

# **ADULT SUPPORT AND PROTECTION (SCOTLAND) BILL**

[AS AMENDED AT STAGE 2]

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## **REVISED EXPLANATORY NOTES**

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1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Adult Support and Protection (Scotland) as amended at Stage 2. They have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill so where a section or schedule, or part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL – AN OVERVIEW**

3. The Bill is in 4 parts. The main provisions of the Bill are as follows:

#### **Part 1 – Protection of Adults at Risk of Harm**

- Introduces measures to identify and protect adults at risk from harm. It defines adults at risk and harm. Where it is known or suspected that an adult is being harmed, the Bill places a duty on councils to make the necessary enquiries to establish whether or not further action is required to stop or prevent harm occurring. A general principle on intervention in an adult's affairs requires action which is the least restrictive to the adult whilst providing benefit to him or her. Protection orders include assessment orders, removal orders and banning orders, which require approval by a sheriff.
- Requires councils to set up Adult Protection Committees to review procedures and practices of specified public bodies relating to the safeguarding of adults at risk.

#### **Part 2 – Adults with Incapacity**

- Amends the Adults with Incapacity (Scotland) Act 2000 with a view to improving how it operates in practice.

- Follows a two year project monitoring the implementation of this Act which resulted in a consultation paper “Improving with Experience” issued by the Scottish Executive in August 2005.
- Makes changes to the regime for intromission with the funds of an adult with incapacity; in connection with powers of attorney, intervention orders and guardianship orders; and in connection with orders about incapable adults’ nearest relatives.

### **Part 3 – Adult Support etc: Miscellaneous amendments and repeals**

- Repeals the liable relatives rule as it applies to charging for accommodation provided under the Social Work (Scotland) Act 1968 and section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003. It also clarifies and updates the financial responsibility for community care services when provided in an area other than the area in which the individual is ordinarily resident.
- Amends the Social Work (Scotland) Act 1968 to enable Scottish Ministers to delegate powers to councils in relation to direct payments for social care services.
- Amends the Social Work (Scotland) Act 1968 to define responsibility for provision of social services where a person receives a service outwith the council area or outwith Scotland.

### **Part 3A – Mental Health: Miscellaneous amendments and repeals**

- Amends the Mental Health (Care and Treatment) (Scotland) Act 2003 in relation to the duty of Mental health tribunals to review compulsory treatment orders.
- Amends the Mental Health (Care and Treatment) (Scotland) Act 2003 to add an additional test to the criteria for revocation of a patient’s transfer for treatment direction or hospital direction. This allows the direction to be revoked where it is no longer considered necessary for the patient to receive treatment compulsorily in hospital.
- Amends the Mental Health (Care and Treatment) (Scotland) Act 2003 to extend the scope of the regulation making power to provide for the reception into Scotland of patients subject to corresponding or similar community-based compulsory treatment orders and compulsion orders. Amends section 316(1)(c) of the 2003 Act to extend the scope of the offence of knowingly inducing or assisting a patient to abscond or harbouring a patient to such transfers.
- Amends the Mental Health (Care and Treatment) (Scotland) Act 2003 to provide for a power to make regulations for and in connection with the keeping in charge of a person who is subject to escorted leave of absence authorised under legislation in force in another part of the UK.
- Repeals sections 88 and 128 of the Mental Health Act 1983, insofar as they extend to Scotland, in relation to the taking into custody in Scotland of persons who have absconded and the offence of inducing or assisting a patient detained under the Mental Health Act 1983 to abscond.

- Amends the Criminal Procedure (Scotland) Act 1995 to provide that the court may adjourn the case without calling on the accused to plead at the first calling when they may be unfit to do so.

## **PART 1**

### **PROTECTION OF ADULTS AT RISK OF HARM**

#### *Introductory*

#### **Section 1 – General principle on intervention in an adult’s affairs**

4. This section sets out the general principle on intervention in an adult’s affairs. It applies for the purposes of section 2 of the Bill only. The general principle states that a person may intervene or authorise an intervention in an adult’s affairs, only where the person is satisfied that the intervention will provide benefit to the adult and that it is the least restrictive option of those that are available which will meet the objective of the intervention.

#### **Section 2 – Principles for performing Part 1 functions**

5. Any public body or official who carries out any functions under this Part must give consideration to the general principle set out above, the feelings of the adult at risk (as far as they can be ascertained) and the views of other significant individuals with an interest who are known to the public body or office-holder.

6. Consideration should also be given to the importance of the adult at risk participating as fully as possible by making sure that appropriate information and support is provided. The adult at risk should not be treated any less favourably than any other adult in a comparable situation and due regard should be given to the adult’s abilities, background and characteristics.

#### **Section 3 – Adults at risk**

7. This section defines adults at risk. These are adults (people aged 16 or over) who are unable to safeguard their own well-being, property, rights or other interests, are 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. ‘Harm’ is defined in section 50.

#### *Inquiries*

#### **Section 4 – Council’s duty to make inquiries**

8. This section places a duty on councils to make inquiries about an adult’s well-being, property or financial affairs in certain circumstances. These circumstances are where the person falls within the definition of an adult at risk, and the council knows or believes it may have to intervene to in order to protect the adult’s well-being, property or financial affairs.

## **Section 5 – Co-operation**

9. This section addresses the requirement for public bodies to co-operate with the council and each other, where harm is known or suspected.

10. Subsection (1) lists the public bodies as the Mental Welfare Commission for Scotland, the Scottish Commission for the Regulation of Care (the Care Commission), the Public Guardian, all councils, chief constables of police forces and the relevant Health Board. It also gives Scottish Ministers power to prescribe other public bodies or office-holders in regulations.

11. Subsection (2) requires these public bodies to co-operate with each other and with the council making inquiries where this is likely to assist the council to make inquiries in accordance with the duty described in section 4 above. The duty to co-operate is subject to any other functions the bodies may have.

12. If one of the above public bodies knows or believes an adult is at risk from harm and believe action is required to safeguard that person's well-being or property, subsection (3) requires them to report to the council for the area in which it considers the person to be.

## **Section 5A – Duty to consider importance of providing advocacy and other services**

13. This section applies where, after making inquiries under section 4, a council considers that it needs to intervene in order to protect an adult at risk from harm. It requires the council to have regard to the importance of the provision of appropriate services (including, in particular, independent advocacy services) to the adult concerned.

## *Investigations*

### **Section 6 – Visits**

14. This section enables relevant council officers, as defined in section 50, to enter premises to make the necessary investigations which will establish whether further action is needed to protect an adult at risk from harm.

### **Section 7 – Interviews**

15. This section permits a council officer and anyone accompanying the officer to interview an adult in private within the place being visited under section 6. This right exists regardless of whether the sheriff has granted an assessment order. In circumstances where it is not practicable to carry out a private interview in the place of the visit and the council officer requires to take the person to other premises, an assessment order must be obtained from a sheriff (see section 10, Assessment Orders). Subsection (2) states that an adult interviewed under this section is not required to answer any question and the adult must be informed of this fact before the interview starts.

## **Section 8 – Medical examinations**

16. This section allows a health professional to conduct a private medical examination of the adult at risk in the place where investigations are being made. Where an assessment order is obtained (see section 10, Assessment Orders), the person may also be taken to another place for medical examination if a health professional is not present during the initial visit, or where it is not practicable to do so. A health professional is defined in section 49(2) as a doctor, a nurse, a midwife or any other suitably qualified individual described in an order made by Scottish Ministers.

## **Section 9 – Examination of records**

17. This section gives council officers the right to require those holding health, financial or any other records to produce them for inspection, either at the time of the visit or subsequently, if this is required to establish whether further action is required to protect an adult at risk from harm. Records may be examined by the council officer or an appropriate person, but health records can only be inspected by a health professional (as defined in section 49(2)).

### *Assessment orders*

## **Section 10 – Assessment orders**

18. This section allows a council to make an application to a sheriff for an assessment order to allow a council officer to conduct a private interview or a health professional to conduct a private medical examination. This would only be the case where it was not possible to carry out a private interview or medical examination within the place being visited under section 6 (see section 12). Applications can only be made where this action is required to establish whether the person is an adult at risk, and if so, to establish whether further action is required to protect them from harm.

## **Section 11 – Criteria for granting assessment orders**

19. This section prescribes the circumstances in which a sheriff may grant an assessment order. Such orders will be valid for up to 7 days. The sheriff must be satisfied that the council has reasonable cause to suspect the subject of the order is an adult at risk who is being, or is likely to be, seriously harmed and that an order is necessary to establish this.

## **Section 12 – Restriction on exercise of assessment order**

20. This section states that an assessment order must only be used in those circumstances where it is not possible for the adult at risk to either be interviewed or medically examined during the course of a visit as described in section 6.

### *Removal orders*

## **Section 13 – Removal orders**

21. This section deals with applications to the sheriff for removal orders, which allow the removal of an adult at risk to a specified place. Such orders are effective for a maximum period

of 7 days. The council can also take such steps during that period as the council thinks reasonable in order to prevent the victim from suffering harm. The application for the removal order must be made by the council, but the council may choose to nominate a person from one of the co-operating public bodies to actually move the adult at risk. The removal must be made within 72 hours of the order being made.

#### **Section 14 – Criteria for granting removal order**

22. This section specifies that a sheriff may only grant a removal order if satisfied that the person for whom the application is made is an adult at risk and that person is likely to be seriously harmed if he or she is not moved. In addition the sheriff must be satisfied that the place to which the adult at risk is to be moved is both available and suitable.

23. Subsection (2) allows the sheriff to specify in the removal order whether a named individual can have contact with the adult at risk during the period of the removal order, and whether this should be subject to specified conditions. Before including such requirements, subsection (3) states that the sheriff must have regard to representations from the council and any relevant representations from the subject of the order (the adult at risk), anyone who wishes to contact the adult at risk or any other person who has an interest in the adult at risk's well-being or property.

24. However, a sheriff can decide to disapply the provisions contained within subsection (3) in relation to representations if he or she can be satisfied that doing so will protect an adult at risk from serious harm or that to not serve the notice on a person will not affect the person's position in a detrimental way (see section 38, 'Applications: procedure').

#### **Section 15 – Right to move adult at risk**

25. This gives the council officer the right to enter any place to remove a person from that place in accordance with a removal order.

#### **Section 16 – Variation or recall of removal order**

26. This section allows the sheriff to vary or recall a removal order. Applications for variation or recall can only be made by the subject of the removal order, or anyone claiming an interest in his or her well-being, or by the council. Variation or recall can only be done where the sheriff is satisfied that the circumstances on which the removal order (or subsequent variation order) was granted have changed. However, the variation cannot permit the council to do anything beyond 7 days after the adult is first moved. Where an order is recalled, the sheriff can direct the council to return the person to the place he or she was removed from, or to any other place which the sheriff, having considered the adult's wishes, may specify.

#### **Section 17 – Protection of moved person's property**

27. This section requires a council which has secured a removal order in respect of an adult at risk to take reasonable steps to prevent any property owned or controlled by the removed person being lost or damaged for the duration of the removal order, where no other arrangements to

protect such property have or are being made. A council officer may enter any place where the council believes that property belonging to the adult at risk is contained in order to carry out his or her duty under this section. A council which moves property must return any property to the adult concerned, as soon as is reasonably practicable after the removal order ceases to have effect. The council is not entitled to recover expenses incurred. "Property owned or controlled" can include pets.

### *Banning orders*

#### **Section 18 – Banning orders**

28. This section deals with applications to the sheriff for banning orders, which specify the place from which, and the length of time for which, a person is banned. The specified place may, for example, be the adult at risk's home or place of residence.

29. Subsection (2) enables a banning order to ban the subject from the vicinity of the specified place, permit the summary ejection of the subject from the specified place or its vicinity, and prohibit the subject from moving anything set out in the order from the place. The banning order may also direct the applicant for the order to take measures to preserve the moveable property of the subject which remains in the premises during the order. The subsection also gives the sheriff flexibility to specify other conditions, or to place requirements on individuals to allow proper enforcement of the order.

30. Subsection (3) permits the inclusion of conditions within a banning order which allow the subject of a banning order, under certain specified circumstances, to be in the place from which he or she is banned. Examples of such circumstances are when supervised by another person (e.g. a council officer) or during specified times only. Subsection (4) states that before including this type of condition within a banning order, the sheriff must have regard to the views of the applicant for the order, the adult at risk and the subject of the order.

31. However, a sheriff can decide to disapply the provisions contained within subsection (4) in relation to representations if he or she can be satisfied that by doing so will protect an adult at risk from serious harm or that to not serve the notice on a person will not affect that person's position in a detrimental way (see section 38, 'Applications: procedure').

32. The sheriff has the power to attach a power of arrest to any banning order (see section 23). Subsection (6) states that the period of the banning order may not exceed 6 months.

#### **Section 19 – Criteria for granting banning order**

33. This section specifies that a sheriff may only grant a banning order where satisfied that an adult at risk is likely to be seriously harmed, and that banning the other person from the adult's home or place of residence would better safeguard the adult's well-being and property than the removal of the adult at risk. In addition, the sheriff must be satisfied that the adult at risk is entitled, or permitted, to occupy the place from which the subject is to be banned, or, alternatively, that neither the adult at risk nor the subject is so entitled or permitted. This means that a person who is entitled to occupy a place cannot be banned from that place by someone who is not so entitled.

## **Section 20 – Temporary banning orders**

34. This allows for temporary banning orders to be granted by a sheriff pending determination of a banning order. Temporary orders may include any of the provisions contained in a banning order. If a temporary banning order is granted, the sheriff must grant or refuse the full banning order within a time limit to be fixed in court rules. The expiry of a temporary banning order will be the earliest of: the date specified at the time of granting; the date the order is recalled, the date on which the sheriff determines the banning order or the date by which the sheriff is required to determine the banning order by virtue of court rules.

## **Section 21 – Right to apply for banning order**

35. This section limits those who are able to apply for a banning order to particular persons. These are the adult at risk (which includes someone acting on his or her behalf), any other person entitled to occupy the property from which the subject would be banned, or the council. These persons are also entitled to apply for a temporary banning order in respect of the same case.

36. The council can only apply for a banning order under certain circumstances. Where a council applies, it must be satisfied that an adult at risk is being, or is likely to be, seriously harmed by another person and that the adult would be more effectively safeguarded by banning the subject of the order than being removed themselves.

37. In addition, the council must be satisfied that no other person is likely to apply for a banning order and no other proceedings are before a court to eject or exclude the subject of the order from the place concerned. Where these circumstances occur, a council must apply for a banning order.

## **Section 21A – Banning orders: occupancy rights of adult at risk**

38. The granting of a banning or temporary banning order does not affect the adult at risk's rights, as a non-entitled spouse, to occupy a home within the place from where the subject of the order is banned under the Matrimonial Homes (Family Protection)(Scotland) Act 1981.

## **Section 22 – Variation or recall of banning order**

39. This section allows the sheriff to vary or recall a banning order or temporary banning order, but only if he or she is satisfied that there has been a change in the facts or circumstances on which the banning order was made or last varied.

40. An application for variation or recall can only be made by the banned person, the person who originally applied for the order, the adult who is being protected by the order, or any other person claiming an interest in the well-being of the adult at risk. An application can also be made by those who are acting on behalf of those listed above.

### **Section 23 – Powers of arrest**

41. This section allows a sheriff to attach a power of arrest to any banning order or temporary banning order. The power of arrest becomes effective only when served on the subject of the order and it will expire at the same time as the order.

### **Section 23A – Notification to adult at risk etc.**

42. Where the applicant seeking a banning order or temporary banning order (or its variation or recall) is not the adult at risk, this section imposes a duty on the applicant, or such other person who may be specified, to notify the adult at risk of the order by delivering a copy of the order (and any power of arrest attached) to the adult or any other person with an interest in the adult's well-being or property. Failure to deliver the order does not, however, invalidate it.

### **Section 24 – Notification to police**

43. This section states that the police, via the chief constable, must be notified as soon as possible after any power of arrest attached to a banning order or temporary banning order becomes effective. This should be done by the applicant for the order (or another prescribed person e.g. sheriff officers). The police must also be notified in the event of a variation or recall of a banning order.

### **Section 25 – Arrest for breach of banning order**

44. Subsection (1) sets out the two-step test that must be satisfied if a police constable is to carry out an arrest. The subject of a banning order or temporary banning order, to which a power of arrest is attached, may be arrested without warrant if a constable reasonably suspects the subject to be in breach of the order and that he or she is likely to breach the order again if not arrested. Subsection (2) states that the arrested person must be told immediately the reason for the arrest and then taken by the constable to a police station as soon as is reasonably possible.

### **Section 26 – Police duties after arrest**

45. Following an arrest under section 25, the officer in charge of the police station must detain the arrested person in custody until the person is either brought before the sheriff or accused on petition or charged on complaint with a criminal offence arising from the incident for which he or she is arrested. The officer in charge must also ensure that the facts and circumstances which gave rise to the arrest are communicated to the procurator fiscal as soon as is practicable. This is linked to the procurator fiscal's duty to present a petition to the sheriff setting out the relevant facts and circumstances on the first available court day after arrest (see section 30).

### **Section 27 – Notification of detention**

46. Where a person has been detained under section 26 above, this section sets out a series of entitlements that may be accessed by the arrested person including the right of access to a solicitor. Subsection (2) provides that where the arrested person appears to be a child then

intimation of the detention and place of detention must be given without delay to any person known to have parental responsibilities for the child.

### **Section 28 – Duty to keep record of detention**

47. This section lists the information that the police must record in connection with the detention of a person under section 26.

### **Section 29 – Duty to bring detained person before sheriff**

48. In this section, subsection (1) makes it clear that the procedure under the Bill would only apply in circumstances where the procurator fiscal has not yet decided to take criminal proceedings against the arrested person as a result of the facts leading to the arrest. The arrested person should be brought to court on the next court day on which it is practicable to do so.

### **Section 30 – Information to be presented to sheriff**

49. This section sets out the matters that should be referred to in the procurator fiscal's petition to the court. This allows the procurator fiscal to present to the court information that will assist the sheriff in deciding whether it would be appropriate to order the arrested person's further detention.

### **Section 31 – Criteria for authorising longer detention**

50. This section sets out the test that the sheriff must apply in deciding whether or not to order the further detention of the arrested person for a maximum of two days. The sheriff must be satisfied, based on the information provided by the fiscal, that a breach of the banning order or temporary banning order has taken place and also that there is a substantial risk that the detained person will breach the order again. Subsection (3) provides that the arrested person must be given an opportunity to make representations before the sheriff decides whether to grant an order under this section. If the sheriff decides not to authorise the further detention, the detained person must be released (unless he or she is to be detained in custody in respect of another matter).

### *Protection orders and visits: supplementary*

### **Section 32 – Consent of adult at risk**

51. This section describes the situation that arises where an adult at risk has refused to consent to the granting of a protection order and/or to the proposed action to be taken under it. A protection order for the purposes of this section is defined, in subsection (7), as any assessment order, removal order, banning order or temporary banning order.

52. Where the adult at risk refuses to consent to the granting of the order, subsection (1) states that a sheriff must not make a protection order. Subsection (2) states that no action can be taken by the person carrying out a protection order if there is known refusal of consent. However, subsection (3) provides an exception to (1) and (2) above permitting the sheriff, or person carrying out the order, to ignore the refusal to consent where the sheriff or person

reasonably believes that the adult at risk appears to be under undue pressure to refuse consent, and, that there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the order or action is intended to prevent.

53. Subsection (4) describes a particular set of circumstances which are to be treated as amounting to undue pressure. An adult at risk may be considered to have been unduly pressurised in the situation where harm is being inflicted on the adult by a person in which the adult has confidence and trust and that the adult would consent to interventions to prevent the harm if he or she did not have confidence and trust in that person.

54. Subsection (6) makes clear that nothing in this Bill allows either a council officer or health professional or other council nominee to carry out an interview or a medical examination where the adult at risk concerned has refused to consent.

### **Section 33 – Visits: supplementary provisions**

55. This section sets out some supplementary provisions in relation to visits. Visits may only be carried out at reasonable times and a council officer must state the purpose of the visit and produce evidence of his or her authority to visit.

56. A council officer is permitted, while visiting, to examine the place and to bring with them any other person or equipment that he or she requires in order to successfully complete the visit. Council officers are not authorised to use force during their visit but it does not prevent a constable with a suitable warrant for entry (see section 34) from using force. However, subsection (5) makes it clear that a person who refuses entry to a council officer, or any person accompanying a council officer, for a visit without a warrant, does not commit an offence under Section 46(1).

### **Section 34 – Warrants for entry**

57. The section defines a warrant for entry. This is a warrant which allows a council officer to visit any specified place together with a constable and where the constable is authorised to use reasonable force in order to achieve the object of the visit.

58. Subsection (2) describes the conditions of a warrant for entry. The warrant is valid for 72 hours after it is granted but once this period has expired, the council officer no longer has any authorisation to remain in the place to which the warrant refers.

### **Section 35 – Criteria for granting warrants for entry: section 6 visits**

59. This section states that a sheriff who grants an assessment order (under section 10) must also grant a warrant for entry in relation to any visit taking place under section 6. Otherwise (i.e. where no assessment order made), the sheriff may only grant a warrant for entry in relation to a visit, under section 6, if satisfied that the council officer reasonably expects to be refused entry, would otherwise be unable to enter, or that the object of the visit would be frustrated without a warrant.

### **Section 36 – Duty to grant warrants for entry: removal orders**

60. This section states that a sheriff who grants a removal order (under section 13) must also grant a warrant for entry in relation to any visit taking place under section 15 (Right to move adult at risk). In the case where a removal order is varied, and the subject of the order has not yet been moved, the warrant for entry is treated as being granted on the date of variation of the order even if it has already expired.

### **Section 37 – Urgent cases**

61. This section allows the council, in urgent cases, to apply to a justice of the peace instead of a sheriff for either a removal order or a warrant for entry in respect of visits under sections 6. However, this circumstance would only arise if it was not practicable to apply to the sheriff and that an adult at risk is likely to be harmed if there is a delay in granting the order or warrant.

62. Subsection (3) confirms that a justice of the peace can only grant a removal order if it was not practicable for the council to apply to the sheriff and that an adult at risk is likely to be harmed if there is a delay in granting the order or warrant. In addition, a justice of the peace may only grant a removal order if satisfied that the person for whom the application is made is an adult at risk and that person is likely to be seriously harmed if he or she is not moved (i.e the provision contained at section 14(1) is also satisfied).

63. Where an application is made to a justice of the peace for a removal order then subsections (3) to (7) of section 38 do not apply (see below).

64. A justice of the peace who grants a removal order must also grant a warrant for entry – this is the same position as for a sheriff. Similarly, a justice of the peace may grant a warrant for entry in relation to a visit, described in section 6, if satisfied that it is not practicable to apply to the sheriff and that an adult at risk is likely to be harmed if there is a delay in granting a warrant. In addition, he or she must be satisfied that the council officer reasonably expects to be refused entry, would otherwise be unable to enter or that the object of the visit would be frustrated without one.

65. Subsection (7) places a reduced time limit on the duration of removal orders granted by a justice of the peace. The order to remove the person must specify a period of 12 hours, beginning when the order is made, as the period within which that person may be moved. The order must also specify a period of no longer than 24 hours as the period within which it is to take effect.

66. A warrant for entry granted under this section expires 12 hours after it is granted (subsection (8)).

### **Section 38 – Applications procedure**

67. This section applies to applications for assessment orders, removal orders, a banning order, a temporary banning order or the variation or recall of a removal order, a banning order or a temporary banning order.

68. The applicant for an order must give notice of an application to both the subject of the application and the affected adult at risk (in the situation where the adult is neither the applicant nor the subject). Before granting an application, the sheriff must invite the subject of the application and the affected adult at risk (again where the adult is neither the applicant nor the subject) to be heard by, or represented before, the sheriff. An adult at risk can be accompanied by a friend, relative or representative at any hearing. The sheriff may appoint a person to safeguard the interests of the adult at risk.

69. However, subsection (2) allows the sheriff not to apply the provisions described in paragraph 67 above in any application if satisfied that doing so will protect an adult at risk from serious harm or that to not serve the notice on a person will not affect the person's position in a detrimental way. In addition, the provisions stated in sections 14(3) and 18(4), which require that a sheriff must have regard to relevant representations made in relation to removal orders and banning orders where the orders contain specified conditions relating to contact, may also be disapplied for the same reason.

#### *Adult Protection Committees*

### **Section 39 – Adult Protection Committees**

70. Subsection (1) states that each council must establish an Adult Protection Committee to carry out the functions listed in relation to the safeguarding of adults at risk present in the council's area. The Committee, in carrying out its functions, should also be seeking to improve co-operation between each of the public bodies involved in order to better safeguard adults at risk. The public bodies involved are the relevant council, the Care Commission, the relevant Health Board, the chief constable of the police force in the council area, and any other public body as may be specified by Scottish Ministers.

### **Section 40 – Membership**

71. The council must appoint an independent convener and other members of its Adult Protection Committee. The public bodies listed in section 39 above (other than the council and the Care Commission) must nominate a representative with the relevant knowledge and skills to be a Committee member. The Care Commission may choose to nominate a representative if it wishes to do so. The council must then appoint those nominated representatives as members of the Adult Protection Committee. The council may also appoint such other persons to be members of the Committee as appear to it to have skills and knowledge relevant to the Committee.

### **Section 41 – Committee procedure**

72. Each Adult Protection Committee will be responsible for regulating its own procedures but these procedures must allow a representative from the Mental Welfare Commission, the Public Guardian, the Care Commission or any other public body or office-holder to be specified by Scottish Ministers, to attend Committee meetings if they so wish.

## **Section 42 – Duty to provide information to Committee**

73. The public bodies represented on the Adult Protection Committee together with the Mental Welfare Commission for Scotland, the Public Guardian, the Care Commission, and any other public body or office-holder to be specified by Scottish Ministers, must provide the Committee with any information which it requires in carrying out its functions.

## **Section 43 – Annual Report**

74. The convener of an Adult Protection Committee must prepare a general report on the Committee's work every two years. After obtaining the Committee's approval of the report, a copy should be sent to each of the public bodies and office-holders represented on the Committee, the Scottish Ministers, the Mental Welfare Commission for Scotland, the Public Guardian, the Care Commission, and any other public body or office-holder to be specified in regulations by Scottish Ministers.

## **Section 44 – Guidance**

75. This section states that Adult Protection Committees must take into account any guidance issued by Scottish Ministers in relation to their functions.

### *Other provisions*

## **Section 45 – Code of practice**

76. This section requires Scottish Ministers to prepare and publish a code of practice containing guidance on the operation of the adult protection measures contained within this Part. This code of practice will provide guidance on how to perform the functions undertaken by councils, their officers, and health professionals. This code of practice must be periodically reviewed and updated in consultation with others. Those councils, council officers, and health professionals who have a role in performing the functions contained within this Part should have regard to the code of practice produced.

## **Section 46 – Obstruction**

77. This section states that it is an offence to prevent or obstruct any person from doing anything which he or she is authorised or entitled to do under an assessment order, a removal order, a banning order, a temporary banning order, a warrant for entry or any other provision contained in this Part. It is also an offence to refuse, without reasonable excuse, to comply with a request to provide information made under section 9 (Examination of records etc). A person found guilty of these offences is liable on summary conviction to a fine (not exceeding level 3 on the standard scale), to imprisonment (for a term not exceeding 3 months) or both. However, nothing done by the adult at risk will constitute an offence such as is described under this section.

### **Section 47 – Offences by bodies corporate etc.**

78. This section allows for individuals who exercise control within an organisation, as well as the organisation itself, to be proceeded against and punished where the organisation commits any offences described under this Part.

### **Section 48 – Appeals**

79. There are no appeals against the granting of an assessment order, a removal order or a warrant for entry.

80. A decision of a sheriff to grant, or refuse to grant a banning order or temporary banning order may be appealed to the sheriff principal. However an appeal against the granting of, or a refusal to grant, a temporary banning order, is competent only with the leave of the sheriff.

81. The sheriff principal's decision on an appeal under subsection (2) may be appealed to the Court of Session. However an appeal relating to a temporary banning order is competent only with the leave of the sheriff principal.

82. Where a sheriff principal decides to quash a banning order or temporary banning order, the order will continue to have effect until either the end of the period for appeal (if no appeal is made) or, where an appeal is made, when it is abandoned or where the decision is confirmed. Alternatively, the order will continue to have effect until the order otherwise expires by virtue of section 18(6) or 20(4), or in the case of a temporary banning order, the sheriff principal refuses leave to appeal against the decision to quash the order.

### **Section 49 – Persons authorised to perform functions under this Part**

83. This section sets out who is able to perform functions under this part. Scottish Ministers have the power to restrict by order the type of individual who may be authorised by a council to perform those functions given to council officers under the adult protection measures. In any case, individuals must be authorised by the relevant council as being suitable to perform particular functions.

84. A health professional, who is authorised to carry out medical examinations under this Part, is defined as a doctor, a nurse, a midwife or any other suitably qualified individual as specified by order by Scottish Ministers.

### **Section 50 – Interpretation of Part**

85. This section lists the meaning of various terms used throughout this Part.

86. In particular, the section defines the meaning of "harm". "Harm" is defined as including all harmful conduct and, in particular: conduct which causes physical or psychological harm, unlawful conduct which appropriates or adversely affects property, rights or interests (e.g. theft,

fraud, embezzlement or extortion), or conduct which causes self-harm. It should be noted that “conduct” is also defined in this section as including neglect and other failures to act.

## **PART 2**

### **ADULTS WITH INCAPACITY**

#### **Section 52 – Orders about incapable adult’s nearest relatives**

87. This section amends section 4 of the Adults with Incapacity (Scotland) Act (“the 2000 Act”). Section 4 at present allows an adult to apply to the sheriff to have the person who would otherwise be treated as the adult’s nearest relative displaced, for the purposes of the Act. This amendment provides that any person claiming an interest in the adult’s property, financial affairs or personal welfare may apply to have the nearest relative displaced. It also provides that a court may make an order different to the one applied for, eg naming a different person from the person specified in the application.

#### **Section 53 – Powers of attorney**

88. This section amends sections 15, 16, 19, 20, 22 and 23 of the 2000 Act.

89. Subsections (1) and (2) amend section 15 (creation of continuing power of attorney) and section 16 (creation and exercise of welfare power of attorney) respectively. They provide that where the person does not have sufficient knowledge of the granter it is sufficient that the person consults one person who does have knowledge of the granter to ascertain that the granter understood the nature and extent of the power of attorney. At present under these provisions it is necessary to consult more than one person. These amendments also provide that all welfare powers of attorney and those continuing powers of attorney which will start on incapacity must contain a statement to the effect that the granter has considered how incapacity should be determined. They further provide, to put beyond doubt, that a solicitor for the purpose of providing a certificate in sections 15 and 16 of the 2000 Act is a ‘practising solicitor’ and provide a definition of that expression. Subsection (1) also contains a declaratory provision that a continuing power of attorney ceases to have effect if the granter or attorney becomes bankrupt.

90. Subsection (3) inserts a new section 16A to provide that where a power of attorney contains both welfare and financial powers in a single document only one certificate is required.

91. Subsections (4), (5), (6) and (8) contain a number of minor changes relating to notification of welfare powers of attorney.

92. Subsection (7) introduces a new section 22A dealing with revocation of continuing and welfare powers of attorney. At present there is no express provision in the Act dealing with revocation of powers of attorney and the common law governs the position. This new statutory provision provides that revocation by the granter of a power of attorney (or any of the powers in it) must be done by giving notice in writing to the Public Guardian and must incorporate a certificate by a practising solicitor or a member of a prescribed class stating that s/he interviewed the granter immediately before the document was signed, that the granter understands the effect

of the revocation and was not under undue influence. The revocation will be registered by the Public Guardian which is the point at which revocation takes effect. The Public Guardian will notify the attorney of the revocation and, in addition, where it is a welfare power of attorney, the Mental Welfare Commission and the local authority.

## **Section 54 – Applications for authority to intromit with funds**

### *Purposes and application of Part*

93. This section replaces Part 3 of the 2000 Act (sections 25-35) and inserts new section 24-33.

94. New section 24A(1) and (2) sets out afresh the provision of a statutory scheme under which the Public Guardian may grant authority to access and use (intromit with) the funds of an adult and the types of expenditure that may be authorised by the Public Guardian under this Part of the Act. These include day to day household and living expenses and care costs, such as payments for home help services or for residential care. The Public Guardian's fee for processing the application may be met from the adult's funds but not the applicant's legal fees or any other expenses incurred in relation to the application

95. New section 24B(1) provides that an application can only be made where an adult is incapable in relation to decisions about the funds concerned. Section 24B(2) excludes adults whose funds are covered by a power of attorney or an intervention order.

### *Authority to take preliminary steps*

96. New section 24C(1)-(3) provide that the Public Guardian may, on application, issue a certificate of authority to a person who wishes to intromit with funds but cannot do so because of a lack of information about the adult's accounts. This was not possible under the original scheme. Section 24(4) provides that the certificate will authorise a bank or other financial institution to provide information about an adult's account or accounts, required for the purpose of making an application for authority to intromit with funds.

97. New section 24D(1)-(3) provide that the Public Guardian may, on application, issue a certificate authorising the opening of an account in the adult's name for the purpose of intromitting with funds. This was not possible under the original scheme. Section 24D(4) allows the Public Guardian to specify the kind of account that can be opened. Section 24D(5) provides that the certificate will authorise the fundholder to open the account but if the certificate specifies a type of account, the fundholder may only open this type of account (Section 24D(6)). Section 24D(7) provides that the applicant must notify details of the account to the Public Guardian once it has been opened.

### *Authority to intromit*

98. Section 25(1) and (2) provide that the persons who are permitted to apply for authority to intromit with funds are individuals, joint individuals or bodies (other than managers of authorised establishments under Part 4 of the 2000 Act). The original scheme only provided for individuals. Section 25(3) provides that where an application under section 25(1) is submitted with an application under 24D(5) to open an account, it will only be granted once the account is

opened and its particulars notified to and registered by the Public Guardian. Section 25(4) provides that where the Public Guardian grants the application, she must enter the particulars on the register and issue a ‘withdrawal certificate’. Section 25(5) prevents an application being made if a person is already authorised to intromit. Section 25(6) provides that the person who is issued with a ‘withdrawal certificate’ is called a ‘withdrawer’.

99. New section 26(1) sets out what is required in an application to intromit. Subsection (2) introduces the possibility of identifying another account (the second account), either a pre-existing account or one to be opened under section 24D, which the applicant wishes to use for the purpose of intromitting with the adult’s funds.

#### *Withdrawal certificates*

100. New section 26A(1) sets the parameters of what can be authorised in a withdrawal certificate. The withdrawal certificate can set limits on the amounts transferred, allow standing orders or direct debits to be set up on the current account for specified purposes (for example, the payment of regular utility bills), and authorise withdrawal of funds from the designated account for specified purposes. Section 26A(2) provides that the certificate cannot authorise any of the accounts to be overdrawn.

#### *Joint and reserve withdrawers*

101. New section 26B provides that the Public Guardian may on application issue a certificate appointing an additional withdrawer to be authorised to act alongside one or more existing withdrawers. At present there can be only one withdrawer on an incapable adults account. This will ensure continuity for the adult. The joint withdrawer’s application must be signed by the original withdrawer and the Public Guardian will enter the particulars into the Register. The certificate is valid until the withdrawal certificate held by the original withdrawer ceases to be valid.

102. New section 26C defines the extent of joint withdrawers’ liability. It provides for consultation among joint withdrawers before the exercise of their functions and for an application to the Public Guardian for directions in the event of a disagreement between joint withdrawers. There is an appeal to the sheriff and provision is made for third parties transacting with joint withdrawers in good faith.

103. New section 26D provides for an application to the Public Guardian for the appointment of a reserve withdrawer either at the time of the original application or at some later date on application by the main withdrawer. This was not possible under the original scheme and will help ensure continuity for the adult. The reserve withdrawer’s application must be signed by the original withdrawer and the Public Guardian will enter the particulars into the Register.

104. New section 26E (1)-(3) provides for a reserve withdrawer’s authority to act coming into effect, either by notice to the Public Guardian by the main withdrawer, or in cases where the main withdrawer is unable to do so, by the reserve withdrawer and for the issue of a certificate by the Public Guardian. Section 26E(4) provides for the duration of the validity of the certificate and section 26E(5) sets out the limits of liability of both withdrawers for the reserve withdrawer’s actings.

*Variation of withdrawer's authority*

105. New section 26F provides for applications to be made to the Public Guardian for variation of a withdrawal certificate, other than for the period of validity (which is covered by section 31) and the issue by the Public Guardian of a varied withdrawal certificate.

*Authority to transfer funds*

106. New section 26G provides for an application by a withdrawer or a person who has applied to become a withdrawer to the Public Guardian and for the issue of a certificate for a one-off transfer of funds from an adult's account to the designated account or to the adult's current or second account. It also provides that it will also be possible to apply for authority to close the original account and terminate standing orders and direct debits on it. This will enhance the flexibility of the scheme.

*Applications: general*

107. New section 27 covers those aspects of the application procedure which apply to all applications under this Part.

108. New section 27A(1) sets out the new countersigning requirements for applications for authority to obtain information (24C), open an account (24D), intromit (25) and for a joint withdrawer (26B.) The countersignatory must have known the applicant for at least a year (this was previously two years), must not fall into one of the excluded categories and confirm that s/he believes the information in the application to be true and that the applicant is a fit and proper person to intromit. Section 27A(2) makes provision for the countersigning of reserve withdrawers' applications. Section 27A(3) sets out that applications by organisations do not require to be counter-signed.

109. New section 27B provides for a medical certificate to accompany applications for authority to provide information (24C), to open an account (24D) and to intromit (25). Medical certificates under this section will refer to the adult's ability to manage funds.

110. New section 27C requires all applications to be intimated in the same way as is currently required under the 2000 Act: to the adult; the adult's nearest relative; the adult's primary carer; the adult's named person and to any other person the Public Guardian considers has an interest. In cases where the applicant is both the adult's nearest relative and carer or a body other than a local authority, it must also be intimated to the Chief Social Work Officer of the local authority.

111. New section 27D requires the Public Guardian to be satisfied that an applicant, or a proposed reserve withdrawer, is a fit and proper person to intromit with an adult's funds before granting an application under sections 24C, 24D, 25, 26B or 26D. The Public Guardian has a broad discretion in this regard but must take account of any guidance issued by Scottish Ministers.

112. New section 27E provides a requirement that objectors should be heard in relation to all applications and refusals of applications under this Part. Representations may be made orally or in writing.

113. New section 27F provides power for the Public Guardian to refer an application under this Part to the sheriff to be determined. The sheriff's decision is final.

114. New section 27G(1) provides that where there has been an application for authority to obtain information (24C), open an account (24D) or intromit (25) and where that person makes a further application in relation to the adult, the Public Guardian has the power to dispense with the need for the same information to be provided more than once, or for the application to be countersigned or a medical certificate produced when this has already been done in respect of a previous application in respect of the same adult. Section 27G(2) allows for the issuing of a combined certificate.

#### *Fundholders*

115. New section 28 sets out that the fundholder of the relevant account is authorised to act on the instructions of a withdrawer to the extent of the authority in the withdrawal certificate and must not allow any operations on the account other than those authorised by the withdrawal certificate. Section 28(3) allows fundholders to release statements and other information on the adult's current and second accounts to the withdrawer whilst the withdrawal certificate is valid.

116. Section 28A allows fundholders on an original account to act on instructions to the extent of a varied withdrawal certificate.

117. New section 29 sets out that fundholders will be liable for funds taken out of the adult's account at any time when they were aware that the withdrawer's authority had been terminated or suspended. Having met the liability, a fundholder can then recover from the withdrawer.

#### *Withdrawers*

118. New section 30 clarifies that the adult's funds must be spent on the adult's own requirements, although they may be used for shared household expenses, for example, where the withdrawer is the adult's partner and lives in the same house.

119. New section 30A requires the withdrawer to inform the Public Guardian of a change in his or her permanent address or that of the adult.

120. New section 30B requires a withdrawer to keep records of the exercise of his or her powers and permits the Public Guardian to make inquiries into the exercise of the withdrawer's functions.

#### *Duration etc. of authority*

121. New section 31(1) provides that unless otherwise stated a withdrawal certificate is valid for 3 years. Section 31(2) allows this period to be reduced or extended by the Public Guardian. Section 31(4) provides that a withdrawer's authority will terminate if there is a guardianship or intervention order made, or continuing attorney appointed, with powers in relation to the funds in question.

122. New section 31A provides for the suspension and termination of authority. To take account of the amendments to the scheme which provide for intromission with more than one account in the adult's name and for separate certificates authorising one-off transfers, the duty to intimate suspensions and terminations is extended to include such other persons as the Public Guardian thinks fit. On terminating the authority, the Public Guardian may issue an interim withdrawal certificate for up to four weeks to the withdrawer.

123. New section 31B provides for applications to renew authority where the person applying holds an existing authority to intromit or where the reserve withdrawer wants to take the place of the main withdrawer where the latter has died, becomes incapable or has his or her authority terminated. This section will allow the Public Guardian, if she sees fit, to dispense with certain of the application requirements in order to make the renewal process faster and less onerous.

#### *Appeals*

124. New section 31C brings together, in a single section, the appeal provisions. Decisions relating to applications under sections 24C, 24D, 25, 26D, 26E, 26F and 26G are appealable.

125. New section 31D provides for transition from guardianship to intromission with funds and extends to transitions from guardianship where applications are made by a person other than the guardian. It provides for situations where financial guardianship is no longer necessary (e.g. because there has been a simplification of the adult's financial affairs) but the adult remains incapable of managing his or her finances and intromission with funds would be more appropriate. There is no requirement for countersigning where the application is made by the adult's guardian. The Public Guardian may also disapply the requirement for a medical certificate. The Public Guardian must recall the guardianship before granting the application. The withdrawal certificate will specify the period of authority. This provision is not available where there is a recognised guardian under the law of another country.

#### *Miscellaneous*

126. New section 32 enables joint accounts to continue to be operated on by a joint account holder where the other joint account holder no longer has capacity to operate it.

#### *Interpretation*

127. The purpose of new section 34F is to avoid the need to repeat definitions in several sections.

### **Sections 60 and 61 – Intervention orders and guardianship orders**

128. These sections amend provisions in Part 6 of the 2000 Act which makes provision for intervention orders and guardianship orders.

129. Section 60(1)(za) and 61(1A) provide that a sheriff must take into account the views put forward on behalf of the adult by someone providing an independent advocacy service.

130. Sections 60(1)(a) and 61(1) amend sections 53 and 57 of the 2000 Act respectively to provide that:-

- (a) where a medical report is lodged in an application for an intervention order or a guardianship order it shall be valid even where the medical examination of the adult has been carried out more than 30 days previously, provided that the sheriff is satisfied that the adult's condition is unlikely to have improved since the examination was carried out;
- (b) Scottish Ministers may prescribe in regulations, following consultation with the Mental Welfare Commission, persons (i.e. medical practitioners) who can complete reports to accompany applications for guardianship and intervention orders; and
- (c) where an adult is not living in Scotland and is the subject of an application for an intervention order or guardianship order, he or she may be examined by a medical practitioner in the country where he or she lives provided that practitioner holds recognised qualifications, has special experience in relation to mental disorders and has consulted the Mental Welfare Commission about the report.

131. Sections 60(1)(b) and (c) and 61(2), (3), (6) and (9) amend sections 53 and 57 respectively to dispense with the requirement for caution in intervention orders and guardianship orders relating to property or financial affairs. Whether to impose caution in such circumstances is left instead to the sheriff's discretion. These sections provide that the sheriff may permit the Public Guardian to accept other forms of security instead of caution.

132. Section 60(2) amends sections 53 to provide for notification to the Public Guardian by the person authorised under the intervention order of a change in his or her or the adult's address within 7 days of such a change. Provision for such notification by guardians is already made in section 64(4) of the 2000 Act.

133. Sections 60(3) and 61(10) insert new sections 56A and 75A which provides for notification to the Public Guardian of the death of a person authorised to intervene or death of a guardian by his or her personal representatives.

134. Section 61(2A) inserts new subsections (3) and (3A) into section 60 to provide a simplified procedure for renewal which can be dealt with by the sheriff on the basis of an application form. Section 60(3)(a) provides that the application must be supported by a medical report completed not more than 30 days before the application. Section 60(3)(b) provides for one other report to support the application either from a mental health officer, or the chief social work officer where the adult is unable to communicate, where the application relates to the adult's welfare or from the Public Guardian if it relates to the adult's property or financial affairs. Section 60(3A) provides, as for guardianship applications, that where the reason for incapacity is mental disorder, the medical report, or one of them, must be carried out by a relevant medical practitioner.

135. Section 61(1)(d) amends section 57 to provide that sheriffs may grant interim guardianships for 3 months (as at present) or for a longer period up to a maximum of 6 months.

136. Section 61(5) amends section 70 (non-compliance with decisions of guardian with welfare powers) to remove the unintended effect that a warrant may be issued for the adult's

removal from his or her place of residence where a third party has refused to comply with the guardian's decision. It also inserts a new subsection to provide that the sheriff may, on cause shown, disapply the intimation requirement and the corresponding right to object within a prescribed period. The reason for this is that in urgent cases a delay of the prescribed period of 21 days can prove detrimental to the welfare of the adult concerned.

137. Section 61(7) amends section 72(1) to provide that where the guardianship order has expired the Public Guardian may grant a discharge to a financial guardian in respect of the former guardian's actings and intromissions with the estate of the adult.

138. Section 61(8) inserts a new subsection (3A) in section 73 to provide that the Mental Welfare Commission may recall guardianships relating to personal welfare only in those cases where incapacity relates to a mental disorder and not, as at present, all guardianships relating to personal welfare. It also inserts new 73A which allows local authorities to recall welfare guardianships where the Chief Social Work Officer is the guardian. Under section 73A(2) the proposed recall must be intimated to the Public Guardian and the Mental Welfare Commission in addition to the adult and other persons who have an interest. If any objections are received, the local authority may not recall the guardianship and must remit the matter to the sheriff for a decision.

139. Section 61(11) inserts a new section 79A which allows a guardianship order to be applied for in the three month period prior to an individual's sixteenth birthday and for that order to come into effect on the individual's sixteenth birthday. The new provision is to provide continuing protection for young adults who lack capacity. At present, an application cannot be made for an individual aged under sixteen. These guardianship orders will be subject to the other provisions which currently apply to guardianship orders.

140. Section 61(12) inserts new sub-paragraph (3A) into paragraph 6 of schedule 4 to provide for the reconsideration under the 2000 Act of the appointments of all welfare and financial guardians who became such by virtue of being curators bonis, tutors dative or tutors at law prior to the coming into effect of Part 6 of the 2000 Act and of the appointment of joint guardians to these transitional guardians. The amendment provides that these guardianships will cease unless there is an application for renewal within two years of the commencement of this subsection (or, where the guardian was previously curator bonis to a person under 16 years, within 2 years of the person becoming sixteen, if that is a longer period). Subsection (12) also inserts the new sub-paragraph (3B) to provide that new sub-paragraph (3A) does not prevent early termination of guardianship under the terms of the Act, e.g. where guardianship is recalled.

141. Section 61A inserts new section 81A which strengthens the Public Guardians's powers to obtain information when carrying out investigations into the exercise of authority by proxies under the 2000 Act. Section 81A(1) provides that proxies can be required by the Public Guardian to provide her with their records and other relevant information. In addition, banks and other financial institutions can be required by the Public Guardian to provide her with records and other relevant information about the accounts of the adult concerned. Section 81A(2) provides that proxies comprise attorneys, withdrawers, persons authorised under intervention orders and guardians and include former proxies. Section 81A(3) provides for fees to be charged by fundholders for providing information.

## **PART 3**

### **ADULT SUPPORT ETC.: MISCELLANEOUS AMENDMENTS AND REPEALS**

#### **Section 62 – Accommodation charges: removal of liability to maintain spouse and child etc.**

142. This section repeals sections 42 and 43 of the National Assistance Act 1948 whereby a spouse or parent of a person resident in accommodation provided or secured by a local authority under the Social Work (Scotland) Act 1968 or provided with accommodation under section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003 can be required to contribute to the cost of the resident's care. Section 62 of the Bill includes technical amendments in order to clarify the provisions in section 65(f) of the National Assistance Act 1948 and section 87(3) of the Social Work (Scotland) Act 1968, and makes a consequential amendment to section 4(1)(b) of the Community Care and Health (Scotland) Act 2002 in order to repeal the reference to liable relatives in that section.

#### **Section 63 – Direct payments: sub-delegation to councils**

143. The section amends section 12B(6) of the Social Work (Scotland) Act 1968. The amendment allows regulations made under section 12B to be more flexible by enabling them to include provisions delegating functions (including decision-making functions) to local authorities. The intention is to use the new power immediately to allow local authorities to determine whether exceptional circumstances exist which would justify using direct payments to employ a close relative in a particular case.

#### **Section 64 – Adjustments between councils in relation to social services etc.**

144. This section clarifies and updates the legislation determining which local authority is financially responsible for providing community care services when a person moves between local authority areas. The Scottish Executive's long established policy and guidance is that normally the local authority in which a person is ordinarily resident is financially responsible for the community care services for that person. The current legislation may not support this policy and the proposed amendments to section 86 of the Social Work (Scotland) Act 1968 ("the 1968 Act") aim to put the matter beyond doubt. The amendments also update the provisions in recognition of the changes in the range of services available and the methods of provision.

145. Section 64(1)(a) extends the provision to cover direct payments and makes a consequential amendment to section 86(1) of the 1968 Act. Section 64(1)(b)(i) introduces a new provision into section 86(3) of the 1968 to disregard from determining ordinary residence in the case of a child, any period during which he is provided with accommodation under the 1968 Act or under section 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 64(1)(b)(ii) updates the statutory references to hospitals.

146. Section 64(1)(c) inserts new subsections into section 86 of the 1968 Act to extend the provisions for adjustments between local authorities to cover care provided by way of an arrangement between them.

147. New section 86(4) and (5) of the 1968 Act supplement the provisions of section 86(1) of the 1968 Act which allows local authorities who provide or secure services or accommodation provided under the Acts mentioned in section 86(1) of the 1968 Act to recover the net cost of doing so from the local authority in whose area the person to whom the care is provided is ordinarily resident. New section 86(4) and (5) provide that where one local authority (“the responsible authority”) arranges with another local authority or a third party (“the provider”) for accommodation to be provided in an area in which the person is not ordinarily resident, so that the responsible authority can fulfil its obligations under the provisions referred to in new section 86(4)(a) to (c), two consequences flow. First, if the provider is a local authority, then any cost incurred by the provider is recoverable from the responsible authority: where the provider is a third party, payment will be governed by the contract between the responsible authority and the third party provider. Secondly, any period during which the person is accommodated under the arrangement is to be disregarded in determining the person’s ordinary residence for the purposes of determining which local authority should fund the net cost of the accommodation.

148. New section 86(6) to (8) also supplement the provisions of section 86(1) of the 1968 Act. They apply when one local authority (“the other authority”) arranges with another local authority (“the providing authority”) that the providing authority will arrange services in the providing authority’s area so that the other authority can fulfil its obligations under the provisions listed in new section 86(6)(a) to (c). The new subsections provide the Scottish Ministers with the power to make regulations specifying when the providing authority may recover from the other authority expenditure incurred in arranging the relevant services where the person for whom the services are providing is not ordinarily resident in the provider authority’s area.

149. New section 86(7) provides the Scottish Ministers with the power to make regulations specifying circumstances which are to be taken into account or disregarded when determining a person’s ordinary residence for the purposes of section 86 of the 1968 Act.

150. New sections 86(8) and (9) supplement the regulation making powers in amended section 86 of the 1968 Act to provide the flexibility needed to keep up to date with changes in the way services and accommodation are delivered and require any regulations made under new section 86(6) in relation to arrangements dealing with services to be subject to affirmative resolution.

151. New section 86(10) ensures that “local authority” has the same meaning in new section 86(4) to (6) as it does in section 86(1) to (3) of the 1968 Act.

152. Section 66(2) amends section 2 of the Community Care and Health (Scotland) Act 2002 which allows Ministers to determine what is and is not to be regarded as accommodation provided under section 86 of the 1968 Act so that the meaning of “accommodation” in section 86 of the 1968 Act can remain the same as for section 87(2) and (3) of the 1968 Act.

### **Section 65 – Application of Social Work (Scotland) Act 1968: persons outwith Scotland**

153. Section 65 inserts section 87A into the 1968 Act. This section relates to persons placed in Scotland by an arrangement made by a local authority in any other part of the United Kingdom or in the Channel Islands or the Isle of Man. It provides for the Scottish Ministers to make regulations to amend the 1968 Act as it applies to such persons. Section 5 of the Community

Care and Health (Scotland) Act 2002 provides powers to enable Scottish local authorities to make placements to other parts of the United Kingdom, the Channel Islands and the Isle of Man. Section 5 has not yet been commenced but should these section 5 powers be required, the powers provided by section 87 of the 1968 Act will also be required to make provision for reciprocal cases of those placed in Scotland from such other countries. Section 87(2) and (3) supplements the regulation-making power in section 87(1) of the 1968 Act and requires any regulations made under section 87(1) to be subject to affirmative resolution.

### **Section 66 – Public Guardian: interaction with courts**

154. This section extends the powers of the Public Guardian to take part in or initiate court proceedings, when it appears to him or her to be necessary, to safeguard the property or financial affairs of an adult with incapacity. This new provision will complement the existing provision in section 12 of the Adults with Incapacity (Scotland) Act 2000 which limits the Public Guardian's ability to enter into court proceedings to where this is explicitly tied to an investigation he or she has carried out. An example of when these new powers might be used is where the Public Guardian is aware of particular facts about an applicant for guardianship which he or she considers may impact adversely on an adult's property or financial interests, derived from prior dealings with the adult's affairs rather than from an investigation. In such circumstances the Public Guardian will be able to inform the court of these facts to protect the adult's interests, if it is necessary to do so.

## **PART 3A**

### **MENTAL HEALTH: MISCELLANEOUS AMENDMENTS AND REPEALS**

#### **Section 67 – Review of determination extending compulsory treatment order**

155. This section amends section 101(2)(b) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). Section 101 applies where a patient is subject to a Compulsory Treatment Order ("CTO") made under section 64(4)(a) of the 2003 Act and the patient's responsible medical officer makes a determination under section 86 of the 2003 Act extending the CTO.

156. Section 101(2)(a) requires the Mental Health Tribunal for Scotland ("the Tribunal") to review such a determination if the record submitted to the Tribunal with the determination states that there is a difference between the type(s) of mental disorder that the patient has and the type(s) of mental disorder recorded in the CTO in respect of which the determination is made, or that the patient's mental health officer disagrees with the determination (or has failed to inform the patient of the matters set out in section 85(2) of the 2003 Act (including the patient's rights in relation to the determination)).

157. The amendment to section 101(2)(b) of the 2003 Act (together with new subsections (3) and (4)) provides a further ground for reviews of determinations under section 86. This ground comes into play 2 years from the original granting of the CTO if there is a determination under section 86 extending the CTO for a further year. The effect of this is that there is not to be a review by the Tribunal under the new section 101(2)(b) of determinations under section 86 in

respect of the first two year period from the granting of the CTO (i.e. there is not to be a review of the first two determinations from the granting of the CTO under that section).

158. Thereafter there is to be a review of a determination by the Tribunal if, within the two year period ending just before the CTO would expire if not extended by that determination, no application has been made to the Tribunal under section 92, 95, 99 or 100 of the 2003 Act, nor has there been a review under section 101.

159. Section 102 sets out the range of powers and duties of the Tribunal on such a review.

#### **Section 67A – Hospital directions and transfer for treatment directions: revocation**

160. This section will amend section 207(5), 208(4), 210(2), 212(4) and 215(4) of the 2003 Act so to add an additional test to the criteria for revocation of a patient's transfer for treatment direction or hospital direction. The additional test is that the patient's responsible medical officer, the Scottish Ministers or the Mental Health Tribunal for Scotland, as the case may be, is not satisfied that it continues to be necessary for the patient to be subject to the direction.

161. For as long as the patient has a mental disorder and requires to receive treatment by virtue of meeting the tests at section 206(4)(b) and (c) of the 2003 Act, the present effect of the provisions dealing with the revocation criteria is that the direction cannot be revoked, meaning that the patient must remain detained in hospital to receive treatment compulsorily there. The effect of these amendments is that where the patient has a mental disorder and still requires to receive treatment, the direction can still be revoked in circumstances where it is no longer considered necessary for the patient to receive that treatment compulsorily in hospital, thus allowing the patient to be returned to prison to be treated voluntarily there.

#### **Section 67B – Compulsory treatment orders and compulsion orders: cross-border transfer of patients etc.**

162. This section amends section 289 of the 2003 Act. Section 289 at present allows the Scottish Ministers to make regulations to make provision for or in connection with the removal from Scotland of a patient who is subject to a community-based compulsory treatment order or compulsion order. This amendment extends the scope of this regulation-making power through the insertion of new subsection (1)(b) of section 289, to allow for regulations to make provision for or in connection with the reception into Scotland from the rest of the UK, the Isle of Man or the Channel Islands, of patients subject to corresponding or similar community-based orders.

163. Subsection (1) amends section 289 to provide that regulations made under that provision may or shall make provision as to certain specified matters. Those matters include making exceptions as to notification requirements, allowing for powers and immunities to be conferred on those who are escorting patients who are being removed under the regulations or who are pursuing or restraining such patients in the event that they abscond, and requiring the reception of community-based patients into Scotland to take place only with the consent of hospital managers. In addition, subsection (1) amends section 289 so that regulations may also provide for amendments or modifications to be made to provisions in the 2003 Act or any other enactment.

164. Subsection (2) amends section 309 of the 2003 Act. These are consequential amendments to extend the scope of the provision allowing regulations to apply absconding provisions in the 2003 Act to patients from other jurisdictions, so that they may apply to non-detained patients as well as patients who are subject to detention.

165. Subsection (3) amends section 316(1)(c) of the 2003 Act. This is a consequential amendment to a provision in the 2003 Act regarding the scope of an offence of knowingly inducing or assisting a patient to abscond or harbouring a patient. The scope of that offence is extended so that it applies in relation to community-based patients who are being transferred under section 289 of the 2003 Act.

166. Subsection (4) amends section 326(4)(c) of the 2003 Act, to provide that regulations made under section 289 of the 2003 Act will be subject to affirmative resolution procedure in the Scottish Parliament.

### **Section 67C – Cross-border visits: leave of absence**

167. Section 67C(1) inserts a new section 309A into the 2003 Act to provide a power for the Scottish Ministers to make regulations for and in connection with the keeping in charge of a person who is subject to escorted leave of absence authorised under legislation in force in another part of the UK, or in the Isle of Man or the Channel Islands. Such regulations may make such provision by applying sections 301 to 303 of the 2003 Act, with or without modification, to such patients. This new provision will enable regulations to make clear the powers of persons escorting patients under authority conferred under legislation in force in other territories, so that there is clear authority under the 2003 Act for those persons to continue to escort the patient whilst in Scotland. Section 67C(2) amends section 326(4)(c) to provide that regulations made under new section 309A of the 2003 Act will be subject to affirmative resolution procedure in the Scottish Parliament.

### **Section 67D – Mental Health Act 1983: repeal of power to return patients absent from hospital etc.**

168. This section repeals sections 88 and 128 of the Mental Health Act 1983, insofar as they extend to Scotland, in relation to the taking into custody in Scotland of persons who have absconded from England and Wales, and the offence of inducing or assisting a patient detained in England and Wales under the Mental Health Act 1983 to abscond. These powers are now provided for by way of sections 309 and 316 of the 2003 Act.

### **Section 67E – Assessment orders: amendment of the Criminal Procedure (Scotland) Act 1995**

169. This section amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), as amended by the 2003 Act. This amendment makes provision in the 1995 Act (by the insertion of new section 145ZA) that where an accused person is present at the first calling of a case in a summary prosecution and a court is making the accused subject to an assessment order (to assess the extent of their mental disorder), the court may adjourn the case without calling on the accused to plead to any charge against him or her. Such an adjournment may be for a period not exceeding 28 days or, in the case of a further adjournment, a period not exceeding 7 days. At

present, the effect of section 144 of the 1995 Act is that in these circumstances the accused must be called upon to plead at the first calling, when they may be unfit to do so.

170. Section 145 of the 1995 Act already provides for a similar power, where the accused is present at the first calling, for a court to adjourn the case without calling on the accused to plead in circumstances where the accused is being remanded in custody or on bail, or ordained to appear at a fixed diet.

## **PART 4**

### **FINAL PROVISIONS**

#### **Section 68 – Ancillary provisions**

171. This allows the Scottish Ministers to make provision ancillary to the Bill in subordinate legislation.

#### **Section 69 – Minor and consequential amendments and repeals**

172. This section gives effect to the schedules to the Bill which amend and repeal provisions in other Acts.

#### **Section 70 – Orders**

173. This sets out the procedure under which the Scottish Ministers can exercise powers which the Bill gives them to make subordinate legislation.

174. All orders are to be made by statutory instrument (and will be published as such). Most will be subject to the Scottish Parliament's negative resolution procedure. Orders under section 68 which make changes to primary legislation will be subject to the Scottish Parliament's affirmative resolution procedure. Commencement orders will not be subject to parliamentary procedure.

175. Subordinate legislation powers which the Bill adds to other Acts will be regulated by the procedures set out in the Acts into which they are inserted.

#### **Section 71 – Commencement**

176. This section commences sections 68, 70, 71 and 72 on the day on which the Bill receives Royal Assent. It gives the Scottish Ministers power to by order appoint the days on which other provisions are to be commenced.

#### **Section 72 – Short title**

177. This section gives the Act its short title.

## **Schedule 1 – Minor and consequential amendments**

### **Paragraph 2**

178. Subparagraph (a) amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to provide that a guardianship order cannot be made under the 1995 Act if there is an existing guardianship order made under the 2000 Act which makes the same provision as that applied for.

### **Paragraph 4**

179. This paragraph amends the Mental Health (Care and Treatment) (Scotland) Act 2003 to reduce the minimum number of medical commissioners which the Commission is required to appoint to one. This change reflects the Commission’s reduced role in relation to the discharge of patients under the new Act.

## **Schedule 2 – Repeals**

180. The repeals to the Solicitors (Scotland) Act 1980 provide that disqualification is no longer to be linked to guardianship and remove obsolete references to curators bonis.



*This document relates to the Adult Support and Protection (Scotland) Bill as amended at Stage 2 (SP Bill 62A)*

**ADULT SUPPORT AND PROTECTION (SCOTLAND)  
BILL**  
[AS AMENDED AT STAGE 2]

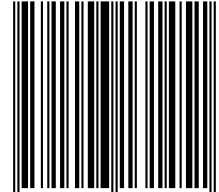
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