Technical note – amendment to Adults with Incapacity (Scotland) Act 2020

We have closely followed recent emergency legislation passed by the UK Parliament and the Scottish Parliament, and have noted the terms of the Coronavirus Act 2020 ("the UK Act") and the Coronavirus (Scotland) Act 2020 ("the Scottish Act"). We have also noted the terms of guidance and comment which has been issued, including in particular the "High Level Guidance to accompany The Coronavirus (Scotland) Bill" issued by the Team Leader, Adults with Incapacity Legislation and Practice, within the Scottish Government's Directorate for Community Health and Social Care, as updated on 7th April 2020. We have taken account of guidance such as that issued by the Chief Medical Officer on 3rd April 2020 entitled "Coronavirus (COVID-19): clinical advice", noting that on the one hand this explains necessary interaction with patients and highlights the importance of anticipatory care planning, but on the other does not explicitly address the situation of patients with impairment of relevant capacity. We commend the huge amount of collaborative work done by so many people to take matters this far so quickly. We have taken account of the foregoing and all other available material in formulating and explaining the proposals in this letter.

In view of the monitoring role accorded to Mental Welfare Commission for Scotland ("MWC") as intimated in the updated "High Level Guidance", we have advised MWC of our intentions and have copied relevant material to MWC.

Our further proposals for temporary modification to the 2000 Act are set out in the Appendix to this technical note.

1. **General principles (section 1 of the 2000 Act)**

   We believe that the overarching application of the principles set out in section 1 of the 2000 Act represents the minimum necessary preservation of human rights safeguards in the present context; that this can be achieved without unduly impeding the intentions of emergency legislation; and that the explicit safeguards in our proposal (a) are necessary. We acknowledge that this stance raises issues regarding the modifications to section 13ZA of the 1968 Act contained in provisions of the Scottish Act. We address that topic later in this note.

2. **Powers of attorney**

   Members of the public who have not yet granted powers of attorney are being encouraged to do so, to facilitate prompt decision-making if care and treatment regimes, and placements to provide them, as well as any subsequent transfers between regimes, become urgently necessary. The existence of a power of attorney will also enable other necessary safeguards to be applied, including in relation to property and finances. We

are aware that at least some GP practices have been circulating patients, encouraging them to make powers of attorney.

The Society has already issued temporary guidance to the solicitors' profession on how to take and implement instructions to prepare power of attorney documents, and to certify them, safely as regards both avoiding face-to-face contact and maintaining safeguards against abuse. Those measures have been agreed with the Public Guardian, and do not require any legislative change. Practising solicitors report a surge in such instructions.

However, under the 2000 Act, powers of attorney cannot be operated until they have been registered with the Public Guardian. Because of constraints on available staff, and the fact that they are working from home, the Office of the Public Guardian ("OPG") cannot currently process all applications for registration.

As last reported to us, the Public Guardian had 24 staff working from home and 3 based at OPG's premises at Hadrian House. They are currently processing all work that they assess as urgent, or business critical. In particular, they prioritise urgent registration of power of attorney documents, and revocations, where urgent. Under normal circumstances, OPG treats as "urgent" situations where the granter has lost capacity and welfare or financial decisions require to be made, or in other extreme circumstances. The Public Guardian has explicitly assured us that OPG remains able to continue to register deeds that are urgent, in accordance with those criteria, even with depleted staff numbers. She has encountered difficulties, and has sought the Society's assistance, because in present circumstances solicitors and granters do not necessarily agree with OPG's criteria for urgency. Solicitors report considerable pressure from granters dismayed by delays in the registration process. Granters have been encouraged to believe that as soon as they grant the document, it will be available for operation immediately in the event of sudden emergency needs.

The 2000 Act does not envisage significant delays between granting and registration of a power of attorney. Thus the medical treatment provisions of Part 5 of the 2000 Act disapply the authority to treat under that Part where an attorney "has been appointed", this is known, and it is reasonable and practicable to obtain the attorney's consent. That will be a common situation in the current emergency. It is essential that the attorney be empowered to give such consent immediately, even where the document has not been registered. A temporary solution is suggested in our proposals (c) and (d). We believe that in the current emergency this suggested solution strikes an appropriate balance between safeguards and necessity. The provision will only be available where a solicitor is able to certify in terms of our proposal (d), putting professional responsibility upon that solicitor, who could be

responsible for misconduct if that responsibility were not properly discharged.

On this topic, we would add that OPG is not able to enter all applications for registration upon receipt, as that would be an additional task for staff, reducing their availability for priority work. That position is accepted and catered for in our proposals.

Once the response of Scottish Government to this proposal is known, the Society will issue further guidance to practitioners towards meeting the assistance sought by the Public Guardian.

Having regard to the respective statutory roles and functions, in relation to continuing powers of attorney and welfare powers of attorney, of both the Public Guardian and of MWC, we have advised the Public Guardian of our proposals regarding powers of attorney, as well as advising MWC of our proposals as a whole, as indicated above.

3. Advance statements

This section, and our related proposal (c), is offered as a possible approach that could be adopted if the Scottish Government should take the view that facilitating advance care planning would also be helped by statutory provision giving greater clarity and certainty to advance statements, including both persuasive statements and binding advance directives. We acknowledge that, unlike our other proposals which are clearly focused upon immediate and urgent needs and do not carry policy implications beyond that, the Scottish Government may or may not consider it appropriate to propose statutory modifications in respect of advance directives. This section is offered to provide assistance if the Scottish Government should so decide. We have however noted that as with powers of attorney and for the same reasons, the public throughout the UK is being encouraged to grant advance directives. The status of such documents in Scotland is less certain than in England & Wales: see paragraph 5.46 of Scottish Law Commission “Report on Incapable Adults”, (Report No 151, September 1995)) (“the SLC Report”). The difference has increased following the Mental Capacity Act 2005, which applies only to England & Wales. Fortunately, the SLC Report addressed the question with care and included a suggested statutory provision, which we have adopted. It has been adopted in terms of our proposal (e). For a full explanation of the need for and wording of that provision, see paragraphs 5.41 – 5.59 of the SLC Report.

4. Guardianship and intervention orders

Guardianship and intervention orders in terms of the 2000 Act are granted by the sheriff. Applications must be accompanied by reports as prescribed

in the legislation, including two reports from a medical practitioner. OPG maintains a register of guardianship and intervention orders granted.

Two issues arise. Firstly, the current situation is placing strain on the court system generally. Sheriffs Principal are endeavouring to address the difficulties by issuing Practice Notes for their sheriffdoms. There are some significant differences among sheriffdoms, no doubt related to local conditions. A frequent common feature, however, is that to a greater or lesser extent applications for guardianship and intervention orders are generally given low priority. Secondly, such applications can only be lodged in court, so that procedure even in urgent cases can be initiated, where the prescribed reports are received, and under the 2000 Act the preparation of such reports requires examinations by medical practitioners and interviews by mental health officers (or, where only financial powers are sought, other suitable persons). Currently, many professional staff have been instructed or advised not to conduct face-to-face examinations or interviews. In any event, availability of professional staff to do that is significantly depleted.

Orders are nevertheless likely to be urgently required. Even if healthcare needs could be met by other means, more general social and financial needs (for example to safeguard welfare and property) are likely to be required upon sudden onset of serious illness, and will continue to be required for all of the other reasons that frequently arise in normal circumstances.

Our proposal (b) is designed to focus the importance of dealing promptly with applications for interim orders, and in particular for interim guardianship orders, and to ensure that this happens.

Our proposal (g) is designed to facilitate faster preparation of applications in a form that can be warranted upon presentation to court, and to reduce demands upon relevant professionals, in particular by suspending the requirement for a second medical report, by providing an alternative to reports by mental health officers, and by allowing remote examinations and interviews where the person reporting is satisfied that the reports may nevertheless properly be issued. Proposal (f), by cross-reference, applies the same temporary modifications to procedure for obtaining intervention orders.

Notwithstanding these proposed modifications, in each case it would still be for the sheriff to consider the available information and decide whether the order sought can be granted.

5. Other concerns: guardianship and intervention orders

As is explained in the “High Level Guidance” referred to above, temporary modifications to the 2000 Act effected by the Scottish Act include

modifications designed to “stop the clock” on the running of periods until expiry of orders, including renewal orders. However, there are cases where a sheriff has expressly imposed a time limit, often a relatively short time limit, to ensure review of powers granted in order to comply with relevant human rights requirements and ensure that necessary steps are taken within the proposed period. An example is the recent case of *Scottish Borders Council v AB*, 2020 SLT (Sh Ct) 41, in which the sheriff limited the duration of a guardianship order to six months not only to ensure compliance with human rights requirements for regular review in respect that implementation of the order would amount to a deprivation of liberty (in terms of Article 5 of the European Convention on Human Rights), but also to ensure that within that period the adult in question would receive necessary medical treatment (in that case, treatment for post traumatic stress disorder which had the potential to restore the adult’s ability to understand the consequences of her decisions). We would suggest that there be urgent consideration as to whether the purpose of such time limiting by a sheriff explicitly for necessary reasons should be defeated by the indiscriminate application of “stop the clock” provisions to all guardianship and intervention orders.

6. Other concerns: section 13ZA of the 1968 Act

We acknowledge that the amendment by section 11(1) of the 1968 Act contained in the Scottish Act is one of the few provisions of the Scottish Act that, in the words of the “High Level Guidance”, will only come into force when regulations are invoked by Ministers. The guidance confirms that this will only be done when it is absolutely necessary. Nevertheless, section 11(1) would remove the requirement for compliance with the principles contained in section 1(4) of the 2000 Act, and in particular the requirements of section 1(4)(a) which are generally regarded, particularly in the era following the promulgation of the United Nations Convention on the Rights of Persons with Disabilities, as rather weakly acknowledging what is now considered to be the most important of all of the section 1 principles. Generally, we adhere to the view, expressed above, that all of the principles represent, even in an emergency, the minimum necessary safeguards for respect for human rights. Disregarding the principles in section 1(4) will be of no help, and potentially a hindrance, to conscientious professionals seeking – all the more so in emergency situations – to act properly and ethically.

There have always been significant concerns that, among the range of statutory measures available, procedure under section 13ZA contains the weakest safeguards for essential human rights. In our view, those concerns should not be exacerbated, even in an emergency.

An example of more general concerns is the urgent call by Alzheimer Europe on 3rd April 2020 “to ensure any access or withdrawal regulations to life-saving treatment are based on sound ethical principles which do not discriminate against people with dementia”. The 2000 Act established Scotland as a world leader in human rights-compliant incapacity legislation. Even in emergency circumstances, Scotland should not lag behind.

We did not think that it would be helpful to raise such concerns in the context of proceedings in the Parliament on 1st April. We are encouraged by the special requirements for bringing them into force to anticipate that there is already general awareness in Government of the potential concerns outlined above, and that the delay before implementation becomes possible will be used to reconsider the provisions themselves, or alternatively whether they should ever be implemented.

The detailed work that has generated the proposals in this note has been done principally by 22 experts on the circulation of the Society’s Mental Health and Disability Sub-Committee. The Society would be happy to engage in discussions with your officials, and to make that expertise available to assist. Across many issues arising at this time, the Society has found ways, with expert input, to meet needs by guidance, without seeking modifications to legislation. I acknowledge that further discussion with your officials could, for example, explore the possibility of meeting by robust public guidance some of the points in sections 5 and 6 above. However, we believe that the temporary modifications to the 2000 Act set out in the following Appendix represent the minimum legislative change that it is necessary.

Appendix

Note: These proposals are worded as statutory amendments to the provisions of the 2000 Act.

The Adults with Incapacity (Scotland) Act 2000 be amended as if:

(a) Immediately after section 1 there were inserted –

> "1A Subject to the reference to subsection (4) of section 1 of this Act in section 13ZA of the Social Work (Scotland) Act 1968 as amended as provided for in the Coronavirus (Scotland) Act 2020, no powers conferred by the Coronavirus Act 2020 or by the Coronavirus (Scotland) Act 2020 may be exercised so as to amend the terms or alter the effect of section 1 of this Act."

(b) In section 3 (Powers of sheriff) after subsection (2) there were inserted:

> "(2A) The sheriff shall determine any application to make an interim order in terms of subsection (2)(b), and shall determine any application to make an order for the appointment of an interim guardian in terms of section 57(5), within three days of receipt of such application by the court, or within such other period as may be agreed by the applicant."

(c) In section 19 (Registration of continuing or welfare power of attorney) subsection (1) were amended to read:

> "19(1) Except as provided in subsection (1A) and subject to subsections (1B), (1C) and 1(D), a continuing or welfare attorney shall have no authority to act until the document conferring the power of attorney has been registered under this section."

(d) In section 19 (Registration of continuing or welfare power of attorney) after subsection (1) (as hereby amended) there were inserted:

> "(1A) Where the document conferring the power of attorney has been sent to the Public Guardian during the period when this subsection is in force and is accompanied by a certificate by a practising solicitor in accordance with subsections (1C) and (1D), subsection (1) shall not apply, and instead the continuing and/or welfare attorney or attorneys appointed in terms of that document shall have no authority to act until the document and application for registration thereof, along with such certificate, have been sent to the Public Guardian.
>
> "(1B) If the Public Guardian intimates to the applicant that the Public Guardian has declined to register the document conferring the power of

attorney in accordance with the provisions of this section, such authority to act following upon subsection (1A), if and insofar as then brought into force, and still in force notwithstanding exercise by the sheriff of any of the powers conferred by section 20 or revocation by the granter in terms of section 22A, shall cease, and the provisions of section 22A shall apply as if the power of attorney had been revoked in full by the granter with effect at the date of intimation as aforesaid by the Public Guardian that the Public Guardian has declined to register it.

"(1C) A certificate in accordance with subsection (1A) shall contain the elements set forth in subsection (1D) until a form of such certificate has been prescribed, and once a form of certificate incorporating those elements has been prescribed, a certificate in accordance with subsection (1A) shall be in accordance with such prescribed form.

"(1D) A certificate in accordance with subsections (1B) and (1C) shall be incorporated into the power of attorney document and shall certify that:

1. The solicitor issuing the certificate drafted the accompanying power of attorney document.
2. The document is now submitted as drafted by that solicitor.
3. Such solicitor is satisfied that the power of attorney document and accompanying application are in all respects suitable for acceptance and registration by the Public Guardian.
4. Such solicitor has explained to [the granter, named] the relevant provisions of the 2000 Act as amended by this Act; and that such solicitor is satisfied that it is appropriate that the authority to act of the attorney(s) appointed in terms of the accompanying document should be available to be brought into force from and upon presentation of the accompanying application, in accordance with the amendments to said section 19 effected by this Act.
5. Such solicitor (a) has been explicitly assured by the granter that no previous power of attorney that has not been revoked in whole has been granted by the granter, and (b) has no cause to doubt the veracity of that assurance.

"(1E) A copy of a document conferring a continuing or welfare power of attorney incorporating certificates in accordance with sections 15(3)(c), 16(3)(c) or 16A (as the case may be) and a certificate in accordance with the foregoing subsections (1A), (1B), (1C) and (1D), and certified in accordance with section 3 of the Powers of Attorney Act 1971, if accompanied by written confirmation by a practising solicitor that it has been sent to the Public Guardian, and whether exhibited by hard copy or electronically, shall be accepted for all purposes as sufficient evidence

of the contents of the original and of any matter relating thereto appearing in the copy."

(e) Immediately after section 52 (Appeal against decision as to medical treatment) there were inserted –

"**Advance statements**

52A – (1) This section applies to any statement ("advance statement") which an adult may make as to the circumstances in which medical treatment of a description specified in the statement is not to be afforded to him at any time when the statement is operative.

(2) An advance statement may be –

(a) made or revoked orally or in writing by the adult;

(b) revoked orally or in writing by a welfare attorney to whom the adult has given authority to do so.

(3) Where an advance statement or the revocation of an advance statement is in writing it shall not be valid unless it is signed by the adult or, as the case may be, by the welfare attorney.

(4) An advance statement is operative during any period when –

(a) the circumstances specified in the statement exist; and

(b) the adult is incapable of making or is incapable of communicating a decision about such medical treatment.

(5) Subject to subsections (6) and (7) below, where an advance statement is validly made and is operative any authority to carry out medical treatment of a description specified in the statement in the circumstances mentioned in the statement shall have no effect.

(6) An advance statement may be disregarded by the person responsible for the medical treatment where he reasonably believes that –

(a) the circumstances, other than the medical condition of the adult, have changed to a material degree since the statement was given; and

(b) in consequence of such changed circumstances the adult, if he were capable of making and communicating a decision, would authorise the medical treatment.

(7) An advance statement shall not have effect –

(a) where compliance with it would endanger the life of the adult, unless the terms of the statement expressly provide for such an effect;

(b) to prohibit the provision of procedures to maintain adequate standards of hygiene and measures to relieve serious pain;

(c) to prohibit the treatment for mental disorder by virtue of Part X of the 1984 Act of a patient liable to be detained under that Act;
(d) in the case of a female adult, where compliance with it would endanger the development of a foetus being carried by her where the pregnancy has exceeded its twenty-fourth week.

(8) Where the advance statement was valid and operative or the person responsible for the medical treatment reasonably believed that it was valid and operative, the person responsible for the medical treatment and any person withholding it, or participating in the withholding of it, in accordance with the advance statement shall not thereby incur liability.

(9) Where –
(a) the person responsible for the medical treatment –
(i) did not know of the existence of an advance statement relating to the medical treatment in question; or
(ii) reasonably believed –
(aa) that such an advance statement was not valid or was not operative; or
(bb) that subsection (7) above applied to the case; or
(b) such an advance statement was disregarded by virtue of subsection (6) above, and medical treatment was carried out contrary to the terms of the advance statement, the person responsible for the medical treatment and any person carrying it out or participating in it, shall not thereby incur liability.

(10) In this section –
'medical treatment' has the same meaning as in section 47 of this Act; and
'welfare attorney' includes a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity."

(f) In subsection (4) of section 53 (Intervention orders) "and (4)" were deleted and the following were inserted in place thereof -
"4(3C), (3D), (3E) and (4A)"

(g) In section 57 (Application for guardianship order) after subsection (3B) there were inserted:

"(3C) There may be lodged in court along with an application under section 57, in place of the reports required by subsection (3)(a), one report, in the form currently prescribed in terms of said subsection (3)(a) or such other form as may be prescribed, of an examination and

assessment of the adult carried out not more than 30 days before the lodging of the application by one medical practitioner.

“(3D) There may be lodged in court along with an application under section 57, in place of the report required by subsection (3)(b), a report, in the form currently prescribed in terms of said subsection (3)(b) or such other form as may be prescribed, of an interview and assessment of the adult from a person who has sufficient knowledge to make such report.

“(3E) Reports in terms of subsections (3), (3C) and (3D) may proceed upon examinations and interviews conducted remotely, provided that:

(a) the person making such report is satisfied that the report may properly be issued and lodged upon the basis of such remote examination or, as the case may be, remote interview, and
(b) the method of conduct of any such remote examination or remote assessment is stated in the report.

“(4A) With reference to the provisions of subsection (4), the chief social work officer may, with reference to any application under section 57, dispense with the requirement that such report as is specified in subsection (4) be prepared; and if the chief social work officer so determines, the chief social work officer shall forthwith notify the applicant or the applicant’s solicitor to that effect in writing, which may be by writing communicated electronically.”