



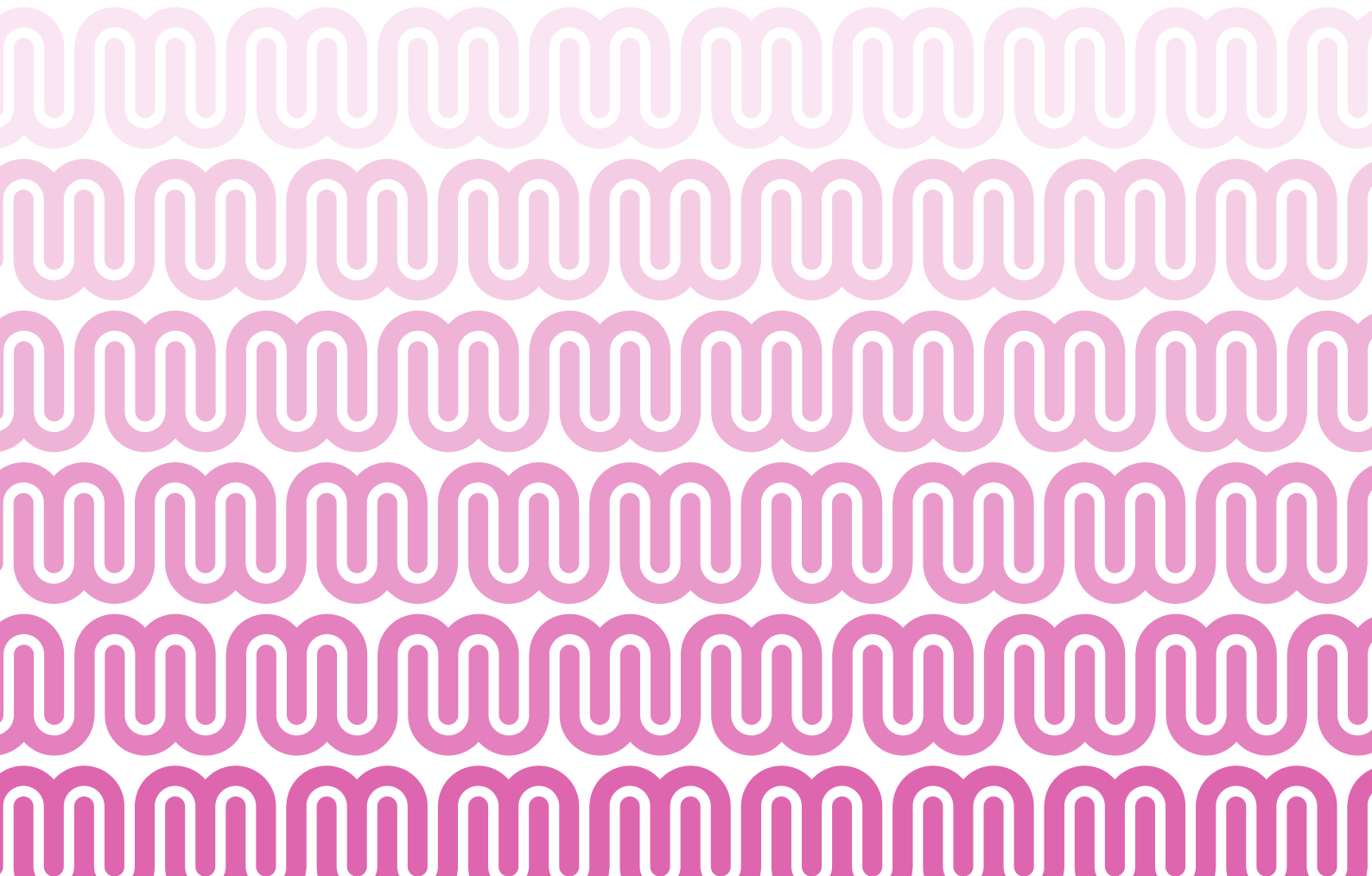
**mental welfare**  
commission for scotland

# **Common Concerns with Power of Attorney**

Good practice guide

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28 July 2020



# Our mission and purpose

## Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

## Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

## Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

## Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

This guidance was last published in 2017. It was reviewed and updated in July 2020. The main changes are:

- Increased prominence of AWI Principles (section 2)
- New section on powers of attorney and restriction of liberty (section 10)
- Updated section on discharge decisions, to take account of hospital based complex care (section 16)
- Improved structure, shortened text, and enhanced readability

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## 1. Why we have produced this good practice guide

While the vast majority of attorneys undertake their role with care and respect, there are times when the situation is more difficult and the Commission has been asked for advice and guidance.

The Mental Welfare Commission has therefore compiled this guide to assist health and social care staff faced with issues that arise from the operation of powers of attorney. It may also be of interest to people drawing up their own power of attorney, and to prospective attorneys.

## 2. Principles

The principles of the Adults with Incapacity (Scotland) Act 2000 should govern any intervention by the Attorney. This means all decisions made on behalf of the Adult should be justifiable in terms of the guiding principles found in Section 1 of the Act.

These are that any intervention must:

- benefit the Adult
- be the least restrictive option
- take the past and present wishes of the Adult into account,
- consult with relevant others involved with the Adult
- and encourage the Adult to exercise whatever skills he or she has concerning their welfare, property or financial affairs and develop new skills

The website of the Office of the Public Guardian (Scotland) and the Code of Practice for this part of the Adults with Incapacity (Scotland) Act 2000 (Part 2) (referred to as 'the Act') provide clear and detailed advice on creating and exercising powers of attorney.

- <https://www.publicguardian-scotland.gov.uk/>
- <https://www.gov.scot/publications/code-practice-continuing-welfare-attorneys-second-edition-updated-february-2018/>

This guide does not duplicate these, but looks at some of the practical and ethical dilemmas that arise and considerations for attempting to resolve these.

Although this guide will mainly discuss issues in relation to welfare matters, there are links throughout the document to further information in relation to financial matters.

### 3. What is a power of attorney?

A power of attorney is an authority given by an Adult, who is known as the granter, to another person(s), known as the Attorney/s, to deal with aspects of the granter's affairs. This could relate to financial/property matters and/or personal welfare.

- Powers relating to the granter's financial/property affairs are known as 'continuing powers' and may be given either with the intention of taking effect immediately and continuing upon the granter's incapacity, or to begin on the incapacity of the granter.
- Powers relating to the granter's welfare are known as welfare powers and cannot be exercised until the granter has lost the capacity to make these decisions.

A power of attorney is drawn up when the granter has the mental capacity to do so.

If the Adult has lost capacity and does not have a power of attorney, an individual or the local authority can apply for a welfare guardianship order to make welfare decisions on behalf of the Adult.

Further details about power of attorney and Guardianship process can be found at the following links:

- [https://www.mwcscot.org.uk/sites/default/files/2019-06/poa\\_leaflet\\_care\\_homes.pdf](https://www.mwcscot.org.uk/sites/default/files/2019-06/poa_leaflet_care_homes.pdf)
- <https://www.publicguardian-scotland.gov.uk/power-of-attorney>
- <https://www.publicguardian-scotland.gov.uk/guardianship-orders/following-a-guardianship-order/welfare-guardianship>

### 4. Can an Adult have capacity to grant a power of attorney but lack capacity for some other decisions?

Yes. It is important to make the distinction between the granter's ability to make certain welfare and financial decisions, and the granter's ability to grant a power of attorney to understand the nature and extent of the powers they are granting and who they wish to make decisions for them.

## 5. Who should be informed about a power of attorney?

There is no requirement for the granter to tell anyone, other than the proposed Attorney, that he or she is drawing up a power of attorney document. However, it may avoid difficulties in the future if the granter considers now who might need to know about it.

There are potential problems if close relatives are not aware of a power of attorney. Where there are tensions in family relationships, these may intensify when one relative begins to make welfare or financial decisions as Attorney when others are unaware of this. In most cases such disputes would not have been what the granter would have wished.

Similarly the proposed Attorney may wish to think about the implications of accepting the role, particularly in regard to their relationships with other family members. When acting as Attorney, they will need to be mindful of the principles of the Adults with Incapacity Act in all decision making, which include taking into account the views of others with an interest in the person's welfare. The principles are outlined in part 2 of this guidance.

The certificate of registration and power of attorney document are only issued to the person who sends the application to the Office of the Public Guardian (Scotland) (usually a solicitor). The granter receives a copy of the power of attorney document.

The power of attorney can only be used when registered and the Attorney should provide a certificated copy of the document to relevant staff to confirm their status as Attorney.

## 6. When can a power of attorney take effect?

Powers relating to the granter's financial and property affairs are known as 'continuing powers' and may be given with the intention of taking effect immediately and continuing upon the granter's incapacity, or beginning on their incapacity.

Welfare powers cannot be exercised until the granter has lost the capacity to make these decisions. A power of attorney document may contain either continuing powers, welfare powers or a combination of both. A power of attorney that is to begin in the event of incapacity must have a statement confirming that the granter 'has considered how their incapacity is to be determined'.

It is good practice for the granter to record in the power of attorney document exactly how they want their incapacity to be determined and who should do this. This makes it clear what their wishes are so they can be followed.

The [Continuing and welfare attorneys code of practice](#) outlines how to create a power of attorney.

It is important to look closely at the definition of incapacity in the Adults with Incapacity (Scotland) Act 2000. Section 1 of the Act states that incapacity shall be construed as being incapable of:

- acting; or
- making decisions; or
- communicating decisions; or
- understanding decisions; or
- retaining the memory of decisions

Where an Attorney is stating they are acting as Attorney, they should be expected to produce the certificated power of attorney document that has been registered with the Office of the Public Guardian. Relatives, on occasion, will refer to themselves as having power of attorney when they are in fact the Adult's appointee for Department of Work and Pensions benefits, or they are simply the next of kin. It is important for services to ask for a copy of the document to see that it has been registered with the Office of the Public Guardian, to check what the powers are, and, if there is a clause about how the granter wants their incapacity determined, what that says. For instance, where it states that the power of attorney requires to be triggered by a written medical statement of incapacity, this should be provided along with a copy of the power of attorney document. It is important that staff read the power of attorney document with regard to the powers and any stipulation about when the Attorney can act, particularly where there are contentious decisions.

## 7. Why is it important to consider capacity and undue influence?

It is important to establish that the granter understands the implications of drawing up a power of attorney and the decisions they wish their Attorney to take for them. They must grant these freely without being subject to undue influence.

It is vital for the solicitor to establish that the Adult has capacity and is not subject to the undue influence of the proposed Attorney. Where a solicitor has doubts about the potential granter's capacity, they should seek the opinion of a medical practitioner.

The Commission published a report in 2012 about [Mr and Mrs D](#) who had learning disabilities and granted welfare and financial power of attorney to Mr D's brother, who later abused these powers. The full Investigation report can be found on following link

In response to our report, in August 2013 the Law Society produced two separate pieces of guidance - [Vulnerable Clients Guidance](#), and [Guidance on Continuing and Welfare Powers of Attorney](#). The guidance should be read subject to the terms of relevant Law Society of Scotland Practice Rules 2011.

The issues discussed in the guidance for solicitors include:

- Effective communication strategies with vulnerable clients including consideration of the place and time of meetings, using straightforward language and documentation and independent support.
- 'Incapacity to act' and awareness of how undue influence can impact on this.
- The difference between due and undue influence.
- The need to seek expert guidance from a medical practitioner or clinical psychologist if there is any doubt about capacity.
- The advisability of seeing vulnerable clients alone to try to establish their wishes, particularly if someone else has initiated the process.
- Consideration of who is the client and possible conflicts of interest.



## **8. What should be done if there are concerns about someone's capacity to grant a power of attorney or that they are under undue influence?**

If there are concerns that the granter has drawn up a power of attorney document and has not understood its effects or has been subject to undue influence, it is important to contact the Office of the Public Guardian (Scotland) promptly so that they can examine this before it is registered.

Once registered, the power of attorney can only be revoked if the granter still has the capacity to do so. Otherwise it can only be revoked by applying to the Sheriff. This would involve legal fees for the applicant and sufficient evidence that the person did not have capacity to create the power of attorney at the time of granting.

## **9. Can an Attorney with welfare powers force the adult with incapacity to comply with their decisions?**

The principles of the Act should govern any intervention by the attorney. These principles are outlined on page 4 of this guidance and must be adhered to when making welfare decisions on behalf of the Adult.

The Act does not permit the use of force other than in Section 47 (7)(a) in relation to medical treatment if it is 'immediately necessary and only for so long as necessary in the circumstances' and in Section 70 which relates to non-compliance with welfare guardianship powers. The [code of practice](#) for Attorneys (2018) says:

**5.45** Ultimately you may find that you simply have to insist. If you are confident in your judgement, do not back down. You would be letting the person down if you gave in for the sake of peace; or stood down, leaving the person with no-one (or someone he/she did not choose) to make welfare decisions on his/her behalf.

We therefore consider that whilst an Attorney can persuade the Adult to comply with the powers, and can insist that they comply, they cannot enforce compliance.

If it is necessary to enforce compliance, an application to the court for a welfare guardianship order with a Section 70 warrant to comply should be considered by the Attorney, another interested party or the local authority.

See the next section for considerations where the Adult is resisting interventions amounting to significant restriction of liberty.

## **10. Can a power of attorney authorise significant restrictions of liberty?**

### **10.1. Can a Welfare Attorney, granted a specific power to overcome resistance, authorise a significant restriction of liberty when the adult with incapacity resists or objects?**

Unfortunately the law is unclear, and the increased awareness of the need for legal authorisation for a deprivation of liberty has led to a number of powers of attorney being granted with specific powers to authorise deprivation of liberty, or to impose coercive measures such as restraint. There is an argument that if an Adult has granted an Attorney the power to consent to care arrangements, including arrangements amounting to a deprivation of liberty, this should be respected, in the same way that the person's consent, if capable, would suffice to permit depriving them of their liberty.

We recognise this argument, and would generally encourage people granting powers of attorney to be as specific as possible in the powers they grant. However, on balance, **we do not believe a power of attorney can be safely relied on to authorise coercive measures which amount to a deprivation of liberty**, for the reasons set out below.

### **10.2. Why we do not believe a power of attorney can authorise deprivation of liberty**

When a person with capacity withdraws consent, then any deprivation of their liberty would need to be authorised by another legal measure such as might be granted by a court, if it is deemed necessary for it to continue. Otherwise their continued deprivation of liberty becomes illegal, both at common law, and under Article 5 of the European Convention on Human Rights.

However, there is a lack of protection for an Adult with incapacity who appears to withdraw their consent.

Any adult when they have capacity can grant any welfare or financial powers to an Attorney. The registered power of attorney document may be completed without the oversight of a solicitor, and the doctor who confirms the capacity of the grantor does not have to pay detailed consideration to the powers granted, only to the capacity of the Adult. The power of attorney document does not go before a court, but is registered in Scotland by the Office of the Public Guardian. If it is a competent legal document they must register it. It is possible for the document to authorise the Attorney to decide for themselves when an Adult has become incapable, with no independent verification.

The principles of the Adults with Incapacity Act require respect for the wishes and feelings, past and present, of an Adult who subsequently has lost capacity, at the time an Attorney plans to exercise the welfare powers. Thus if the Adult appears to oppose or resist the arrangements it is arguable that it would not be in accordance with the principles to rely on the power of attorney to authorise them. This approach to the principles is supported by Article 12 of the UN Convention on the Rights of Persons with Disabilities (the Convention), which makes clear that measures affecting a person's legal capacity must respect their 'rights, will and preference'.

It is unfortunate that the Adults with Incapacity Act does not spell out the extent of an Attorney's powers to overcome the resistance of an incapable Adult in respect of measures which might amount to a significant restriction or deprivation of liberty (except in relation to the specific bar on admitting a person to hospital for treatment for mental disorder against their will). Nor does the Act make clear whether an Attorney who is a carer can use or authorise the use of restraint,

where an Adult appears to wish to leave his or her place of residence or day service.

Section 70 of the Adults with Incapacity Act provides for Welfare Guardians, but not a Welfare Attorney, to apply for an order in the event of "Non-compliance with decisions of a guardian with welfare powers". It says that, where any decision of a Welfare Guardian is not complied with by the Adult, the sheriff can make an order requiring the Adult to comply with the decision of the guardian. However, if an adult with capacity granted a power, in the power of attorney document, specifically to overcome their own resistance to a decision of their Attorney, and then having lost capacity, resists or refuses to comply with the decision of their Welfare Attorney, the Attorney has no recourse to seek compliance using section 70. The Adults with Incapacity Act provides at section 3 that any Welfare Attorney unsure about the extent of their powers could seek instructions from a sheriff.

Crucially, how can an Adult who has lost capacity exercise their right to challenge the decision of a Welfare Attorney who is authorising a significant restriction of liberty against their present wishes, relying only on the power granted to them by that same person when they had capacity?

The "right to liberty" is too important in a "democratic society" within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention"

*De Wilde, Ooms and Versyp v Belgium* [1971] ECHR 1

### **10.3. Should someone acting on behalf of the Attorney carry out their wishes against the resistance of the Adult?**

Where any person is involved in carrying out the wishes of a welfare attorney and being told to overcome the resistance of the Adult with incapacity, for instance a care home manager, we believe they could seek direction from the court and ask that the authority of the power of attorney to overcome the resistance of the Adult is reviewed by the sheriff. The only procedure for this to happen in the Adults with Incapacity Act is an application for a direction under s3.

The [Code of Practice for Continuing and Welfare Attorneys Second Edition](#) (Updated February 2018) states in a section entitled 'What if you encounter resistance to the exercise of your powers?':

**3.22** [...] If the person him/herself or someone else with an interest in his/her welfare contends you are in breach of your powers then he/she can make a formal complaint.

**3.23** Ultimately it is for the courts to decide if someone is incapable and others could apply to the sheriff to have the granter interviewed or assessed. You can direct anyone who doubts your position to his/her right to seek directions from the sheriff under section 3(3) of the Act, or you can seek such directions yourself.

A later section, Obtaining specialist advice, states:

**5.16** It would be against the principles of the Act to do anything which is strongly resisted by the person (unless the particular matter is included specifically within the powers granted). If you think this is an issue you are advised to consult the local authority social work department.

### **10.4. Our view**

Some resistance may be very temporary, but easily overcome with persuasion or direction.

However, until there is further legal clarity, the Mental Welfare Commission takes the cautious view that it is better for a court to have authorised any intervention required, (even where the power to enforce is specified in a power of attorney document), to overcome the persistent verbal, or non-verbal, resistance of an Adult with incapacity to a *significant restriction of liberty*.

Some resistance may be for interventions not considered to be a significant restriction of liberty, such as to ensure personal hygiene or nutrition. Some resistance may need to be overcome for the immediate safety of the Adult or other people. In these situations, we accept that a legal process is not required if the Attorney is acting within the apparent scope of their powers. However, for persistent strongly held views or determined efforts, for instance, to leave a care setting, we recommend that the Welfare Attorney, or others concerned about the powers being exercised by the Welfare Attorney, either seek Welfare Guardianship with the appropriate power, or at the very least seek the direction of the sheriff under s3(3) for clarification on the extent of the Attorney's powers. See section 18, What if someone is resisting personal care.

See appendix 2 for an explanation of how the Cheshire West Supreme Court decision about deprivation of liberty affects decisions made by an attorney.

See also the Commission's advice note on [Deprivation of Liberty](#) (Updated July 2015).

## **11. What should be done if there are concerns about an Attorney's decisions in relation to the person's welfare?**

There may be differences of opinion on welfare matters between professionals and the Welfare Attorney or between the Welfare Attorney and the Adult who has lost capacity.

### **11.1. Local authority duty to investigate concerns about an Attorney**

Where there are concerns about an Attorney's decisions relating to the Adult's welfare, the local authority has a duty to investigate any complaint about how the Welfare Attorney is exercising their powers, or investigate any circumstances where the Adult's welfare is at risk (Section 10 AWI Act).

### **11.2. Local authority duty to investigate concerns about an adult at risk**

Under the Adult Support and Protection (Scotland) Act 2007 (the ASP Act) the local authority also has a duty to make enquiries into the circumstances of an 'adult at risk', as defined by this Act (Section 4). The definition is

- an adult unable to safeguard their own well-being, property, rights or interests and
- who is at risk of harm and
- because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected'.

<http://www.legislation.gov.uk/asp/2007/10/contents>

In the first instance, the complainant should seek advice from the local authority social work office in the Adult's locality and provide as much information as possible to highlight their concerns. Although concerns can also be raised anonymously, this does make the situation more difficult to investigate.

Depending on the nature of the concerns, the local authority may give advice and guidance or make further enquiries to determine whether the person is at risk of harm and what further intervention is required. In most cases, the local authority will try to resolve the concerns without recourse to further use of legislation. This will obviously depend on the seriousness of the allegations and the cooperation of the Attorney and others. There are a range of formal interventions which the local authority may consider.

### **11.3. What else could be done?**

Any other person claiming an interest in the Adult's affairs may also use the measures below.

#### **1. Application to the Sheriff for direction under Section 3 of the Adults with Incapacity (Scotland) Act 2000**

Where there are concerns about how certain welfare powers are being exercised, the local authority or any other interested party can apply to the Sheriff for direction on how to proceed. The Sheriff has broad discretionary powers under this section. These can potentially be very useful in resolving disputes, or for resolving doubts and difficulties even where there is no dispute.

The Sheriff can make consequential or ancillary orders such as the measures available under Section 20 of the Adults with Incapacity Act, which includes removing some or all of the Attorney's powers or requiring the Attorney to be supervised.

The Sheriff can:

- give direction to any of the parties with functions under the Act;
- attach conditions or restrictions to any order;
- order further reports; and
- appoint a safeguarder for the Adult, to represent their interests or gather their views.

## **2. Application to the Sheriff for an order under Section 20 of the Adults with Incapacity Act**

With regard to welfare matters, the local authority or any other interested party can apply to the Sheriff under Section 20 (or the Sheriff may take such measures as a result of an application under Section 3) for an order to have the welfare attorney supervised by the local authority; for any of the welfare or **financial** powers granted to be revoked or for revocation of the appointment of the Attorney. The Sheriff can also order a report from the Attorney as to the manner in which they have exercised their powers over a particular period.

## **3. Application for welfare guardianship by the local authority or other party**

Where there are significant concerns about how the Welfare Attorney has been exercising their powers, and no foreseeable resolution to these concerns, another interested party or the local authority may consider applying for a Welfare Guardianship order, if the person is deemed to lack capacity.

A Welfare Guardianship order, if granted, would end the authority of the Attorney only in relation to the matters covered by the guardianship order (unless they specifically ask for the power of attorney to be revoked). A Guardianship order will only be granted if the Adult is assessed as lacking capacity.

## **4. Adult Support and Protection Act**

Where an Adult is at risk of harm as defined in the Adult Support and Protection Act, the local authority may instigate Adult protection proceedings.

Following an investigation the local authority has a range of options that they may consider applying to the court for. These protective orders include an Assessment Order, a Removal Order or a Banning Order, or measures such as a Guardianship order under the Adults with Incapacity Act may be considered.

## **11.4. The Mental Welfare Commission**

The Mental Welfare Commission's functions are set out in Section 9 of the Adults with Incapacity Act. The Commission can provide advice on, and inquire into, any concerns about the operation of Welfare Attorneys, guardians or interveners or the care and support of anyone subject to the Act where they appear to be at risk.

Where there is a concern about the actions of an Attorney, the Commission expects the local authority to investigate and take any appropriate action.

The Commission may take up concerns with local authorities or health boards or consult with the Office of the Public Guardian (Scotland). Where concerns have not been fully investigated, the Commission may make further inquiries into these matters.

## **11.5. What should be done if there are concerns about an Attorney's decisions in relation to the person's finances or property?**

We increasingly hear of family disputes regarding the operation of the powers by the Attorney. Many of these centre on allegations between family members around financial transactions

which are benefiting the Attorney rather than the Adult, as well as where the Attorney has not taken into account the views of other relevant parties in welfare decisions.

## **11.6. The Office of the Public Guardian (Scotland) and financial concerns**

Where there are concerns about the management of their property or financial affairs by their Continuing (Financial) Attorney, contact the Office of the Public Guardian (Scotland) Investigations Team by phone, letter or email, or the referral form available on the Office of the Public Guardian website (one for local authorities and one for others). The complainant should explain the reasons why they think that the person's property or financial affairs appear to be at risk, and provide any evidence which may have to support those concerns. The Office of the Public Guardian will be able to provide advice and guidance.

<https://www.publicguardian-scotland.gov.uk/investigations/about-investigations/when-can-we-act>

A person may also refer the matter to the local authority for the area in which the person is resident, under section 5 (3) of the Adult Support and Protection (Scotland) Act 2007.

## 12. What happens if the Attorney disagrees with the doctor about medical treatment?

Where there is a Welfare Attorney in place with powers to consent to or refuse medical treatment, the Attorney should make themselves known to the medical practitioner who is treating the Adult, and this information should be clear within the medical notes. They should also provide a copy of the registered Power of Attorney documentation to confirm their status and their decision-making powers. Where the document has stated that incapacity must be determined by a medical practitioner, this written statement must also be provided. The practitioner who is treating the person should seek the Attorney's consent to treatment where this is 'reasonable and practicable'. An Attorney with appropriate welfare powers may discuss treatment options on the patient's behalf but cannot insist on a particular treatment.

Where there is a disagreement as to a proposed medical treatment which cannot be resolved, the medical practitioner can request a 'nominated medical practitioner' from the Mental Welfare Commission to give an independent opinion as to the proposed treatment. There is a further level of appeal to the Court of Session. These measures are set out in Section 50 of the Adults with Incapacity Act and in the Adults with Incapacity Act Part 5 Code of Practice:

<http://www.scotland.gov.uk/Publications/2010/10/20153801/0>

Where the Adult is being treated under the Mental Health (Care and Treatment) (Scotland) Act 2003, it would be good practice to consult a Welfare Attorney who has powers to consent to or refuse medical treatment. But treatment for their mental health condition may be given without the Welfare Attorney's consent. Treatment for any physical health problems that are not 'the cause or consequence of the mental disorder' require the Welfare Attorney's consent where it is reasonable or practicable to obtain it.

Under the common law 'principle of necessity', it is reasonable in an emergency to take necessary action to safeguard a person who is unable to consent and who, without treatment, would come to significant harm. In such circumstances it would not be possible or reasonable for the Attorney to be contacted prior to treatment.



### **13. What if the Adult indicates disagreement with the doctor and the Attorney's decision regarding medical treatment?**

The definition of treatment under the Adults with Incapacity Act includes 'any procedure or treatment designed to safeguard or promote physical or mental health' and covers investigations of physical disorders. Treatment can be given to a person who is incapable of consenting under Part 5 of the Act following the completion by a medical practitioner of a Section 47 certificate of incapacity and consultation with the Welfare Attorney, where the Attorney has relevant medical powers. However, force cannot be used, unless 'immediately necessary and only for as long as necessary'.

Where resistance by the Adult is anticipated, multidisciplinary discussion may be useful. The discussion should cover the necessity and immediacy of the need to proceed and how to proceed, bearing in mind the principles of the Act. The Welfare Attorney with medical powers should be involved in these discussions. A second opinion from another medical practitioner may be useful. It may be necessary to consider an application for medical powers under an intervention order or a welfare guardianship order with a Section 70 compliance order.

See the Commission's guidance on [Consent to Treatment](#).

### **14. Can someone be given covert medication (concealing medication in food or drink)?**

Covert medication must never be given to someone who is capable of deciding about medical treatment. Where a person lacks capacity and is rejecting medication, covert medication may, in certain circumstances, be necessary, following full consideration of the principles of the Adults with Incapacity Act and the alternatives. Where there is an Attorney with the power to give or refuse consent, they must be consulted unless it is impracticable to do so. Where covert medication is being considered, we would expect that a covert medication care pathway has been followed and a Section 47 certificate and treatment plan is in place.

[https://www.mwscot.org.uk/sites/default/files/2019-06/covert\\_medication.pdf](https://www.mwscot.org.uk/sites/default/files/2019-06/covert_medication.pdf).

## 15. Who can make decisions about resuscitation?

If an Adult lacks capacity and has a Welfare Attorney or Guardian, the Attorney or Guardian must be consulted about cardiopulmonary resuscitation (CPR) decisions, which are made on a balance of benefits and risks. Welfare Attorneys and Guardians cannot demand treatment that is clinically inappropriate. Where there is disagreement between the healthcare team and an appointed Welfare Attorney about whether CPR should be attempted in the event of cardiac or respiratory arrest, this should be resolved as quickly as possible by discussion and, if necessary, a second clinical opinion.

- If the healthcare team wishes to attempt CPR but the Welfare Attorney or Guardian refuses to give consent, the Mental Welfare Commission must appoint a 'nominated medical practitioner' to give an opinion. This opinion is final unless appealed to the Court of Session.
- If the healthcare team does not believe that attempting CPR would benefit the Adult, and the Welfare Attorney disagrees, a second opinion should be sought from another health board. There is no recourse to a nominated medical practitioner from the Commission or the Court of Session.

See NHS Scotland Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) Integrated Adult Policy - Decision Making & Communication

<http://www.scotland.gov.uk/resource/doc/312784/0098903.pdf>.

## 16. Who decides whether an Adult who is unable to go home should stay in hospital or be discharged to a care home?

Only patients with complex care needs who cannot be cared for in another setting will stay in hospital. This is called Hospital Based Complex Clinical Care. The Scottish Government has published [guidance](#) on this, which replaces older guidance on NHS Continuing Care.

Disputes sometimes arise when a hospital decides that an Adult no longer requires hospital treatment and is ready for discharge, but the Attorney considers that:

- the Adult requires continuing hospital care; or
- the Adult needs to stay in hospital until there is a vacancy in the care home they have chosen.

A Welfare Attorney or Guardian has no more power to decide that a person should continue to stay in hospital beyond the date they are ready for discharge than the Adult themselves would have, if they had capacity.

The decision about whether a patient needs Hospital Based Complex Clinical Care will be taken by the responsible medical officer, involving the multidisciplinary team. The guidance sets out that decisions should be discussed fully with the patient and their family. This should include the Welfare Attorney. The guidance states:

As with current medical practice, the patient is entitled to a second opinion. However, when a final decision has been reached that someone is clinically ready for discharge then there should be no delay. No individual has the right to choose to remain in hospital when there is no longer a need for in-patient care.

Where an Adult who lacks capacity is moving from hospital to a care home, it is preferable that they only have one move. Where the wait for the care home chosen by the Attorney is short, it may be possible to negotiate with the Responsible Medical Officer to extend the stay in hospital briefly but this will depend on the pressure on beds. Where there is likely to be a longer waiting time, the Adult may have to move to an interim placement. The Attorney does not have the authority to demand that the person remains in hospital care.

The Scottish Government [Guidance on Choosing a Care Home on Discharge from Hospital](#) issued in December 2013 provides detailed advice on managing the choice of care homes for people assessed as requiring on-going long term care in a care home, following a hospital stay and the mechanisms for dealing with disagreements.

## **17. What authority does an Attorney have to influence packages of care?**

In terms of care packages, the Welfare Attorney should be fully involved in any assessment of need, but cannot dictate what the local authority provides. Where there is disagreement between the Attorney and the local authority on the appropriateness of a care package, it is often because:

- the Attorney feels more care and support is required, or
- there has been a reduction in the care package due to a reassessment of need by the local authority, or
- the Attorney is dissatisfied with the quality of the service provision.

In the first instance, this should be discussed with the care manager and the risks that the Attorney identifies or the shortcomings of the current service considered.

Where there remain difficulties in resolving differences, the Welfare Attorney has the option of making a formal complaint to the local authority if they feel the process of assessment has not been carried out properly. The Welfare Attorney will receive a response to this and can go to the Scottish Public Services Ombudsman if they feel the complaint has not been dealt with fairly or correctly. These are the options available to any person or their carer, not just a Welfare Attorney.

In certain circumstances, where the use of the Attorney's powers is affecting the delivery of an appropriate care package, the local authority or anyone with an interest can apply to the Sheriff, who can make orders such as the measures available under Section 20 as outlined in part 11.3 of this guidance.

## 18. What if someone is resisting personal care?

Where an Adult is resisting personal care, whilst the Attorney may feel the care home staff should insist, staff may be reluctant to override the Adult's wishes where it requires 'hands on' intervention.

This needs careful care planning. The necessity and frequency of a shower or a bath will depend on factors such as incontinence. If the Adult is continent, it may be sufficient to have a wash down rather than a shower if they are more cooperative with this.

Where a bath or shower is necessary, because of incontinence for instance, there needs to be a discussion as to how often this is required and what the optimum conditions are to try to assist the Adult with this e.g. the time of day, using a care worker who has a good relationship with the Adult, the Adult's preference for bath or shower, washing someone's hair separately from having a shower, the use of music etc.

Where lack of personal hygiene may threaten skin integrity or increase the likelihood of infection, a section 47 certificate should be completed which includes fundamental healthcare procedures. However, neither a Section 47 certificate, nor a Welfare Attorney with powers to make decisions about healthcare or personal care, can authorise restraint of an Adult to effect personal hygiene tasks. Where it is likely that restraint is required on a regular basis, we consider that an application for the appropriate powers should be made in a Welfare Guardianship order. The power in the order should be specific and indicate that restraint may be required. The Sheriff is then clear what he or she is granting in terms of powers, and staff will be clear they are acting within the law.

[https://www.mwcscot.org.uk/sites/default/files/2019-06/rights\\_risks\\_2013\\_edition\\_web\\_version.pdf](https://www.mwcscot.org.uk/sites/default/files/2019-06/rights_risks_2013_edition_web_version.pdf).

## 19. Cross-border arrangements for Welfare Power of Attorney

Where an Adult has moved to another part of the UK, or moved to Scotland from another part of the UK, the validity of their welfare power of attorney may be questioned.

This can be a complex issue. The Office of the Public Guardian have produced guidance, including a certificate which can be printed and presented along with a power of attorney. This may assist in getting a non-Scottish power of attorney accepted in Scotland.

See:

- [Can a Scottish PoA be used in England?](#)
- [Can a non-Scottish PoA be used in Scotland?](#)
- [Can a Scottish PoA be used outside the UK?](#)

If you need more information about the system in England and Wales or how best to proceed, contact the [Office of the Public Guardian for England & Wales](#), 0300 456 0300, [customerservices@publicguardian.gov.uk](mailto:customerservices@publicguardian.gov.uk).

For N. Ireland, information is available from the [Office of Care and Protection, NI Courts and Tribunals Service](#), (028) 9076 3000.

To get more information generally or advice about how best to proceed in a given case, contact the Office of the Public Guardian (Scotland) (see Useful links below).

## Appendix 1 - Useful links

### Adults with Incapacity (Scotland) Act 2000

- <http://www.legislation.gov.uk/asp/2000/4/contents>
- [Code of Practice for Continuing and Welfare Attorneys](#)

### Office of the Public Guardian (Scotland)

Hadrian House, Callendar Business Park, Callendar Road, Falkirk, FK1 1XR

01324 678300

[OPG@scotcourts.gov.uk](mailto:OPG@scotcourts.gov.uk)

<http://www.publicguardian-scotland.gov.uk/>

### Law Society for Scotland

<http://www.lawscot.org.uk/>

### Scottish Legal Aid Board

<http://www.slab.org.uk/>

### Scottish Independent Advocacy Alliance

<https://www.siaa.org.uk/>

### Alzheimer Scotland

<http://www.alzscot.org>

### Headway

<https://www.headway.org.uk/Regions/Scotland.aspx>

### Mental Welfare Commission publications

Working with the AWI Act - Information and guidance for people working in adult care settings

[https://www.mwcscot.org.uk/sites/default/files/2020-07/WorkingWithAWI\\_July2020.pdf](https://www.mwcscot.org.uk/sites/default/files/2020-07/WorkingWithAWI_July2020.pdf)

## Appendix 2 - How does the Cheshire West Supreme Court decision about deprivation of liberty affect decisions made by an attorney?

A decision by the UK Supreme Court on a case brought against Cheshire West and Chester Council in England broadens what can be seen as deprivation of liberty, to include continuous supervision and control. This may have implications for services, and in the longer term may require changes to the law in Scotland. This guidance aims to assist services in understanding good practice in the context of the Cheshire West decision.

Where there are any concerns about a deprivation of liberty, services and decision-making proxies may need to seek their own legal advice. The Cheshire West decision is a substantial development from previous decisions of domestic courts and the European Court of Human Rights, such as the HL or Bournewood case.

The implications for Scottish legislation will be the subject of debate for some considerable time yet. Consideration of these issues is likely to form part of a review of incapacity legislation.

The Cheshire West decision poses challenges to the operation of incapacity law in Scotland as it currently stands.

<https://www.supremecourt.uk/cases/docs/uksc-2012-0068-judgment.pdf>

The UK Supreme Court's view on the definition of deprivation of liberty considerably broadens existing interpretations in Scotland which have been held, for the most part, by health and social services. These interpretations have evolved over the years from accepted common practice, but have been further informed by the Scottish Government's Guidance in CCD5/2007 following the amendment to the Social Work (Scotland) Act 1968 with the introduction of Section 13ZA

[https://www.sehd.scot.nhs.uk/publications/CC2007\\_05.pdf](https://www.sehd.scot.nhs.uk/publications/CC2007_05.pdf)

The ruling states that deprivation of liberty is a matter of fact, and does not depend on the purpose of the intervention or the nature of the person's individual circumstances. The majority of the judges involved agreed that the fundamental characteristics of deprivation of liberty are being 'under continuous supervision and control' and lack of freedom to leave.

Until there are legislative changes, services need to operate within the existing statutory framework, and be informed by the developing case law. If services are satisfied that a person who cannot consent will be deprived of their liberty, it is necessary to consider what lawful authority justifies that detention. At the same time, unless and until Parliament or the courts determine otherwise, current legislation remains in full effect, including the provisions of s13ZA of the Social Work (Scotland) Act 1968, and the principle set out in s1(4) of the Adults with Incapacity (Scotland) Act 2000 that 'There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.'

In considering issues of deprivation of liberty in the context of discharge from hospital, it is also important to bear in mind that the same European Court of Human Rights requirements pertain to health care settings as to social care settings. In other words, a person who is under continuous supervision and control and not free to leave a hospital is no less deprived of their liberty than a person subject to similar constraints in a care home. The ruling in Cheshire West should not be a justification for delaying discharge to a social care setting if that is agreed to be the appropriate care setting for an individual.

In short, the Commission believes that what was good practice before the Cheshire West case



will in large part remain good practice now, but that the decision makes it even more necessary that there is a proper and auditable process for taking decisions on care arrangements for people who lack capacity, and that this process fully reflects the principles of the 2000 Act.

Where it is determined, in accordance with those principles, that the operation of a power of attorney is insufficient for the decisions required, an application for welfare guardianship should be made. It is important to identify any particular measures which may constitute or contribute to a deprivation of liberty, ensuring that the measures are necessary and justified, and seeking specific authority in the order. Such measures may include restraint or any use of physical force, preventing a person from leaving or requiring them to return to their place of residence, or intrusive surveillance, whether personal or through technology.

Local authorities should also, in implementing their statutory duties, including under s57 of the 2000 Act, reflect on the guidance issued in CCD5/2007, see above. Integrating key elements of this guidance into assessment and care management decision making processes would help establish an auditable trail of good practice which informed the decision as to whether or not statutory powers should be sought to implement a care plan, or a significant change to existing care plans.



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