

This response was submitted to the consultation held by the Nuffield Council on Bioethics on *Dementia: ethical issues* between May 2008 and July 2008. The views expressed are solely those of the respondent(s) and not those of the Council.

Office of the Public Guardian (Scotland)

**QUESTIONS ANSWERED:**

**Q13**

**ANSWER:**

"Adult" is used throughout this submission, as within the Adults with Incapacity (Scotland) Act 2000, to mean the individual with incapacity. The adult's past wishes cannot, in isolation, be the focus; past wishes often do not cover the particular current situation. Likewise however, the focus cannot be entirely on the current situation, as this disregards past wishes. The ideal is a proportionate balancing of the adult's past wishes (if known), the adult's current wishes (if known), the adult's current needs, the adult's likely future needs, and any views of those closest to the adult on matters as they see it affecting the adult and themselves. The Public Guardian (Scotland) however appreciates that significant difficulty can arise when trying to balance these often conflicting elements. We would advocate, in the strongest terms, early, full and frank exchange of views between the adult and those closest to him in order that the adult's past wishes can truly be part of any post capacity decisions and thereafter for all parties to place the benefit to be gained by the adult central to their deliberations.

**Q14**

**ANSWER:**

The Scottish Act uses "benefit" [to the adult] as its central premise. We have found that, even in borderline capacity cases, applying the principle of 'benefit', or its opposite, [avoiding] detriment, helps one determine the preferred course of action.

**Q16**

**ANSWER:**

The Public Guardian (Scotland) is of the view that the role of the attorney (or guardian) should carry the most significant weight. It defeats the purpose of the law if the role of a proxy is fettered. In the case of an attorney, one nominates a proxy, whilst capable, whom one wishes to act on ones behalf if no longer capable of so doing personally, that person should be permitted to act as the adult would have chosen to act themselves had they been able to do so. However, when dealing with the proxy one must be satisfied that the proxy is representing the views of the adult and not their own views for the adult. Thus, there needs to be appropriate safeguards in place to deal with any concerns of inappropriate decisions or improper actions of a proxy. The Adults with Incapacity (Scotland) Act 2000 offers this. I cannot comment on English law.

On those occasions when there are competing views on what is in the best interests for the adult it may assist to use the Scottish principle of 'benefit' [to the adult]to help steer the deliberations. If one takes a systematic approach to balancing the adult's past wishes (if known), the adult's current wishes (if known), the adult's current needs, the adult's likely future needs, along with the respective views of the proxy and health professional, together with views of others closest to the adult – holding 'benefit to the adult' as central to the deliberations, it is often possible to mediate an appropriate solution. We reiterate the importance of early, full and frank exchange of views between the adult and those closest to him in order that the adult's wishes can be represented accurately and comprehensively by the proxy. A record of any such conversations should be maintained.