



FACULTY OF ADVOCATES

RESPONSE

BY

FACULTY OF ADVOCATES

TO

THE SCOTTISH GOVERNMENT

ON

DRAFT CODE OF PRACTICE: CONTINUING AND WELFARE ATTORNEYS

The Scottish Government is consulting on the terms of an updated Draft of the Code of Practice for Continuing and Welfare Attorneys issued under the Adults with Incapacity (Scotland) Act 2000. In the e-mail circulated with the draft Code of Practice, the Scottish Government acknowledge that the entire law relating to Mental Capacity and Mental Disorder is currently under consideration by the Scott Review, which is not due to report until September 2022.

It is evident that any recommendations of the Scott Review will not translate into legislation for a considerable time after its Report is issued. There is a concern that the current Code of Practice, issued in 2018 will be considerably outdated if not revised prior to such a point. Not least amongst such concerns will be whether the operation of the 2000 Act remains consistent with the United Nations Convention on the Rights of Persons with Disability (UNCRPD) which was ratified by the UK Government in 2019, and which the Scottish Government intends to incorporate into the domestic law of Scotland as part of a wider Human Rights Bill.

Without embarking on a detailed analysis of which parts of the UNCRPD appear to contribute to the proposed revised Code of Practice, several of its sections highlight matters such as Supported Decision - Making and Best Interpretation Decision – Making which chime with the anticipated effect of implementing the UNCRPD. In general, a proactive approach which aims to enhance the legal agency of an Incapable Adult is to be welcomed. However, the expounding of how that is to be operated in practice in the draft is at times highly detailed, recalling that it is intended for the guidance of individuals who may have no Professional insight into the role of a Continuing or Welfare Attorney.

For this reason, comment has been directed primarily towards highlighting where the complexity of the wording potentially militates against the intended purpose. In essence, matters which might usefully be reconsidered are as follows:-



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Para.1.20. Reference is made to the past and present wishes and feelings of the Granter of the Power of Attorney. This is consistent with the principles of the 2000 Act, but given that advice is correctly given later in the draft concerning use of a Statement of Wishes and Feelings, it may be helpful to establish its role at this early stage.

Para. 1.27 A link is provided to a study undertaken for MWCS by Professor Jill Stavert. This is a thorough analysis of the relevant law in Scotland against the ECHR by a recognised Expert in the field of Mental Capacity Law, but is unlikely to be accessible to most users of the Code of Practice. Given the complexity of other areas noted, it may be more helpful to add a link to the more brief advice *Common Concerns regarding Power of Attorney (2021)* also issued by MWCS, which is mentioned elsewhere in the text (See also Para.7.13)

Para 2.20 This passage reflects the many considerations implicit in adoption of the UNCRPD. What seems problematic is that the guidance faces an Attorney with 21 different matters to consider in relation to one single decision (In para 3.36, the decision process is assigned 13 issues; in Para.4.40, 19 matters are set out; in Para 7.31, 23 issues). As a matter of proper consideration this can be seen as appropriate guidance, but the potential effect on the office holder may well be one of being overwhelmed by detail to the point where the guidance may be ignored or the Attorney simply leaves office.

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It is acknowledged that this is no simple matter to resolve, but it may be helpful to reconsider whether – as also suggested in relation to para.1.27 – the balance of the information provided can be altered in the interests of accessibility. It is important that an Attorney can demonstrate that proper regard has been given to the Guidance in discharging their office, which implies a level of understanding which may be compromised by a surfeit of information.

Para 2.33: This an matter where obtaining an Intervention Order may be a simpler and less restrictive option than applying for a Guardianship Order.

Para 5.25: It may be helpful to point out that the OPG will issue endorsed copies of a registered Power of Attorney in order for financial and other matters to be resolved with multiple organisations simultaneously.

Para 7.31 It may be useful for this passage of advice to be repeated with regard to the operation of a Welfare Power of Attorney.

These comments do not detract from the thoroughness with which developments in the law since 2018 have been addressed in the Draft Code of Practice, and overall that approach is to be commended pending implementation of the Scott Review. What should be avoided if possible is production of a document which discourages lay individuals from carrying out an important support to vulnerable adults.