





## Who we are and what we do

The Mental Welfare Commission is an independent organisation working to safeguard the rights and welfare of everyone with a mental illness, learning disability or other mental disorder. Our duties are set out in mental health and incapacity law.

We are made up of people who have understanding and experience of mental illness and learning disability. Some of us have worked in healthcare, social care or the law. Some of us are carers or have used mental health and learning disability services ourselves.

We believe that everyone with a mental illness, learning disability or other mental disorder should:

- Be treated with dignity and respect;
- Have the right to treatment that is allowed by law and fully meets professional standards;
- Have the right to live free from abuse, neglect or discrimination;
- Get the care and treatment that best suits his or her needs;
- Be enabled to lead as fulfilling a life as possible.

## Our work

- We find out whether individual treatment is in line with the law and practices that we know work well.
- We challenge those who provide services for people with a mental illness or learning disability, to make sure they provide the highest standards of care.
- We provide advice, information and guidance to people who use or provide services.
- We have a strong and influential voice in how services and policies are developed.
- We gather information about how mental health and adults with incapacity law are being applied. We use that information to promote good use of these laws across Scotland.

### Our investigations

This investigation was conducted under section 11 of the Mental Health (Care and Treatment) (Scotland) Act 2003. We may investigate where an individual with mental disorder “may be, or may have been, subject, or exposed, to:

- i) Ill-treatment;
- ii) Neglect; or
- iii) Some other deficiency in care or treatment.”

Section 11(2)(e) concerns situations where, because of the individual’s mental disorder, their “property:

- i) May be suffering, or may have suffered, loss or damage; or
- ii) May be, or may have been, at risk of suffering loss or damage.”

In this report, we have changed certain details to avoid identifying the people involved. We wanted to respect their right to privacy while highlighting important aspects of their experiences.

### How this matter came to our attention

Mr and Mrs D have mild learning disability. We first heard about them in September 2008. A social worker asked for advice over the actions of a welfare and continuing attorney for the couple. He thought that the attorney was not acting in accordance with the principles of the legislation. We advised the local authority to hold a case conference to consider a possible application to the Sheriff under Section 20 of the Adults with Incapacity (Scotland) Act 2000 (the Act). The Sheriff could have removed the powers or ordered that the attorney be supervised.

When we got in touch with the couple’s GP and psychiatrist, we found that these concerns had been present for a number of years. We also learned that the local authority had involved the Office of the Public Guardian (OPG) because it was concerned that the attorney was not managing the couple’s finances properly. The OPG decided not to investigate because they believed the couple capable of revoking the power of attorney themselves. They eventually did this with the support and assistance of a relative in mid-June 2009.

We were concerned about the alleged abuse of the powers of attorney. As health and social work services had been closely involved, we wanted to find out what action they took when they believed that the powers were not being used correctly. We also had questions about the process of the granting of the power of attorney in December 2003.

We looked at all available records about Mr and Mrs D. We met the couple, the health and social care staff involved in their care and obtained information from the solicitor who drew up the power of attorney. We also met staff from the Office of the Public Guardian. We offered to interview the attorney, Mr E, but he refused the offer.

This investigation is into the response of statutory services and professionals to concerns they had about Mr and Mrs D. It is not an investigation into the actions of any private person. We wanted to include Mr E's views, but his refusal to meet us made this impossible. We looked into:

- The way in which the local authority responded to the concerns about Mr and Mrs D before a power of attorney was granted;
- The role of the solicitor in the granting of the power of attorney;
- The role of the GP in the granting of the power of attorney;
- The response of the OPG to concerns about the management and use of Mr and Mrs D's funds;
- The way in which the local authority dealt with concerns about Mr and Mrs D following the response of the OPG; and
- The circumstances surrounding the ultimate resolution of the case and the revoking of the power of attorney.

Social work and health care staff across the country may face similar difficulties to those presented by this case. At the time this investigation was initiated, there had already been 170,000 powers of attorney granted across the country. The number is currently in excess of 200,000, with approximately 40,000 new powers of attorney granted each year. Over 90% of powers of attorney granted are for both welfare and continuing (financial) powers.

### About Mr and Mrs D

#### Before they gave power of attorney

Mr and Mrs D met at a school for people with special needs. They married in 1982 and managed well with the help of Mr D's father. He died in 1997. Up to that point, the only records we found were about health matters.

After Mr D's father died, Mr E, Mr D's brother, took over the role of supporting Mr and Mrs D to the exclusion of other family members. Mrs D's GP referred her to mental health services because she was having outbursts of anger. NHS and social work services were involved from then on.

Before the couple granted power of attorney in favour of Mr E, we found statements of concern about Mr E and his relationship with the couple. Services were trying to help the couple become less dependent on Mr E. They found this difficult. Mrs D was said to be showing signs of depression and there were reports of conflict between her and Mr E. Mr E even wrote to the community care team to say that he could no longer be "responsible" for Mrs D's care.

Mr E was recorded as denying access to the couple by care services. A senior care manager recorded concerns that the Ds were *“being left exposed to emotional and financial exploitation.”* Mr E was also managing the Ds’ money. He had no apparent authority to do this. Mrs D appeared to agree, but the doctor recorded that there was *“a degree of emotional coercion”*. We were very concerned to see statements from a community care officer that said *“Mr E can be emotionally very abusive to Mrs D”* and *“I have rarely come across such an unhealthy and abusive situation which has caused clients such anxiety.”* This statement was reported on forms signed off by senior managers, but was never formally addressed.

#### Granting the power of attorney

Despite these concerns, Mr and Mrs D gave Mr E power of attorney to manage their finances and welfare in December 2003. We looked into what happened at this time. Mr E consulted a solicitor who then wrote to Mr and Mrs D’s GP asking for an assessment of their capacity to grant power of attorney. The GP reply said they probably had capacity but a further examination would be necessary to confirm this. The GP and solicitor arranged for the Ds to attend the GP surgery. Mr E was present, but did not intervene. Both the GP and solicitor thought that the Ds understood what they were doing and were capable of giving power of attorney.

It was clear that the process was started by Mr E, not Mr and Mrs D. The Ds told us that they did not know why they were going to the GP that day. We have no evidence to show that they had been given any opportunity to think about the implications of giving power of attorney before they went to the GP.

#### After the power of attorney was granted

Between 2003 and 2009 we found over 40 records of concern about how Mr E was interacting with Mr and Mrs D and managing their finances and welfare. This is probably an underestimate. There was a two and a half year gap in the notes.

The records we found included concerns about:

- Emotional abuse such as threats of getting at least one of the couple taken into care;
- Financial abuse such as running up debts and failing to pay bills;
- Physical abuse with allegations of physical violence;
- Interference with health and social care services including attempts to block services considered important for the couple; and
- Interference with the couple’s privacy and wishes such as opening mail and restricting access to other family members.

We also found that the attorney was making welfare decisions on behalf of the couple when practitioners regarded the couple as able to make their own decisions. At the time the powers were granted, the attorney could act when he reasonably believed the couple to lack capacity. The law has been changed since then, but still is unclear about this matter (see the section on “Powers of attorney: what the law says”).

Matters came to a head in September 2008. Mrs D was removed from the house to a local authority training flat. She alleged that Mr E had bullied and physically abused her. Adult protection procedures and the care programme approach were instigated. Mrs D returned home, but problems continued.

The local authority and the Office of the Public Guardian (OPG) looked into the actions of the attorney. There were routes available to ask the Sheriff to either remove the attorney’s powers or have the attorney supervised. Despite this, it was left to the couple to revoke the powers themselves, although the records showed that they were afraid of the attorney and were under pressure from him not to revoke the powers.

#### Power of attorney revoked

Mr and Mrs D eventually revoked the power of attorney in June 2009. They had support from independent advocacy and another family member (Mr F) who came on to the scene. He offered considerable practical and emotional support, which enhanced their capacity to do this. The Ds’ psychiatrist and the Commission wrote again to the OPG requesting an investigation. The OPG said that, as they had capacity, the Ds could instruct a solicitor themselves.

Since the revocation of the powers of attorney Mr and Mrs D have gone from strength to strength. They both feel freer in their lives. Their movements are no longer restricted and they have regained their privacy. Without the influence of someone using powers of attorney to exert control over their lives, they no longer fear being punished and are no longer afraid of making decisions about their own lives.

### Mr and Mrs D's own account

The couple told us about how Mr E treated them before and after they gave him power of attorney. They told us they were not allowed to have friends unless Mr E had approved them. They were not allowed in to town on their own and were not allowed out of the house after 9pm at night. Mr E never took them out anywhere socially. Both Mr and Mrs D told us that they thought Mr E was trying to split them up.

Mr E came into the house whenever he wanted, even at night or when they were not there. They were not allowed to open and look at their own mail. They had to take it all down to Mr E. They had to go to Mr E's house to ask for toilet rolls. He kept their supply after purchasing; he said they were using too much. They did none of their own shopping. Mr E would buy groceries and then give them what he deemed appropriate. They were not asked what they wanted. Often he bought things for himself with their shopping money, such as cat food, cigarettes and cleaning materials. They were not allowed pudding. Mr E said that they were overweight.

They got their clothes once a year, which Mr E bought and wrapped up as Christmas presents though they were bought with their money. Mr E did not allow Mrs D to ride in Mr D's motability car. Mr E made Mr D run errands for him, including when Mr D had a bad hip. They were not allowed an answer phone. Mr E took away the one they had.

They said that Mr E used their names to open credit cards and they ended up £10,000 in debt; he opened up accounts with catalogue companies in their name and purchased items for himself, including clothes and a new TV set; and, he had borrowed money from a money lender and used their money to repay it. Mr E told Mr and Mrs D that he was entitled to their money for looking after them. They were not allowed to keep their own bank books. They also told us that Mr E used Mr D's motability car for his own purposes and very rarely took them anywhere in it.

Mrs D has epilepsy. Both she and Mr D said that Mr E managed her medication and would not allow her to do it herself by using a dosette box as she had in the past, on the grounds that it was too expensive. Mrs D stated that Mr E took her to the GP and said she was pretending to have fits, following which her medication was changed. Mr F said that Mr E took Mr D to the GP and told her Mr D was crying a lot and needed medication. The doctor prescribed an anti-depressant. Mr F said that Mr D was also prescribed a tablet for a heart problem, which was discontinued after Mr E was no longer involved.



We also asked Mr D and Mrs D about their signing of the powers of attorney. Mr D said that Mr E told them that they had an appointment at the doctor's surgery but did not tell them why. Mr D said that the GP expressed surprise that he and Mrs D did not know why they were at the surgery. Mr E, however, told the GP that they might not have come if he had told them. They went through to another room and a lady was sitting there who said she was Mr E's solicitor. She asked whether they knew why they were there and Mr D replied that they did not know. The solicitor advised the couple that it was not to take the couple's money away, but it was just to help them make sure they did not get into debt. The solicitor showed them the forms. This was the first time they had seen them. Mr and Mrs D were told to sign them. Mr D does not read and Mrs D has very limited reading skills. They, however, signed the documents and Mr E and the solicitor retained copies of these. Mr D said Mr E was in complete charge then.

### **Powers of attorney: what the law says about safeguards**

In 1991, the Scottish Law Commission made several recommendations for changing the legislation in Scotland on incapacity. In relation to powers of attorney, their report included these recommendations, all of which became law:

- Granters should be fully aware of what they are doing in signing a document conferring a continuing power of attorney or a welfare power of attorney and should not be subject to undue influence to do so.
- Welfare powers should only be used when the granter loses capacity.
- There must be adequate protection if the granter loses capacity and cannot monitor the actions of the attorney. These include the formal registration of powers with a central body, welfare powers only being able to be exercised upon the loss of the adult's capacity and greater powers of investigation.

The Adults with Incapacity (Scotland) Act 2000 has several safeguards that broadly incorporate these recommendations. These include:

- Certification of capacity to grant power of attorney;
- A recent amendment to ensure that the granter “considers how incapacity is to be determined” before welfare powers can be used. However, this wording does not require that the granter makes a clear statement about who decides he/she is incapable;
- Power to investigate the use of powers, mainly conferred on the local authority, the Mental Welfare Commission and the OPG;
- Powers of the Sheriff to give directions as to the use of powers (section 3); and
- Powers of the Sheriff to remove the powers of order supervision of the attorney (section 20).

We believe that, despite these safeguards being available, there is ample evidence that Mr and Mrs D suffered harm which could have been avoided or lessened had statutory services used these available safeguards. We studied their case in great detail and interviewed the couple and all relevant practitioners. We hope that everyone will learn from our findings and be careful about how powers of attorney are granted, used and investigated.

### Summary of findings

We thought that many care staff made great efforts to help Mr and Mrs D. Some staff did extra work on a voluntary basis that was of benefit to the couple. Latterly, we thought that the use of independent advocacy was very good and helped the Ds greatly. Social work staff worked hard to support the Ds and we were particularly impressed by one senior social worker’s investigation and action to have the Ds’ debts written off.

There were, however, several areas of concern. This is a summary of our main findings and our recommendations from examining the case of Mr and Mrs D.

#### Assessment of need and risks and the planning of care

Before the Ds granted power of attorney in 2003, there were concerns about the needs of the couple and possible risks to their wellbeing. In our view, the local authority staff should have performed a full assessment of needs and risks. They did not. They also failed to assess needs and plan care during spells when they had serious concerns about abusive behaviour by the attorney. In particular, managers did not act on serious concerns recorded by a community care officer.

We looked into the reasons for this. Poor communication between staff, lack of awareness of the existence of the power of attorney and poor understanding of the legislation all resulted in, at times, failure to address properly the needs of the couple and the risks to their welfare and finances.

### Case co-ordination and recording

Poor case recording and the lack of a lead person coordinating the assessment and care management of the Ds undoubtedly affected the quality of the communication within and between services. It also affected the quality of risk assessment and risk management. The gap of two and a half years where no records were available was a major deficiency in procedures.

### Communication between the community learning disability team (CLDT) and the primary health care team

The CLDT had concerns about Mr E exerting undue influence over key areas of Mrs D's and Mr D's lives for several years prior to the GP being asked to confirm their capacity to grant the power of attorney. They did not keep the couple's GP informed about their concerns. Had they done so, the GP would have been more aware of the influence and pressure Mr E exerted. This knowledge may have altered the GP's view of the couple's capacity to grant power of attorney.

Also, the CLDT did not know that the GP had been asked about the couple's capacity to grant power of attorney. If the CLDT had communicated better with the GP, they might have been informed of the request from the solicitor.

### The role of the GP in certifying the powers of attorney

As a result of inadequate communication, the GP was not aware of the likely extent of Mr E's influence over the couple. We were pleased to hear that the GP met the couple on their own, without Mr E being present. Looking back, the GP agreed that the couple may have been unable to express any unhappiness about granting these powers to Mr E.

We think it unlikely that the couple fully understood the implications of the 30 powers they were giving to Mr E. We discuss this in more detail below.

### The role of the solicitor in the granting of the powers of attorney

Mr and Mrs D told us that were unaware as to the reason for their attendance at the GP surgery on the day when they were asked to grant the powers of attorney. We are satisfied that the solicitor took steps to try to explain the powers on that day. We do not think this was enough, however. The couple had learning disability; Mr D had limited reading skills, Mrs D could not read at all and they had not had time and independent support to consider the implications of giving these powers. This is particularly important given what we heard about the influence Mr E had over them.

The solicitor undertook this work at the request of Mr E. We feel there must be considerable doubt that the Ds were ever effectively instructing the solicitor in relation to the granting of the powers of attorney.

There are problems with the legislation and the guidance available. The 2000 Act and Codes of Practice assume that the granter(s) are giving power of attorney under their own volition. In many cases, including the Ds' case, this is not what happens. It is others, including the prospective attorney, that initiate the process. While we have concerns about the GP's and the solicitor's actions, they were acting with a lack of clear guidance. The Codes of Practice do not specifically address this and the Law Society of Scotland does not provide the same level of guidance that their sister organisation does for the legislation in England and Wales. Its guidance has not, in fact, been updated to take account of the changes brought in by the 2000 Act.

#### Assessment of capacity and undue influence

It is important to look closely at the definition of incapacity in the Act. Section 1 of the Act states that incapacity shall be construed as incapable of:

- a) Acting; or
- b) Making decisions; or
- c) Communicating decisions; or
- d) Understanding decisions; or
- e) Retaining the memory of decisions.

We do not believe that the assessment of the capacity of the Ds to grant or revoke the powers of attorney included a proper consideration of their capacity to act to protect their own interests. We also believe that there was no proper consideration of the role of undue influence of Mr E and the presence of other factors that might have affected their capacity for these actions.

#### The decision by local authority not to intervene under the Act

The relevant duties of the local authority under the Act are to:

- Supervise welfare attorneys when ordered to do so by the Sheriff;
- Investigate circumstances where the personal welfare of an adult seems to be at risk;
- Provide information and advice to proxies with welfare powers;
- Investigate complaints in relation to those exercising welfare powers;
- Consult the Public Guardian and the Mental Welfare Commission on cases or matters where there is, or appears to be, a common interest; and
- Apply for intervention or guardianship orders where necessary and no other application has or is likely to be made.

When we looked into how local authority staff exercised these duties, we found:

The local authority had evidence that the undue influence Mr E exerted over the Ds effectively stopped the Ds from taking action to protect their own interests. This was recorded over several years. In our opinion, this should have led to greater intervention in September 2008 when they had serious concerns about physical, emotional and financial abuse. We think they had recorded sufficient concerns to have intervened even earlier.

The local authority could have applied to the sheriff for a direction on the use of powers or to have the attorney's powers removed or made subject to supervision by the OPG and/or the local authority. These options were never fully considered.

We think this was because there did not appear to be a clear assessment of risks to the couple at this time. We think that practitioners paid too much attention to the need to proceed at the pace the Ds were comfortable with in gaining independence from Mr E. If the local authority had taken action, it would have removed the responsibility from the Ds and offered them greater protection. Despite this, we found that the local authority, together with health colleagues, put considerable effort into supporting the Ds following the events of September 2008.

It was the intervention of another family member (Mr F) that enhanced the couple's capacity to act to revoke the powers of attorney. There was little evidence that the local authority was preparing to make an application to the Sheriff Court under the AWI Act. The Ds would have remained intimidated, fearful of revoking the powers of attorney and at risk of physical, emotional and financial harm.

### The utilisation of local authority legal advice

We would have expected social work staff to take advice from legal colleagues in this situation. In our view, they did not fully and appropriately involve colleagues from the council's legal department in discussing options open to the multidisciplinary team in responding to the perceived risks to the Ds from the apparent abuse of the powers of attorney.

Despite asking for specific advice regarding revoking the power of attorney shortly before the Ds did this, social work staff did not appear to have ever requested specific advice from council solicitors on available options open to them and the evidence required to pursue these. As a consequence, there was never a proper recorded discussion of options/actions available under the Act within the various adult protection case conferences and multidisciplinary reviews following the incidents of August/September 2008.

### The role of the Office of the Public Guardian (OPG) in investigating alleged mismanagement of the continuing power of attorney

The relevant functions of the Office of the Public Guardian (OPG) in relation to the Ds' case are laid out in section 6 of the Act. These include the duties to:

- Receive and investigate any complaints regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to continuing attorneys;

- Investigate any circumstances made known to them in which the property or financial affairs of an adult seem to him to be at risk;
- Provide, when requested to do so, a guardian, a continuing attorney, a withdrawer or a person authorised under an intervention order with information and advice about the performance of functions relating to property or financial affairs under this Act; and
- Consult the Mental Welfare Commission and any local authority on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest.

When we looked into how it exercised these duties, we found that the OPG was placed in a very difficult situation in being asked to investigate the management of the continuing powers of attorney. Financial information required to take this forward was not provided because of a lack of any arrangement with the Department of Work and Pensions (DWP) to provide this. It was advised not to contact the attorney out of fear of possible repercussions for the Ds. The OPG did make considerable efforts to uncover financial details that, had they been successful, would have helped in determining whether it felt there was sufficient evidence to pursue an investigation in further depth, and it did suggest to the local authority a possible way to proceed using the Adult Support and Protection (Scotland) Act.

The OPG could only investigate if the Ds did not have capacity. OPG staff asked the couple's psychiatrist for a report. This stated that their capacity had not changed since they granted the powers. It also stated that the couple would not be able to manage complex financial affairs. While it is a matter of medical judgement whether or not an adult has capacity and not for the OPG to determine, we believe the standard letters used by the investigation team in seeking information from medical staff on the capacity of the Ds could have been more helpful if framed differently. The letter could have asked about the presence of undue influence or other factors affecting the Ds' capacity to act freely to protect their own interests.

While acknowledging the above difficulties and efforts, we believe that the OPG did, in fact, have authority to fully investigate the management of the continuing powers of attorney as the Ds did not have capacity to manage their finances except on a very basic level. We also believe that the local authority had established "face value" evidence of risk.

The closing letter to local authority staff informing them that no further action was to be taken by the OPG could have usefully pointed out other options open to the local authority under the Act – specifically the possibility of applying to the Sheriff for a supervision requirement under section 20 of the Act.

## Conclusions

The local authority should have intervened at a much earlier stage to protect the welfare and property of Mr and Mrs D. Once the powers of attorney had been granted, local authority staff should have given proper consideration to making an application to the Sheriff under section 20 of the Act. They had many documented concerns of abusive use of powers. In failing to do so, they exposed Mr and Mrs D to the risk of continued abuse. It was wrong to rely on the couple to act to protect their own interests when there was so much evidence that they were unable to do so without considerable support while they remained under the influence of Mr E.

The process by which the powers of attorney were granted appeared to us to have been significantly flawed. In our view, Mr and Mrs D could not have fully understood the extent of the powers they were granting. We believe that Mr E pressured them into doing so. We also believe that the solicitors did not appropriately involve the Ds in the preparation of the powers of attorney documents, nor did they advise the Ds to seek their own separate legal advice. Also, the GP should have taken greater care in signing the certificates of capacity that accompany the documents. She should have alerted and consulted the specialist team and the consultant psychiatrist.

The OPG should have fully investigated to reach a more reasoned and informed conclusion. It was clear from the correspondence from the couple's psychiatrist that they lacked capacity to deal with the more complicated aspects of their finances. OPG staff stopped investigating because they thought that the couple retained sufficient capacity. Further, the OPG should have given clear advice from the outset about the local authority making their own application to the Sheriff for supervision in terms of section 20. The Department of Work and Pensions (DWP) do not routinely share data with the OPG. This impeded the OPG's ability to investigate.

Underlying all of this were fundamental problems with understanding the legislation. Practitioners of all disciplines needed a better understanding of the meaning of "incapable of acting" and the problems that arose because of undue influence. They struggled because of a lack of guidance and, to some extent, because the law is unclear.

## Recommendations

### Council A should:

1. Make a formal apology to Mr and Mrs D for its failure to intervene appropriately on their behalf.
2. Investigate the reasons for the missing case file material and communication books relating to its involvement with the Ds and take remedial action to prevent similar occurrences.
3. Review existing guidelines and procedures in respect of the local authority's duties and functions under the Adults with Incapacity (Scotland) Act 2000 with particular reference to Sections 3, 10, 20 and 57(2).
4. Review arrangements for front-line supervision of local authority social work and care management staff to ensure concerns raised by front-line staff about vulnerable service users are acknowledged, recorded and responded to appropriately.
5. Review access to, and use of, Council legal services by staff working in community care and adult protection within the department.

### Council A and NHS Board A should together:

1. Examine the function of the community learning disability team as part of the current review of community care services being undertaken by Council A. This should include clarifying the roles and responsibilities of health and social work staff in these teams; the relationship between the CLDT and the primary health care teams as well as the relationship with local authority staff responsible for assessment, care management and service provision and commissioning.
2. Undertake a training needs analysis of staff in respect of the Adults with Incapacity (Scotland) Act 2000 and develop targeted training to address these identified needs. Training should take place, ideally, on a joint basis.

### The Office of the Public Guardian should:

1. Review and revise existing *Investigation Referral Form for Local Authorities* in consultation with the Association of Directors of Social Work.
2. Develop further information/guidance to complement its existing publications on the OPG's role and practice in carrying out its investigation responsibilities under Section 6 of the Adults with Incapacity (Scotland) Act 2000.
3. Work with the Mental Welfare Commission for Scotland in developing training for relevant members of staff on the issue of capacity and how it is assessed.



The Law Society of Scotland should:

1. Update existing guidance for solicitors in respect of powers of attorney to take account of the changes in the AWI Act. Such guidance should address situations where the process of granting a power of attorney is initiated by a party other than the granter as well as situations where there may be some question as to the granter's capacity, the presence of undue influence, or other vitiating factors. Guidance should also address the fact that the delegation of welfare powers causes ethical issues different from those in the delegation of financial management matters.

The Scottish Government should:

1. Review and revise existing guidance and Codes of Practice to ensure they address in greater depth:
  - The need for medical practitioners, in assessing an adult's capacity, to consider, in particular, whether the adult is capable of acting. This is in addition, but related to, whether the adult may be capable of making a decision, or communicating a decision or understanding a decision or of retaining the memory of a decision.
  - The issues faced by individuals who initiate and/or take forward the process of the granting of welfare and continuing attorneys on behalf of another individual.

- The practice issues faced by medical practitioners, solicitors and practising members of the Faculty of Advocates who are completing the prescribed certifying forms, especially when the process is not being initiated by the prospective granters of the powers of attorney. This should include the particular cautions and safeguards that need to be closely considered in such circumstances to ensure that the Act is implemented as intended. In conjunction with this, develop concise guidance for GPs who are approached to certify the granting of powers of attorney. This should complement existing BMA and GMC guidance.
2. Review the following provisions of the Adults with Incapacity (Scotland) Act 2000:
    - Section 15(3)(b) as amended by the Adult Support and Protection (Scotland) Act 2007 states that where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, the certificate has to state that the granter has considered how such a determination may be made. The Commission recommends that in such cases the granter should state in the document how the determination of incapacity is to be made, not merely that it has been considered. We also believe this determination as to the incapacity of the adult should be in respect of actions as well as decisions.

- Section 16(3)(b) as amended by the Adult Support and Protection (Scotland) Act 2007 states that a welfare power of attorney shall be valid and exercisable only if it is expressed in a written document that the granter has considered how a determination as to whether he is incapable in relation to decisions about the matter to which the welfare power of attorney relates may be made for the purposes of subsection (5) (b). The Commission recommends that in such cases the granter should state in the document how the determination of incapacity is to be made, not merely that it has been considered. We also believe this determination as to the incapacity of the adult should be in respect of actions as well as decisions.
  - Section 16(3)(c)(ii) allows for the views of the certifier being informed either by their knowledge of the granter or from consultation with other persons who must be named on the certificate. It should be reviewed whether it was the intent of Parliament that the views of the certifier could be solely informed by information obtained from the attorney to whom the powers are being granted.
  - Section 19(2)(c) requiring the Public Guardian to notify local authorities and the Mental Welfare Commission of the registration of welfare powers of attorney in order to clarify if the law needs amending to achieve its intended effect in a more efficient and effective manner.
3. Approach the DWP to request that information be shared by the DWP with the OPG when the OPG is carrying out investigations involving moneys which were paid as benefits.
  4. Raise with the UK Government the need to revise the Interpretation Act 1978 such that “an enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament and thus permitting the Department for Work and Pensions to release to Scottish regulatory authorities information that would otherwise be withheld as confidential.



