered as unlikely to result in reforming legislation until some four or five years hence.

In the meantime, the paper contained the following undertaking:

1 See Law Society of Scotland, Consultation response: Adults with Incapacity Reform, April 2018, (incorporating the Law Society of Scotland’s response, March 2016, to Scottish Government consultation on the Scottish Law Commission Report on Adults with Incapacity) <https://www.lawsocot.org.uk/media/360115/18-04-30-mhd-consultation-awi-reform.pdf>

2 Available at: <https://www.glasgowchildprotection.org.uk/CHttpHandler.ashx?id=44895&p=0>

3 Ibid

4 <https://www.mentalhealthlawreview.scot/>

5 Scottish Government, Future Direction of Mental Health and Incapacity Law, 19 March 2019, available at <https://www.glasgowchildprotection.org.uk/CHttpHandler.ashx?id=44895&p=0>

“At the same time as the review takes place, we will complete the work we have started on reforms to guardianships, including work on restrictions to a person’s liberty, creation of a short term placement and amendments to power of attorney legislation so that these are ready when the review is complete.”⁶

The sub-committee records with regret that over the period of two years since that undertaking was given, little or no progress has been made as indicated in it. The sub-committee is aware of increasing pressure recently from a range of interests, including health and social care services, for early amending legislation. The sub-committee is firmly of the view that early amending legislation should provide for all matters addressed in the law reform process up to and including the 2018 consultation and responses thereto, except only matters allocated to the Scott Review in terms of the announcement of 19th March 2019. However, we recommend that the Scott Review should nevertheless be encouraged to review the total range of provision in adult incapacity, mental health, and adult support and protection law (within and outwith the principal Acts on those topics) as it will stand following implementation of reforms to the 2000 Act which in the sub-committee’s view are now overdue.

Under reservation of that position, as representing what is required in the public interest, the sub-committee has been asked to identify particular items of reform that could be described as self-contained and substantially non-controversial. In deference to that request, items which in our view can be so characterised are marked with asterisks in this paper. Except as re-stated in this paper, all of our comments and recommendations in our response to the 2018 consultation, and in our response to the 2016 consultation as annexed to our 2018 consultation, continue to apply.

Priorities

In order to fulfil Scotland’s human rights aspirations, and at the same time to make better use of hard-pressed resources, early legislation to “fill the gaps” in existing adults with incapacity provision is essential. We welcome the opportunity to contribute suggestions. In our view, and on the basis of practitioner experience throughout Scotland, urgent priorities – which cannot await eventual legislation some years hence following completion of the deliberations of the Scott Review – include these:

Firstly, the most serious gap in Scots law is the lack of provision to enable human rights compliance for deprivations of liberty. As experience leading up to and during the pandemic has vividly illustrated, in contexts such as the unlawful removal of people from hospital to care homes, this gap is causing ongoing human rights violations, and at the same time major avoidable pressures (including upon social work authorities) to cope with the current deficit. A regime, including draft legislation, was published by Scottish Law Commission in 2014.⁷ There was substantial consultation following upon that. To pluck one element of those proposals,

⁶ Scottish Government, Future Direction of Mental Health and Incapacity Law, 19 March 2019, available at <https://www.glasgowchildprotection.org.uk/CHttpHandler.ashx?id=44895&p=0>

⁷ Scottish Law Commission, Report on Adults with Incapacity, October 2014 Scot Law Com No 240, available at: https://www.scotlawcom.gov.uk/files/6414/1215/2710/Report_on_Adults_with_Incapacity_-_SLC_240.pdf

such as short-term transfer arrangements, from that scheme will – if there were to be adequate consideration of the consequences – be no less difficult than re-visiting the coherent scheme of existing proposals as a whole, and implementing them. Comparatively, one need look no further than England & Wales, where the existence of such a scheme (recently updated in light of experience) results in far fewer applications for their equivalent of welfare guardianships, and far greater general awareness of the need to recognise (and provide properly for) proposed deprivations of liberty.

Secondly, we lack proper provision for medical decision-making in emergency situations. The protections under section 82 of the 2000 Act for persons acting in good faith and in accordance with the Act's principles does not extend to medical decision-making. In England & Wales similar protection exists, and much advice to the medical professions throughout the UK appears not to recognise this differentiation.

Thirdly, lack of provision for advance directives (beyond “advance statements” in mental health legislation), as a support for the principles of autonomy and self-determination, is another area of non-compliance with modern human rights norms. Again, a scheme was proposed by Scottish Law Commission, this time as long ago as 1995;⁸ and, yet again, there is statutory provision in England & Wales, and encouragement to people throughout the UK during the pandemic to consider granting advance directives does not take account of lack of equivalent provision in Scotland.

Beyond the foregoing, some time ago now both the Office of the Public Guardian and the Law Society of Scotland compiled “wish lists” of necessary or desirable amendments to the 2000 Act, to be implemented whenever opportunity arises. Broadly speaking, these could be seen as “technical” improvements that better implement the policy of the Act, rather than matters requiring consideration from a policy perspective. Nevertheless, we recognise that it has to be a policy decision as to the extent to which these can now be implemented. In consequence, we have re-stated below, in updated form, our own full list of these.

Finally, we have considered the question of compatibility of making proposed improvements to the 2000 Act now with the broader “re-think” of all relevant areas of law to be expected in due course from the Scott Review. We believe that any convergence will be better achieved if done in the context of improved, rather than defective, legislation in the field of adults with incapacity.

To the extent that it is found possible to implement all or any of our suggestions in early legislation, we shall be pleased to provide any assistance requested in taking those suggestions forward.

⁸ Scottish Law Commission, Report on Incapable Adults, September 1995 Scot Law Com No 151, available at: https://www.scotlawcom.gov.uk/files/5013/2758/0994/rep151_1.pdf (part 1) and https://www.scotlawcom.gov.uk/files/5913/2758/1129/rep151_2.pdf (part 2)

Part One: Amendments required for compliance with UNCRPD

- a) The requirements to give all reasonable assistance in communicating (in sections 1(4)(a) and s1(6) of the 2000 Act) should become a robust obligation upon specified persons, and should be extended to an obligation upon specified persons to provide all support necessary to enable an adult to exercise such capacity as may – with such support – be within the adult’s capabilities.
- b) There should be an explicit rebuttable presumption in favour of capacity in relation to any adult for the purposes of any particular act or decision.
- c) In statute, it should be declared that the starting-point for decision-making should be a requirement to ascertain the adult’s past and present ‘wishes and feelings’, as the primary element in achieving respect for the adult’s ‘rights, will and preferences’.
- d) In statute, there should be a rebuttable presumption in favour of implementing consistent (and not mutually conflicting) will and preferences.
- e) In practice, items c) and d) should be implemented from now on by adopting the ‘constructing decisions’ approach.
- f) A range of techniques (DWP appointeeships, management of damages payments, and so forth) are not CRPD-compliant. Part 1 of the 2000 Act should apply to all situations where someone acts, manages or decides on behalf of an adult.
- g) Under private ‘third party measures’, where trustees are in effect exercising management functions in respect of funds allocated to, or which they have discretion to allocate to, a person with some degree of relevant disability (or under arrangements predicated upon such relevant disability) the section 1 principles of the 2000 Act, and perhaps some other provisions, should apply.
- h) Under section 67(5) of the 2000 Act, deemed validity is conferred upon transactions authorised by a guardian. This could be extended to transactions authorised by an attorney.
- i) Either in the 2000 Act or in relevant rules of court, there should be a clear requirement to facilitate the personal participation of the adult, to supplement this where necessary, to record how this has been done, and in the absence of participation to record the reasons and to record the steps nevertheless taken to ascertain the ‘will and preferences’ of the adult.

(Recently introduced rules of court in England & Wales are designed to ensure that this is done and recorded.)

- j) Implementation of the “one door” approach unanimously favoured by all stakeholders and interest-groups in the 1990s during the processes of consultation and discussion which led to the 2000 Act, combining the three jurisdictions of AWI, mental health, and ASP
- k) Consideration should be given to introducing concepts of ‘assisting’ and ‘acting with’ the granter in Powers of Attorney; and the introduction of the role of supervising attorney. As Scotland does not have prescribed forms of Powers of Attorney, these features could initially be introduced as a matter of good practice where desired by granters.
- l) For full compliance, the principle of reversed jurisprudence will probably be required.

* For suggested immediate provisions, see item Proposed sections 3(7) and (8) below.

Part Two: Other areas for review in the 2000 Act

For convenience, paragraphs in this section are identified by reference to Parts, sections, Schedules or their paragraphs, of the 2000 Act. This section does not replicate the identification of areas for review in other sections of this response, but does contain some selective cross-references to them.

A general concern relates to unnecessary differences in provisions as between different Parts of the Act (and indeed as between the 2000 Act and the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”), or the 2000 Act and the Adult Support and Protection (Scotland) Act 2007 (“the 2007 Act”). As a matter of strict interpretation, this could mean that a provision applicable only in one context was expressly intended not to be applicable in other contexts. In each case, that was not necessarily in fact the intention of the Parliament. We raise general points under the provision of the 2000 Act where they at present arise, or first arise, but they should be understood as each having more widespread application.

Section 1(1) – We are aware that it has been questioned whether here and elsewhere references to “an adult” should be limited to adults with some relevant impairment of capacity. In our understanding the use of “adult” was deliberate, and in our view it should be retained. The view that such provisions should be limited to adults with identified impairments of relevant capacity would contravene the requirements of CRPD to avoid discrimination on grounds of disability, and in any event would be impractical in many cases as it would give rise to a need to try to assess capabilities in relation to a particular purpose and in the particular circumstances, which in relation to general provisions such as section 1(1) would create an impossible circularity.

Section 1(5) –

- a) The term “continuing attorney” causes confusion. It requires countless repeated explanation to members of the public. In a wider context, it is inconsistent with the more logical use of “continuing power of attorney” in Council of Europe Recommendation (2009)11⁹ as meaning any power of attorney (whether covering property and financial matters, or welfare matters, or both) intended to enter into force or continue into force following relevant incapacity of the granter. It is a further difficulty and cause of confusion that the terminology “continuing attorney” and “welfare attorney” is not replicated in relation to guardians. One of the basic distinctions throughout the 2000 Act is between an adult’s property and financial affairs, on the one hand, and an adult’s personal welfare (including healthcare matters) on the other. We would recommend careful consideration of the introduction for all purposes, including in the primary legislation itself, of terminology such as

“financial/property attorney” (or “financial attorney”), “financial/property guardian” (or “financial guardian”), “welfare attorney”, and “welfare guardian”. Similarly, there should be introduced descriptions such as “financial/property powers” (or “financial powers”), and “welfare powers”.

- b) Other provisions of the 2000 Act can unduly restrict the performance of the obligation in section 1(5). For example, it may be appropriate to allow and encourage an adult to have access to, and operate, an account held by a guardian or subject to Part 3 administration. Such an arrangement would present issues of control and accountability, but these are issues which should be addressed.

Section 2 –

- a) See section 4 of the sub-committee’s response to the 2016 consultation (regarding an appropriate forum for incapacity, mental health, and adult support and protection jurisdictions).¹⁰
- b) Current exploration of the potential for mediation in contested AWI proceedings should be encouraged and provisions added to the 2000 Act to ensure that mediation is attempted in contested situations except where there is self-evidently no prospect of mediation succeeding even in narrowing the areas of dispute.

Section 3(2)(d) – It is a matter of significant concern that the requirements of section 11, providing for strict criteria and procedures for an application or other proceedings not to be intimated to the adult, can be circumvented – and sometimes have been circumvented – by seeking an interim order in terms of this section. Compliance with section 1(4)(a) should be a strict condition before a sheriff makes an interim order. Even in matters of immediate urgency, there should be a requirement for what is proposed to be effectively communicated to the adult, and for the court to be satisfied that this has been done.

Section 3(3) –

- a) * The power to give directions to people exercising functions under the 2000 Act (or foreign equivalents of functions under the Act) should be widened to include persons formerly exercising such functions, so that (for example) a former attorney or guardian could be ordered to provide

¹⁰ See Law Society of Scotland, Consultation response: Adults with Incapacity Reform, April 2018, (incorporating the Law Society of Scotland’s response, March 2016, to Scottish Government consultation on the Scottish Law Commission Report on Adults with Incapacity) <https://www.laws Scot.org.uk/media/360115/18-04-30-mhd-consultation-awi-reform.pdf>, from page 81

information, deliver items held, execute documents, and so forth, where reasonably required by an attorney or guardian currently acting, or by executors.

- b) * The power under section 3(3) should be extended to a discretionary power to give directions to anyone where that is appropriate for the proper operation of provisions of the 2000 Act. An example would be to instruct and authorise a pension provider to transfer payments into an account which could be operated under Part 3.

Section 3(4), (5) and (5A) – See comments in our 2016 response. There is insufficient clarity as to the respective roles of safeguarders, persons appointed to convey the views of the adult and advocates, and what are the criteria by which they should discharge their functions: particularly as to the extent to which they should act in accordance with the wishes, will and preferences of the adult, rather than any views which they themselves form and which might be contrary to what the adult wants. There is also at present insufficient requirement to involve the adult directly in proceedings – see item i) of part 1 of this response. The actual participation of adults themselves also requires to be strengthened in accordance with the “rule of personal presence” developed by the ECtHR in cases such as *Shtukaturov v Russia* (App No 4409/05) (2008) 11 CCL Rep 440.

Section 3(5A) and (5B) – These provisions should be transferred to section 1, so as to form part of the principles, and should be of general application.

* Proposed sections 3(7) and (8) – As a short-term measure to implement some essential reforms identified above in relation to sections 1 and 3, the sub-committee recommends insertion in section 3 of two new subsections as follows:

Section 3(7) – Without prejudice to the provisions of section 1 and the foregoing provisions of this section 3, the sheriff shall not make any order in accordance with any of the provisions of sections 1 or 3 unless the sheriff is satisfied:

- (a) that the terms of the proposed order have been intimated to the adult, and explained to the adult so far as that is possible using any means of support or means of communication, whether human or by mechanical aid (and whether of an interpretative nature or otherwise) appropriate to the adult;
- (b) that independent advocacy services in relation to the proposed order have been made available to the adult;
- (c) that the adult has been afforded an opportunity to participate in the proceedings either personally or through a representative instructed by the adult;

(d) that any such order is consistent with the will and preferences of the adult, except only where the sheriff is satisfied either (i) that it has been impossible to form a view as to the consistent will and preferences of the adult, or (ii) that compliance with sections 1(2) and/or (3) is not possible and that the order is inconsistent with the adult's will and preferences to the minimum extent necessary to achieve compliance with section 1(2) and (3).

Section 3(8) – The power of the sheriff to give directions in terms of section 3(3) shall include giving directions to any person exercising functions under any legislation or rule of law in relation to an adult who is incapable (as defined in section 1(6)) in relation to those functions (including exercising functions of a like nature conferred by the law of any country) and all of the provisions of section 3 shall apply to any application made and directions given in terms of this subsection.

Section 6(1) – The principal post is now that of Public Guardian. The functions of the Accountant of Court are still required, but are of minor relevance in comparison. Section 6(1) should now read “There shall be a Public Guardian”. There should be a further provision that “the Accountant of Court shall be either the Public Guardian, or such person responsible to the Public Guardian as may from time to time be appointed as Accountant of Court by the Public Guardian”.

Section 6(2)(b) – It is clear from the SLC 1995 Report that it was intended that the full text of any relevant order or document (including, for example, a power of attorney document) should be held on a public register and made available to anyone upon payment of a prescribed fee. It was further intended that prescribed relevant matters occurring subsequently to initial registration should be registered and should similarly be made publicly available. These provisions were conceived before cyber crime, identity theft, and other risks became significant threats, particularly to vulnerable adults. They probably take insufficient account of rights to data protection, and to protection of privacy under ECHR Article 8. The Public Guardian in fact currently seeks to exercise control over disclosure of information on the registers established under this section. On the one hand, she is at risk of being forced to disclose (for example by an application under section 3(3)). On the other, there are frequent complaints that information is not disclosed where reasonably required, for example where an adviser whose client complains about the actions of an attorney requires to see the terms of the power of attorney document in order to advise whether the attorney is acting in accordance with them. The envisaged regulations have in any event never been promulgated (raising *inter alia* a question as to whether it is a breach of ECHR for responsible ministers to fail to prescribe matters by regulation where that is provided for in the primary legislation). It should be noted by contrast that the Rules of Court in relation to registration of international deeds are precise and specific as to what should be registered (though the extent of that requirement may give rise to the risks identified above: there

should be a clear review of the position, then consistency across all provisions regarding registration and release of information).¹¹ Under the [unified] tribunal model suggested above, issues about disclosure of registered information could often be resolved on a “desktop” basis by an in-house tribunal convener, without requiring a cumbersome court application under section 3(3).

* **Section 6(2)(c) and (d)** – It appears to be necessary to specify that these powers are not exercisable following the death of the adult in question, though it should also expressly be provided that an investigation in relation to a deceased adult is competent where another adult could be at risk (for example, where the same person is attorney or guardian both to an adult now deceased and an adult still alive). Where an investigation has commenced prior to the death of the adult, it should be provided that the investigation can continue to its conclusion, at the discretion of the Public Guardian. This would address current difficulties which may arise where, for example, the Attorney is suspected of misappropriation, and has potentially already benefitted financially, as the OPG has no legal mechanism to advise the other interested parties, find out who the Executor is (unless that information is volunteered) or continue with the investigation and potentially make a police referral. There should also be review of the position where (for example) the executor who would normally be expected to challenge the actings of an attorney is the same person as the former attorney. It would be appropriate to review the respective positions of beneficiaries, executors, and former appointees under the 2000 Act, including where the same person occupies more than one of those roles.

Section 6 generally – Consideration should be given to creating a register of persons found to have acted wrongfully, or wilfully to have acted inappropriately, in roles under the 2000 Act. Such entry on the register would be grounds, or at least *prima facie* grounds, for refusing any future such appointment, removal from any other such appointment held, and disqualification to act as an executor (and perhaps in other fiduciary categories). Rules on disqualification from acting as a company director could be considered as a comparator. Such disqualification might be one of additional grounds for inclusion in the proposed register.

Section 7(1) – See previous comments regarding section 6(2)(b).

* **Section 9** – The investigatory powers of the Mental Welfare Commission have been transferred to the 2003 Act, but issues such as those raised in relation to section 6(2)(c) apply to those powers.

* **Section 10(1)(c) and (d)** – See comments on section 6(2)(c) and (d).

¹¹ Act of Sederunt (Summary Applications, Statutory Applications And Appeals Etc. Rules) 1999

* **Section 11** – See comments on section 3(2)(d).

Section 12 – There should be full co-ordination of investigations under the 2000 Act, the 2003 Act and the 2007 Act, and better correlation of criteria.

* **Section 13** – Existing codes of practice require review for accuracy, and there should in future be requirements for consultation prior to amendment to codes of practice, as well as prior to original issue. In consequence of inadequate consultation, an amendment to the code of practice for guardians and appointees under intervention orders erroneously suggests that administration of a direct payment is competent under a welfare guardianship order, when this is clearly a financial matter.

* **Section 15(3)(ba), and also section 16(3)(ba)** – The outcome of the granter’s consideration (and not just the fact that the granter has considered) must be included in the document.

Sections 15 and 16 – Scottish provisions are relatively unusual in that registers disclose powers of attorney which have been granted and registered, but will not necessarily indicate which are in fact being operated. Consideration should be given to a simple form of notification to the Public Guardian where an attorney (who may have been appointed very many years previously) has commenced acting.

* **Section 15(5)** – It is inappropriate that bankruptcy of the granter should bring a power of attorney to an end. It would be obviously inappropriate for the attorney to act in circumstances where it would no longer be competent for the adult to act, but beyond that the protections of having an attorney are likely to be more necessary in such situation. “Bankruptcy” for the purposes of this provision should be more clearly defined. Similar provisions should apply to guardians, appointees under intervention orders, and also withdrawers acting under Part 3, as regards property and financial powers. In principle, there should be provisions for reinstatement of an attorney (or guardian or appointee under an intervention order or withdrawer), by application, when the bankruptcy is “spent”.

* **Sections 15 and 16 generally** – It should be explicit that only a person who has attained the age of 16 may act as an attorney (there may be circumstances in which it might be appropriate to appoint them at a younger age, but the appointment could only be accepted and acted upon once the person appointed has reached the age of 16).

* **Section 16(6)** – See comments on section 64(2).

* **Section 17** – Upon a strict interpretation, it would appear that guardians, withdrawers and appointees under intervention orders are required to act even in circumstances where, under section

17, an attorney is not obliged to act. This provision should be translated into a provision requiring proportionality, and included in section 1.

* **Section 19(2)** – The Public Guardian should be authorised to defer registration on cause shown, pending a decision under section 3(3) whether to register or not. The Public Guardian should be able to call for additional reports or information on cause shown and make a decision whether to register or not (subject to application to the court). The same should apply to registration of a revocation notice under section 22A.

* **Section 19(2)(b)** – The meaning of “send” should be reviewed, throughout the 2000 Act, and likewise “receive” should be defined. The new definition should include electronic transmission and provision for e-signatures.

* **Section 19(2)(c)** – “give notice” should be similarly reviewed.

Section 19(4) – There appears to be widespread confusion about the requirement for authentication by the Public Guardian. Many banks and financial institutions appear to have procedural requirements to see a certificate “with a red seal”. This section should be expanded to cover all competent methods of authentication of copies, including by the granter or others in accordance with the Powers of Attorney Act 1971.

* Note: There should be collaboration with the other UK legislatures to ensure recognition and enforceability throughout the United Kingdom of duly authenticated copies of powers of attorney which bear to have been duly registered in any part of the United Kingdom, coupled with facility readily to ascertain from the relevant Public Guardian whether that document, in the terms produced, remains in force.

* **Section 19(5)(b)** – This should be replaced by a provision entitling the person who has submitted the document for registration to be provided, upon request, with up to a stated maximum number of authenticated copies (or alternatively for these to be provided to the granter). It would then be for the recipients of those copies to do with them as they wished.

* **Section 20** – Upon cause shown following investigation, the Public Guardian should be entitled (subject to appeal to the sheriff) to put an attorney under supervision, to give directions to an attorney, and to suspend an attorney from acting pending a decision by the sheriff under section 20.

* **Section 20(2)** – It should be clear that where there are joint attorneys the various powers of the court may be exercised in respect of one only, or in respect of both, or differently in respect of each.

Section 22 – There is reference in the fees order to a “Deed of Amendment” but no provision in the Act for notification of more than the matters set forth in section 22. Consideration should be given to explicitly prohibiting any amendment to any of the effective provisions of a power of attorney document, the appropriate procedure in such an event being to grant and register a fresh document. On the other hand, it should be possible to notify some events and obtain a fresh certificate. Examples would be changes in the name or other particulars of granter or attorney.

* **Section 22A** – There should be provisions similar to those in relation to section 19(2) noted above relevant to revocation notices, and a further provision permitting removal of a revocation notice from the register, and reinstatement of the power of attorney, where a purported revocation notice is shown to be vitiated by lack of capacity, undue influence or other factors.

* **Section 22A(2)(b)** – A power of attorney is a contract between granter and attorney. It should not be competent effectively to end such a contract by notice only to a third party (the Public Guardian) and subsequent intimation to the attorney. The certificate should require inclusion of confirmation that the contract has been ended by notification in writing to the attorney, with particulars of the date and method of intimation of that notification.

* **Section 24** – There should be provisions for the termination of a power of attorney upon the incapacity of the attorney.

Part 2 generally

- a) * There should be provisions equivalent to section 64(6) permitting an attorney to delegate, but remaining accountable.
- b) * There should be better provision in relation to joint attorneys, including a presumption that provisions equivalent to those of section 62(6) (in respect of joint guardians) shall apply if and to the extent that the power of attorney document does not stipulate otherwise.
- c) * There should be better provision in relation to substitute attorneys, including a requirement for the substitute to submit notice to the Public Guardian, including notice of acceptance of substitute appointment, upon the substitution being triggered.
- d) * There should be provision expressly permitting the appointment of a supervising attorney (as under some other jurisdictions) particularly having regard to the requirement for effective safeguards in Article 12 of CRPD.

e) * Also having regard to the requirements of CRPD and the terms of the General Comment, there should be express provision for incorporation of supported decision-making and co-decision-making clauses in power of attorney documents. [Note: In the short term this should be a facilitative provision, simply confirming that such provisions may be included in power of attorney documents]

* **Section 24B(2)(c)** – This provision as worded is illogical and could be interpreted as preventing one of the very situations in which an intervention order can properly be used, namely to transfer funds (perhaps from the sale of a house or other asset) into an account that in accordance with the least restrictive intervention provisions of section 1(3) ought thereafter to be administered under Part 3. The words “has been granted” should be amended to “is in force”.

* **Section 25(5)** – It is unclear whether “already authorised to intromit” means authorised under Part 3, or authorised under any other provisions as well. The latter interpretation can inhibit appropriate use of Part 3 where there is already some other source of authority, such as a DWP appointment. That can cause disadvantageous inflexibility.

* **Section 26(1)(b)** – The requirement for the account to be “in the adult’s sole name” can be cumbersome, where proper organisational use of a single account, coupled with appropriate technology, can still be operated with adequate protection for each individual adult.

Section 26A(1)(b) – There can be consideration of allowing wider powers to the withdrawer, for example to vary the terms of an existing standing order without having to proceed under section 26F.

* **Section 28(3)** – The word “may” is potentially ambiguous. Does it protect the fundholder from criticism that the fundholder ought to preserve confidentiality, or does it give the fundholder discretion to refuse? The fundholder should be obliged to provide information upon request, and should be protected in doing so.

* **Section 31E** – It is a major defect of Part 3 that equivalent transfer from an intervention order is not permitted. This can result in an unnecessary guardianship, rather than the lesser intervention of an intervention order, where the expectation is that funds released can ultimately be administered under Part 3.

* **Part 4** – We have no separate comments on Part 4, but comments upon provisions of Part 3 apply where those provisions of Part 3 are reflected in similar provisions in Part 4.

Part 5 –

- a) The procedure for authorisation under section 47 is the only procedure under the Act under which there are no provisions for notifying the adult or anyone else that a certificate has been issued, or for registration of issued certificates anywhere. The lack of any requirement to notify, particularly even to the adult, may be in breach of ECHR. In any event, these characteristics should be reviewed.
- b) In relation to Part 5, the lack of adequate training, such as followed the original passing of the 2000 Act, is particularly obvious. The membership of the sub-committee has had direct experience of situations where section 47 certificates have been issued in respect of a large number of residents in a nursing home, every one of them certifying dementia, even in relation to people who have other intellectual disabilities but certainly not dementia.
- c) * There appears to be in some quarters a belief that authorisation in terms of section 47 extends beyond the definition of “medical treatment” in section 47(4) to include, for example, authorisation of arrangements or even placements amounting to a deprivation of liberty. Section 47(4) should be extended so as explicitly to exclude such interpretations.
- * **Section 53** – There is no provision in relation to intervention orders equivalent to the power of Scottish Ministers under section 64(11) to define the scope of the powers which may be conferred on a guardian. Any better definition, and thus potentially limitation, on powers under an intervention order should not be other than by primary legislation, as it should not be open to government by executive act to remove altogether a potential solution under the 2000 Act, and the role of intervention orders as a “safety net” where other provisions of the 2000 Act are not available is important. On the other hand, there appears in some quarters to be a growing practice of using intervention orders as a form of quasi guardianship, avoiding the supervision of guardianship, and also the controls available under guardianship upon the amount of remuneration paid to appointees. There should be provision to prevent granting of intervention orders where a guardianship would be more appropriate. A common definition adopted by commentators has been that intervention orders are appropriate for a single act or a linked series of acts of self-limiting duration. However, that concept could be extended to cover a series of separate acts in relation to the same purpose over an indefinite period. An example would be powers to enter a lease, which could properly under the same order be exercised at intervals into the future to deal with matters concerning the lease, such as agreed arrangements to vary the terms, rent reviews, extensions, and the like. There is no provision in relation to “closing off” intervention orders where the appointment has been fulfilled, or where it is appropriate for it to be terminated for some other reason. There should be provision for such a process, administered by the Public Guardian, with a right to refer to the sheriff under section 3(3). See also comments on section 64(2).

- * **Section 53(6)** – This and the equivalent provisions in relation to guardianship in Schedule 2 paragraph 6(1) require better clarification. For example, the full requirements of these provisions should apply in relation to the adult’s last principal private residence, unless evidence is produced that there is no prospect of the adult returning to live there. Moreover, there should be at least some lesser requirements in relation to any sale or disposal of heritable property, such as at least a requirement to give to the Public Guardian a specified period of notice of intention to do so.

- * **Section 57** – In view of the acute shortage of mental health officers (see section 4.2 of our 2016 response¹²) the limitation to mental health officers as defined in the legislation for reports under section 57(3)(b) should be widened to permit “private” reports and to specify the required qualifications for persons to be able to do so. There should be a time limit for local authorities to increase numbers of mental health officers to enable them to meet their statutory obligations, and beyond that time limit local authorities should be responsible for reimbursing the costs of obtaining a “private” report if a report by a local authority mental health officer has not been provided within the period of 21 days required by section 57(4), or in the event of the local authority intimating that it will not be able to comply with that time limit.

- * **Section 57(3)(a)** – Given that the principal issue under the jurisdiction is the existence of incapacity, not diagnosis of a mental disorder causing incapacity, and given the importance of not presuming incapacity where the ability to act or decide can be enhanced by provision of skilled support, the quality of evidence provided by a clinical psychologist is likely to be at least as valuable as that of a “relevant medical practitioner” (as defined). The evidence of a clinical psychologist was generally acceptable to the Court of Session for purposes of appointment of tutors. They should be included in section 57(3)(a) as alternatives to both medical practitioners and relevant medical practitioners.

- * **Section 57(4)** – Preliminary notice of intention to apply should also be given to the Public Guardian in relation to all Part 6 applications, in a form to be prescribed. It is understood that it is at present the practice of the Office of the Public Guardian to contact proposed guardians and appointees once the application has been intimated. In a proportion of these, when the requirements and duties are explained, the proposed guardian or appointee regrets having agreed to that role. By then, however, significant expense will have been incurred and the application will already be underway. It is better that such action by the Office of the Public Guardian take place at a much earlier stage. This proposal

¹² See Law Society of Scotland, Consultation response: Adults with Incapacity Reform, April 2018, (incorporating the Law Society of Scotland’s response, March 2016, to Scottish Government consultation on the Scottish Law Commission Report on Adults with Incapacity) <https://www.laws Scot.org.uk/media/360115/18-04-30-mhd-consultation-awi-reform.pdf>, from page 89

would integrate well with the Declaration Form for prospective lay financial guardians recently introduced by the Office of the Public Guardian.¹³

* **Section 58(3)** – It is essential that there be greater flexibility. The sheriff should be able to make a guardianship order where an intervention order has been sought, or put in place provisions for access to funds under Part 3 where either an intervention order or a guardianship order has been sought, and the sheriff should be able to make alternative disposals of different parts of the same application. In practice, from time to time the courts have granted an intervention order to deal with part of a guardianship application, and a guardianship order to deal with the rest. The reassurance of statutory authorisation of such dual or multiple outcomes should be provided in statute.

* **Section 58(7)** – All interlocutors in all court proceedings under the 2000 Act should be notified to the Public Guardian and to other relevant parties, so that they are aware of the progress of the application and any issues arising. This will also facilitate supervision and control of failure to dispose of applications at first hearing except for good and necessary reasons. Equivalent procedures are already in place under MHTS, and their application to proceedings under the 2000 Act would be a welcome consequence of implementation of the recommendations noted above regarding an appropriate forum for incapacity, mental health, and adult support and protection jurisdictions.

Section 59 – It would appear that some guardians do not realise the nature and implications of their appointment until after they have been appointed. In some jurisdictions guardians require to produce evidence that they have undertaken a specified course of instruction, before the appointment is finalised. This principle should be considered with a view to application to Scottish conditions. Conscientious and competent candidates for guardianship are usually pleased to be offered opportunity to inform and educate themselves. Appropriate educational institutions could be encouraged to provide suitable modular courses, and candidates for appointment could be required to produce evidence of having completed such a course, preferably at time of application, or alternatively as a prerequisite for issue of the certificate of appointment,

* **Section 60** – There have been suggestions that if an appointment has been allowed to expire without a renewal application having been lodged, the guardian could continue acting as such under the principle of necessity. Alternatively, they might claim to be continuing to act as *negotiorum gestor*. Such arrangements should be either prohibited, or regularised.

¹³ <https://www.publicguardian-scotland.gov.uk/general/news/2021/02/22/new-declaration-form-for-prospective-lay-financial-guardians>

- * **Section 61(7)** – It is understood that the Office of the Public Guardian quite frequently have to “chase” guardians for the updated Land Certificate (or endorsed interlocutor), and are often uncertain whether section 61 has been complied with or not. A simple administrative solution would be for the updated Land Certificate or endorsed interlocutor to be sent by the Keeper to the Office of the Public Guardian, who would then be able to note their records and pass the certificate of interlocutor on to the guardian.

- * **Section 62** – Similar provisions should apply to the appointment of joint appointees under intervention orders.

- * **Section 63** – Substitute appointments should also be competent under intervention orders. There should be consideration of greater clarity and flexibility, such as specifying the order of substitution where there are joint guardians, or where there is more than one substitute; and allowing for temporary substitution followed by reinstatement of an original guardian.

- * **Section 64(1)** – Each guardianship order should be required to specify to which of the categories (a) – (e) the powers, or groups of powers, conferred belong.

- * **Section 64(1)(e)** – This power should be automatic in all appointments in respect of financial and property affairs. If the guardian does not have such powers, the guardian cannot authorise transactions in accordance with section 67(1), and would thus be unable to comply with the mandatory requirement of section 1(5) to encourage the adult to exercise and develop skills insofar as it might be reasonable and practicable to do so. Where this combination of provisions prevents an adult from acting in any “transaction” of which the adult is in fact – or has become – capable, that would amount to a form of “incapacitation”, contrary to the principles of the 2000 Act, demonstrably unjustly, and contrary to CRPD.

- * **Section 64(2)** (and equivalents in relation to attorneys and appointees under intervention orders) – There is uncertainty as to whether the stated exclusions are the only required exclusions. Council of Europe Recommendation R(99)4 on Principles Concerning The Legal Protection Of Incapable Adults (23 February 1999)¹⁴ recommends that states should explicitly specify acts and decisions which cannot be taken by anyone else on behalf of an incapable adult. Thus, the Mental Capacity Act 2005 (England and Wales) specifies that an appointee cannot vote in an election on behalf of the adult, but the 2000 Act contains no such prohibition. In matters such as voting, marriage, and even granting consent under the 2003 Act, there is uncertainty as to the inter-relationship between the

¹⁴ [https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec\(99\)4E.pdf](https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(99)4E.pdf)

2000 Act and other legislation. For example, there has been litigation as to whether guardians under the 2000 Act can act or decide on behalf of the adult for the purposes of the 2003 Act. These uncertainties should be resolved by including a comprehensive list of matters excluded from provisions of the 2000 Act. Beyond that, there are matters which should perhaps be permissible only under an intervention order, and which should have additional requirements. An example is Will-making and similar acts. There seems at present to be a considerable range of practice. Only one such case has gone to appeal, so far as we are aware. In *Application by Adrian Douglas Ward*, decided by Sheriff Principal B A Kerr on 17th December 2013, the Sheriff Principal set stringent and limiting requirements for proof before execution of a Will could be authorised. On the other hand, in at least some sheriffdoms it appears that simple powers to execute a Will, without specification of the terms of the Will or enquiry into the appropriateness of it, appear to be routinely included among guardianship powers. We would suggest that execution of a Will, and other documents with testamentary effect, should be possible only by specific intervention order and that there should be provisions and requirements broadly equivalent to those under the Mental Capacity Act 2005 for execution of “statutory Wills” in England & Wales.

* **Section 64(7)** – This requirement should apply to all appointees acting in financial or property matters under provisions of the 2000 Act.

Sections 68 and 69 – Consideration should be given to allowing greater control by the Public Guardian, including to modify or withhold remuneration, subject to application to the court or (preferably, in the event of implementation of the proposals noted above regarding an appropriate forum for incapacity, mental health, and adult support and protection jurisdictions) determination of objections by an in-house convener.

* **Section 70** – These powers should also be available to attorneys and to appointees under intervention orders.

* **Sections 72 and 73** – It should be competent for a guardian to apply for discharge where powers have been recalled by the Public Guardian.

* **Section 74** –

a) Variation procedure should be available to vary any of the terms of a guardianship order.

b) The Public Guardian should be able to vary caution in all cases.

* **Section 74(4)** – Something less than the full requirements of section 57 will often suffice in this situation. This provision should perhaps be replaced with a specific requirement upon the court to

consider, immediately upon presentation of an application for variation, whether to exercise powers under section 3 to call for any reports (or further reports).

Section 76 – For the purposes of this section and elsewhere, including in particular Schedule 3, it is unacceptable that when an adult moves, habitual residence and ordinary residence may diverge, and that current government guidance as to change of ordinary residence differs as between England & Wales on the one hand and Scotland on the other. This position should be reviewed and if possible resolved.

* **Section 78** – There would be advantages of consistency and administrative efficiency if the obligation under section 78 rested with the guardian rather than the Public Guardian, as with the obligation under section 61(7), and that such provisions should also apply to triggering of a substitution under section 63 and the death of a guardian under section 65A.

* **Section 81**- the provisions on repayment of funds do not cover the situation where the Adult has died. This section seems to imply that the obligation on the part of the Attorney (or other intervener) applies only whilst they are still in office. This presents particular difficulties where a sole attorney is subsequently appointed as sole executor, as other beneficiaries do not have rights of enforcement. Section 81 also refers to “funds”. The word “funds” is not defined in the interpretation section of the 2000 Act (section 87). Arguably, section 81 does not therefore cover the situation where an Attorney transfers a heritable property belonging to the Adult to himself/herself and following death of the Adult, the residuary beneficiaries object. The obligation to repay should be continued beyond the date of the death of the adult, and rights of enforcement should be conferred upon persons with a relevant interest in the estate.

* **Section 85** – The definition of adults for the purpose of section 85, and thus for Schedule 3, differs significantly from the definition in Hague Convention 35 on the International Protection of Adults.¹⁵ It has been suggested that this discrepancy means that Hague Convention 35 has not been effectively ratified in respect of Scotland. The discrepancy requires to be addressed and resolved.

* **Schedule 2: 1(1)** – It is inconsistent that the Public Guardian may dispense with an inventory but not with a management plan. The Public Guardian should be able to dispense with both.

* **Schedule 2: 6(3)** – Remit to the court should not be automatic. The Public Guardian should be authorised to hear objections, the Public Guardian’s decision being appealable to the court.

¹⁵ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=71>

* **Schedule 3** – There requires to be clarification as to the extent of the Public Guardian’s responsibilities where a guardian appointed in Scotland acts in another country; there should be provision for transfer of supervisory responsibilities to the other state where supervision by the Public Guardian is impractical.

* **Schedule 3: 1(1)(b) and (c)** – Paragraph (c) suggests that if an adult is not habitually resident in Scotland the Scottish courts have jurisdiction in relation to property belonging to the adult situated in Scotland only as a matter of urgency, whereas paragraph (b) renders situation of property in Scotland a separate ground of jurisdiction without the need for urgency. This inconsistency requires to be resolved, though it is acknowledged that it is an inconsistency deriving from Hague Convention 35.

Schedule 3: 7(2) – This does not properly address the situation in which the United Kingdom has ratified in respect of Scotland but not in respect of England & Wales. [Note: It is understood that Ministry of Justice intend to achieve ratification in respect of England & Wales during 2021. If so, this concern should be resolved by such ratification]

BUSINESS

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