



# Adult Support and Protection (Scotland) Act 2007

2007 asp 10

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 15th February 2007 and received Royal Assent on 21st March 2007**

An Act of the Scottish Parliament to make provision for the purposes of protecting adults from harm; to require the establishment of committees with functions relating to the safeguarding of adults who are at risk of harm; to amend the law relating to incapable adults; to remove an individual's liability for expenses incurred by councils in performing certain functions in relation to the individual's spouse or child; to allow the Scottish Ministers to delegate their functions relating to councils' duty to pay sums for the purposes of securing community care services; to make provision entitling a council to recover expenses incurred in providing social services to persons who are not ordinarily resident in the council's area; to allow the Public Guardian to intervene in court proceedings; to amend the law relating to mentally disordered persons; and for connected purposes.

## PART 1

### PROTECTION OF ADULTS AT RISK OF HARM

#### *Introductory*

#### **1 General principle on intervention in an adult's affairs**

The general principle on intervention in an adult's affairs is that a person may intervene, or authorise an intervention, only if satisfied that the intervention—

- (a) will provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs, and
- (b) is, of the range of options likely to fulfil the object of the intervention, the least restrictive to the adult's freedom.

This section applies for the purposes of section 2 only.

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

A public body or office-holder performing a function under this Part in relation to an adult must, if relevant, have regard to—

- (a) the general principle on intervention in an adult’s affairs,
- (b) the adult’s ascertainable wishes and feelings (past and present),
- (c) any views of—
  - (i) the adult’s nearest relative,
  - (ii) any primary carer, guardian or attorney of the adult, and
  - (iii) any other person who has an interest in the adult’s well-being or property,
 which are known to the public body or office-holder,
- (d) the importance of—
  - (i) the adult participating as fully as possible in the performance of the function, and
  - (ii) providing the adult with such information and support as is necessary to enable the adult to so participate,
- (e) the importance of ensuring that the adult is not, without justification, treated less favourably than the way in which any other adult (not being an adult at risk) might be treated in a comparable situation, and
- (f) the adult’s abilities, background and characteristics (including the adult’s age, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage).

## **3 Adults at risk**

- (1) “Adults at risk” are adults who—
  - (a) are unable to safeguard their own well-being, property, rights or other interests,
  - (b) are at risk of harm, and
  - (c) 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.
- (2) An adult is at risk of harm for the purposes of subsection (1) if—
  - (a) another person’s conduct is causing (or is likely to cause) the adult to be harmed, or
  - (b) the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm.

### *Inquiries*

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

A council must make inquiries about a person’s well-being, property or financial affairs if it knows or believes—

- (a) that the person is an adult at risk, and

- (b) that it might need to intervene (by performing functions under this Part or otherwise) in order to protect the person’s well-being, property or financial affairs.

## **5 Co-operation**

- (1) This section applies to—
  - (a) the Mental Welfare Commission for Scotland,
  - (b) the Care Commission,
  - (c) the Public Guardian,
  - (d) all councils,
  - (e) chief constables of police forces,
  - (f) the relevant Health Board, and
  - (g) any other public body or office-holder as the Scottish Ministers may by order specify.
- (2) The public bodies and office-holders to which this section applies must, so far as consistent with the proper exercise of their functions, co-operate with—
  - (a) a council making inquiries under section 4, and
  - (b) each other,where such co-operation is likely to enable or assist the council making those inquiries.
- (3) Where a public body or office-holder to which this section applies knows or believes—
  - (a) that a person is an adult at risk, and
  - (b) that action needs to be taken (under this Part or otherwise) in order to protect that person from harm,the public body or office-holder must report the facts and circumstances of the case to the council for the area in which it considers the person to be.

## **6 Duty to consider importance of providing advocacy and other services**

- (1) 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.
- (2) Where this section applies, the council must have regard to the importance of the provision of appropriate services (including, in particular, independent advocacy services) to the adult concerned.
- (3) “Independent advocacy services” has the same meaning in subsection (2) as it has in section 259(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ([asp 13](#)).

### *Investigations*

## **7 Visits**

- (1) A council officer may enter any place for the purpose of enabling or assisting a council conducting inquiries under section 4 to decide whether it needs to do anything (by performing functions under this Part or otherwise) in order to protect an adult at risk from harm.

- (2) A right to enter any place under subsection (1) includes a right to enter any adjacent place for the same purpose.

## **8 Interviews**

- (1) A council officer, and any person accompanying the officer, may interview, in private, any adult found in a place being visited under section 7.
- (2) An adult interviewed under this section is not required to answer any question (and the adult must be informed of that fact before the interview starts).
- (3) The power given by subsection (1) applies regardless of whether the sheriff has granted an assessment order authorising the council officer to take the person to another place to allow an interview to be conducted.

## **9 Medical examinations**

- (1) Where—
- (a) a council officer finds a person whom the officer knows or believes to be an adult at risk in a place being visited under section 7, and
  - (b) the officer, or any person accompanying the officer, is a health professional, that health professional may conduct a private medical examination of the person.
- (2) A person must be informed of the right to refuse to be examined before a medical examination is carried out (whether under this section or in pursuance of an assessment order).
- (3) The power given by subsection (1) applies regardless of whether the sheriff has granted an assessment order authorising the council officer to take the person to another place to allow a medical examination to be conducted.

## **10 Examination of records etc.**

- (1) A council officer may require any person holding health, financial or other records relating to an individual whom the officer knows or believes to be an adult at risk to give the records, or copies of them, to the officer.
- (2) Such a requirement may be made during a visit or at any other time.
- (3) Requirements made at such other times must be made in writing.
- (4) Records given to a council officer in pursuance of such a requirement may be inspected by—
- (a) the officer, and
  - (b) any other person whom the officer, having regard to the content of the records, considers appropriate,
- for the purposes of enabling or assisting the council to decide whether it needs to do anything (by performing functions under this Part or otherwise) in order to protect an adult at risk from harm.
- (5) Nothing in this section authorises a person who is not a health professional to inspect health records (other than to determine whether they are health records).

- (6) A requirement under subsection (1) which is transmitted by electronic means is to be treated as being in writing if it is received in legible form and capable of being used for subsequent reference.
- (7) “Health records” are records relating to an individual’s physical or mental health which have been made by or on behalf of a health professional in connection with the care of the individual.

### *Assessment orders*

## **11 Assessment orders**

- (1) A council may apply to the sheriff for an order (“an assessment order”) which authorises a council officer to take a specified person from a place being visited under section 7 in order to allow—
  - (a) a council officer, or any council nominee, to interview the specified person in private, and
  - (b) a health professional nominated by the council to conduct a private medical examination of the specified person,for the purposes set out in subsection (2).
- (2) Those purposes are to enable or assist the council to decide—
  - (a) whether the person is an adult at risk, and
  - (b) if it decides that the person is an adult at risk, whether it needs to do anything (by performing functions under this Part or otherwise) in order to protect the person from harm.
- (3) An assessment order—
  - (a) is valid from the date specified in the order, and
  - (b) expires 7 days after that date.

## **12 Criteria for granting assessment order**

The sheriff may grant an assessment order only if satisfied—

- (a) that the council has reasonable cause to suspect that the person in respect of whom the order is sought is an adult at risk who is being, or is likely to be, seriously harmed,
- (b) that the assessment order is required in order to establish whether the person is an adult at risk who is being, or is likely to be, seriously harmed, and
- (c) as to the availability and suitability of the place at which the person is to be interviewed and examined.

## **13 Restriction on exercise of assessment order**

A person may be taken from a place in pursuance of an assessment order only if it is not practicable (due to a lack of privacy or otherwise) to—

- (a) interview the person under section 8, or
  - (b) conduct a medical examination of the person under section 9,
- during a visit under section 7.

### *Removal orders*

#### **14 Removal orders**

- (1) A council may apply to the sheriff for an order (“a removal order”) which authorises—
  - (a) a council officer, or any council nominee, to move a specified person to a specified place within 72 hours of the order being made, and
  - (b) the council to take such reasonable steps as it thinks fit for the purpose of protecting the moved person from harm.
- (2) A removal order expires 7 days (or such shorter period as may be specified in the order) after the day on which the specified person is moved in pursuance of the order.

#### **15 Criteria for granting removal order**

- (1) The sheriff may grant a removal order only if satisfied—
  - (a) that the person in respect of whom the order is sought is an adult at risk who is likely to be seriously harmed if not moved to another place, and
  - (b) as to the availability and suitability of the place to which the adult at risk is to be moved.
- (2) A removal order may require a council to allow any specified person to have contact with the adult at risk to whom the order relates—
  - (a) at any specified time during which the order has effect, and
  - (b) in accordance with any specified conditions.
- (3) But the sheriff must, before including such a requirement, have regard to—
  - (a) any representations made by the council as to whether persons should be allowed to have contact with the adult at risk, and
  - (b) any relevant representations made by—
    - (i) the adult at risk,
    - (ii) any person who wishes to be able to have contact with the adult at risk, and
    - (iii) any other person who has an interest in the adult at risk’s well-being or property.

#### **16 Right to move adult at risk**

- (1) A council officer may enter any place in order to move an adult at risk from the place in pursuance of a removal order.
- (2) A right to enter any place under subsection (1) includes a right to enter any adjacent place for the same purpose.

#### **17 Variation or recall of removal order**

- (1) The sheriff may vary or recall a removal order if satisfied that the variation or recall is justified by a change in the facts or circumstances in respect of which the order was granted or, as the case may be, last varied.

- (2) A removal order may not be varied so as to authorise the council to do anything after the day which falls 7 days after the day on which the adult at risk to whom the order relates is moved in pursuance of the order.
- (3) Where an adult at risk has been moved from any place in pursuance of a removal order which is recalled, the sheriff may direct the council to—
  - (a) return the adult to that place, or
  - (b) take the adult to any other place which the sheriff, having regard to the adult's wishes, may specify.
- (4) A removal order may be varied or recalled only on the application of—
  - (a) the adult at risk to whom the order relates,
  - (b) any person who has an interest in the adult at risk's well-being or property, or
  - (c) the council.

## **18 Protection of moved person's property**

- (1) The council must take reasonable steps to prevent any property owned or controlled by a person moved in pursuance of a removal order from being lost or damaged because—
  - (a) the moved person is unable to protect, care for or otherwise deal with it, and
  - (b) no other suitable arrangements have been or are being made for the purposes of preventing such loss or damage.
- (2) A council officer may enter any place which the council knows or believes to contain any property in respect of which it has a duty under subsection (1) in order to enable or assist the council to perform that duty.
- (3) A right to enter any place under subsection (2) includes a right to enter any adjacent place for the same purpose.
- (4) A council officer who finds any property in respect of which the council has a duty under subsection (1) may do anything which the officer considers reasonably necessary in order to prevent the property from being lost or damaged (and may, in particular, move the property to another place).
- (5) The council is not entitled to recover from a moved person any expenses it incurs in performing functions under this section in relation to property owned or controlled by that person.
- (6) The duty imposed by subsection (1) applies only while the removal order concerned has effect.
- (7) A council which moves any property in pursuance of the duty imposed by subsection (1) must, as soon as is reasonably practicable after the removal order concerned ceases to have effect, return the property to the adult concerned.

### *Banning orders*

## **19 Banning orders**

- (1) A banning order is an order granted by the sheriff which bans the subject of the order ("the subject") from being in a specified place.

- (2) A banning order may also—
- (a) ban the subject from being in a specified area in the vicinity of the specified place,
  - (b) authorise the summary ejection of the subject from the specified place and the specified area,
  - (c) prohibit the subject from moving any specified thing from the specified place,
  - (d) direct any specified person to take specified measures to preserve any moveable property owned or controlled by the subject which remains in the specified place while the order has effect,
  - (e) be made subject to any specified conditions,
  - (f) require or authorise any person to do, or to refrain from doing, anything else which the sheriff thinks necessary for the proper enforcement of the order.
- (3) A condition specified in a banning order may, in particular, authorise the subject to be in the place or area from which the subject is banned in specified circumstances (for example, while being supervised by another person or during specified times).
- (4) The sheriff must, before including a condition of the type mentioned in subsection (3), have regard to any relevant representations made by—
- (a) the applicant for the order,
  - (b) the adult at risk,
  - (c) any other person who has an interest in the adult at risk's well-being or property, and
  - (d) the subject.
- (5) A banning order expires on the earliest of the following dates—
- (a) any specified expiry date,
  - (b) if the banning order is recalled, the date on which it is recalled,
  - (c) the date which falls 6 months after the date on which it is granted.

## **20 Criteria for granting banning order**

The sheriff may grant a banning order only if satisfied—

- (a) that an adult at risk is being, or is likely to be, seriously harmed by another person,
- (b) that the adult at risk's well-being or property would be better safeguarded by banning that other person from a place occupied by the adult than it would be by moving the adult from that place, and
- (c) that either—
  - (i) the adult at risk is entitled, or permitted by a third party, or
  - (ii) neither the adult at risk nor the subject is entitled, or permitted by a third party,
 to occupy the place from which the subject is to be banned.

## **21 Temporary banning orders**

- (1) The sheriff may grant a temporary banning order pending determination of an application for a banning order.



- (2) A temporary banning order may include any provision which may be included in a banning order.
- (3) Where a temporary banning order is granted, the sheriff must determine the related application for a banning order within such period as may be specified in rules made under section 32 of the Sheriff Courts (Scotland) Act 1971 (c. 58).
- (4) A temporary banning order expires on the earliest of the following dates—
  - (a) the date on which the sheriff determines the related application for a banning order,
  - (b) the date by which subsection (3) requires the sheriff to determine the related application for a banning order,
  - (c) if the temporary banning order is recalled, the date on which it is recalled,
  - (d) any specified expiry date.

## **22 Right to apply for banning order**

- (1) An application for a banning order may be made only by or on behalf of—
  - (a) an adult whose well-being or property would be safeguarded by the order,
  - (b) any other person who is entitled to occupy the place concerned, or
  - (c) where subsection (2) applies, the council.
- (2) The council must apply for a banning order if it is satisfied—
  - (a) as to the matters set out in section 20,
  - (b) that nobody else is likely to apply for a banning order in respect of the circumstances which caused the council to be satisfied as to those matters, and
  - (c) that no other proceedings (under this Part or otherwise) to eject or ban the person concerned from the place concerned are depending before a court.
- (3) An applicant for a banning order may also apply for a temporary banning order in respect of the same case.

## **23 Banning orders: occupancy rights of adult at risk**

The granting of a banning order or a temporary banning order does not affect any right the adult at risk has by virtue of being a non-entitled spouse to occupy a home within the place from which the subject is banned under section 1(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c. 59).

## **24 Variation or recall of banning order**

- (1) The sheriff may vary or recall—
  - (a) a banning order, or
  - (b) a temporary banning order,if satisfied that the variation or recall is justified by a change in the facts or circumstances in respect of which the order was granted or, as the case may be, last varied.
- (2) A variation may not vary the date on which the order expires—
  - (a) in the case of a banning order, beyond the date which is 6 months after the date on which the order was granted,

- (b) in the case of a temporary banning order, beyond the date by which section 21(3) requires the sheriff to determine the related application for a banning order.
- (3) An order may be so varied or recalled only on an application by or on behalf of—
  - (a) the subject of the order,
  - (b) the applicant for the order,
  - (c) the adult at risk to whom the order relates,
  - (d) any other person who has an interest in the adult at risk's well-being or property.

## **25 Powers of arrest**

- (1) The sheriff may attach a power of arrest to any—
  - (a) banning order, or
  - (b) temporary banning order.
- (2) Any such power of arrest—
  - (a) becomes effective when it is served (together with such documents as may be prescribed) on the subject of the order, and
  - (b) expires together with the order to which it is attached.

## **26 Notification to adult at risk etc.**

- (1) This section applies where the sheriff—
  - (a) grants a banning order or temporary banning order, or
  - (b) varies or recalls such an order,
 on the application of a person other than the adult whose well-being or property is safeguarded by the order.
- (2) Where this section applies, the applicant (or such other person as may be prescribed) must deliver the document mentioned in subsection (3) to—
  - (a) the adult whose well-being or property is safeguarded by the order, and
  - (b) any other person with an interest in that adult's well-being or property as the sheriff may specify.
- (3) The document which is to be delivered under subsection (2) is a copy of—
  - (a) the order (and any power of arrest attached),
  - (b) the varied order, or, as the case may be,
  - (c) the order of recall.
- (4) Failure to comply with subsection (2) does not invalidate the order, variation or recall concerned.

## **27 Notification to police**

- (1) The applicant for a banning order or temporary banning order (or such other person as may be prescribed) must, as soon as possible after any power of arrest attached to the order becomes effective, deliver to the chief constable—
  - (a) a copy of the order (with the power of arrest attached), and
  - (b) such other documents as may be prescribed.

- (2) Where a banning order or temporary banning order is varied or recalled, the applicant for the variation or recall (or such other person as may be prescribed) must, as soon as possible after the variation or recall, deliver to the chief constable—
  - (a) a copy of the varied order or, as the case may be, a note of the recall, and
  - (b) such other documents as may be prescribed.
- (3) In this section, “chief constable” means the chief constable of the police force maintained for the area in which the place specified in the order concerned is situated.

## **28 Arrest for breach of banning order**

- (1) A constable may arrest without warrant the subject of any banning order, or temporary banning order, to which a power of arrest is attached if the constable—
  - (a) reasonably suspects the subject to be breaching, or to have breached, the order, and
  - (b) considers that there would, if the subject were not arrested, be a risk of the subject breaching the order again.
- (2) The constable must—
  - (a) immediately inform the arrested person of the reason for the arrest, and
  - (b) take the arrested person as quickly as is reasonably practicable to a police station.

## **29 Police duties after arrest**

- (1) The officer in charge of a police station to which any person arrested under section 28 is taken (“the officer in charge”) must detain the arrested person in custody until the person is—
  - (a) accused on petition or charged on complaint with an offence in respect of the facts and circumstances which gave rise to the arrest, or
  - (b) brought before the sheriff under section 32.
- (2) The officer in charge must ensure that the facts and circumstances which gave rise to the arrest are reported to the fiscal as soon as is practicable.

## **30 Notification of detention**

- (1) Where a person is detained under section 29, the officer in charge must ensure that the detained person is informed immediately of—
  - (a) the right to have, on request, intimation of the detention and of the place of detention given, without delay, to—
    - (i) a solicitor, and
    - (ii) one other person reasonably named by the person,
  - (b) the right to have, on request, intimation given to a solicitor that the solicitor’s professional assistance is required,
  - (c) the right to have, on request, the solicitor informed, as soon as the information is available, of the court to which the person is to be taken and the date when that is to happen, and
  - (d) the right to have, on request, a private interview with the solicitor before any appearance before the sheriff under section 32.

- (2) Where the officer in charge knows or believes that a person detained under section 29 is a child, the officer must, where practicable, give intimation, without delay, of the detention and of the place of detention to any person known to have parental responsibilities and rights in relation to the detained person.
- (3) Any person to whom intimation is given under subsection (2) must be permitted reasonable access to the detained person.

### **31 Duty to keep record of detention**

The officer in charge must ensure that the following matters are recorded in connection with the detention of a person under section 29—

- (a) the time at which the person was arrested,
- (b) the police station to which the person was taken,
- (c) the time when the person arrived at that police station,
- (d) the address of any other place to which the person is, during the detention, taken,
- (e) the time when the person was informed of the rights set out in section 30(1),
- (f) the time and nature of any request made by the person to exercise any of those rights, and
- (g) the time and nature of any action taken by a police officer under section 30.

### **32 Duty to bring detained person before sheriff**

- (1) Where—
  - (a) a person is detained under section 29, and
  - (b) the fiscal has not decided to take criminal proceedings in respect of the facts and circumstances which gave rise to the arrest,
 the detained person must be brought, on the next court day on which it is practicable to do so, before the sheriff sitting as a court of summary jurisdiction for the district in which the person was arrested.
- (2) Nothing in this section prevents the detained person from being brought before the sheriff on a day other than a court day if—
  - (a) the sheriff is sitting on such a day for the disposal of criminal business, and
  - (b) the fiscal has not decided to take criminal proceedings in respect of the facts and circumstances which gave rise to the arrest.

### **33 Information to be presented to sheriff**

Where a person is brought before the sheriff under section 32, the fiscal must present to the sheriff a petition—

- (a) giving the detained person's particulars,
- (b) stating the facts and circumstances which gave rise to the arrest,
- (c) giving any information known to the fiscal—
  - (i) about the circumstances which gave rise to the banning order or temporary banning order concerned, and
  - (ii) which is relevant to an assessment of whether the detained person is likely to breach that order again, and

- (d) requesting the sheriff to consider whether a longer period of detention is justified.

### **34 Criteria for authorising longer detention**

- (1) The sheriff may, if satisfied—
  - (a) that the information which the fiscal presents under section 33 ostensibly discloses a breach of a banning order or temporary banning order, and
  - (b) that there is a substantial risk that the detained person will breach the order again,by order authorise the continuation of the detention for a period of not more than 2 days (not counting days which are not court days).
- (2) Where the sheriff refuses to authorise such a continuation, the detained person must be released from custody (unless that person is in custody in respect of any other matter).
- (3) Before deciding whether to grant an order under this section, the sheriff must give the detained person the opportunity to make representations.

#### *Protection orders and visits: supplementary*

### **35 Consent of adult at risk**

- (1) The sheriff must not make a protection order if the sheriff knows that the affected adult at risk has refused to consent to the granting of the order.
- (2) A person must not take any action for the purposes of carrying out or enforcing a protection order if the person knows that the affected adult at risk has refused to consent to the action.
- (3) Despite subsections (1) and (2), a refusal to consent may be ignored if the sheriff or person reasonably believes—
  - (a) that the affected adult at risk has been unduly pressurised to refuse consent, and
  - (b) 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.
- (4) An adult at risk may be considered to have been unduly pressurised to refuse to consent to the granting of an order or the taking of an action if it appears—
  - (a) that harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in whom the adult at risk has confidence and trust, and
  - (b) that the adult at risk would consent if the adult did not have confidence and trust in that person.
- (5) Subsection (4) does not affect the generality of subsection (3).
- (6) Neither subsection (3) nor any other provision of this Part authorises a council officer or a health professional or other council nominee to ignore a refusal by a person to consent to participate in—
  - (a) an interview, or
  - (b) a medical examination.

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*Status: This is the original version (as it was originally enacted).*

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(7) In this section, a “protection order” means any—

- (a) assessment order,
- (b) removal order,
- (c) banning order, or
- (d) temporary banning order,

and “affected adult at risk”, in relation to a protection order, means the person whose well-being or property would be safeguarded by the granting, carrying out or enforcement of the order.

### **36 Visits: supplementary provisions**

- (1) A council officer may visit a place at reasonable times only.
- (2) A council officer must, while visiting any place—
  - (a) state the object of the visit, and
  - (b) produce evidence of the officer’s authorisation to visit the place.
- (3) A council officer may, while visiting any place—
  - (a) examine the place,
  - (b) take into the place—
    - (i) any other person, and
    - (ii) any equipment,
 as may be reasonably required in order to fulfil the object of the visit, and
  - (c) do anything else (under this Part or otherwise) which is reasonably required in order to fulfil the object of the visit.
- (4) A council officer may not use force during, or in order to facilitate, a visit (but this does not prevent the sheriff from granting a warrant for entry authorising a constable to use force).
- (5) A refusal to allow a council officer, or any person accompanying a council officer, to carry out a visit which is not authorised by a warrant for entry does not constitute an offence under section 49(1).

### **37 Warrants for entry**

- (1) A “warrant for entry” is a warrant which authorises—
  - (a) a council officer to visit any specified place under section 7 or 16 together with a constable, and
  - (b) a constable who so accompanies a council officer to do anything, using reasonable force where necessary, which the constable considers to be reasonably required in order to fulfil the object of the visit.
- (2) A warrant for entry—
  - (a) expires 72 hours after it is granted, and
  - (b) does not entitle any person to remain in a place which that person has entered in pursuance of the warrant after the warrant has expired.

### **38 Criteria for granting warrants for entry: section 7 visits**

- (1) A sheriff who grants an assessment order must also grant a warrant for entry in relation to a visit under section 7 of a place from which a person may be taken in pursuance of the assessment order.
- (2) The sheriff may, on the application of the council, otherwise grant a warrant for entry in relation to a visit under section 7 only if satisfied, by evidence on oath—
  - (a) that a council officer has been, or reasonably expects to be—
    - (i) refused entry to, or
    - (ii) otherwise unable to enter, the place concerned, or
  - (b) that any attempt by a council officer to visit the place without such a warrant would defeat the object of the visit.

### **39 Duty to grant warrants for entry: removal orders**

- (1) A sheriff who grants a removal order must also grant a warrant for entry in relation to a visit under section 16.
- (2) Where—
  - (a) a removal order is varied, and
  - (b) the subject of the varied order has not yet been moved in pursuance of the order,the warrant for entry granted under subsection (1) in relation to the order is, regardless of whether the warrant has already expired, to be treated for the purposes of section 37(2) as having been granted on the date of variation.

### **40 Urgent cases**

- (1) A council which believes that the circumstances set out in subsection (2) have arisen may apply to a justice of the peace instead of the sheriff for—
  - (a) a removal order, or
  - (b) a warrant for entry in respect of a visit under section 7.
- (2) Those circumstances are—
  - (a) that it is not practicable to apply to the sheriff, and
  - (b) that an adult at risk is likely to be harmed if there is any delay in granting such an order or warrant.
- (3) A justice of the peace may grant a removal order only if satisfied, by evidence on oath—
  - (a) that the circumstances set out in subsection (2) have arisen, and
  - (b) as to the matter set out in section 15(1).
- (4) Subsections (3) to (7) of section 41 do not apply in relation to an application to a justice of the peace for a removal order.
- (5) A justice of the peace who grants a removal order must also grant a warrant for entry in relation to a visit under section 16.
- (6) A justice of the peace may grant a warrant for entry in relation to a visit under section 7 only if satisfied, by evidence on oath—

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- (a) that the circumstances set out in subsection (2) have arisen, and
  - (b) as to either of the matters set out in section 38(2).
- (7) A removal order granted under this section must—
- (a) despite section 14(1)(a), specify a period of 12 hours beginning when the order is made as the period within which the person specified in the order may be moved in pursuance of the order, and
  - (b) specify a period of no longer than 24 hours as the period within which the order is to have effect.
- (8) Despite section 37(2)(a), a warrant for entry granted under this section expires 12 hours after it is granted.

#### **41 Applications: procedure**

- (1) This section applies in relation to any application for—
- (a) an assessment order,
  - (b) a removal order,
  - (c) a banning order,
  - (d) a temporary banning order,
  - (e) the variation or recall of a removal order, banning order or temporary banning order.
- (2) The sheriff may disapply any of the following provisions in relation to an application if satisfied that doing so will protect an adult at risk from serious harm or will not prejudice any person affected by the disapplication—
- (a) subsections (3) to (7),
  - (b) section 15(3),
  - (c) section 19(4).
- (3) The applicant must give notice of an application to—
- (a) the subject of the application, and
  - (b) the affected adult at risk (where that person is neither the applicant nor the subject of the application).
- (4) The sheriff must, before determining an application, invite—
- (a) the subject of the application, and
  - (b) the affected adult at risk (where that person is neither the applicant nor the subject of the application).
- to be heard by, or represented before, the sheriff.
- (5) The affected adult at risk may be accompanied at any hearing conducted in respect of an application by a friend, a relative or any other representative chosen by the adult.
- (6) The sheriff may appoint a person to safeguard the interests of the affected adult at risk in any proceedings relating to an application.
- (7) Such an appointment may be made on such terms as the sheriff thinks fit.
- (8) Nothing in this section affects the Court of Session's power to make further provision under section 32 of the Sheriff Courts (Scotland) Act 1971 (c. 58) in connection with the procedure and practice to be followed in connection with an application.



- (9) For the purposes of this section, the “affected adult at risk” is—
- (a) where an application relates to an assessment order or removal order, the subject of the application,
  - (b) where an application relates to a banning order or a temporary banning order, the person whom that order would protect, or is protecting, from harm.

#### *Adult Protection Committees*

### **42 Adult Protection Committees**

- (1) Each council must establish a committee (an “Adult Protection Committee”) with the following functions—
- (a) to keep under review the procedures and practices of the public bodies and office-holders to which this section applies which relate to the safeguarding of adults at risk present in the council’s area (including, in particular, any such procedures and practices which involve co-operation between the council and other public bodies or office-holders to which this section applies),
  - (b) to give information or advice, or make proposals, to any public body and office-holder to which this section applies on the exercise of functions which relate to the safeguarding of adults at risk present in the council’s area,
  - (c) to make, or assist in or encourage the making of, arrangements for improving the skills and knowledge of officers or employees of the public bodies and office-holders to which this section applies who have responsibilities relating to the safeguarding of adults at risk present in the council’s area,
  - (d) any other function relating to the safeguarding of adults at risk as the Scottish Ministers may by order specify.
- (2) In performing its functions, an Adult Protection Committee must have regard to the desirability of improving co-operation between each of the public bodies and office-holders to which this section applies for the purpose of assisting those bodies and office-holders to perform functions in order to safeguard adults at risk present in the council’s area.
- (3) The public bodies and office-holders to which this section applies are—
- (a) the council,
  - (b) the Care Commission,
  - (c) the relevant Health Board,
  - (d) the chief constable of the police force maintained in the council’s area,
  - (e) any other public body or office-holder as the Scottish Ministers may by order specify.

### **43 Membership**

- (1) It is for the council to appoint the convener and the other members of its Adult Protection Committee in accordance with this section.
- (2) Each public body and office-holder to which section 42 applies (other than the council and the Care Commission) must nominate a representative who appears to the body or office-holder to have skills and knowledge relevant to the functions of the Adult Protection Committee to be a Committee member.

- (3) The Care Commission may nominate a representative who appears to it to have skills and knowledge relevant to the functions of the Adult Protection Committee to be a Committee member.
- (4) The council must appoint the representatives nominated under subsections (2) and (3) as Committee members.
- (5) The council may also appoint as Committee members such other persons who appear to it to have skills and knowledge relevant to the functions of the Adult Protection Committee.
- (6) The Committee convener must not be a member or officer of the council.

#### **44 Committee procedure**

- (1) It is for an Adult Protection Committee to regulate its own procedures.
- (2) But those procedures must allow a representative of—
  - (a) the Mental Welfare Commission for Scotland,
  - (b) the Public Guardian,
  - (c) the Care Commission (where it has not nominated a representative to be a member of the Committee), and
  - (d) any other public body or office-holder as the Scottish Ministers may by order specify,
 to attend Committee meetings.

#### **45 Duty to provide information to the Committee**

- (1) Each of the public bodies and office-holders set out in subsection (2) must provide the Adult Protection Committee with any information which the Committee may reasonably require for the purposes of performing the Committee's functions.
- (2) Those public bodies and office-holders are—
  - (a) each of the public bodies and office-holders represented on the Adult Protection Committee by virtue of section 43(4),
  - (b) the Mental Welfare Commission for Scotland,
  - (c) the Public Guardian,
  - (d) the Care Commission (where it is not represented on the Committee), and
  - (e) any other public body or office-holder as the Scottish Ministers may by order specify.

#### **46 Biennial Report**

The convener of an Adult Protection Committee must, as soon as practical after such date as the council may direct biennially—

- (a) prepare a general report on the exercise of the Committee's functions during the 2 years ending on that date, and
- (b) after securing the Committee's approval of the report, send a copy of it to—
  - (i) each of the public bodies and office-holders represented on the Adult Protection Committee by virtue of section 43(4),
  - (ii) the Scottish Ministers,

- (iii) the Mental Welfare Commission for Scotland,
- (iv) the Public Guardian,
- (v) the Care Commission (where it not represented on the Committee), and
- (vi) any other public body or office-holder as the Scottish Ministers may by order specify.

#### **47 Guidance**

Adult Protection Committees, and councils, must have regard to any guidance issued by the Scottish Ministers about their functions under sections 42 to 46.

#### *Other provisions*

#### **48 Code of practice**

- (1) The Scottish Ministers must prepare a code of practice containing guidance about the performance of functions under this Part by—
  - (a) councils and their officers, and
  - (b) health professionals.
- (2) The Scottish Ministers must review the code of practice from time to time and may, following such a review, revise it.
- (3) Before preparing the code of practice, and when reviewing it, the Scottish Ministers must consult—
  - (a) such councils (or persons representing councils),
  - (b) such health professionals (or persons representing health professionals), and
  - (c) such other persons appearing to them to be interested in the code of practice, as they think fit.
- (4) The Scottish Ministers must publish the code of practice and any revisions to it.
- (5) Councils, council officers and health professionals performing functions under this Part must, if relevant, have regard to the code of practice.

#### **49 Obstruction**

- (1) A person commits an offence by, without reasonable excuse, preventing or obstructing any other person from doing anything which the other person is authorised or entitled to do by virtue of—
  - (a) an assessment order,
  - (b) a removal order,
  - (c) a banning order,
  - (d) a temporary banning order,
  - (e) a warrant for entry, or
  - (f) any provision of this Part.
- (2) A person commits an offence by, without reasonable excuse, refusing or otherwise failing to comply with a requirement made under section 10.

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- (3) A person who is guilty of an offence under this section is liable, on summary conviction—
- (a) to a fine not exceeding level 3 on the standard scale,
  - (b) to be imprisoned for a term not exceeding 3 months, or
  - (c) to both such a fine and such imprisonment.
- (4) Nothing done by a person whose well-being or property another person is attempting to investigate or safeguard constitutes an offence under this section.

## **50 Offences by bodies corporate etc.**

- (1) Where—
- (a) an offence under this Part has been committed by—
    - (i) a body corporate,
    - (ii) a Scottish partnership, or
    - (iii) an unincorporated association other than a Scottish partnership, and
  - (b) it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of—
    - (i) a relevant person, or
    - (ii) a person purporting to act in the capacity of a relevant person,
- that person as well as the body corporate, partnership or, as the case may be, unincorporated association is guilty of the offence and is liable to be proceeded against and punished accordingly.
- (2) In subsection (1), “relevant person” means—
- (a) in relation to a body corporate other than a council—
    - (i) a director, manager, secretary or other similar officer of the body,
    - (ii) where the affairs of the body are managed by its members, a member,
  - (b) in relation to a council, an officer or member of the council,
  - (c) in relation to a Scottish partnership, a partner, and
  - (d) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.

## **51 Appeals**

- (1) No appeal is competent against the granting of—
- (a) an assessment order,
  - (b) a removal order, or
  - (c) a warrant for entry.
- (2) Any decision of a sheriff to grant, or to refuse to grant, a banning order or temporary banning order may be appealed to the sheriff principal.
- But an appeal under this subsection against the granting of, or a refusal to grant, a temporary banning order is competent only with leave of the sheriff.
- (3) The sheriff principal’s decision on an appeal under subsection (2) may be appealed to the Court of Session.

But an appeal under this subsection against a decision relating to a temporary banning order is competent only with leave of the sheriff principal.

- (4) Where a sheriff principal decides to quash a banning order or temporary banning order, the order concerned is (despite the sheriff principal's determination) to continue to have effect until—
- (a) the end of the period during which the decision to quash the order may be appealed to the Court of Session (if no such appeal is made),
  - (b) where such an appeal is made, the day on which—
    - (i) the appeal is abandoned, or
    - (ii) the Court of Session confirms the sheriff principal's decision to quash the order, or
  - (c) any other day on which—
    - (i) the order otherwise expires by virtue of section 19(5) or 21(4), or
    - (ii) in the case of a temporary banning order, the sheriff principal refuses leave to appeal against the decision to quash the order.

## **52 Persons authorised to perform functions under this Part**

- (1) The Scottish Ministers may by order restrict the type of individual who may be authorised by a council to perform functions given to council officers by virtue of this Part.
- (2) For the purposes of this Part, a person is a “health professional” if the person is—
- (a) a doctor,
  - (b) a nurse,
  - (c) a midwife, or
  - (d) any other type of individual described (by reference to skills, qualifications, experience or otherwise) by order made by the Scottish Ministers.

## **53 Interpretation of Part 1**

- (1) In this Part—
- “adult” means an individual aged 16 or over,
  - “adult at risk” has the meaning given by section 3,
  - “Adult Protection Committee” means a committee established under section 42,
  - “assessment order” has the meaning given by section 11,
  - “attorney” means a continuing attorney or welfare attorney (within the meaning of the Adults with Incapacity (Scotland) Act 2000 (asp 4)),
  - “banning order” has the meaning given by section 19,
  - “Care Commission” means the Scottish Commission for the Regulation of Care,
  - “child” means an individual under the age of 16,
  - “conduct” includes neglect and other failures to act,
  - “council” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39); and references to a council in relation to any person known or believed to be an adult at risk are references to the council for the area which the person is for the time being in,
  - “council officer” means an individual appointed by a council under section 64 of the Local Government (Scotland) Act 1973 (c. 65) (but “council officer” must,

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where relevant, also be interpreted in accordance with any order made under section 52(1)),

“court day” means a day which is not—

- (a) a Saturday,
- (b) a Sunday, or
- (c) a court holiday prescribed for the relevant court under section 8 of the Criminal Procedure (Scotland) Act 1995 (c. 46),

“doctor” means a fully registered person within the meaning of the Medical Act 1983 (c. 54),

“fiscal” means the procurator fiscal,

“harm” includes all harmful conduct and, in particular, includes—

- (a) conduct which causes physical harm,
- (b) conduct which causes psychological harm (for example: by causing fear, alarm or distress),
- (c) unlawful conduct which appropriates or adversely affects property, rights or interests (for example: theft, fraud, embezzlement or extortion),
- (d) conduct which causes self-harm,

“health professional” has the meaning given by section 52(2),

“midwife” means an individual registered in the register maintained under article 5 of the Nurses and Midwives Order 2001 (S.I. 2002/253) by virtue of qualifications in midwifery,

“nearest relative” has the meaning given by section 254 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13),

“nurse” means an individual registered in the register maintained under article 5 of the Nurses and Midwives Order 2001 (S.I. 2002/253) by virtue of qualifications in nursing,

“officer in charge” has the meaning given by section 29(1)

“parental responsibilities and rights” has the same meaning as in the Children (Scotland) Act 1995 (c. 36),

“prescribed” means prescribed by rules of court,

“primary carer” has the same meaning as in the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13),

“relevant Health Board”, in relation to any council, means any Health Board or Special Health Board constituted by order under section 2 of the National Health Service (Scotland) Act 1978 (c. 29) which exercises functions in relation to the council’s area,

“removal order” has the meaning given by section 14,

“specified”, in relation to any order or warrant, means specified in the order or warrant,

“temporary banning order” has the meaning given by section 21,

“visit” has the meaning given by subsection (2),

“warrant for entry” has the meaning given by section 37.

- (2) References in this Part to visiting any place are, unless the contrary intention appears, to be read as references to a council officer exercising a right of entry conferred by section 7, 16 or 18 (including any such right which is authorised by a warrant for entry).

## PART 2

### ADULTS WITH INCAPACITY

#### 54 Preliminary

References in this Part to “the 2000 Act” are references to the Adults with Incapacity (Scotland) Act 2000 (asp 4).

#### 55 Applications and proceedings: sheriff to consider adult’s wishes and feelings

After section 3(5) of the 2000 Act insert—

“(5A) In determining an application or any other proceedings under this Act, the sheriff shall, without prejudice to the generality of section 1(4)(a), take account of the wishes and feelings of the adult who is the subject of the application or proceedings so far as they are expressed by a person providing independent advocacy services.

(5B) In subsection (5A), “independent advocacy services” has the same meaning as it has in section 259(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13).”.

#### 56 Orders about incapable adults' nearest relatives

(1) Section 4 (orders about functions of nearest relative etc.) of the 2000 Act is amended as follows.

(2) In subsection (1)—

- (a) the words “On an application by an adult,” are repealed,
- (b) for “the adult”, where first occurring, substitute “an adult with incapacity”,
- (c) in paragraph (b), for “application” substitute “order”.

(3) In subsection (3), the words “, on an application by an adult,” are repealed.

(4) After subsection (3) insert—

“(3A) The court may make an order under subsection (1) or (3) only on the application of—

- (a) the adult to whom the application relates; or
- (b) any person claiming an interest in that adult’s property, financial affairs or personal welfare.

(3B) The court may dispose of an application for an order under subsection (1) or (3) by making—

- (a) the order applied for; or
- (b) such other order under this section as it thinks fit.”.

(5) Subsection (4) is repealed.

#### 57 Powers of attorney

(1) Section 15 (continuing powers of attorney) of the 2000 Act is amended as follows—

- (a) after paragraph (b) of subsection (3) insert—
    - “(ba) where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, states that the granter has considered how such a determination may be made;”
  - (b) in subsection (3)(c)—
    - (i) leave out “a solicitor” and insert “a practising solicitor”,
    - (ii) in sub-paragraph (ii), for “other persons” substitute “another person”,
    - (iii) in sub-paragraph (ii), for “have” substitute “has”,
  - (c) in subsection (4), for “A solicitor” substitute “A practising solicitor”,
  - (d) after subsection (4) insert—
    - “(5) It is declared that the rule of law which provides that an agent’s authority ends in the event of the bankruptcy of the principal or the agent applies, and has applied since subsection (1) came into force, in relation to continuing powers of attorney.”
- (2) Section 16 (welfare powers of attorney) of the 2000 Act is amended as follows—
- (a) after paragraph (b) of subsection (3) insert—
    - “(ba) states that the granter has considered how a determination as to whether he is incapable in relation to decisions about the matter to which the welfare power of attorney relates may be made for the purposes of subsection (5)(b);”
  - (b) in subsection (3)(c)—
    - (i) leave out “a solicitor” and insert “a practising solicitor”,
    - (ii) in sub-paragraph (ii), for “other persons” substitute “another person”,
    - (iii) in sub-paragraph (ii), for “have” substitute “has”,
  - (c) in subsection (4), for “A solicitor” substitute “A practising solicitor”,
  - (d) in subsection (6)(b), for “mentioned in section 48(1) or (2)” substitute “in relation to which the authority conferred by section 47(2) does not apply by virtue of regulations made under section 48(2)”.
- (3) After section 16 of the 2000 Act insert—

**“16A Continuing and welfare power of attorney: accompanying certificate**

Where a document confers both—

- (a) a continuing power of attorney; and
- (b) a welfare power of attorney,

the validity requirements imposed by sections 15(3)(c) and 16(3)(c) may be satisfied by incorporating a single certificate which certifies the matters set out in those provisions.”

- (4) Section 19 (registration of powers of attorney) of the 2000 Act is amended as follows
- (a) in subsection (2)(c), for “send a copy of it to” substitute “give notice of the registration of the document to both the local authority and”,
  - (b) in subsection (5)—



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- (i) the word “and” which appears immediately after paragraph (a) is repealed,
  - (ii) after paragraph (b) insert—
    - “(c) where the document confers a welfare power of attorney and the local authority requests a copy of it, send such a copy to the local authority; and
    - (d) where the document confers a welfare power of attorney and the Mental Welfare Commission requests a copy of it, send such a copy to the Mental Welfare Commission.”.
- (5) In section 20(3)(b)(iii) (notice of order: supervision etc) of the 2000 Act, the words from “(in” to “disorder)” are repealed.
- (6) In section 22 (notice of changes) of the 2000 Act, the words “(in a case where the incapacity of the granter is by reason of, or reasons which include, mental disorder)”, where they occur in subsections (1) and (2), are repealed.
- (7) After section 22 of the 2000 Act insert—

#### **“22A Revocation of continuing or welfare power of attorney**

- (1) The granter of a continuing or welfare power of attorney may revoke the power of attorney (or any of the powers granted by it) after the document conferring the power of attorney has been registered under section 19 by giving a revocation notice to the Public Guardian.
- (2) A revocation notice shall be valid only if it is expressed in a written document which—
  - (a) is subscribed by the granter; and
  - (b) incorporates a certificate in the prescribed form by a practising solicitor or by a member of another prescribed class that—
    - (i) he has interviewed the granter immediately before the granter subscribed the document;
    - (ii) he is satisfied, either because of his own knowledge of the granter or because he has consulted another person (whom he names in the certificate) who has knowledge of the granter, that at the time the revocation is made the granter understands its effect;
    - (iii) he has no reason to believe that the granter is acting under undue influence or that any other factor vitiates the revocation of the power.
- (3) The Public Guardian, on receiving a revocation notice, shall—
  - (a) enter the prescribed particulars of it in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be; and
  - (b) notify—
    - (i) the continuing or welfare attorney; and
    - (ii) where it is the welfare attorney who is notified, the local authority and the Mental Welfare Commission.

- (4) A revocation has effect when the revocation notice is registered under this section.
- (5) No liability shall be incurred by any person who acts in good faith in ignorance of the revocation of a power of attorney under this section. Nor shall any title to heritable property acquired by such a person be challengeable on that ground alone.”.
- (8) In section 23(3) (notice of resignation) of the 2000 Act, the words from “(in” to “disorder)” are repealed.
- (9) In section 87(1) (interpretation) of the 2000 Act, after the definition of “power of attorney” insert—
- ““practising solicitor” means a solicitor holding a practising certificate issued in accordance with Part 2 of the Solicitors (Scotland) Act 1980 (c. 46);”.

## 58 Accounts and funds

For Part 3 of the 2000 Act substitute—

### “PART 3

#### ACCOUNTS AND FUNDS

##### *Purposes and application of Part*

### 24A Intromissions with funds

- (1) This Part makes provision for the authorisation of persons by the Public Guardian to intromit with the funds of an adult for the purposes mentioned in subsection (2).
- (2) Those purposes are—
- (a) the payment of central and local government taxes for which the adult is responsible;
  - (b) the provisions of sustenance, accommodation, fuel, clothing and related goods and services for the adult;
  - (c) the provision of other services provided for the purposes of looking after or caring for the adult;
  - (d) the settlement of debts owed by or incurred in respect of the adult, including any prescribed fees charged by the Public Guardian in connection with an application under this Part;
  - (e) the payment for the provision of items other than those mentioned in paragraphs (a) to (d) such as the Public Guardian may, in any case, authorise.

## **24B Adults in respect of whom applications may be made**

- (1) An application to the Public Guardian under this Part may be made only in relation to an adult who is incapable in relation to decisions about, or of safeguarding the adult's interests in, the funds to which the application relates.
- (2) But an application may not be made in the case of an adult in relation to whom—
  - (a) there is a guardian of the type mentioned in section 33(1)(a) with powers relating to the funds in question;
  - (b) there is a continuing attorney with powers relating to the funds in question; or
  - (c) an intervention order relating to the funds in question has been granted.

### *Authority to take preliminary steps*

## **24C Authority to provide information about funds**

- (1) This section applies where a person—
  - (a) believes that an adult holds funds in an account in the adult's sole name; but
  - (b) cannot make an application under section 25 or section 26G because the person does not know—
    - (i) where the account is held;
    - (ii) the account details;
    - (iii) how much is held in the account; or
    - (iv) any other information needed to complete the application.
- (2) Where this section applies, the person may apply to the Public Guardian for a certificate authorising any fundholder to provide the person with such information as the person may reasonably require in order to make an application under section 25 or 26G.
- (3) Where the Public Guardian grants an application under subsection (2), the Public Guardian must issue the certificate to the applicant.
- (4) A fundholder presented with a certificate issued under subsection (3) is not prevented by—
  - (a) any obligation as to secrecy; or
  - (b) any other restriction on disclosure of information,from providing the person who presents the certificate to it with such information as the person may reasonably require in order to make an application under section 25 or 26G about funds held by it on behalf of the adult.

## **24D Authority to open account in adult's name**

- (1) This section applies where—
  - (a) a person believes that—
    - (i) an adult holds funds;

- (ii) an adult is entitled to income or other payments or is likely to become so entitled; or
  - (iii) a fundholder holds funds on behalf of an adult; but
  - (b) the adult does not have a suitable account in the adult's sole name in which the funds, income or other payments can be placed for the purposes of intromitting with the adult's funds under this Part.
- (2) Where this section applies, the person may apply to the Public Guardian for a certificate authorising the opening of an account in the adult's name for the purpose of intromitting with the adult's funds.
  - (3) Where the Public Guardian grants an application under subsection (2), the Public Guardian must issue the certificate to the applicant.
  - (4) The certificate issued under subsection (3) may specify the kind of account which may be opened by a fundholder.
  - (5) A fundholder presented with a certificate issued under subsection (3) may open an account in the adult's name.
  - (6) But, if the certificate specifies a kind of account, the fundholder may open only an account of the type specified.
  - (7) On an account being opened in pursuance of subsection (5), the applicant must notify prescribed particulars of the account to the Public Guardian.

*Authority to intromit***25 Authority to intromit**

- (1) A person mentioned in subsection (2) may apply to the Public Guardian for a certificate authorising the person to intromit with an adult's funds.
- (2) Those persons are—
  - (a) an individual (other than an individual acting in his capacity as an officer of a local authority or other body established by or under an enactment);
  - (b) two or more individuals who wish to act jointly; or
  - (c) a body (other than a manager of an authorised establishment within the meaning of section 35(2)).
- (3) An application under subsection (1) which is accompanied by an application under section 24D may only be granted if—
  - (a) an account is opened in pursuance of section 24D(5); and
  - (b) prescribed particulars of that account are notified to the Public Guardian in pursuance of section 24D(7).
- (4) Where the Public Guardian grants an application under subsection (1), the Public Guardian must—
  - (a) enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii); and
  - (b) issue a certificate of authority (a “withdrawal certificate”) to the applicant.

- (5) No application may be made under subsection (1) if a person is already authorised to intromit with the funds of the adult to whom the application relates (unless the application is made by that person).
- (6) In this Act, an individual or a body who holds a valid withdrawal certificate issued under this Part is referred to as a “withdrawer”.

## **26 Authority to intromit: application**

- (1) An application under section 25(1) must—
  - (a) state the purposes of the proposed intromission with the adult’s funds, setting out the specific sums relating to each purpose;
  - (b) specify an account held by a fundholder in the adult’s sole name which the applicant wishes to use for the purpose of intromitting with the adult’s funds (or be accompanied by an application under section 24D to open an account for that purpose);
  - (c) contain an undertaking that the applicant will open an account (the “designated account”) solely for the purposes of—
    - (i) receiving funds transferred under the authority of any certificate granted; and
    - (ii) intromitting with those funds;
- (2) The application may also specify another account held by a fundholder in the adult’s sole name which the applicant also wishes to use for the purpose of intromitting with the adult’s funds (or be accompanied by an application under section 24D to open an account for that purpose).
- (3) In this Part—
  - (a) the account specified or, as the case may be, opened for the purposes of subsection (1)(b) is referred to as the adult’s current account.
  - (b) the account specified or, as the case may be, opened for the purposes of subsection (2) is referred to as the adult’s second account.

### *Withdrawal certificates*

## **26A Withdrawal certificates**

- (1) A withdrawal certificate may—
  - (a) authorise the transfer of funds—
    - (i) from the adult’s current account to the designated account;
    - (ii) from the adult’s current account to the adult’s second account;
    - (iii) from the designated account to the adult’s second account;
  - (b) authorise the continuance or making of arrangements for the regular or occasional payment of funds from the adult’s current account for specified purposes (for example: by standing order or direct debit);
  - (c) authorise the withdrawal of funds from the designated account for specified purposes;
  - (d) place limits on the amount of funds that may be so transferred, paid or withdrawn.

- (2) But such a certificate does not authorise a transfer of funds or payment that would cause—
- (a) the adult’s current account;
  - (b) the adult’s second account; or
  - (c) the designated account,
- to become overdrawn.
- (3) If any of the accounts mentioned in paragraphs (a) to (c) of subsection (2) is overdrawn, the fundholder of that account has a right of relief against the withdrawer.
- (4) In subsection (1)(b), “specified” means specified in the certificate of appointment.

*Joint and reserve withdrawers*

**26B Addition of joint withdrawer**

- (1) This section applies where an individual has or individuals have been appointed as a withdrawer in relation to an adult.
- (2) Where this sections applies, another individual may apply to the Public Guardian for appointment as a joint withdrawer.
- (3) An application under subsection (1) must be signed by the existing withdrawer.
- (4) Where the Public Guardian grants an application under subsection (1), the Public Guardian must—
- (a) enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii); and
  - (b) issue a certificate of authority (a “withdrawal certificate”) to the existing withdrawer and the applicant.
- (5) Subject to sections 31(2) and 31A, a certificate issued under subsection (4)(b) is valid until the date on which the withdrawal certificate held by the existing withdrawer would cease to be valid under section 31(1) or 31E(6), as the case may be (regardless of any subsequent extension, reduction, termination or suspension of the existing withdrawer’s authority).
- (6) In this section, “the existing withdrawer” means the individual or individuals mentioned in subsection (1).
- (7) In this Part, where two or more individuals are appointed as withdrawers, each individual is referred to as a “joint withdrawer”.

**26C Joint withdrawers: supplementary**

- (1) Joint withdrawers may, subject to subsection (2), exercise their functions individually, and each joint withdrawer is liable for any loss incurred by the adult arising out of—
- (a) the joint withdrawer’s own acts or omissions; or

- (b) the joint withdrawer’s failure to take reasonable steps to ensure that another joint withdrawer does not breach any duty of care or fiduciary duty owed to the adult.
- (2) Where more than one joint withdrawer is liable under subsection (1), they are liable jointly and severally.
- (3) A joint withdrawer must, before exercising any function conferred on the joint withdrawer, consult the other joint withdrawers, unless—
  - (a) consultation would be impracticable in the circumstances; or
  - (b) the joint withdrawers agree that consultation is not necessary.
- (4) Where joint withdrawers disagree as to the exercise of their functions, one or more of them may apply to the Public Guardian for directions.
- (5) Directions given by the Public Guardian in pursuance of subsection (4) may be appealed to the sheriff, whose decision is final.
- (6) Where there are joint withdrawers—
  - (a) a third party in good faith is entitled to rely on the authority to act of any one or more of them; and
  - (b) section 31A(5) (interim authority) only applies where the Public Guardian terminates the authority of all of the joint withdrawers.

#### **26D Reserve withdrawers: applications**

- (1) In any case where an individual is issued with a withdrawal certificate (“a main withdrawer”), the Public Guardian may, on an application by the main withdrawer, appoint another individual (“a reserve withdrawer”) to act as a withdrawer in the event of the main withdrawer temporarily becoming unable to act.
- (2) An application for appointment of a reserve withdrawer may be made at the time of the application under section 25 for a withdrawal certificate or at any later time.
- (3) The application for appointment as a reserve withdrawer must be signed by the proposed reserve withdrawer.
- (4) Where the Public Guardian grants the application, the Public Guardian must enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii).

#### **26E Reserve withdrawers: authority to act**

- (1) Where—
  - (a) a reserve withdrawer has been appointed under section 26D; and
  - (b) the main withdrawer considers that the main withdrawer is or will be unable to carry out some or all of the main withdrawer’s functions under this Part,

the main withdrawer may notify the Public Guardian that the main withdrawer wishes the Public Guardian to authorise the reserve withdrawer to intrude with the adult’s funds for a specified period.

- (2) Where a reserve withdrawer becomes aware that the main withdrawer is unable —
- (a) to carry out some or all of the main withdrawer’s functions in relation to intromitting with the funds concerned; and
  - (b) to notify the Public Guardian under subsection (1),
- the reserve withdrawer may apply to the Public Guardian for a certificate authorising the reserve withdrawer to intromit with the adult’s funds for a specified period.
- (3) The Public Guardian, on being notified under subsection (1), must or, on an application under subsection (2), may—
- (a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iii);
  - (b) issue a certificate of authority (a “withdrawal certificate”) to the reserve withdrawer; and
  - (c) notify the adult and the main withdrawer.
- (4) The certificate issued under subsection (3)(b) is—
- (a) valid for the specified period, or such shorter period as the Public Guardian thinks fit, but does not extend beyond the date on which the validity of the withdrawal certificate issued to the main withdrawer would cease under section 31(1) or 31E(6), as the case may be;
  - (b) suspended during any period when the authority of the main withdrawer is suspended;
  - (c) terminated if the authority of the main withdrawer is terminated.
- (5) The main withdrawer and the reserve withdrawer are liable (jointly and severally) for any loss incurred by the adult arising out of the reserve withdrawer’s acts or omissions.
- (6) In this section, “specified” means specified in the notice or, as the case may be, application.

*Variation of withdrawer’s authority*

**26F Variation of withdrawal certificate**

- (1) The Public Guardian may—
- (a) on the application of a withdrawer, or
  - (b) if notified under section 30A,
- vary the withdrawal certificate (the “existing certificate”) issued to the withdrawer.
- (2) But a withdrawal certificate may not be varied under this section so as to alter the period of validity of the certificate.
- (3) Where the Public Guardian decides to vary the withdrawal certificate under subsection (1), the Public Guardian must—
- (a) enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii); and
  - (b) issue a varied withdrawal certificate to the withdrawer.



- (4) The existing certificate ceases to be valid on the date the varied certificate is issued under subsection (3)(b).

*Authority to transfer funds*

**26G Authority to transfer specified sums**

- (1) A person mentioned in subsection (2) may apply to the Public Guardian for a certificate authorising the transfer of a specified sum from a specified account (“the original account”) in an adult’s sole name to—
- (a) the designated account;
  - (b) the adult’s current account;
  - (c) the adult’s second account; or
  - (d) such other account as may be specified.
- (2) Those persons are—
- (a) a withdrawer;
  - (b) a person who has applied for a withdrawal certificate under section 25;
- (3) An application under subsection (1) may also seek authority—
- (a) to close the original account;
  - (b) to terminate an arrangement for the payment of funds from the original account to another account (for example: a standing order or direct debit).
- (4) Where the Public Guardian grants an application under subsection (1), the Public Guardian must—
- (a) enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii); and
  - (b) issue the certificate to the applicant.
- (5) In this section, “specified” means specified in the application under subsection (1) or, as the case may be, in the certificate granted under subsection (4).

*Applications: general*

**27 Applications: general requirements**

An application under section 24C, 24D, 25, 26B, 26D, 26F or 26G must—

- (a) be signed by the applicant;
- (b) contain the name and addresses of the nearest relative, named person and primary carer of the adult, if known;
- (c) be submitted to the Public Guardian no later than 14 days after—
  - (i) where it is required to be countersigned under section 27A, the day the application is so countersigned, or
  - (ii) in any other case, the day the application is signed by the applicant as mentioned in paragraph (a).

**27A Countersigning of applications**

- (1) An application under section 24C, 24D, 25, or 26B must be countersigned by a person who must declare in the application that—
- (a) the person knows the applicant and has known the applicant for at least one year prior to the date of the application;
  - (b) the person is not any of the following—
    - (i) a relative of or person residing with the applicant or the adult;
    - (ii) a director or employee of the fundholder;
    - (iii) a solicitor acting on behalf of the adult or any other person mentioned in this paragraph in relation to any matter under this Act;
    - (iv) the medical practitioner who has issued the certificate under section 27B in connection with the application;
    - (v) a guardian of the adult;
    - (vi) a welfare or continuing attorney of the adult;
    - (vii) a person who is authorised under an intervention order in relation to the adult;
  - (c) the person believes the information contained in the application to be true; and
  - (d) the person believes the applicant to be a fit and proper person to intromit with the adult's funds.
- (2) An application under section 26D (reserve withdrawers) must be countersigned by a person who must declare in the application the matters set out in paragraphs (a) to (d) of subsection (1) but with references in those paragraphs to “applicant” read as references to the proposed reserve withdrawer.
- (3) This section does not apply to an application made by a body.

**27B Medical certificates**

An application under section 24C, 24D, or 25 must be accompanied by a certificate in prescribed form from a medical practitioner that the adult is—

- (a) incapable in relation to decisions about; or
- (b) incapable of acting to safeguard or promote the adult's interests in, the adult's funds.

**27C Intimation of applications**

- (1) On receipt of a competent application under section 24C, 24D, 25, 26B, 26D, 26F or 26G, the Public Guardian must intimate the application to—
- (a) the adult;
  - (b) the adult's nearest relative;
  - (c) the adult's primary carer;
  - (d) the adult's named person;
  - (e) where the applicant is—
    - (i) the individual mentioned in both paragraph (b) and (c); or

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- (ii) a body other than a local authority,  
the chief social work officer of the local authority; and
- (f) any other person who the Public Guardian considers has an interest in the application.

- (2) A competent application is an application which complies with section 27 and, where appropriate, sections 27A and 27B.

**27D Determination of applications: applicant to be fit and proper**

- (1) The Public Guardian may grant an application made under section 24C, 24D, 25, 26B or 26D only if satisfied that—
  - (a) the applicant in an application under section 24C, 24D, 25 or 26B, or
  - (b) the proposed reserve withdrawer in an application under section 26D, is a fit and proper person to intrude with the funds of the adult.
- (2) In deciding whether a person is fit and proper, the Public Guardian must have regard to any guidance issued in relation to that matter by the Scottish Ministers.

**27E Determination of applications: opportunity to make representations**

- (1) The Public Guardian must not grant an application under section 24C, 24D, 25, 26B, 26D, 26F or 26G without affording to any person who receives intimation of the application under section 27C or any other person who wishes to object an opportunity to make representations.
- (2) Where the Public Guardian proposes to refuse the application the Public Guardian must intimate the proposed decision to the applicant and advise the applicant of the prescribed period within which the applicant may object to the proposed refusal.
- (3) The Public Guardian must not refuse an application without affording to the applicant, if the applicant objects, an opportunity to make representations.

**27F Referral of application to sheriff**

- (1) The Public Guardian may remit an application under section 24C, 24D, 25, 26B, 26D, 26F or 26G for determination by the sheriff at the instance of—
  - (a) the Public Guardian;
  - (b) the applicant; or
  - (c) any person who objects to the granting of the application.
- (2) The sheriff's decision on an application remitted under subsection (1) is final.

**27G Multiple applications etc.**

- (1) Where a person who has made an application under section 24C, 24D or 25 in respect of an adult makes another application under any of those sections in respect of the same adult, the Public Guardian may disapply any of the provisions in sections 27 to 27B to that application.

- (2) Where the Public Guardian is to issue more than one certificate under this Part to the same person, the Public Guardian may instead issue a combined certificate to the person.
- (3) References in this Part to a withdrawal certificate or other certificate issued under this Part include references to any combined certificate issued by the Public Guardian instead of the withdrawal or other certificate.

### *Fundholders*

#### **28 Fundholders of adult’s current account and adult’s second account**

- (1) The fundholder of an adult’s current account may act on the instructions of a withdrawer to the extent authorised by the withdrawal certificate issued to the withdrawer.
- (2) The fundholder of an adult’s current account presented with a withdrawal certificate must not allow any operations to be carried out on that account other than those carried out in accordance with the certificate by the withdrawer.
- (3) The fundholder of an adult’s current account or an adult’s second account presented with a withdrawal certificate may provide the withdrawer with a copy of any statement or other correspondence issued by the fundholder to the adult during the period when the withdrawal certificate is valid.

#### **28A Fundholder of original account**

The fundholder of an original account may act on the instructions of a withdrawer to the extent authorised by the certificate issued to the withdrawer under section 26G(4).

#### **29 Fundholder’s liability**

The fundholder of an account mentioned in section 28 or 28A is liable to the adult for any funds removed from the account under that section at any time when it was aware that the withdrawer’s authority had been terminated or suspended by the Public Guardian under section 31A but, on meeting such liability, the fundholder of the account has a right of relief against the withdrawer.

### *Withdrawers*

#### **30 Use of funds by withdrawer**

- (1) Any funds used by the withdrawer must be applied only for the benefit of the adult.
- (2) Despite subsection (1), where the withdrawer lives with the adult, the withdrawer may, to the extent authorised by the certificate, apply any funds withdrawn towards household expenses.

### **30A Notification of change of address**

- (1) A withdrawer must notify the Public Guardian—
  - (a) of any change in the withdrawer's address; and
  - (b) of any change in the address of the adult.
- (2) A notice under subsection (1) must be given within 7 days of the date of the change to which it relates.

### **30B Records and inquiries**

- (1) A withdrawer must keep records of the exercise of the withdrawer's powers.
- (2) The Public Guardian may make inquiries from time to time as to the manner in which a withdrawer has exercised the withdrawer's functions under this Part.

#### *Duration etc. of authority*

### **31 Duration of withdrawal certificate**

- (1) Unless this Part provides otherwise, a withdrawal certificate issued under section 25 is valid for a period of 3 years commencing with the date of issue of the certificate.
- (2) The Public Guardian may reduce or extend the period of validity of a withdrawal certificate; and an extension may be without limit of time.
- (3) Subsections (1) and (2) are without prejudice to the right of the withdrawer to make subsequent applications under section 25 after the withdrawal certificate ceases to be valid or, as the case may be, a suspension or termination of the withdrawer's authority.
- (4) The validity of a withdrawal certificate ceases—
  - (a) on the appointment of a guardian with powers relating to the funds or account in question;
  - (b) on the granting of an intervention order relating to the funds or account in question; or
  - (c) on a continuing attorney's acquiring authority to act in relation to the funds or account in question,but no liability is incurred by any person who acts in good faith under this Part in ignorance of the withdrawal certificate ceasing to be valid under this subsection.

### **31A Suspension and termination of authority**

- (1) The Public Guardian may suspend or terminate the authority of a withdrawer under a withdrawal certificate.
- (2) The Public Guardian must without delay intimate the suspension or termination to—
  - (a) the withdrawer whose authority is suspended or terminated;

- (b) any other joint withdrawer;
  - (c) any reserve withdrawer; and
  - (d) the fundholder of the designated account; and
  - (e) such other persons as the Public Guardian thinks fit.
- (3) A suspension or termination under subsection (1) suspends or, as the case may be, terminates all operations on the designated account by the withdrawer whose authority is suspended or terminated.
- (4) The Public Guardian must on suspending or terminating the authority of the withdrawer enter prescribed particulars in the register maintained by the Public Guardian under section 6(2)(b)(iii).
- (5) The Public Guardian may on terminating the authority of the withdrawer issue to the withdrawer an interim withdrawal certificate to continue to intromit with the adult's funds for a period not exceeding 4 weeks from the date of the termination.

### **31B Renewal of authority to intromit**

- (1) This section applies to an application under section 25 if condition A or B is satisfied.
- (2) Condition A is that the application is made by a person holding an existing withdrawal certificate.
- (3) Condition B is that—
- (a) the main withdrawer has died or become incapable or the main withdrawer's authority under this Part has been terminated; and
  - (b) the application is made, without undue delay, by an individual who was the reserve withdrawer at the time of the death, incapacity, or termination, as the case may be.
- (4) Where this section applies, the Public Guardian may disapply any of the provisions in sections 26(1), 27A and 27B to an application to which this section applies (but may require the applicant to provide such other information as the Public Guardian requires to determine the application).
- (5) Where condition A is satisfied in relation to an application under section 25, the existing withdrawal certificate will continue to be valid until the application is determined.
- (6) Where an application to which this section applies is granted, the existing withdrawal certificate ceases to be valid.

### **31C Duration of certificates issued under section 24C, 24D, and 26G etc.**

- (1) A certificate issued under section 24C, 24D or 26G is valid for such period as it may specify.
- (2) But the Public Guardian may cancel the certificate at any time before the end of any period so specified.
- (3) The Public Guardian must without delay intimate such a cancellation to—
- (a) the person to whom the certificate was issued,

- (b) where the certificate was issued under section 26G, the fundholder of the original account, and
- (c) such other persons as the Public Guardian thinks fit.

### *Appeals*

#### **31D Appeals**

- (1) A decision of the Public Guardian—
  - (a) to grant or refuse an application under section 24C, 24D, 25, 26B, 26D, 26E, 26F or 26G;
  - (b) to refuse to remit an application to the sheriff under section 27F;
  - (c) to reduce or extend the period of validity of a withdrawal certificate under section 31(2); or
  - (d) to suspend or terminate the authority of a withdrawer under section 31A,may be appealed to the sheriff.
- (2) The sheriff's decision on an appeal under subsection (1) is final.

### *Transition from guardianship*

#### **31E Transition from guardianship**

- (1) This section applies where—
  - (a) there is a guardian with powers relating to the property or financial affairs of an adult; and
  - (b) an application is made under section 25 in relation to the adult's funds.
- (2) Section 27A does not apply to the application if it is made by the adult's guardian.
- (3) The Public Guardian may disapply section 27B to the application.
- (4) Where—
  - (a) it appears to the Public Guardian that, if the application were granted, the adult's interests in the adult's property and affairs can be satisfactorily safeguarded or promoted otherwise than by the existing guardianship; and
  - (b) the Public Guardian proposes to grant the application,the Public Guardian must initiate the recall of the guardianship under section 73.
- (5) The Public Guardian may not grant the application unless the guardianship is recalled.
- (6) Where the Public Guardian grants the application, the withdrawal certificate issued to the withdrawer is valid for such period as the Public Guardian specifies at the time the Public Guardian grants the application.
- (7) This section does not apply, and no application under this Part may be made, in the case of an adult if there is a person who is—

- (a) appointed or otherwise entitled under the law of any country other than Scotland to act as a guardian (however called) in relation to the adult's property and financial affairs during the adult's incapacity; and
  - (b) recognised by the law of Scotland as the adult's guardian.
- (8) Despite subsection (7), no liability is incurred by any person who acts in good faith under this Part in ignorance of any guardian of the type mentioned in that subsection.

### *Miscellaneous*

#### **32 Joint accounts**

Where an individual who along with one or more others is the holder of a joint account with a fundholder becomes incapable in relation to decisions about, or of safeguarding the individual's interests in, the funds in the account, any other joint account holder may continue to operate the account unless—

- (a) the terms of the account provide otherwise; or
- (b) the joint account holder is barred by an order of any court from so doing.

### *Interpretation*

#### **33 Interpretation of Part**

- (1) In section 24B, 27A and 31 any reference to—
- (a) a guardian includes a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
  - (b) a continuing attorney includes a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity.
  - (c) a welfare attorney includes a reference to 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.
- (2) In this Part—
- “fundholder” means a bank, building society or other similar body which holds funds on behalf of another person;
  - “withdrawal certificate” means a certificate issued under section 25, 26B, 26E, 26F or 31A.”.

#### **59 Intervention orders**

- (1) In section 53 (intervention orders) of the 2000 Act—
- (a) in subsection (4), for “Section 57(3) and (4)” substitute “Subsections (3), (3A), (3B) and (4) of section 57”,



- (b) in subsection (7)—
    - (i) the word “and” and the words from “shall” to the end of paragraph (b) are repealed, and
    - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
  - (c) in subsection (10)—
    - (i) the word “and” which immediately follows paragraph (a) is repealed,
    - (ii) after paragraph (a) insert—
      - “(aa) when satisfied that the person authorised under the order has found caution or given other security if so required, issue a certificate of appointment to the person; and”,
    - (iii) in paragraph (b), after “Commission” insert “of the terms of the interlocutor”.
- (2) In section 55 (notice of change of address), for the words from “notify”, where first occurring, to “Guardian”, where second occurring, substitute “, not later than 7 days after any change of the person’s or the adult’s address, notify the Public Guardian of the change who”.
- (3) After section 56 insert—

#### **“56A Death of person authorised to intervene**

Where a person authorised under an intervention order dies, the person’s personal representatives shall, if aware of the existence of the authority, notify the Public Guardian who shall—

- (a) notify—
  - (i) the adult;
  - (ii) the local authority; and
  - (iii) in a case where the adult’s incapacity is by reason of, or reasons which include, mental disorder and the intervention order relates to the adult’s personal welfare or factors including it, the Mental Welfare Commission; and
- (b) enter prescribed particulars in the register maintained under section 6(2)(b)(v).”.

## **60 Guardianship orders**

- (1) In section 57 (guardianship orders) of the 2000 Act—
- (a) in subsection (3)(a), for “an approved” substitute “a relevant”,
  - (b) after subsection (3), insert—
    - “(3A) Subsection (3B) applies where a report lodged under subsection (3) (a) relates to an examination and assessment carried out more than 30 days before the lodging of the application.
    - (3B) Where this subsection applies, the sheriff may, despite subsection (3) (a), continue to consider the application if satisfied that there has been no change in circumstances since the examination and assessment

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- was carried out which may be relevant to matters set out in the report.”,
- (c) in subsection (6)(b), for the words from “period” to “appointment” substitute “effective period”,
- (d) after subsection (6) insert—
- “(6A) The “effective period”, for the purposes of subsection (6), means—
- (a) the period of 3 months beginning with the date of appointment; or
- (b) such longer period (not exceeding 6 months) beginning with that date as the sheriff may specify in the order.
- (6B) In subsection (3)(a), “relevant medical practitioner” means—
- (a) an approved medical practitioner;
- (b) where the adult concerned is not present in Scotland, a person who—
- (i) holds qualifications recognised in the place where the adult is present and has special experience in relation to the diagnosis and treatment of mental disorder which correspond to the qualifications and experience needed to be an approved medical practitioner; and
- (ii) has consulted the Mental Welfare Commission for Scotland about the report concerned; or
- (c) any other type of individual described (by reference to skills, qualifications, experience or otherwise) by regulations made by the Scottish Ministers.
- (6C) The Scottish Ministers shall consult the Mental Welfare Commission before making regulations under subsection (6B)(c).”,
- (e) in subsection (7), for “(3)(a)” substitute “(6B)”.
- (2) In section 58 (disposal of application for guardianship) of the 2000 Act—
- (a) in subsection (6)—
- (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
- (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
- (b) in subsection (7)(b), after “caution” insert “or given other security”.
- (3) In section 60 (renewal of guardianship)—
- (a) for subsection (3) substitute—
- “(3) There must be lodged in court along with an application under this section—
- (a) at least one report, in the prescribed form, of an examination and assessment of the adult carried out by a medical practitioner not more than 30 days before the lodging of the application;
- (b) where the application relates to the adult’s personal welfare, a report, in the prescribed form, from the mental health officer (but where it is in jeopardy only because of the adult’s

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inability to communicate, from the chief social work officer), containing the officer's opinion as to—

- (i) the general appropriateness of continuing the guardianship, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application; and
  - (ii) the suitability of the applicant to continue to be the adult's guardian; and
- (c) where the application relates to the adult's property or financial affairs, a report from the Public Guardian, in the prescribed form, containing the Public Guardian's opinion as to—
- (i) the applicant's conduct as the adult's guardian; and
  - (ii) the suitability of the applicant to continue to be the adult's guardian.

(3A) In a case where the incapacity is by reason of mental disorder—

- (a) where a single report is lodged under subsection (3)(a), the related examination and assessment must be carried out by a relevant medical practitioner;
- (b) where 2 or more reports are so lodged, at least one of the related examinations and assessments must be carried out by a relevant medical practitioner.

“Relevant medical practitioner” has the same meaning in this subsection as it has in section 57(3)(a) (see definition in section 57(6B)).”

(b) after subsection (4) insert—

“(4A) A sheriff may determine an application made under this section without hearing the parties.”

(4) In section 61(3) (application for registration of guardianship order) of the 2000 Act, after “caution” insert “or giving other security”.

(5) In section 62(5)(b) (duty to issue certificate of additional guardian's appointment) of the 2000 Act, after “caution” insert “or given other security”.

(6) In section 63 (substitute guardian) of the 2000 Act—

- (a) in subsection (5)—
  - (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
  - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
- (b) in subsection (9)(b), after “caution” insert “or given other security”.

(7) In section 64(2)(b) (medical treatment to which a guardian cannot consent), for “mentioned in section 48(1) or (2)” substitute “in relation to which the authority conferred by section 47(2) does not apply by virtue of regulations made under section 48(2)”.

(8) In section 70 (non-compliance with guardian's decisions)—

- (a) in subsection (1), the words “or by any other person”, “or other person” and “or any person named in the order” are repealed,

- (b) after subsection (4) insert—
- “(4A) The sheriff may, on cause shown, disapply or modify the application of—
- (a) subsection (3); and
  - (b) subsection (4) in so far as it requires the sheriff to hear objections.”.

(9) In section 71 (replacement etc. of guardian) of the 2000 Act—

    - (a) in subsection (2)—
      - (i) for the words from “shall” to the end of paragraph (b) substitute “may”,
      - (ii) after “caution”, where last occurring, insert “or to give such other security as the sheriff thinks fit”,
    - (b) in subsection (3)(b)—
      - (i) in sub-paragraph (i), after “caution” insert “or given other security”,
      - (ii) in sub-paragraph (ii), after “caution” insert “or given other security”.

(10) In section 72(1) (discharge of guardian with financial powers), after paragraph (a) insert—

“(aa) the expiry of such a guardianship order;”.

(11) In section 73 (recall of guardian’s powers) of the 2000 Act—

    - (a) in subsection (3), the words from “(other” to “guardian)” are repealed,
    - (b) after subsection (3) insert—
 

“(3A) The Mental Welfare Commission may recall the powers of a guardian under subsection (3) only if those powers were granted in a case where the adult’s incapacity is by reason of, or reasons which include, mental disorder.”,
    - (c) after subsection (10) insert—
 

“(11) Section 73A modifies the application of this section in relation to the recall by a local authority of guardianship powers held by their chief social work officer.”.

(12) After section 73 of the 2000 Act insert—

**“73A Recall of chief social work officer’s guardianship powers**

- (1) This section applies where—
  - (a) a local authority’s chief social work officer is appointed as a guardian; and
  - (b) either—
    - (i) the local authority wish to recall their chief social work officer’s guardianship powers at their own instance; or
    - (ii) another person (including the adult himself) applies to the local authority for such a recall.
- (2) Where this section applies—
  - (a) the local authority shall, for the purposes of section 73(5), treat the Public Guardian and the Mental Welfare Commission as persons

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- whom they consider to have an interest in the recall of the guardian's powers; and
- (b) if the Public Guardian, the Mental Welfare Commission or any other person to whom intimation is given under section 73(5) objects to the recall of the guardian's powers, the local authority—
- (i) shall not recall the guardian's powers; but
  - (ii) shall instead remit the matter for determination by the sheriff under section 73(8)."
- (13) In section 74 (variation of guardianship) of the 2000 Act—
- (a) in subsection (2)—
    - (i) for the words from "shall" to the end of paragraph (b) substitute "may",
    - (ii) after "caution", where last occurring, insert "or to give such other security as the sheriff thinks fit",
  - (b) in subsection (5)(c), after "caution" insert "or other security".
- (14) In section 75(3)(b) (duty to issue certificate of substitute guardian's appointment) of the 2000 Act, after "caution" insert "or given other security".
- (15) After section 75 insert—

#### **"75A Death of guardian**

The personal representatives of a guardian who dies shall, if aware of the existence of the guardianship, notify the Public Guardian who shall—

- (a) notify—
    - (i) the adult;
    - (ii) the local authority; and
    - (iii) in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors including it, the Mental Welfare Commission;
  - (b) enter prescribed particulars in the register maintained under section 6(2)(b)(iv); and
  - (c) issue a new certificate of appointment—
    - (i) to any surviving joint guardian;
    - (ii) where the Public Guardian is satisfied that any substitute guardian appointed in respect of the dead guardian is willing to act and has found caution or given other security if so required, to the substitute guardian."
- (16) After section 79 insert—

*"Guardianship orders: children*

#### **79A Guardianship orders: children**

Sections 57 to 79 apply in relation to a child who will become an adult within 3 months as they apply in relation to an adult; but no guardianship order made in relation to a child shall have effect until the child becomes an adult."

(17) In paragraph 6 (application of 2000 Act to curator bonis, tutor-dative or tutor-at-law treated as guardian appointed under that Act) of schedule 4 to the 2000 Act—

(a) in sub-paragraph (3), for the words from “to the period” to the end of that sub-paragraph substitute “—

(a) in the case of a curator bonis who, under paragraph 1(2), became guardian to a person on the person attaining the age of 16 years, to the period of 2 years from the later of the following dates—

(i) the date on which section 60(17) (which amends this paragraph) of the Adult Support and Protection (Scotland) Act 2007 (asp 10) came into force;

(ii) the date on which the person attained the age of 16 years,

(b) in any other case, to the period of 2 years from the date on which section 60(17) (which amends this paragraph) of the Adult Support and Protection (Scotland) Act 2007 (asp 10) came into force.”,

(b) after sub-paragraph (3) insert—

“(3A) A person who has become a guardian to an adult by virtue of this schedule and who was a curator bonis, tutor dative or tutor-in-law to that adult shall cease to be authorised to act as that adult’s guardian—

(a) where the person does not apply for renewal of guardianship within the 2 year period set by sub-paragraph (3), on the expiry of that period;

(b) where—

(i) the person applies for such a renewal within that period; and

(ii) the sheriff refuses the application, on the date of refusal;

(c) where—

(i) the person applies for such a renewal within that period; and

(ii) the sheriff grants the application,

in accordance with the provisions of this Act.

(3B) Sub-paragraph (3A) does not prevent the authority of a guardian of the type mentioned in that sub-paragraph from being terminated (by virtue of the terms on which the guardian is authorised to act or sections 71, 73, 75 or 79A) earlier than the date on which it would otherwise terminate by operation of that sub-paragraph.

(3C) Where—

(a) a person (“G”) who was a curator bonis, tutor dative or tutor-at-law to an adult becomes the adult’s guardian by virtue of this schedule; and

(b) another person is appointed under section 62 as an additional guardian to the adult before G’s appointment

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as guardian has been renewed in accordance with the provisions of this Act,  
subsection (3A) applies in relation to the additional guardian as it applies in relation to G.

- (3D) The Public Guardian must take reasonable steps to give notice of the effect of sub-paragraph (3A) to any person who—
- (a) is a guardian to an adult by virtue of this schedule;
  - (b) was a curator bonis to that adult; and
  - (c) has not applied for renewal of guardianship.
- (3E) A local authority must take reasonable steps to give notice of the effect of sub-paragraph (3A) to any person who—
- (a) is a guardian to an adult residing within the local authority's area by virtue of this schedule;
  - (b) was a tutor dative or tutor-in-law to that adult; and
  - (c) has not applied for renewal of guardianship.”.

## **61 Power to obtain records**

After section 81 of the 2000 Act insert—

### **“81A Public Guardian’s power to obtain records**

- (1) The Public Guardian may, when carrying out an investigation under section 6(2)(c) or (d) or inquiries under section 30B(2)—
- (a) require any person falling within subsection (2) to provide the Public Guardian with—
    - (i) the person’s records of the exercise of the person’s powers in relation to the adult to whom the investigation relates; and
    - (ii) such other information relating to the exercise of those powers as the Public Guardian may reasonably require,
  - (b) require any person who holds (or who has held) funds on behalf of the adult to whom the investigation relates to provide the Public Guardian with—
    - (i) its records of the account; and
    - (ii) such other information relating to those accounts as the Public Guardian may reasonably require.
- (2) A person falls within this subsection if the person is or has been—
- (a) a continuing attorney appointed by the adult to whom the investigation relates;
  - (b) a withdrawer with authority to intromit with that adult’s funds;
  - (c) a person authorised under an intervention order to act in relation to that adult; or
  - (d) that adult’s guardian.
- (3) A fundholder may charge a reasonable fee for complying with a requirement under subsection (1)(b) and may recover that fee from the account concerned.”.

### PART 3

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

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

- (1) In the National Assistance Act 1948 (c. 29)—
- (a) sections 42 and 43 are repealed, and
  - (b) in section 65(f)—
    - (i) after “expressed” insert “in sections 22(2) to (8) and 26(2) to (4) of this Act”,
    - (ii) for the word “thereof” substitute “of this Act”.
- (2) In section 87(3) of the Social Work (Scotland) Act 1968 (c. 49), for the words from “(as amended”, where first occurring, to “etc.)” substitute “(as amended by any enactment within the meaning of the Scotland Act 1998 (c. 46)) of the said Act of 1948”.
- (3) In section 4(1)(b) of the Community Care and Health (Scotland) Act 2002 (asp 5), the words from “including” to the end of paragraph (b) are repealed.

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

In section 12B(6) of the Social Work (Scotland) Act 1968 (c. 49), before paragraph (a) insert—

“(za) make provision for the delegation of functions to local authorities;”.

#### **64 Power to help incapable adults to benefit from social services etc.**

After section 13 of Social Work (Scotland) Act 1968 (c. 49) insert—

##### **“13ZA Provision of services to incapable adults**

- (1) Where—
- (a) a local authority have decided under section 12A of this Act that an adult’s needs call for the provision of a community care service; and
  - (b) it appears to the local authority that the adult is incapable in relation to decisions about the service,
- the local authority may take any steps which they consider would help the adult to benefit from the service.
- (2) Without prejudice to the generality of subsection (1) above, steps that may be taken by the local authority include moving the adult to residential accommodation provided in pursuance of this Part.
- (3) The principles set out in subsection (2) to (4) of section 1 of the 2000 Act apply in relation to any steps taken under subsection (1) above as they apply to interventions in the affairs of an adult under or in pursuance of that Act.
- (4) Subsection (1) does not authorise a local authority to take steps if they are aware that—
- (a) there is a guardian or welfare attorney with powers relating to the proposed steps;



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- (b) an intervention order has been granted relating to the proposed steps; or
- (c) an application has been made (but not yet determined) for an intervention order or guardianship order under Part 6 of the 2000 Act relating to the proposed steps.

(5) In this section—

- (a) “the 2000 Act” means the Adults with Incapacity (Scotland) Act 2000 (asp 4);
- (b) “adult” has the meaning given in section 1(6) of the 2000 Act;
- (c) “community care service” has the meaning given in section 5A of this Act;
- (d) “incapable” has the meaning given in section 1(6) of the 2000 Act;
- (e) “intervention order” is to be construed in accordance with section 53 of the 2000 Act”;
- (f) the reference to a guardian includes a reference to—
  - (i) a guardian appointed under the 2000 Act; and
  - (ii) a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
- (g) the reference to a welfare attorney includes a reference to—
  - (i) a welfare attorney within the meaning of section 16 of the 2000 Act; and
  - (ii) 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.”.

## 65 Adjustments between councils in relation to social services etc.

(1) Section 86 (adjustments between local authority providing services and local authority of area of ordinary residence) of the Social Work (Scotland) Act 1968 (c. 49) is amended as follows—

- (a) in subsection (1)—
  - (i) for “section”, where first occurring, substitute “subsection”,
  - (ii) after paragraph (b) insert—
    - “(ba) in making a payment under section 12B of this Act in relation to the provision of a service for a person ordinarily so resident; or”,
- (b) in subsection (3)—
  - (i) after “child,”, where first occurring, insert “any period during which he is provided with accommodation under this Act or under sections 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13),”,
  - (ii) for the words from “hospital”, where first occurring, to “1978”, where second occurring, substitute “health service hospital (within the meaning of section 108(1) of the National Health Service (Scotland) Act 1978 (c. 29))”,
- (c) after subsection (3) insert—

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- “(4) This subsection applies where a local authority (“the responsible authority”) performs a function under—
- (a) this Act;
  - (b) Part II of the Children (Scotland) Act 1995 (c. 36); or
  - (c) section 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13),
- by making arrangements with a person (“the provider”) in terms of which the provider undertakes to accommodate, or to secure accommodation for, another person.
- (5) Where subsection (4) applies—
- (a) any expenditure incurred under the arrangements by a provider which is a local authority is recoverable from the responsible authority; and
  - (b) any period during which the person is accommodated under the arrangements is to be disregarded in determining the person’s ordinary residence for the purposes of subsection (1) of this section.
- (6) The Scottish Ministers may make regulations specifying circumstances in which a local authority (“the providing authority”) may recover from another local authority (“the other authority”) expenditure which the providing authority incurs in the provision of services or facilities under arrangements made with the other authority for the purpose of enabling that other authority to perform a function under—
- (a) this Act;
  - (b) Part II of the Children (Scotland) Act 1995 (c. 36); or
  - (c) section 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13).
- (7) The Scottish Ministers may make regulations specifying circumstances which must be taken into account, or disregarded, when determining a person’s ordinary residence for the purposes of subsection (1) of this section (and such regulations may modify subsection (2), (3) and (5)(b) of this section).
- (8) Regulations made under subsection (6) or (7) of this section may—
- (a) make different provision for different cases and for different persons;
  - (b) include such supplementary, incidental, consequential and transitional provisions and savings as the Scottish Ministers think fit.
- (9) Despite section 90(2) of this Act, no statutory instrument containing regulations made under subsection (7) of this section which includes provisions which modify this section may be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.

- (10) References in subsections (4) to (6) of this section to a local authority which is providing accommodation, service or facilities include references to a local authority in England or Wales.”.
- (2) In section 2 of the Community Care and Health (Scotland) Act 2002 (asp 5), for “section 87(2)” substitute “sections 86 and 87(2)”.

## **66 Application of Social Work (Scotland) Act 1968: persons outwith Scotland**

After section 87 of the Social Work (Scotland) Act 1968 (c. 49) insert—

### **“87A Power to modify Act for persons placed from outwith Scotland**

- (1) The Scottish Ministers may make regulations modifying this Act in such manner as they think fit for the purposes of applying or disapplying any of its provisions in relation to persons placed in Scotland by virtue of arrangements made by—
- (a) a local authority in any other part of the United Kingdom or in any of the Channel Islands or the Isle of Man;
  - (b) any other public body or office-holder exercising functions in relation to any other part of the United Kingdom, or any of the Channel Islands or the Isle of Man, as may be specified in the regulations.
- (2) Such regulations may—
- (a) make different provision for different cases and for different persons;
  - (b) include such supplementary, incidental, consequential and transitional provisions and savings as the Scottish Ministers think fit.
- (3) Despite section 90(2) of this Act, no statutory instrument containing such regulations may be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.”.

## **67 Public Guardian: interaction with courts**

After section 6(2)(d) of the Adults with Incapacity (Scotland) Act 2000 (asp 4), insert

- “(da) to take part as a party in any proceedings before a court or to initiate such proceedings where he considers it necessary to do so to safeguard the property or financial affairs of an adult who is incapable for the purposes of this Act;”.

## **PART 4**

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

## **68 Review of determination extending compulsory treatment order**

Section 101 (duty of Mental Health Tribunal to review determination extending compulsory treatment order) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) is amended as follows—

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- (a) for subsection (2)(b) substitute—
  - “(b) the conditions in subsection (3) are satisfied in relation to the compulsory treatment order to which the determination relates,”
- (b) after subsection (2) insert—
  - “(3) The conditions mentioned in subsection (2)(b) above are—
    - (a) that the order was made 2 or more years before the renewal day;
    - (b) that this section did not require the Tribunal to review the previous determination made under section 86 of this Act in relation to the order; and
    - (c) that, in the period of 2 years ending with the day before the renewal day, no application has been made to the Tribunal under section 92, 99, 95 or 100 in relation to the order.
  - (4) In subsection (3) above, the renewal day is the first day on which the order, had it not been extended by the determination, would not authorise the measures specified in it.”

## 69      **Compulsion orders: revocation**

- (1) In section 183(5)(b)(ii) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) substitute—
  - “(ii) either—
    - (A) that the conditions mentioned in paragraphs (b) and (c) of section 182(4) of this Act continue to apply in respect of the patient; or
    - (B) that it continues to be necessary for the patient to be subject to the compulsion order.”
- (2) In section 184(4)(b)(ii) of that Act substitute—
  - “(ii) either—
    - (A) that the conditions mentioned in paragraphs (b) and (c) of section 182(4) of this Act continue to apply in respect of the patient; or
    - (B) that it continues to be necessary for the patient to be subject to the compulsion order.”
- (3) In section 188(4)(b)(ii) of that Act substitute—
  - “(ii) either—
    - (A) that the conditions mentioned in paragraphs (b) and (c) of section 182(4) of this Act continue to apply in respect of the patient; or
    - (B) that it continues to be necessary for the patient to be subject to the compulsion order.”
- (4) In section 193(4)(b)(ii) of that Act substitute—
  - “(ii) either—

- (A) that the conditions mentioned in paragraphs (b) and (c) of section 182(4) of this Act continue to apply in respect of the patient; or
- (B) that it continues to be necessary for the patient to be subject to the compulsion order.”.

## **70 Hospital directions and transfer for treatment directions: revocation**

- (1) For section 207(5)(b)(ii) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) substitute—

“(ii) either—

- (A) that the conditions mentioned in paragraph (b) and (c) of section 206(4) of this Act continue to apply in respect of the patient; or
- (B) that it continues to be necessary for the patient to be subject to the direction.”.

- (2) For section 208(4)(b)(ii) of that Act substitute—

“(ii) either—

- (A) that the conditions mentioned in paragraph (b) and (c) of section 206(4) of this Act continue to apply in respect of the patient; or
- (B) that it continues to be necessary for the patient to be subject to the direction.”.

- (3) For section 210(2)(b)(ii) of that Act substitute—

“(ii) either—

- (A) that the conditions mentioned in paragraph (b) and (c) of section 206(4) of this Act continue to apply in respect of the patient; or
- (B) that it continues to be necessary for the patient to be subject to the direction.”.

- (4) For section 212(4)(b)(ii) of that Act substitute—

“(ii) either—

- (A) that the conditions mentioned in paragraph (b) and (c) of section 206(4) of this Act continue to apply in respect of the patient; or
- (B) that it continues to be necessary for the patient to be subject to the direction.”.

- (5) For section 215(4)(b)(ii) of that Act substitute—

“(ii) either—

- (A) that the conditions mentioned in paragraph (b) and (c) of section 206(4) of this Act continue to apply in respect of the patient; or
- (B) that it continues to be necessary for the patient to be subject to the direction.”.

**71 Compulsory treatment orders and compulsion orders: cross-border transfer of patients etc.**

(1) Section 289 (cross-border transfer of patients subject to requirements other than detention) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) is amended as follows—

(a) in subsection (1)—

(i) the words from “the”, where first occurring, to the end of the subsection become paragraph (a),

(ii) at end insert—

“(b) the reception in Scotland of a person subject to corresponding requirements in England, Wales, Northern Ireland, the Isle of Man or the Channel Islands and removed from there.”,

(b) in subsection (2), for “that provision is made” substitute “provision is made by regulations under paragraph (a) of subsection (1) above”,

(c) after subsection (2) insert—

“(2XA) Where provision is made by regulations under paragraph (a) of subsection (1) above, the regulations may make provision for exceptions to provisions included in them by virtue of subsection (2) (d).

(2YA) Where provision is made by regulations under paragraph (b) of subsection (1) above, the regulations shall provide for the reception of persons to take place only if—

(a) the managers of a hospital consent to the reception; and

(b) those managers undertake to appoint an approved medical practitioner to be the person’s responsible medical officer.

(2ZA) Regulations under subsection (1) above may in particular—

(a) make provision for things done under the law of a territory other than Scotland to be treated as things done under provisions of the law of Scotland,

(b) confer powers and immunities on persons engaged in—

(i) escorting persons being moved under the regulations;

(ii) pursuing persons who have absconded while being so moved;

(iii) restraining persons who have absconded, or attempt to abscond, while being so moved;

(c) make provision amending provisions of this Act (other than this section) or any other enactment, or providing for any such provision or enactment to have effect with modification.”,

(d) in subsection (2A), for “Subsection (2) above is” substitute “Subsections (2) to (2ZA) above are”,

(e) after subsection (3) insert—

“(4) For the purposes of subsection (1)(b) above, a person is subject to “corresponding requirements” in a territory if under the law of that territory the person is subject to measures corresponding or similar to a requirement imposed in relation to a person under section 66(1)

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of this Act or section 57A(8) of the 1995 Act, not being detention in a hospital.”.

- (2) In section 309 (patients from other jurisdictions) of that Act—
- (a) in subsection (1), after “to”, where third occurring, insert “corresponding requirements or”;
  - (b) after subsection (2) insert—

“(2A) The reference in subsection (1) above to persons subject to corresponding requirements shall be construed in accordance with section 289(4) of this Act.”.
- (3) In section 316(1)(c) (offence of inducing or assisting patient to abscond), after “section” insert “289 or”.
- (4) In section 326(4)(c) (regulations subject to affirmative resolution) of that Act, after “286,” insert “289,”.

## **72 Cross-border visits: leave of absence**

- (1) After section 309 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ([asp 13](#)), insert—

### **“309A Cross-border visits: leave of absence**

- (1) Regulations may make provision for and in connection with the keeping in charge of a person who is subject to a corresponding suspension of detention in England, Wales, Northern Ireland, the Isle of Man or the Channel Islands.
  - (2) Those regulations may—
    - (a) make provision applying sections 301 to 303 of this Act to such persons;
    - (b) make such modifications of those sections in that application as the Scottish Ministers think fit.
  - (3) A person is subject to a “corresponding suspension of detention” in a territory if under the law of that territory—
    - (a) but for the leave of absence mentioned in paragraph (b), the person would be subject to measures corresponding or similar to detention in hospital authorised by virtue of this Act or the 1995 Act; and
    - (b) the person has been granted a leave of absence subject to a condition corresponding or similar to the condition set out in section 127(6)(a) of this Act.”.
- (2) In section 326(4)(c) (regulations subject to affirmative resolution) of that Act, after “309,” insert “309A,”.

## **73 Applications to the Mental Health Tribunal for Scotland**

After paragraph 13 of schedule 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 ([asp 13](#)), insert—

*“Withdrawn applications to be disregarded for certain purposes*

- 13A For the purposes of sections 101(3)(c), 189(2)(a)(ii) and (b)(ii) and 213(2)(a)(ii) and (b)(ii) of this Act, an application to the Tribunal which is withdrawn by the applicant before it is determined is to be treated as not having been made.”.

**74 Mental Health Act 1983: repeal of power to return patients absent from hospital etc.**

Sections 88 and 128 of the Mental Health Act 1983 (c. 20) are repealed.

**75 Assessment orders: amendment of Criminal Procedure (Scotland) Act 1995**

The Criminal Procedure (Scotland) Act 1995 (c. 46) is amended as follows—

- (a) in section 144 (procedure at first diet)—
- (i) in subsection (1), after “section 145” insert “or 145ZA”,
  - (ii) in subsection (9), after “section 145” insert “, 145ZA”,
- (b) after section 145 insert—

**“145ZA Adjournment where assessment order made at first calling**

Where the accused is present at the first calling of a case in a summary prosecution the court may, where it makes an assessment order in respect of the accused, adjourn the case under this section for a period not exceeding 28 days without calling on the accused to plead to any charge against him; and the court may so adjourn the case for a further period not exceeding 7 days.”.

**PART 5**

FINAL PROVISIONS

**76 Ancillary provision**

- (1) The Scottish Ministers may by order make—
- (a) such supplementary, incidental or consequential provision, or
  - (b) such transitional, transitory or saving provision,
- as they consider appropriate for the purposes of, or in consequence of, or for giving full effect to, any provision made by virtue of this Act.
- (2) An order under subsection (1) may modify any enactment, instrument or document.

**77 Minor and consequential amendments and repeals**

- (1) Schedule 1 contains minor and consequential amendments.
- (2) The enactments mentioned in the first column in schedule 2 are repealed to the extent specified in the second column.



## **78 Orders**

- (1) Any power of the Scottish Ministers under this Act to make an order is exercisable by statutory instrument.
- (2) Any such power includes power to make different provision for different purposes.
- (3) Subject to subsection (4), a statutory instrument containing an order (other than an order made under section 79(3)) made under this Act is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (4) A statutory instrument containing an order made under section 76 containing provisions which add to, replace or omit any part of the text of this or any other Act may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.

## **79 Commencement**

- (1) This Part (other than section 77) comes into force on Royal Assent.
- (2) Sections 64, 69 and 70 come into force on the day after Royal Assent.
- (3) Section 77, and the provisions of Parts 1 to 4 (except sections 64, 69 and 70), come into force on such day as the Scottish Ministers may by order appoint.
- (4) Such an order may also make such transitional, transitory or saving provision as the Scottish Ministers consider appropriate.

## **80 Short title**

This Act may be cited as the Adult Support and Protection (Scotland) Act 2007.

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*Status: This is the original version (as it was originally enacted).*

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## SCHEDULE 1

(introduced by section 77(1))

### MINOR AND CONSEQUENTIAL AMENDMENTS

#### *National Assistance Act 1948 (c. 29)*

- 1 The National Assistance Act 1948 is amended as follows—
- (a) in section 26(4)—
    - (i) for “Subsections (5A), (7) and (9)” substitute “Subsection (5A)”,  
and
    - (ii) for “they apply” substitute “it applies”,
  - (b) in section 51—
    - (i) in subsection (1), for “, himself or any other person” substitute “him”,
    - (ii) in subsection (3), after “conviction” insert “to imprisonment for a term not exceeding 3 months.”.

#### *Disabled Persons (Services, Consultation and Representation) Act 1986 (c. 33)*

- 2 The Disabled Persons (Services, Consultation and Representation) Act 1986 is amended as follows—
- (a) in section 7(2)(a), for “1984” substitute “2003”,
  - (b) in section 16—
    - (i) in paragraph (b) of the definition of “mental disorder”, for the words “section 1(2) of the 1984 Act” substitute “section 328 of the 2003 Act”,
    - (ii) in the definition of “State hospital”, for “1984” substitute “2003” .

#### *Legal Aid (Scotland) Act 1986 (c. 47)*

- 3 The Legal Aid (Scotland) Act 1986 is amended as follows—
- (a) in section 34(2), after the last paragraph insert—
    - “(g) in pursuance of a requirement made under section 10(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).”,
  - (b) in section 36(3)(bb)—
    - (i) after “is” insert “applying for an order under section 53(1), 57(1), 60(1), 62(1) or 63(1) of the Adults with Incapacity (Scotland) Act 2000 (asp 4) (in relation to himself or any other adult) or is otherwise”,
    - (ii) for “the Adults with Incapacity (Scotland) Act 2000 (asp 4)” substitute “that Act”.

#### *Criminal Procedure (Scotland) Act 1995 (c. 46)*

- 4 The Criminal Procedure (Scotland) Act 1995 is amended as follows—
- (a) in section 58(6)(d), for “person” substitute “person’s personal welfare which makes the same provision as the guardianship order which the court proposes to make under this section”,

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- (b) in section 58(7)—
  - (i) after “order”, where first occurring, insert “made under this section”,
  - (ii) for “offender” substitute “person” and for “offender's” substitute “person's”,
- (c) in section 60B, the words “under section 58(1) of this Act” are repealed.

*Adults with Incapacity (Scotland) Act 2000 (asp 4)*

- 5 The Adults with Incapacity (Scotland) Act 2000 is amended as follows—
- (a) in section 6(2)(b)(iii), for “to intromit” substitute “relating to intromission”,
  - (b) in section 39(1)(a), after “(c.4)” insert “, the State Pensions Credit Act 2002 (c. 16)”,
  - (c) in section 41(a), after “(c.4)” insert “, the State Pensions Credit Act 2002 (c. 16)”,
  - (d) in section 47, after subsection (2) insert—
    - “(2A) Subsection (2)—
    - (a) does not affect any authority conferred by any other enactment or rule of law; and
    - (b) is subject to—
      - (i) the following provisions of this section;
      - (ii) sections 49 and 50; and
      - (iii) sections 234, 237, 240, 242, 243 and 244 of the 2003 Act.”
  - (e) in section 87, after subsection (1) insert—
    - “(1A) Any power under this Act to prescribe anything by regulations is exercisable by the Scottish Ministers.”
  - (f) in paragraph 6(2) of schedule 2, after “carer” insert “, his named person”,
  - (g) in paragraph 3(3) of schedule 3, for “18” substitute “20”,
  - (h) for sub-paragraphs (3) to (6) (as re-numbered) of paragraph 4 of schedule 4 substitute—
    - “(3) Sections 6(2)(c)(i), 15, 19, 20(3)(a), 21, 22, and 23 shall not apply to persons who have become continuing attorneys by virtue of sub-paragraph (1)(a) or (c).
    - (4) Sections 16(1) to (4) and (7), 19, 20(3)(a), 21, 22, and 23 shall not apply to persons who have become welfare attorneys by virtue of sub-paragraph (1)(b) or (c).”

*Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)*

- 6 In paragraph 3(1)(b) of schedule 1 to the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), for “a minimum of three” substitute “one or more”.

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*Status: This is the original version (as it was originally enacted).*

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## SCHEDULE 2

(introduced by section 77(2))

## REPEALS

<i>Enactment</i>	<i>Extent of repeal</i>
National Assistance Act 1948 (c. 29)	Section 47. In section 48(1), paragraph (c) and the word “or” which immediately precedes it. In section 48(3), the words “, or from any person who for the purposes of this Act is liable to maintain him,”. In section 50(4), the words from “or” to “death”. In section 51(1), the words “or any person whom he is liable to maintain for the purposes of this Act”. In section 51(2), the words “or any other person”. In section 51(3), paragraphs (a) and (b).
National Assistance (Amendment) Act 1951 (c. 57)	The whole Act.
Solicitors (Scotland) Act 1980 (c. 46)	In section 24F(1), paragraph (b). In section 24G(4), the words “or (b)” and the words “or, as the case may be, on the <i>curator bonis</i> being discharged”.
Mental Health Act 1983 (c. 20)	Section 142. In section 146, the words from “88” to “138” and the words from “128” to “guardianship”.
Law Reform (Parent and Child) (Scotland) Act 1986 (c. 9)	Paragraph 5 of Schedule 1.
Adults with Incapacity (Scotland) Act 2000 (asp 4)	In section 47(2), the words from the beginning to “the 2003 Act,” and the word “the”, where eighth occurring. Section 47(8). Paragraphs 4 and 26(4) of schedule 5.
Courts Act 2003 (c. 39)	Paragraph 80 of Schedule 8.