



Law Society
of Scotland

Consultation Response

Code of Practice for Continuing and Welfare Attorneys (Third Edition)

March 2022



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 consider and respond to the Scottish Government's request for feedback on the draft third edition of the *Code of Practice for Continuing and Welfare Attorneys*. The sub-committee has the following comments to put forward for consideration.

General Comments

We welcome steps to achieve improvements in practice by updating the Code of Practice while the outcome of the Scottish Mental Health Law Review, and substantive law reform following on from that review, is awaited.

The revisions proposed to the Code of Practice represent improvement, but there is scope for further review. In the time available, we have not been able to conduct a line-by-line review of the draft code, and have made general and high-level comments for the most part. We would welcome the opportunity to engage further with the process of updating the Code of Practice.

We note that the draft Code of Practice has been divided in to two parts. We have commented on each part separately below.

Creating a power of attorney – For those granting a power of attorney

Our Comments

This draft, whilst helpful, is written in professional language and may not be accessible to some prospective granters. Consideration should be given to developing an additional simplified summary of essential points, avoiding legal 'jargon' as far as possible. It may also be helpful for versions of the document to be created in relevant community languages.

While it is important for prospective granters to be aware of the substantive information set out in the Code of Practice, consideration should be given to publishing the information for granters and substantive Code of Practice as separate documents with appropriate cross-referencing and signposting. The current combined drafts are extremely lengthy.

The draft is in some respects difficult to follow, and we recommend that its structure is reviewed prior to publication.

References to paragraph numbers below refer to paragraphs of the draft document “*Creating a power of attorney – For those granting a power of attorney*”.

1.1- the draft should be clear that a person can grant a valid Power of Attorney even though not capable of everything authorised by it. Such granters must be given all necessary support to do this if they wish (Art 12.3 CRPD).

1.4- this paragraph should be clarified. We would suggest “ acting and deciding on behalf of the granter in relation to all or any personal welfare matters, including healthcare, as may be specified in the Power of Attorney document. A welfare power may only be exercised while the granter is incapable in respect of the matter authorised by that power. Some granters may be incapable in relation to some matters authorised by the document and not others, and may both lose and then re-gain relevant capacity.”

1.5- in the first line, the reference should be to the “same person or people” to reflect the possibility of joint appointments.

1.6- this paragraph should be expanded to emphasise that any such standard document should however be adapted as necessary to meet the granter’s own wishes and circumstances. It should also emphasise that where the habitual residence of the granter is in Scotland, they should check that any commercially available document is for Scotland. Otherwise, it may be found to be invalid when it is needed and the granter is no longer able to grant a valid document.

1.8- this paragraph should clarify that the document does not require to be witnessed.

1.11- this paragraph should include the requirement that the attorney be at least 16, and capable of accepting the appointment.

1.12- this paragraph is confusing and should be restructured to more clearly differentiate between the bankruptcy of the granter and of the attorney.

1.14- this section should be expanded to encourage granters to consider the practical aspects of joint appointments. The granter may wish to consider how potential joint attorneys would cooperate with each other, particularly in cases of potential conflict, and whether and when joint attorneys should be empowered to act individually. This can be particularly relevant where one or more attorneys may live at some geographical distance, which can create challenges where decisions need to be made quickly or personal presence is required, for example in dealing with financial institutions. The Power of Attorney

document should specify fully and clearly when one attorney may act alone, when an act or decision of both/all is required, what happens if one drops out, and what triggers substitution, etc.

1.16 and 1.17- this information may be more appropriately situated in the first section of the document, after paragraph 1.6, in order to emphasise the importance of tailoring the document to the needs of the granter.

1.17- It may be helpful to expand this paragraph to emphasis that granters should ensure that they understand the scope and limits of the powers before they sign, whether or not they are using a solicitor.

1.18- the second bullet-point should be expanded to clarify that an attorney can also vary or terminate a tenancy. The list of particular powers could be expanded to also include references to entering into or terminating contracts such as utilities/insurance and care home contracts, as well managing self-directed support payments.

1.20- this paragraph should be strengthened to state that the attorney will have a legal duty to consider past and present wishes and feelings when exercising powers, to emphasise that the granter should tell them what those are.

1.21- the information in the third bullet-point, which deals with section 47 of the 2000 Act and medical consent, may be more appropriately addressed as a separate section.

1.22 – 1.27- this section is confusing. It should start with a clear statement of Article 5, and why it is relevant to granting Power of Attorney. The potential implications for granters should be clearly expressed, including that their attorney may not be able to lawfully authorise a deprivation of liberty. Further examples of situations where deprivation of liberty may occur would be helpful. It may also be helpful to explain the impact that the granting of a welfare guardianship to authorise deprivation of liberty will have on the rest of the attorney's powers. The terminology in this section could be improved, specifically:

- The references to 'consent' are inappropriate. The issue is not whether the adult appears to consent to the arrangement, but whether they lack capacity to consent.
- At 1.24, the attorney does not have powers to deprive an adult of their liberty. Rather, the Power of Attorney document may give the attorney powers to authorise a deprivation of liberty.
- It is not appropriate to use the terms 'deprivation of liberty' and 'significant restriction of liberty' interchangeably. If they are used to mean the same thing, there should be consistency of terminology. If they are used to mean different things, the difference should be clearly explained.

1.40- this section is useful, but may be more appropriately covered immediately after paragraph 1.20.

Code of Practice For Continuing (property and finance) and Welfare Attorneys (Third Edition)

Our Comments

References to paragraph numbers below refer to paragraphs of the draft document “*Code of Practice For Continuing (property and finance) and Welfare Attorneys (Third Edition)*”.

The requirements of the UN CRPD should be built in throughout the Code of Practice. In particular, the explanation of the AWI Act principles (Chapter 2) should integrate CRPD requirements.

CRPD refers to preferences in relation to any matter, not preference (eg 4.33). A key aspect of arriving at a settled will in any matter is to reconcile conflicting preferences. The adult may be able to express preferences but not to reconcile conflicts among them. This should be reflected in the Code of Practice.

The rejection of a “best interests” test should be explained and emphasised.

Throughout, acting is a concept in its own right, not only acting to implement a decision, but proactively addressing a need that may in due course lead to a requirement to make decisions (eg in 4.1). The need for attorneys to be proactive, not merely reactive, in promoting and safeguarding the rights, welfare and interests of the adult, should be stressed.

Co-decision making, appointment of attorney also as supporter, and effect of any advance directive must all be explained and covered.

The draft wrongly conflates wishes, views and decisions (eg 3.15, 4.4).

Consideration should be given to addressing in the Code of Practice situations where there may be a need for powers to be exercised outside Scotland, for example where the granter has significant assets outside Scotland, or makes regular visits to another country (including England and Wales). Granters should be encouraged to consider and if appropriate seek legal advice on the application of Hague Convention 35 on the protection of vulnerable adults, the Evidence and Powers of Attorney Act 1940, and the circumstances in which it may be appropriate to grant a parallel Power of Attorney in another jurisdiction.

2.7- the reference to guardians is confusing in the context of explaining the principles for attorneys.

3.29- diagnosis should be added to the list of matters not determinative of lack of capacity.

3.38- it is inappropriate to suggest that yes/no questions should always be avoided. Some people with no verbal communication may only be able to signal yes or no to a structured list of questions: if that is what is needed, that is what the attorney must do.

5.6- a reference to section 1(5) of the 2000 Act might be appropriate here.

5.11- it may be helpful to expand this section to offer guidance on what to do if there is a conflict between joint attorneys.

5.20- whether something is 'necessary' is not the issue. The issue is whether it benefits the Adult ("necessary to obtain benefit for the Adult"). This should be clarified.

5.22- the Power of Attorney does not need to be inadequate in a number of ways for a guardianship/intervention order to be required. It may be deficient in just one respect, and therefore not be a lawful basis for a decision on that matter.

5.23- 26- it may be appropriate to mention the possibility of seeking a section 3 direction, if there is a genuine and serious conflict over a proposed action, and also the possibility of seeking removal of another attorney in serious disputes. This section could be strengthened to provide more effective guidance.

5.34- this paragraph should cross-reference 5.76.

5.38- this paragraph should include a reminder that attorneys cannot claim expenses unless specifically authorised to do so.

5.48- it might be appropriate to clarify that differences of opinion between attorneys, or attorneys and other people the adult knows, are generally outwith the scope of investigation. A cross-reference to 5.68 may be appropriate.

5.73- the Act does not require someone to 'show' interest. Except where having an interest is the test, in Part 5 of the AWI Act only, the requirement throughout the Act is "claiming an interest".

5.74- this paragraph could be expanded to clarify that that the OPG or the local authority would provide supervision where this is ordered by the court, and that if the person required a guardian, a further application to court would be required.

5.75- this paragraph should be expanded to clarify that anyone else claiming an interest can seek a direction under section 3, including a direction that the attorney should do something, and that the attorney would be notified and could participate in that process.

For further information, please contact:

Jennifer Paton

Policy Team

Law Society of Scotland

DD: 0131 476 8136

Jennifer.Paton@lawscot.org.uk