

# **ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE ACT**

3. The purpose of the Act is to provide for decisions to be made on behalf of adults who lack legal capacity to do so themselves because of mental disorder or inability to communicate. The decisions concerned may be about the adult's property or financial affairs, or about their personal welfare, including medical treatment.
4. The Act is in 7 parts.
  - Part 1 gives a definition of incapacity and sets out general principles that are to apply to any intervention in the affairs of an adult under the legislation. It defines the role of the authorities that will act under the legislation: the sheriff, the Mental Welfare Commission and local authorities. It creates the new office of Public Guardian within the Court Service. It also provides for codes of practice containing further guidance to those acting under the legislation.
  - Part 2 clarifies the position of attorneys with financial and welfare powers who act when the granter of the power loses capacity. It provides for registration, monitoring and supervision of such attorneys.
  - Part 3 sets up a new statutory scheme providing access to funds held on behalf of an adult with incapacity with appropriate safeguards.
  - Part 4 provides for hospital and care home managers to manage the finances of patients or residents with incapacity, subject to appropriate safeguards.

- Part 5 confers a statutory authority on medical practitioners and those acting under their instructions to give treatment to adults with incapacity and undertake research in certain circumstances.
- Part 6 creates a new system of welfare and financial intervention orders and guardianship.
- Part 7 includes various other miscellaneous provisions.

## **PART 1: GENERAL**

### **Section 1: General principles and fundamental definitions**

5. Section 1 sets out the general principles that are to be followed by anyone acting under the provisions of the Act to make decisions or intervene in the affairs of an adult. The general principles must be followed by the courts, by statutory bodies such as local authorities and by individuals. This section also defines the people to whom the Act applies.

6. The Act sets out a number of principles to be followed rather than a general test of what is in the best interests of the adult. The “best interests” concept was developed in the context of the law on children. It is a general term and is considered more protective than is appropriate for adults, as it would not give particular weight to the individual’s own views, including those expressed previously while they had the capacity to do so. Subsection (4) refers specifically to the adult’s wishes.

7. Subsection (2) requires that anything done for an adult under the provisions of the Act should produce a benefit for the adult personally, although interventions that incidentally produce a benefit for other people are not excluded. For example, a spouse acting on behalf of an adult who wishes to sell their jointly-owned home would need to ensure that the sale would be to the adult’s benefit, although it might also, incidentally, be to their own advantage.

8. Subsection (2) also requires that the person proposing to intervene should ensure that the intended benefit to the adult concerned cannot reasonably be achieved in another, less intrusive way. Thus, the appointment of a guardian under Part 6 to manage financial affairs for an extended period might be avoided if informal advice and assistance were available or the affairs were re-organised so as to make them easier for the adult to handle.

9. Subsection (3) provides that any intervention should be the minimum necessary to achieve the purpose of the intervention. The rights of the adult are to be restricted as little as possible. This will mean, for example, that a one-off intervention order in relation to an adult’s financial affairs should be considered in preference to the appointment for a longer period of a financial guardian to manage those affairs, wherever the one-off order would provide adequate protection for the adult.

10. Subsection (4) provides that the adult and others connected with them should be consulted about anything that might be done under the legislation. Subsection (4)(a) emphasises the importance of considering the adult’s views, both those known to have been expressed in the past and their current views, regardless of their capacity. The adult should be helped to communicate their views.

11. Subsections (4)(b) and (c) require the views of the adult's nearest relative, primary carer and any guardian or attorney with relevant powers to be taken into account in deciding whether something should be done for an adult under the legislation. In addition, the sheriff may direct that another specified person should have to be consulted and their views taken into account. If views are made known by anyone else with an interest in the adult's welfare or in the action proposed, these will also have to be considered.

12. The nearest relative, primary carer, guardian, attorney and anyone nominated by the sheriff must be consulted by the decision-maker, so far as reasonable and practicable, for example so long as their whereabouts can fairly readily be ascertained. There is no obligation, however, to seek out the views of others who might have an interest, although if such views have been made known to the person taking the decision, they should be taken into account.

13. Subsection (5) requires guardians, attorneys and managers of establishments under Part 4 of the Act to encourage the adult to play as active a role as possible in making their own decisions. This principle might, for example, where appropriate, lead to assisting a young person with a learning disability to play some part in managing their own financial affairs under the supervision of a guardian. The requirement to encourage the use and development of skills is not absolute, however. It might, for example, not be considered reasonable or practicable in terms of this subsection to require adults with rapidly deteriorating capacity to be encouraged to acquire new skills.

14. Subsection (6) clarifies that an adult is a person aged 16 and over. Subsection (6) sets out, through the definition of "incapable", that the provisions in the Act may be applied if the adult either has a mental disorder or is unable to communicate because of physical disability and, because of mental disorder or inability to communicate, is unable to act or to make, communicate, understand or remember decisions. Understanding decisions includes being able to understand or remember information relevant to the decision, including information about the foreseeable consequences of deciding one way or another, or of failing to make the decision altogether.

15. Subsection (6) ensures that all reasonable efforts are made to communicate with the adult in an appropriate way before arriving at a decision on incapacity. For example, the assistance of an independent interpreter who is familiar with the adult's means of communication should be considered. The use of equipment to assist communication should also be considered.

16. Mental disorder is defined at section 87 and the definition is the same as in the Mental Health (Scotland) Act 1984, section 1: mental illness or mental handicap however caused or manifested. Following the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, personality disorder is included in the definition of mental illness. In line with the 1984 Act, a person should not be regarded as mentally disordered by reason solely of immoral conduct, sexual deviancy or dependency on alcohol or drugs nor does the definition cover people who simply act imprudently. People who are temporarily under the influence of alcohol or drugs are not to be regarded as mentally disordered, although those whose mental faculties are impaired due to past alcohol or drug abuse do fall within the definition.

17. Subsection (7) provides that foreign attorneys and guardians should be included in those consulted at subsection (4)(c). This applies to any guardian or attorney recognised by the law of Scotland.

### ***Judicial proceedings***

#### **Section 2: Applications and other proceedings and appeals**

18. This section covers procedures of the sheriff court that will be the forum for dealing with many applications and other matters under the Act.

19. Subsection (2) says that applications to the sheriff under the Act are to be by summary application, which allows them to be made speedily and simply.

20. Subsection (3) sets out how appeals may be made against any decision made by a sheriff in an application to the courts under the legislation.

21. Subsection (4) allows Sheriff Court rules, which determine in detail how the sheriff court functions, to set out the type of evidence the sheriff is to consider in deciding whether intimations to the adult of application about them should be withheld. In most cases this is likely to be medical evidence.

#### **Section 3: Powers of sheriff**

22. This section gives the sheriff wide and flexible powers to deal with matters that come before the court in relation to the affairs of an adult with incapacity.

23. Subsection (1) allows the sheriff to give rulings over and above those which they have initially been asked to consider, provided these are related to the matter before the court.

24. Subsection (2) spells out some of the ways in which sheriffs may exercise their powers. For example, in granting a one-off order that an adult's house should be sold, the sheriff might also, under subsection (2)(a), direct that this should be done as quickly as possible, to release the adult's capital. Subsection (2)(d) allows the sheriff to make an interim order very quickly if the situation warrants it, while taking longer to resolve in full the issue before the court. This might, for example, allow the sheriff to direct that an important document was signed on behalf of the adult, while considering whether it was necessary to appoint a guardian to take charge of a major aspect of the adult's affairs in the longer term.

25. Subsection (3) allows the sheriff to give directions to anyone acting under the Act, such as an attorney or guardian, or those holding equivalent offices under the law of any other country, about how they use their powers. The adult and anybody else with an interest in their affairs are entitled to apply to the court for such a direction.

26. Adults with incapacity may not wish, or be able, to appear themselves in court and even if they do appear, they may not be able fully to protect their own interests. Subsection (4) therefore provides that the sheriff should consider whether to appoint a person to safeguard the adult's interests in any application or other court proceeding. It is already possible to appoint a curator ad litem to represent the adult's views to the court; a curator ad litem is a

party to the court proceedings. Subsection (5) says that the safeguarder should if at all possible be responsible for finding out the adult's views about the matter before the court and conveying these, as well as safeguarding the adult's interests. However, if the sheriff thinks it is not possible to combine the functions of conveying views and safeguarding interests, a separate curator ad litem may be appointed to convey the views of the adult to the court.

27. Subsection (6) specifically allows the sheriff to vary orders made under subsection (2).

#### **Section 4: Power of Court of Session or sheriff with regard to nearest relative**

28. This section allows an adult to apply to the sheriff to have the person who would otherwise be treated as their nearest relative displaced, for the purposes of the Act. Alternatively, the adult may apply for particular information that would otherwise be given to the nearest relative to be withheld from that person.

29. Subsection (4) clarifies that the adult may only apply to the courts under this section where measures are in operation under the Act because of their incapacity. It is not possible to apply in advance of any incapacity to have the nearest relative displaced or information withheld from them.

#### **Section 5: Safeguarding of interests in Court of Session appeals or proceedings**

30. Section 5 ensures that the appointment of a safeguarder is considered in Court of Session proceedings under the Act, in the same way as such an appointment is considered by the sheriff under section 3. Most matters covered by the Act will be dealt with in the sheriff courts, but appeals against sheriffs' decisions may eventually be heard by the Court of Session and certain matters relating to medical treatment under Part 5 will be heard there.

### ***The Public Guardian***

#### **Section 6: The Public Guardian and his functions**

31. This section creates a new post of Public Guardian which is to be held by the Accountant of Court, an officer of the Supreme Courts, who currently supervises curators bonis looking after the financial affairs of adults with incapacity.

32. Subsection (2) sets out the Public Guardian's role, which includes supervising those exercising financial powers under the Act and investigating complaints and suspicious circumstances relating to the exercise of these financial functions.

33. Subsection (2)(b) provides for registers to be kept by the Public Guardian of matters which he is required to register under the Act relating to powers of attorney, use of funds, guardianship orders or intervention orders. A reference in these Notes to a register is a reference to the appropriate register kept under this section.

34. Subsection (2)(d) allows the Public Guardian to investigate any circumstances made known to him where there seems to the Public Guardian to be a risk to the management of the property and financial affairs of an adult with incapacity who lives in Scotland or has property here, even where no-one else is acting for the adult under this legislation.

35. Subsection (2)(e) requires the Public Guardian to give advice to anyone acting under the legislation about managing the finances or property of an adult with incapacity. This may, for example, be done through issuing publications and leaflets.

36. Subsection (2)(f) creates a statutory duty for the Public Guardian to consult the Mental Welfare Commission and the relevant local authority about carrying out duties under the legislation where there may be a common interest. For example, the Public Guardian might ask the Mental Welfare Commission whether they had recently exercised their statutory power to visit a person with a welfare guardian where the Public Guardian thought that information might have been gained at such a visit that would shed light on concerns about the adult's financial affairs.

37. Subsection (3) allows the Public Guardian to look into complaints about financial management by guardians and attorneys appointed in other countries whose powers are recognised in Scotland where the adult is habitually resident, or property in question is situated, in Scotland.

### **Section 7: The Public Guardian: further provision**

38. Subsection (1) allows Regulations to be made prescribing the information to be included in the Public Guardian's registers, how those registers are to be kept, the format of statutory certificates issued by the Public Guardian and the way in which applications to the office are to be made. Under subsection (1)(d), regulations may also prescribe the type of evidence that the Public Guardian would require before deciding not to inform the adult of matters, where the Act would otherwise require intimation to be given.

39. Subsection (2) allows the Public Guardian to charge a fee for carrying out his functions under the legislation and says that the fee may be required before the Public Guardian takes action, for example before a certificate of authority is issued to an attorney or guardian. This subsection does not, however, require the Public Guardian to charge for all the services offered and allows discretion for prescribed fees to be waived.

40. Subsection (3) says that the certificates issued by the Public Guardian are to be taken as evidence in court of the matters to which they relate. For example, a certificate confirming that an attorney for an adult with incapacity has authority to act for that person would be evidence that the actions of the attorney on behalf of the adult were valid.

### ***Expenses in court proceedings***

#### **Section 8: Expenses in court proceedings**

41. The Public Guardian, Mental Welfare Commission or the relevant local authority may need to initiate legal proceedings to protect an adult's financial affairs or welfare. These statutory authorities may also become involved in existing proceedings to argue for the adoption of a particular course of action or put forward their views. This section provides that the statutory authorities should be entitled to be awarded their expenses by the court. The exception to this provision is that the local authority is required by section 68 to meet the costs of applications where the local authority itself is to act as welfare guardian.

42. Where the statutory authorities are involved in proceedings in order to protect the adult's own interests, expenses are to be awardable out of the adult's resources or against any person whose conduct necessitated the application. Where the statutory authorities are representing the public interest expenses are to be awardable against anyone whose actions have prompted the proceedings or who has behaved unreasonably during them. It is possible, but unlikely, that expenses might be awarded against the adult in such cases.

### ***Mental Welfare Commission***

#### **Section 9: Functions of the Mental Welfare Commission**

43. This section sets out the role, under this legislation, of the Mental Welfare Commission, in protecting the interests of adults whose incapacity is a result of mental disorder. The Commission's existence is governed by the Mental Health (Scotland) Act 1984 ("the 1984 Act"). The Commission has no role in relation to adults whose incapacity is due solely to an inability to communicate, for example people who are deafblind.

44. The references in section 3 of the 1984 Act, which set out the Commission's functions in relation to people with guardians appointed under that Act, are being repealed by the Act. Subsection (1) creates a new free-standing set of provisions for the Commission's activities under this legislation. In particular, subsection (1)(b) gives the Commission the power to visit adults on whose behalf others are acting under the Act. Subsection (1)(d) allows the Commission to investigate complaints about the exercise of welfare powers by guardians, attorneys and others, if the local authority, which is the primary complaints body, has not exercised its duty to investigate satisfactorily. Subsection (1)(e) provides for the Commission to look into suspicious circumstances even in the absence of complaints. Subsection (1)(f) allows the Commission to make inquiries if an adult's property, including funds, is at risk. As a result of such investigations or otherwise, the Commission would be entitled to initiate legal proceedings or take other action in order to protect the interests of the adult concerned.

45. Subsection (2) reproduces the requirement currently at section 5(2) of the 1984 Act for local authorities and guardians to allow the Commission the access it needs, for example to interview the adult, to carry out its functions effectively. The requirement is extended to welfare attorneys and those acting under intervention orders

46. Subsection (3) clarifies that the Commission's powers to investigate complaints about welfare matters extend to complaints about the actions of welfare attorneys and guardians appointed in other countries, if their authority is recognised in Scotland and the adult is resident or personal welfare is at risk and the adult is present in Scotland.

### ***Local authorities***

#### **Section 10: Functions of local authorities**

47. This section sets out the major role of the local authority in looking after the welfare of adults with incapacity. For example, subsection (1)(a) gives the local authority a duty to monitor the actions of welfare guardians to ensure that they use their powers properly. The local authority is further required to consult the Public Guardian and the Mental Welfare Commission where these authorities share common concerns about matters under the

legislation. The local authority is to investigate complaints and suspicious circumstances about the exercise of welfare powers.

48. Subsection (1)(d) and subsection (2) provide for either the local authority where the adult lives or the authority in whose area they are at any time to investigate any potential risk to the adult's personal welfare of which the authority is aware.

49. Subsection (3) creates a power to make regulations about how local authorities supervise welfare attorneys and guardians and those acting under intervention orders. This corresponds to the current power under section 43 of the 1984 Act to make regulations about guardianship under that Act. The current regulations require the local authority, among other things, to visit people under guardianship at least once every 3 months.

50. Subsection (4) clarifies that local authorities can investigate complaints about the exercise of welfare powers by guardians and attorneys appointed under the law of another country, provided that their powers are recognised in Scotland and the adult either lives or is present and at risk in Scotland.

### ***Intimation***

#### **Section 11: Intimation not required in certain circumstances**

51. Rules of Court made under the Act will provide generally that adults should be told of all applications to the court about their affairs. The Act provides that adults should also be told whenever the court makes an order about them. This is to ensure that the adult has the chance to express their views to the court before any decisions are made and to be fully aware of arrangements for decisions to be made on their behalf. Subsection (1) allows the sheriff, however, to decide that information about applications or orders should not be given to the adult if such an intimation would be likely to put the adult's health at serious risk. For example, the sheriff might decide on the basis of medical evidence that notifying the adult would be likely to lead to self-harm. In such a case, the sheriff may direct that the adult should not be informed of the matter before the court

52. Subsection (2) allows the Public Guardian, on similar grounds, to dispense with intimations to the adult that would otherwise be required under the legislation.

### ***Investigations***

#### **Section 12: Investigations**

53. Subsection (1) provides that the Public Guardian, Mental Welfare Commission and local authority may follow up an investigation into the exercise by guardians of financial or welfare powers under the legislation, or where an adult appears to be at risk, by doing whatever they think is necessary to protect the adult's interests. In some cases, administrative steps may be sufficient to deal with the problem but in others, legal proceedings may be required, for example an application to the court for an order giving directions to a guardian or even replacing a guardian.

54. Subsection (2) requires the same bodies to co-operate and exchange information when investigations of complaints are being carried out that involve matters in both the welfare and financial field. For example, a complaint may be made to the Commission about the actings of a welfare guardian. If initial investigations by the Commission lead to suspicious of financial irregularities, the Commission will be required to alert the Public Guardian to these and the two bodies could then make suitable arrangements for further investigations into financial matters.

### *Codes of practice*

#### **Section 13: Codes of practice**

55. This section provides that the Scottish Ministers should draw up and keep under review specified codes of practice for those who have functions conferred on them by the legislation. The codes will offer guidance on the legislation itself and further practical information, for example on keeping records and on how to approach the relevant statutory authorities when required.

56. Subsection (2) requires the Scottish Ministers to consult relevant bodies before publishing or updating codes.

### *Appeal against decision as to incapacity*

#### **Section 14: Appeal against decision as to incapacity**

57. This section ensures that any assessment of incapacity made under the legislation, by a medical practitioner or other person, can be challenged through an appeal to the sheriff. It also sets out how an appeal may be made against a decision on incapacity made by the sheriff.

## **PART 2: CONTINUING POWERS OF ATTORNEY AND WELFARE POWERS OF ATTORNEY**

#### **Section 15: Creation of continuing power of attorney**

58. This section defines a continuing power of attorney, and describes how a valid power is created. A power of attorney is a power conferred on another person to manage specified affairs of the person granting the power (“the granter”).

59. Subsections (1) and (2) define a “continuing power of attorney” as a power to manage specified aspects of the granter’s property or financial affairs that continues to have effect when the granter loses the capacity to deal with the matters concerned. The person to whom such powers are given is defined as a “continuing attorney”. This creates a distinction between powers of attorney that have effect only when the granter still has capacity, but cannot or does not want to act for some other reason, and those that are intended to continue on incapacity. The Act is only concerned with the latter.

60. Subsection (1) states that a continuing power of attorney will continue to be legally binding after the incapacity of the person granting it.

61. Subsections (3) and (4) stipulate conditions for a continuing power of attorney to be valid. A written document conferring the power and signed by the granter is required, an oral request would not be sufficient. There is no requirement for this to be witnessed, although in practice documents will be attested so that they can be used as evidence in court proceedings if necessary.

62. Subsection (3)(b) requires the power of attorney to state that it is the intention of the person granting the power that it should have effect on their losing capacity. This new process requires a granter to opt-in to continuing powers. The Act repeals section 71 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which required granters to opt-out if they did not want their power of attorney to be effective on their incapacity. This provides a safeguard against unintentional granting of inappropriate powers.

63. Subsection (3)(c) requires the power of attorney to include a certificate in a prescribed format from the solicitor acting for the granter, or someone in a category of people to be defined in Regulations. This will certify that the solicitor, or other person, interviewed the granter just prior to the granter signing the document. It will also certify that the granter understood what they were signing. In many cases it will be obvious in the solicitor's opinion that the granter is capable of understanding, and no further evidence would be required; however, if the granter appears to be failing in capacity, recent medical evidence might be required. The solicitor or other person acting must also certify they have no reason to believe that pressure or undue influence has been put upon the granter, who, because of failing physical or mental faculties, may be particularly vulnerable to suggestion.

64. Subsection (4) prevents a potential conflict of interests where the solicitor or other person providing the certificate under subsection (3) is also the person to whom the power is being granted.

### **Section 16: Creation and exercise of welfare power of attorney**

65. This section defines a welfare power of attorney, and describes how a valid welfare power of attorney is created. Currently the legal status of attorneys with powers over welfare matters is unclear. This section establishes the right to grant such a power, and establishes various safeguards.

66. Subsections (1) and (2) define a "welfare power of attorney" as referring to a power of attorney granted under this section. A welfare power of attorney confers the authority to make decisions about the personal welfare of the granter, and refers to the individual granted the powers as a "welfare attorney".

67. Subsection (3) and (4) stipulate conditions for a welfare power of attorney to be valid. The conditions for validity are the same as those set out in subsections (3) and (4) of section 15 apart from subsection (3)(b) which specifies that a welfare power of attorney is being made.

68. Subsection (5)(a) limits those who may be granted a welfare power of attorney. Only individuals can be appointed as welfare attorneys; this excludes the officers of statutory organisations, including local authorities.

69. Subsection (5)(b) provides that welfare powers of attorney can only be used to make decisions on the granter's behalf after they lose capacity to deal with the matters covered by the power.

70. Subsection (6) restricts the authority of welfare attorneys preventing a welfare attorney from consenting to the granter's admission to hospital to be treated for mental disorder against their will. Where detention is necessary, the granter can be detained under the provisions of the Mental Health (Scotland) Act 1984. It also prohibits a welfare attorney from consenting to any of the treatments excepted from the general authority to treat, as provided in section 48.

71. Subsection (7) is necessary because powers of attorney generally terminate on the granter or attorney's bankruptcy. Under the Bankruptcy (Scotland) Act 1985, a trustee assumes control of the bankrupt's estate and their authority must supersede that of an attorney with financial powers. The authority of welfare attorneys need not be affected by the granter's bankruptcy. Nor need a welfare attorney who becomes bankrupt lose their powers.

72. Subsection (8) provides that a welfare attorney appointed under the law of another country to act for someone who lives in Scotland may not exercise their powers until the granter loses capacity. It also provides that no foreign welfare attorney may have the granter admitted to hospital in Scotland to be treated for mental disorder against their will, or consent to any of the treatments excepted from the general authority to treat, as provided in section 48.

### **Section 17: Attorney not obliged to act in certain circumstances**

73. There is no statutory duty for an attorney to use their powers, but this section specifically provides continuing or welfare attorneys with the power to omit actions that are included in their authority, if they consider them to be unreasonable, either on grounds of effort or expense, compared to the value of the action. This protects attorneys from carrying out duties that would be very onerous to them and would confer little benefit to the granter.

### **Section 18: Power of attorney not granted in accordance with this Act**

74. This section provides that after commencement of the Act, a power of attorney that is a continuing or welfare power of attorney intended to have effect during the granter's incapacity must be a validly granted continuing or welfare power of attorney according to this Act. This ensures that powers that continue on the granter's incapacity can only be granted by opting into the provisions in the Act.

### **Section 19: Registration of continuing or welfare power of attorney**

75. This section provides for a new statutory process under which continuing and welfare powers of attorney are to be recorded in public registers by the Public Guardian, so that information about the powers is openly available. Subsection (1) provides that continuing and welfare powers of attorney are only valid after registration.

76. Subsection (2) sets out the action required by the Public Guardian to register a continuing or welfare power of attorney. The Public Guardian must be sure that the nominated attorney is prepared to accept the appointment and will then enter the details of the granter and attorney in the public register.

77. Subsection (2)(b) provides for the Public Guardian to issue a certificate of registration, which the attorney may subsequently need to use to confirm that they are validly exercising their powers.

78. Subsection (2)(c) provides for the Public Guardian to inform the Mental Welfare Commission of every registered welfare power of attorney. This will allow monitoring of welfare attorneys by the Mental Welfare Commission.

79. Subsection (3) provides for so called “springing” powers of attorney. It allows documents conferring continuing or welfare powers of attorney to be sent to the Public Guardian, but registration to be postponed until after a specified event has occurred. This event could be the granter losing the capacity to manage his or her own affairs; however it could also be another trigger, such as moving out of their own home. It will be the Public Guardian’s duty to check that the event has occurred before registering the continuing or welfare power of attorney, thus allowing the power to be exercised.

80. Subsection (4) establishes that a copy of the continuing or welfare power of attorney, validated by the Public Guardian, will have the authority recorded in it, as intended by the granter.

81. Subsection (5) places a duty on the Public Guardian to inform the granter, by sending a copy of the document, when the continuing or welfare power of attorney is registered. The document conferring power of attorney may also specify up to two individuals or officials that must also be sent a copy of the power of attorney when the Public Guardian registers it. This could be used to ensure that a relative, for example, or the local authority social work department, were aware that the granter now had a continuing or welfare attorney acting for them.

82. Subsection (6) allows appeals to the sheriff against the Public Guardian’s decisions on whether an attorney accepts their appointment and on whether a springing event as at subsection (3) has occurred.

### **Section 20: Powers of sheriff**

83. This section outlines the powers that sheriffs will have in relation to continuing and welfare attorneys.

84. Subsection (1) establishes the right to apply for an order from the sheriff. Anyone who claims an interest in the property, financial affairs or welfare of an adult who has granted a continuing or welfare power of attorney can apply. This provides a forum for interested parties to express their concerns about the attorney.

85. Subsection (2) limits the sheriff’s power to intervene to cases where the granter has lost capacity and it is necessary to promote or safeguard the adult's interests. If a granter still has the capacity to supervise the attorney, it would be unnecessary to give the sheriff authority over that arrangement, as the granter can supervise their own affairs.

86. Subsections (2)(a), (b), (c) and (d) set out what orders the sheriff can make to safeguard the granter's interests. The sheriff may order a continuing attorney to be supervised by the Public Guardian, or a welfare attorney to be supervised by the local authority. The sheriff may order a continuing attorney to submit accounts for audit by the Public Guardian. These accounts may be requested for any period when the attorney has acted, even while the granter retained legal capacity, to allow an overall picture of the attorney's management of the granter's estate. The sheriff may also ask a welfare attorney for a report on the exercising of their powers.

87. Subsection (2)(e) gives the sheriff the right to make an order revoking any of the powers the attorney is allowed to exercise, or to terminate their appointment. The Act does not, however, allow the court to vary the attorney's powers, since this would run counter to the granter's original intention.

88. Subsection (3) provides for the communication of any order the sheriff has made to the Public Guardian. The Public Guardian will record the order in his register and notify those listed in subsection (3)(b).

89. Subsection (4) states that the decision of the sheriff to order Public Guardian or local authority supervision of an attorney or requiring accounts or reports from a welfare attorney or that such an order is not required, is final.

90. Subsection (5) provides for the court to make orders as in this section to apply to foreign, as well as Scottish, continuing and welfare attorneys. This provides safeguards for granters who live or are present in Scotland, but who have appointed an attorney under the law of another country.

### **Section 21: Records: attorneys**

91. This section requires continuing and welfare attorneys to keep a record of their actions. A continuing attorney is not required to keep formal accounts, merely a record of transactions that could be used to draw up accounts should a court require them. The code of practice for attorneys will contain general information about record-keeping for both continuing and welfare attorneys.

### **Section 22: Notification to Public Guardian**

92. This section provides for the updating of the Public Guardian's registers and notification of statutory bodies and, in particular circumstances, of the granter of the power of attorney when an address recorded in the registers is changed, or the power of attorney comes to an end for any reason. In the circumstances set out in subsection (1), it is the attorney's duty to notify the Public Guardian, and in subsection (2), where the attorney has died, it is the duty of their representative to notify the Public Guardian, if they are aware of the power of attorney.

93. When the Public Guardian is notified under subsection (1) or (2) of a change to the power of attorney registered, he will update his registers and inform the local authority and, in particular circumstances, the Mental Welfare Commission of the changes, allowing them to update their records. When it is an event the granter could be ignorant of, the Public Guardian will also notify them of the new details or the coming to an end of the power of attorney.

**Section 23: Resignation of continuing or welfare attorney**

94. This section provides that once a continuing or welfare power of attorney has been registered by the Public Guardian, according to section 19, the attorney must give notice of their intention to resign, in order to safeguard against any lapse in administering the granter's affairs.

95. Subsection (1) lists those who must be notified. This ensures that the granter, and key people looking after them are aware of the impending change. If necessary, a guardianship application could then be made. Notification also ensures that the Public Guardian can maintain the register of continuing and welfare attorneys accurately.

96. Subsection (2) provides that an attorney's resignation becomes effective 28 days after the Public Guardian receives written notice as above, unless the attorney was a joint attorney, or a substitute attorney was also appointed, in which case subsection (4) may apply. When the attorney's resignation is effective, the Public Guardian will record this in the register.

97. Subsection (4) waives the need to wait 28 days for the resignation of an attorney to be effective, where the Public Guardian has received notice that a remaining joint attorney, or substitute attorney is prepared to act. The resignation would then be effective from the date the Public Guardian receives such notice.

**Section 24: Termination of continuing or welfare power of attorney**

98. Subsection (1) provides that, where the granter and attorney are married, the appointment as attorney will be automatically revoked on a decree of separation, divorce or declarator of nullity, unless the power of attorney states otherwise.

99. Subsection (2) establishes that where a guardian is appointed to deal with the same matters as a continuing or welfare attorney, the authority of the guardian shall supersede that of the attorney, whose appointment in that area is effectively terminated. The Public Guardian will be aware of this through notification of the appointment of the guardian, and will be able to amend the relevant register.

100. Subsection (3) provides that foreign attorneys' authority should also be superseded by the appointment of a guardian by a Scottish court.

101. Subsection (4) protects people who deal with attorneys without realising that their powers have terminated, particularly where the person concerned has acquired heritable property, unaware of circumstances provided in subsections (4)(a) and (b). Subsection (4)(a) provides for the situation where the attorney's appointment has terminated because their marriage to the granter has ended. Subsection (4)(b) provides for circumstances in which the attorney has been superseded by a guardian.

### **PART 3: ACCOUNTS AND FUNDS**

#### **Section 25: Authority to intromit with funds**

102. This section provides for a new statutory scheme under which the Public Guardian may grant authority for individuals to have access to and use (intromit with) the funds of an adult with incapacity who cannot look after those funds properly. Those who apply are expected to be family members or carers. Staff of social work departments or other statutory bodies cannot be given authority. The scheme applies to funds held by any individual or organisation in an account where the adult is the sole holder of the account. It is envisaged that the scheme will apply mainly to bank and building society accounts, although it would extend to any similar organisation.

103. Subsection (2) requires the adult's account to be specified clearly and clarifies that only one authority to have access to the adult's funds can be granted at any one time. It would not, therefore, be possible for two people to have access to the adult's funds for different purposes.

#### **Section 26: Application for authority to intromit**

104. Subsection (1) sets out the information required for applying for authority to use the adult's funds. Subsection (1)(a) requires the application form to detail what the funds will be used for and how much is required for each item, for example, gas, electricity, Council Tax, food. It will be necessary to include information about the extent to which funds are to be used for shared household expenses.

105. Subsection (1)(c) provides that an application must be countersigned. The Scottish Ministers are to have the power to make regulations prescribing who is entitled to countersign. It is envisaged that the class of persons concerned will be similar to those entitled to authenticate passport photographs, for example, teachers, ministers, doctors. Subsection (1)(c) sets out further requirements of the person countersigning the application who must know both the adult and the applicant and must not have a personal interest in the application.

106. Subsection (1)(f) requires the application to be accompanied by a medical certificate, in a form to be prescribed in Regulations, confirming that the adult lacks the capacity to look after the funds concerned

107. Subsection (1)(g) requires details to be given of the new account set up by the applicant, the "designated account", into which the approved amounts are to be transferred from the adult's account. It is envisaged that this account will be clearly identified as the adult's account, although it will be operated by the person authorised to use the adult's funds.

108. Subsection (3) requires the Public Guardian to inform the adult and others who might be expected to have an interest, that an application has been made and that they have a right to make comments on it. The Public Guardian is obliged to take these into account before reaching a decision on whether to grant authority for access to the funds.

109. Subsection (4) provides for the Public Guardian to issue a statutory certificate confirming that an application has been granted. Details are to be entered in the register. The

certificate is required by the person or organisation holding the adult's funds (the fundholder) to allow transactions on the account to take place. Otherwise, it is generally the practice to freeze the account of an adult who loses the capacity to operate it. The certificate will include details of the adult's account, the designated account to which funds are to be transferred and the period for which the Public Guardian's authority is to last.

110. Subsection (5) says that the certificate will require that neither the adult's account nor the designated account is to be overdrawn.

111. Subsection (6) clarifies that the certificate of authority will have the effect that only the authorised withdrawals are to be made from the adult's account and no other transactions on the account are to be permitted. Existing direct debit and standing order arrangements will be cancelled, and any cheque books and cards will be withdrawn.

112. Subsection (7) requires the Public Guardian to give the applicant a chance to make representations if it is proposed to refuse the application.

113. Subsection (8) allows for an application to be referred to the sheriff to be determined. The Public Guardian may decide to refer the matter to the sheriff, or may do so at the request of the applicant or anyone who objects to the application.

114. Subsection (10) defines a withdrawer as a person who is authorised in this Part of the Act to intromit with the adult's funds.

### **Section 27: Notification of change of address**

115. This section requires the withdrawer to inform the Public Guardian of a change in their permanent address or that of the adult, so that the Public Guardian can update the register of authorisations under this Part of the Act.

### **Section 28: Purposes of intromissions with funds**

116. Subsection (1) sets out the types of expenditure that may be authorised by the Public Guardian under this Part of the Act. These include day to day household and living expenses and care costs, such as payments for home help services or for residential care. The Public Guardian's fee for processing the application may be met from the adult's funds but not the applicant's legal fees or any other expenses incurred in relation to the application.

117. Subsection (2) allows the Public Guardian to authorise payments for items not included in subsection (1), at his discretion, for example, payments for small gifts to family members. Any such discretionary payments would have to fall within the general scope of the scheme for access to funds.

118. Subsections (3) and (4) clarify that the adult's funds must be spent on the adult's own requirements, although they may be used for shared household expenses, for example, where the withdrawer is the adult's partner and lives in the same house.

### **Section 29: Withdrawal and use of funds**

119. Subsection (1) allows the fundholder of the adult's account to release to the designated account the amounts authorised by the Public Guardian's certificate of authority.

120. Subsection (2) confirms that the fundholder of the adult's account is liable to repay to the adult any amounts it has released from the adult's account after the Public Guardian's authority has been withdrawn. Although the fundholder is liable to make repayments to the adult, they may subsequently attempt to recover the sums concerned from the withdrawer.

121. Subsection (3) allows the Public Guardian to authorise other payments from the adult's account, for example a one-off payment to a supplier for goods or services

122. Subsection (4) allows an appeal to the sheriff against a decision of the Public Guardian not to allow access to the adult's funds, either for one of the specified purposes on a regular basis, or for an exceptional payment. The sheriff's decision will be final.

### **Section 30: Records and enquiries**

123. Subsection (1) provides for regulations to be made by the Scottish Ministers requiring those with access to the adult's funds to keep records of how they have used the funds. regulations may also be made enabling the Public Guardian to require such records to be released for inspection on demand.

124. Subsection (2) allows the Public Guardian to make checks on how the adult's funds are being used. This includes asking for documentation, including receipts and notebook records that have been kept by the withdrawer.

125. Subsection (3) clarifies that the Public Guardian may make enquiries to the relevant fundholder about transactions on either the adult's or the designated account. The fundholders must release their records to the Public Guardian on request, for the purposes of investigation or spot check. This provision is required, because such information is normally released by the fundholder only to the account-holder.

126. Subsection (4) allows a fundholder who releases records to make a charge for this and to recover it from the adult's or the designated account as appropriate.

### **Section 31: Duration and termination of registration**

127. Subsection (1) provides that authority for regular payments from the adult's account should normally last for 3 years, at which point a fresh application to the Public Guardian in the same form as the original application would be required. Subsection (2) allows the Public Guardian to vary the period of the authority and to allow any other period, including an indefinite period, as he thinks fit.

128. Subsection (3) allows the Public Guardian at his sole discretion to suspend or terminate an authority to have access to funds. The suspension or termination would have to be notified to the withdrawer and, through a formal certificate, to the fundholder.

129. Where the Public Guardian terminates the authority to withdraw, he may under subsection (4) grant an interim authority for a period of up to 4 weeks, provided the adult still lacks capacity to operate their account. The interim authority would allow payments specified by the Public Guardian to be made from the adult's account, in order to prevent hardship of the adult, and of the withdrawer where the relevant expenses are shared. An interim certificate of authority is to be in the same format as a normal certificate and particulars are to be entered in the register.

130. Subsection (6) allows an appeal to the sheriff against a decision of the Public Guardian to suspend or terminate an authority. Suspension or termination of the authority is to remain in effect notwithstanding any appeal to the sheriff until it is reversed on appeal.

131. Subsection (7) clarifies that the authority to have access to the adult's funds automatically terminates where a guardian with the relevant powers is appointed, or an intervention order is granted, or an attorney acquires authority to act. If someone continues to act under the Public Guardian's authority in good faith, however, they will not have to repay to the adult the amounts they have spent.

132. Subsection (8) clarifies that access to funds shall be terminated by the appointment of either a foreign guardian recognised under the law of Scotland or a foreign attorney, with relevant powers.

### **Section 32: Joint accounts**

133. This section applies to "either/or survivor" joint accounts, in other words those enabling any account holder to operate the account without a signature being required from the other holder(s). It does not apply to joint accounts where all the joint account holders have to sign every cheque or withdrawal document. The purpose of the provision is to ensure that one holder of such an account can continue to operate the account if the other holder becomes incapable of doing so, unless the account holders have specifically agreed to opt out of this provision. The purpose is to ensure that fundholders do not freeze a joint account on becoming aware of the incapacity of one of the account holders, thus preventing any withdrawals from the account and requiring the appointment of a guardian to gain access to the funds held.

134. The continued authority to operate will not apply if the joint account holders have previously agreed to opt out of the scheme by confirming with the fundholder that the incapacity of one of them should terminate the authority of the other account holder(s) to operate the account. Nor will the provision apply where the account holder(s) with capacity is/are prevented by a court order from operating the account.

### **Section 33: Transfer of funds**

135. This section allows the Public Guardian to approve the transfer of the adult's funds to a different account. This might be convenient, for example, if the adult or person with access to their funds moved to a different address. The Public Guardian might also authorise movement of the account to allow funds to be lodged in an appropriate high interest account, from which payments under the scheme could be made directly.

### **Section 34: Disapplication of Part 3**

136. This section confirms that authority to have access to the adult's funds will not be granted where there is a guardian with powers over the account, or a continuing attorney or person appointed under an intervention order with relevant powers. This provision applies to both the Public Guardian's authority and to the continued authority to operate a joint account.

137. Subsection (2) clarifies that subsection (1) applies to foreign guardians and attorneys if their powers are recognised in Scotland.

## **PART 4: MANAGEMENT OF RESIDENTS' FINANCES**

138. This Part deals with the management of the financial affairs (defined at section 39) of adults with incapacity, by the managers of care establishments (hospitals, nursing homes, residential care homes) and by a small number of establishments which will be able to apply to be registered only for the purpose of managing residents' finances.

### **Section 35: Application of Part 4**

139. Subsection (1) sets out the categories of establishment which will be able to manage the finances of residents with incapacity.

140. Subsection (2) distinguishes between "registered establishments" and "unregistered establishments". "Registered establishments" includes those which currently have to register with local authorities or health boards in order to operate as care establishments (most independent sector care homes, nursing homes), and will also include those which have applied for and been granted the new form of limited registration under section 36 for the specific purpose of managing residents' finances. "Unregistered establishments" are those which are presently exempt from registration (local authority homes, NHS hospitals). Both registered and unregistered establishments will be able to manage residents' finances and are collectively referred to in the Act as "authorised establishments". The references to paragraphs (ca) and (cb) of subsection (1) are to an earlier version of the Act and may be ignored as they are now meaningless. Under subsection (3), registered establishments, but not unregistered establishments, may opt out of managing their residents' finances. Subsection (4) allows regulations to be made to amend the list of authorised establishments.

141. Subsection (5) provides definitions of "the managers", by reference to schedule 1, and of "resident" as someone whose current main residence is the care establishment or someone who has been detained under the Mental Health (Scotland) Act 1984.

### **Section 36: Registration for purposes of managing residents' finances**

142. This section amends the Social Work (Scotland) Act 1968 to provide a new form of limited registration, for the specific purpose of managing residents' finances. It is expected that establishments applying will include some offering forms of sheltered accommodation.

### **Section 37: Residents whose affairs may be managed**

143. Subsection (1) provides that managers may manage the matters set out in section 39 on behalf of any resident where a medical practitioner has provided a certificate to the effect that the resident is incapable of doing so.

144. Subsection (2) provides that where the managers of a care establishment have considered alternative approaches to managing a resident's financial affairs, but decided that the most appropriate is management under this Part of the Act, the managers must ask a medical practitioner to assess that resident's capacity. If the medical practitioner finds that the resident is incapable of taking decisions about their funds, or of managing those funds properly, a certificate will be issued accordingly.

145. Subsection (3) requires that the managers of a care establishment must tell residents and their nearest relative that it is intended to assess their capacity.

146. Subsection (4) requires the managers and the supervisory body to notify the resident and their nearest relative of matters relating to a certificate of incapacity issued under subsection (2), and of the managers' intention to look after the resident's financial affairs.

147. Subsection (6) prohibits a medical practitioner from providing a certificate of incapacity if the medical practitioner is related to the resident or manager or has any financial interest in the establishment.

148. Subsection (7) requires that certificates of incapacity under this Part of the Act are to be reviewed as required, and that they should expire after 3 years.

149. Subsection (8) provides that a resident need not be told of the intention to assess capacity, nor be given a copy of the certificate of incapacity if there is evidence that this would be seriously detrimental to the individual's health. Subsection (9) allows for regulations to prescribe the type of evidence that the supervisory body would require before deciding that the adult should not be informed.

### **Section 38: Financial procedures and controls in registered establishments**

150. This section requires that registered establishments have satisfactory systems in place for managing the funds of residents with incapacity, including accounting and record keeping procedures which allow them to demonstrate how funds have been used and what balances exist.

151. Unregistered establishments, which are public bodies, have other established procedures to ensure that satisfactory systems for managing residents' funds are in place.

### **Section 39: Matters which may be managed**

152. This section sets out the matters which managers of care establishments may manage on behalf of residents with incapacity. These include any accounts or cash the resident may have and any moveable property (e.g. furniture or pictures) the resident brings to the establishment. Any reference to "residents' affairs" or similar in this part of the Act can be taken to refer to the specific areas set out in this section. Subsection (2) ensures that the managers use a resident's funds for the benefit of that resident. It is permissible to use funds to contribute to the purchase of shared items, so long as each resident concerned will benefit from such items. Subsection (2) also clarifies that managers must take into account the sentimental value of items belonging to a resident, in considering, for example, whether such items should be disposed of. Subsection (3) allows for regulations to prescribe an upper limit

to the amount of funds that may be managed. The approval of the supervisory body would be required for managers to look after funds exceeding this figure.

#### **Section 40: Supervisory bodies**

153. Subsection (1) sets out which authority is responsible for the supervision of each type of residential establishment: Health Boards for nursing homes and hospitals, local authorities for residential care homes.

154. Subsections (2) and (3) impose duties on the supervisory body to monitor the management of residents' affairs by managers of care establishments and to investigate complaints.

#### **Section 41: Duties and functions of managers of authorised establishment**

155. Subsection (1) imposes duties on the managers of authorised establishments in relation to the manner in which they deal with residents' affairs. Residents' funds must be held separately from those of the establishment; funds must either be held in separate accounts or residents' individual balances must be readily identifiable to the extent that the supervisory body requires this; when a resident's funds reach a level to be prescribed by regulations they must be placed in an interest bearing account and not simply held as cash; managers must keep proper records of their use of residents' funds and provide these records to the resident, their nearest relative and the supervisory body on request; managers must only use a resident's funds for that resident's benefit; and establishments managing funds must insure against any loss of those funds which results from the managers' acts or omissions. Paragraph (h) clarifies that a resident's funds should not be spent on services that are normally provided by the establishment.

#### **Section 42: Authorisation of named manager to withdraw from resident's account**

156. Subsection (1) allows the supervisory body to provide a certificate allowing the manager of an authorised establishment to make withdrawals from specified accounts belonging to a resident.

157. Subsections (2) and (3) require that such a certificate be signed by a properly authorised officer of the supervisory body and that it set out the accounts and other funds available to the resident and specify by name an authorised manager.

158. Subsection (4) authorises the manager to make withdrawals from an account specified in the certificate and provides that the bank or other fund holder may allow the manager to do so.

#### **Section 43: Statement of resident's affairs**

159. This section provides for the managers of an authorised establishment to give a financial statement of the resident's affairs to any resident who becomes capable of looking after their own resources, or (if the resident remains incapable) to the managers of another authorised establishment or person who will manage the resident's affairs, when the resident moves from the first establishment.

**Section 44: Resident ceasing to be resident of authorised establishment**

160. Subsection (1) provides that when a resident leaves an authorised establishment or gains capacity to look after their own affairs the managers of that establishment may continue to manage the resident's affairs for up to 3 months to enable other suitable arrangements to be made.

161. Subsection (2) requires the managers to provide a financial statement of the resident's affairs after the transitional period in subsection (1).

162. Subsection (3) requires the managers of the establishment which the resident has left to transfer the former resident's affairs to the establishment, authority or person who will be responsible for their management in future. If the resident has recovered capacity they will resume responsibility for their own affairs.

163. Subsection (4) requires the managers to inform the supervisory body, and in certain circumstances the local authority, of the fact that a resident has ceased to reside in the establishment, within 14 days of leaving.

**Section 45: Appeal, revocation etc.**

164. Subsection (1) makes provision for the power to manage residents' affairs, or, in the case of an establishment registered for the sole purpose of managing residents' affairs, the registration of the establishment, to be revoked by the supervisory body if it is satisfied that the establishment is not performing its duties properly.

165. Subsection (3) requires the supervisory body, if it revokes a power to manage residents' affairs, to take over this role itself within 14 days.

166. Subsection (4) provides that the supervisory body then has 3 months to transfer the management to another authorised establishment etc.

167. Subsection (6) is a general right to appeal to the sheriff against any decision of a supervisory body taken under this Part of the Act.

**Section 46: Disapplication of Part 4**

168. Subsection (1) provides that the powers given by this Part will not be available if there is a guardian, attorney, intervention order, or other arrangement relating to the matter in question, but anyone who does not know that such arrangements exist and acts in good faith shall not incur any liability.

**PART 5: MEDICAL TREATMENT AND RESEARCH**

**Section 47: Authority of persons responsible for medical treatment**

169. This section provides authority to give to an adult with incapacity medical treatment aimed at maintaining or improving the physical or mental health of that adult.

170. Subsection (1) applies this section where the doctor who has overall responsibility for the medical treatment of an adult has certified that that adult is incapable in relation to a particular decision about medical treatment.

171. Subsection (2) provides that, during the validity of the certificate of incapacity, the doctor primarily responsible shall have authority to do what is reasonable in the circumstances, in relation to the medical treatment, to safeguard or promote the physical or mental health of the adult.

172. Subsection (3) permits the general authority to treat to be conferred also on any other person who is acting on behalf of the medical practitioner primarily responsible, under his instructions, or otherwise with his approval or agreement.

173. Subsection (4) defines medical treatment as including any procedure or treatment designed to safeguard or promote physical or mental health.

174. Subsection (5) makes provision regarding the certificate of incapacity. The certificate will be valid for a year, or for a shorter period, depending on the individual circumstances. Such a certificate shall be in a form to be prescribed by the Scottish Ministers in regulations.

175. Subsection (6) allows for a certificate of incapacity to be revoked, or revoked and replaced by a new certificate, if the condition or circumstances of the adult have changed.

176. Subsection (7) provides that the general authority to treat shall not allow the use of force or detention unless it is immediately necessary, and then only for as long as it is necessary. This subsection also makes clear that the general authority does not authorise any action which is contrary to a court decision, nor does it allow an adult to be placed in hospital for the treatment of mental disorder against his will.

177. Subsection (8) excludes from the general authority to treat certain treatments to be specified in regulations under section 48.

178. Subsection (9) restricts the general authority, in cases where a legal challenge has been mounted to that authority, to life saving treatment or treatment to prevent a serious deterioration in health.

179. Subsection (10) withdraws the general authority for a particular treatment in all cases and in all circumstances where a court order prohibiting treatment is in force.

#### **Section 48: Exceptions to authority to treat**

180. This section provides for certain treatments to fall outside the general authority to give medical treatment to adults with incapacity.

181. Subsection (1) excludes treatments covered by Part X of the Mental Health (Scotland) Act 1984 from the general authority to treat.

182. Subsections (2) and (3) empower the Scottish Ministers to make regulations specifying a particular treatment or classes of treatment which will be excluded from the general authority to treat. The regulations may also make provision about the treatments to which the authority does apply, and the circumstances in which such treatments may be carried out.

**Section 49: Medical treatment where there is an application for intervention or guardianship order**

183. This section covers circumstances in which an application has been made for an intervention order or a guardianship order under Part 6 that would confer powers to consent or refuse consent to the treatment in question.

184. Subsection (1) provides that the general authority to treat shall not apply in such circumstances, where the application is known to the person responsible for treating the adult with incapacity, and where the outcome of the application has not been determined.

185. Subsection (2) permits treatment to save life or to prevent a serious deterioration in health in such circumstances until the application is finally determined.

186. Subsection (3) provides that notwithstanding subsection (2), no medical treatment may be given if a court order prohibiting such treatment has been granted and is in force.

**Section 50: Medical treatment where guardian etc has been appointed**

187. This section deals with the situation where a guardian or welfare attorney or person appointed under an intervention order has power in relation to medical treatment, and disagreement arises between such a person and a doctor about the desirability of treatment.

188. Subsection (1) applies this section where a guardian, welfare attorney, or person authorised under an intervention order (referred to as a “proxy”) has power in relation to any medical treatment.

189. Subsection (2) withdraws the general authority to treat where the doctor primarily responsible is aware of the appointment or authorisation of a proxy, it would be reasonable and practicable for the doctor to obtain the proxy’s consent, but they have failed to do so.

190. Subsection (3) provides that where the doctor primarily responsible has consulted the proxy and there is no disagreement as to medical treatment, any person who has an interest in the personal welfare of the adult may nevertheless appeal the decision to the Court of Session.

191. Subsection (4) provides that where disagreement arises between the proxy and doctor, the doctor must ask the Mental Welfare Commission to nominate a second doctor to give an independent opinion on the medical treatment.

192. Subsection (5) provides that the authority to give treatment will apply if the second doctor certifies that in his opinion the proposed medical treatment should be given, having

regard to all the circumstances, and having consulted both the proxy and (if it is reasonable and practicable to do so) another person nominated by the proxy.

193. Subsection (6) permits the doctor primarily responsible, or any other person who has an interest in the personal welfare of the adult, to ask the Court of Session to decide whether or not the proposed treatment should be given if they disagree with the opinion of the second doctor.

194. Subsection (7) withdraws the authority to treat during an appeal to the Court of Session except for life saving treatment or treatment to prevent a serious deterioration in health.

195. Subsection (8) withdraws any authority to treat where a court order has been granted and is still in effect that prohibits the giving of such medical treatment.

196. Subsection (9) provides for the Mental Welfare Commission to establish and maintain a list of medical practitioners from whom they shall nominate independent doctors in terms of subsection (4) above.

197. Subsection (10) provides that the terms “welfare attorney” and “guardian” in this section shall include foreign attorneys and guardians if their powers are recognised in Scotland.

### **51: Authority for research**

198. This section provides that research on adults incapable of giving consent to such research may not be carried out except in particular circumstances and subject to conditions. In particular research is not permitted where it could be carried out on adults who are capable of giving consent.

199. Subsection (1) specifies the types of research covered, and provides the general prohibition of such research except in specific circumstances

200. Subsection (2) specifies the circumstances in which research may be carried out. Research must be to obtain knowledge of the causes, diagnosis, treatment or care of the adult’s incapacity, or the effect of any treatment or care given to the adult during his incapacity. The further conditions specified in subsection (3) must also be fulfilled.

201. Subsection (3) defines the conditions under which research is permitted, all of which must normally be met. The research must be likely to produce real and direct benefit to the adult and the adult must not show unwillingness to participate. The research must involve only minimal risk or discomfort to the adult and have been approved by the Ethics Committee. Consent must also have been obtained from the patient’s guardian or welfare attorney or nearest relative.

202. Subsection (4) provides exceptionally for the possibility that research may be carried out even where it is not likely to produce real and direct benefit to the adult. This is permitted where the research is likely to improve the scientific understanding of the adult’s

incapacity. The group of people suffering from that incapacity may ultimately benefit from this research. It is still necessary to comply with the conditions in subsections (1), (2) and (3)(b)-(f).

203. Subsection (5) allows the Ethics Committee to attach conditions when granting approval for research.

204. Subsection (6) provides for the regulations establishing the Ethics Committee.

205. Subsection (7) enables the Scottish Ministers to specify in regulations matters which the Ethics Committee must take into account when approving research.

### **Section 52: Appeal against decision as to medical treatment**

206. Section 52 provides that any decision taken for the purposes of Part 5 as to the medical treatment of an adult (other than a decision by a doctor under section 50) may be appealed by any person who has an interest in the personal welfare of the adult to the sheriff, and thereafter to the Court of Session.

## **PART 6: INTERVENTION ORDERS AND GUARDIANSHIP ORDERS**

### *Intervention orders*

#### **Section 53: Intervention orders**

207. This section gives the sheriff the power to make one-off intervention orders, which govern a specific action or decision which an adult lacks the capacity to make. An order can be made relating to the adult's property, financial affairs or personal welfare. It is envisaged that intervention orders will be used for a wide variety of matters, including giving consent on behalf of an adult to a transaction, or signing a document. It is intended that an intervention order would be sufficient to overcome particular problems without having to impose continuous management on an adult with incapacity, and that more than one intervention order can be granted at any one time. The sheriff will also be able to make interim orders under section 3(2).

208. Subsection (1) establishes that anyone claiming an interest, including the adult, can apply for an intervention order.

209. Subsection (2) ensures that a sheriff shall consider any other orders relating to the adult made under Part 6 of the Act when considering an application for an intervention order. This will avoid conflicting orders being made and inform the sheriff about measures that have been taken in the past.

210. Subsection (3) places a duty upon the local authority to apply for an intervention order relating to a particular decision, under circumstances where it appears that an order is necessary but nobody else is applying for one. This means that where an intervention order exists, for example, to sell the adult's house, the local authority could still apply for an order relating to a welfare decision where they felt that nobody else was going to apply. However,

if another party was in the process of applying for an order concerning this welfare decision, the local authority should not apply.

211. Subsection (4) provides that the court should have the same reports before it when considering applications for intervention orders as it does when considering guardianship orders.

212. Subsection (6) requires the Public Guardian to consent to the price before accommodation for the adult is bought or sold, under an intervention order. This is the same provision in respect of the actual price as for disposing or buying accommodation under a guardianship order under schedule 2, paragraph 6. In this case, the sheriff has already consented when granting the intervention order to the sale or purchase taking place, so the Public Guardian's consent in principle is not required.

213. Subsection (7) provides for the sheriff, when making or varying an intervention order, to order the person authorised under the order to provide caution or insurance against liability. This is to protect the adult from any mishandling of their affairs, ensuring that recourse to compensation is possible. The sheriff will order that caution must be found by anyone acting under an order about property or financial matters, unless the person authorised proves unable to find caution, in which case, if the sheriff is satisfied that the person is still suitable to be authorised under the order, the requirement can be waived.

214. Subsection (8) provides that an intervention order can be altered or revoked by the sheriff. The person authorised under the intervention order, the adult, or any interested party can apply to the sheriff.

215. Subsection (10) provides that it is the duty of the court to notify the Public Guardian of all intervention orders. The Public Guardian will enter the details of the order in the public register, and inform the adult concerned, the local authority, and where the intervention order concerns welfare matters, the Mental Welfare Commission.

216. Subsection (11) provides protection for third parties who enter into a transaction with a person authorised under an intervention order, providing that these transactions should not be invalidated by problems in the person's authority under an intervention order. Transactions of this kind will not be invalid due to the person acting outwith the scope of their authority, not observing requirements of the Act, or because of an irregularity in their appointment. Without this protection, third parties might be reluctant to deal with those acting under intervention orders.

217. Subsection (12) allows for the outlays made in carrying out the directions or duties of an intervention order to be recovered from the adult's estate. For example, this means that the outlays involved in selling the adult's house, as directed by an intervention order, could be recovered.

218. Subsection (13) provides protection for third parties who acquire heritable property from a person authorised under an intervention order, preventing their title to the property being challenged by an irregularity in the person's appointment, or because they acted outwith their authority. It ensures that there is no greater risk or disincentive for a third party

in acquiring heritable property from a person authorised under an intervention order than from any other person.

219. Subsection (14) provides for sections 64(2) and 67(3) and (4) to apply to intervention orders. Therefore an intervention order may not direct the detention of an adult in a hospital for the treatment of mental disorder, or consent to any of the excepted treatments provided under section 48. An intervention order relating to the adult's personal welfare can be exercised whether or not the adult is in Scotland at the relevant time, and the personal liability of a person authorised under an intervention order is limited in the same way as a guardian's personal liability.

#### **Section 54: Records: intervention orders**

220. This section requires a person authorised under an intervention order to keep a record of their actions. The code of practice for persons authorised under intervention orders will include information on record-keeping.

#### **Section 55: Notification of change of address**

221. This section provides for the Public Guardian to be notified by the person granted the intervention order of any change of their address or that of the adult, and for the appropriate statutory authorities to be notified by the Public Guardian.

#### **Section 56: Registration of intervention order relating to heritable property**

222. This section applies when an intervention order is made concerning an adult's heritable property, that is property which is or could be recorded or registered in the General Register of Sasines or Land Register of Scotland respectively. This would include an adult's house and any land or second home that they owned. The provisions are required so that any conveyancing search of the Registers would reveal the existence of the intervention order for the purposes of transactions with the property.

223. The Register of Sasines, established in 1617, is a register of title deeds to land. The Land Register of Scotland, a map-based and computerised register, established in 1979, is progressively replacing the Register of Sasines. When property changes hands, these registers are examined to ensure that the purchaser obtains a valid title. They provide the same check on who has the title to a particular property. The Land Register is being extended across Scotland in stages. A property whose title was previously recorded in the Register of Sasines will fall to be registered in the Land Register on the first occasion it changes hands after the county in which it is situated becomes operational in the Land Register. If the Keeper of the Registers is satisfied with the state of the title when the property is registered, then he will issue a fully indemnified Land Certificate.

224. Subsection (2) states that an order including powers over heritable property must specify the property in detail.

225. Subsection (3) provides that persons authorised under intervention orders including any rights to deal with, sell or manage an interest in heritable property must record their appointment in the Register of Sasines or Land Register of Scotland, as appropriate.

226. Subsection (4) sets out the information required in the application, including critical details of the powers conferred by the court, for example, the power to sell the property.

227. Subsection (5) states the procedure for recording the intervention order in the Register of Sasines.

228. Subsection (6) states the procedure for recording the intervention order in the Land Register of Scotland. The title sheet of each property over which the person authorised under an intervention order has been granted powers will be amended to show the authority conferred by the court.

229. Subsection (7) provides for the person authorised under an intervention order to send to the Public Guardian the proof of his registration in relation to the heritable property concerned, either the endorsed interlocutor if recorded in the Register of Sasines, or the Land Certificate if registered in the Land Register of Scotland. The Public Guardian will record these particulars in the public register.

### ***Guardianship orders***

#### **Section 57: Application for guardianship order**

230. This section sets out how applications can be made for guardianship orders, who may apply for an order and what documents must accompany applications.

231. Subsection (1) establishes that an application to the sheriff for a guardianship order can be made by anyone with an interest, including the adult. The application can be made about any or all aspects of the property, financial affairs or personal welfare of the adult concerned.

232. Subsection (2) places a duty upon the local authority to apply for a guardianship order under certain circumstances, where it appears that an order is necessary but nobody else is applying for one. In assessing whether the order is required, there must be no other lesser measure that could safeguard the adult's interests sufficiently. A guardianship order would only be appropriate where no other measures were possible or sufficient, for example, an intervention order.

233. Subsection (3) establishes the evidence which must accompany an application for guardianship. Evidence is required in relation to the incapacity of the adult, the need for a guardianship order and the suitability of the person nominated in the order.

234. Subsection (3)(a) requires assessment of the adult concerned to be by two medical practitioners. Their examinations must have been within the 30 days prior to making the application, which ensures recent and specific assessments.

235. Where mental disorder is being assessed, one of the medical practitioners must be approved under section 20 of the Mental Health (Scotland) Act. Section 20 doctors are approved by Health Boards as having special experience in the diagnosis or treatment of

mental disorder. They are mainly psychiatrists but may include other medical practitioners who have the necessary special experience.

236. Where the guardianship application covers any aspect of the personal welfare of the adult, subsection (3)(b) requires a report from the mental health officer of the relevant local authority on the appropriateness of the order sought. Where the incapacity of the adult is due only to an inability to communicate, the report is the responsibility of the chief social work officer. Again the report must be based on a recent assessment. The opinion of the mental health officer or chief social work officer is also sought on the suitability of the nominated guardian.

237. Subsection (3)(c) provides for a similar report to (3)(b) where a guardian with powers covering only property or financial affairs is sought. The report must be from somebody with sufficient knowledge of the adult and the applicant. This may be a social worker, but might also be a relative, carer or professional involved with the adult. They will assess whether guardianship is an appropriate order to make, and the nominated guardian is suitable, by interviewing the adult concerned. Again the assessment must be carried out in the 30 days prior to lodging the application.

238. Subsection (4) requires an individual when applying for a guardianship order covering welfare matters, to inform the chief social work officer of his intention. The chief social work officer or mental health officer, as the case may be, will then be obliged to make their report within 21 days, ensuring that the report will be available for the application to proceed.

239. Subsection (5) establishes that the sheriff may, in the period between receiving an application for a guardianship order, and deciding whether to grant the order, appoint an interim guardian. This measure might be required if the property or financial affairs of the adult required urgent administration, or the adult needed someone to take welfare decisions on their behalf before an order could be granted.

240. Subsection (6) limits the period of the appointment of an interim guardian to until a guardian has been appointed, or three months from the date of appointment, or any earlier date on which the sheriff recalls it. This ensures that interim guardians do not have authority for extended periods, as they would not have been subject to the full scrutiny required to protect adults on the appointment of a guardian.

### **Section 58: Disposal of application**

241. This section sets out how the sheriff will deal with an application for a guardianship order and the process of notification of such an order.

242. Subsection (1)(a) requires the sheriff to ascertain that the adult's incapacity relates to the powers proposed for the guardian, and that the incapacity is likely to continue. Subsection (1)(b) ensures that the principle of least intervention is adhered to and a guardian is only appointed where no other available measure would sufficiently safeguard or promote the adult's interests.

243. Subsection (2) ensures that a sheriff shall consider any previous orders relating to the adult made under Part 6 of the Act when considering an application for a guardianship order.

This will avoid conflicting orders being made and inform the sheriff about measures that have been taken in the past.

244. Subsection (3) allows the sheriff to decide that an intervention order would be more appropriate than guardianship and to treat the original application as an application for an intervention order. This will avoid the delay of having to reapply for an intervention order, and the sheriff having to consider the case twice.

245. Subsection (4) provides that the sheriff will normally appoint a guardian for 3 years, but has discretion to vary this, including making the appointment indefinite.

246. Subsection (5) provides that two or more guardians may be appointed jointly with separate powers, for example, one for welfare matters and one for financial matters. This is different to the provision at section 62 for guardians to be appointed to exercise the same powers jointly.

247. Subsection (6) provides that the sheriff shall order a person granted a guardianship order relating to property or financial affairs to provide caution or insurance against liability. This is to protect the adult from any mishandling of their affairs, ensuring that recourse to compensation is possible. The sheriff will require caution to be found unless the person appointed as guardian proves unable to find caution, in which case, if the sheriff is satisfied that the person is still suitable to be appointed as guardian, the sheriff can waive the requirement.

248. Subsection (7) states that it is the court's duty to inform the Public Guardian of a guardianship order. It also sets out the duties of the Public Guardian on receiving notification of the guardianship order. The details must be entered in the public register, and when satisfied that the guardian has found insurance against liability, if the sheriff has required it, the Public Guardian will issue a certificate to the guardian, giving him authority to act.

249. Subsections (7)(c) and (d) provide for the Public Guardian to notify the appointment of a guardian to the adult and the appropriate statutory bodies. The terms of the interlocutor, that is to say, the details of the appointment, must be notified to the statutory bodies.

### **Section 59: Who may be appointed as guardian**

250. This section sets out who the sheriff may appoint as a guardian to an adult and factors they should consider in making an appointment.

251. Subsection (1) establishes the categories of people suitable for appointment as guardians. The chief social work officer of the local authority can be appointed as an adult's guardian only with respect to their welfare. Otherwise, any individual whom the sheriff considers to be suitable and is willing can be appointed.

252. The chief social work officer of the local authority can be appointed as an adult's guardian only with respect to the adult's welfare. Subsection (2) clarifies that where a guardianship order is to relate to property, financial affairs and welfare, the chief social work officer may be appointed as a joint guardian with powers relating only to the adult's welfare.

253. Subsection (3) provides for the sheriff to ensure that an individual understands the adult's requirements, and a guardian's duties before appointing them.

254. Subsection (4) sets out the points that the sheriff should consider to assess the suitability of an individual to be appointed guardian. It is important that the guardian is easily and regularly accessible to the adult. Subsections (4)(c), (d) and (e) are important to prevent an appointment that fails to benefit the adult. These provisions are not intended to prevent close relatives or a person residing with an adult being appointed their guardian, as stated in subsection (5). Subsection (4)(f) allows the sheriff to take into account any other matter if appropriate.

### **Section 60: Renewal of guardianship order by sheriff**

255. Subsection (1) provides that at any point before a guardianship order expires, a renewal application can be made, and that this will have the effect of continuing the period of guardianship until the renewal has been decided. For example, if a renewal was requested a week before the guardianship order expired and it took six weeks for the sheriff to make a decision, the guardianship would continue uninterrupted until that decision was made.

256. Subsection (2) provides that it is the duty of the local authority to apply for the renewal of a guardianship order where nobody else does, and that in such a case the guardianship order will continue until the application has been determined. This protects the adult against a lapse in their protection.

257. Subsection (3) provides that an application to renew a guardianship order should require the same reports on the incapacity of the adult as the original order required, as set out in section 57. This means that a sheriff will be fully informed as to the current state of the adult's incapacity, and whether a guardianship order is still appropriate, and, where an individual is the guardian, whether they are still a suitable person to act.

258. Subsection (4) provides for sheriffs to follow the same procedure for disposing of renewal applications as other applications, as described in section 58.

259. Subsection (4)(b) provides for the renewal of a guardianship application to normally be for 5 years, as opposed to the 3 years suggested for an initial appointment. The sheriff may, however, set another period where appropriate – this could be short if the adult's condition was subject to change, or indefinite where no improvement was expected.

260. Subsection (5) applies to cases where the sheriff refuses to renew the guardianship order. In this case it is the duty of the court to inform the Public Guardian, who must record this in the public register, and notify the adult and the appropriate statutory bodies.

### **Section 61: Registration of guardianship order relating to heritable property**

261. This section makes the same provision for registering a guardianship order relating to heritable property with the Keeper of the Registers of Scotland, as for intervention orders under section 56. The provision ensures that any conveyancing search of the Registers would reveal the existence of the guardian for the purposes of transactions with the property. See section 56 for further explanatory notes.

### ***Joint and substitute guardians***

#### **Section 62: Joint guardians**

262. This section allows for two or more individuals to be appointed as joint guardians to an adult.

263. Subsection (1) sets out the two manners in which joint guardians might be appointed – either by an initial application by more than one individual, or by adding a further individual to act jointly with the existing guardian or guardians.

264. Subsection (2) states that normally joint guardians will only be appointed where they are close relatives of the adult, namely parents, siblings or children. Only where the sheriff is satisfied that there is a particular need, would individuals who are not relatives of the adult be appointed as joint guardians.

265. Subsection (3) provides that the appointment of joint guardians will follow the same steps as appointing a single guardian. The sheriff will have the same options to dispose of applications as are detailed in section 58 and will use the same criteria to decide whether to appoint the applicants, as described in section 59.

266. Subsection (4) provides for the application of an individual to be an additional guardian to act alongside the existing guardian. The sheriff must be satisfied, using the criteria described at section 59(2) to (4), that the individual is suitable to be appointed as guardian of the adult concerned.

267. Subsection (5) provides the procedure for notification of the appointment of an additional guardian. The sheriff court will inform the Public Guardian of the appointment, who will enter the details in his register, and, when the new appointee has obtained insurance against liability if required, will issue a certificate of appointment. The existing guardian will be issued with a new certificate of appointment, which will indicate the joint guardianship.

268. Subsection (6) states that joint guardians can, subject to the requirements of subsection (7), act individually. Joint guardians are however liable for damage due to their acts or omissions, as a single guardian would be, and also for that caused by their fellow joint guardian, where they have failed to take reasonable steps to prevent it. In the case where two or more joint guardians are liable for loss or injury caused to the adult concerned, their liability is joint and several. For example, if one of the joint guardians, entered into a financial arrangement on behalf of the adult, all of the joint guardians could be liable if the arrangement turned out to have been incompetent.

269. Subsection (7) places a duty on joint guardians to consult each other before acting. This consultation can be waived if it is impractical. For example, one of the joint guardians could freely act if the other was abroad and out of ready communication. It can also be waived by agreement of the joint guardians. For example, two joint guardians might agree that only one would be involved in the adult's everyday finances.

270. Subsection (8) provides for recourse to the sheriff court if joint guardians cannot agree.

271. Subsection (9) establishes that third parties when dealing with a joint guardian can, unless they know anything to the contrary, rely on the authority of one of the guardians as they would on a single guardian, without seeking further confirmation.

### **Section 63: Substitute guardian**

272. This section provides for the appointment of a substitute guardian who will replace the original guardian if they die, or have to stop acting. For example, this might be particularly relevant where a guardian is elderly: the guardian may themselves lose capacity.

273. Subsection (1) states that the sheriff can, on application, appoint a substitute guardian who meets the same criteria that govern the appointment of the original guardian, that is to say, those in section 59.

274. Subsection (3) provides that a substitute guardian's appointment expires at the same time as the appointment of the original guardian. At that point, the need for guardianship will be reviewed by the court and renewed provision for a substitute guardian can be made in any resulting guardianship order.

275. Subsection (4) establishes that an application for the appointment of a substitute guardian can be made at the same time as the appointment of the original guardian or later. This allows a substitute to be appointed when the circumstances of the original guardian alter. Alternatively, a suitable individual who was not eligible at the time of the original application may apply, for example, if a child of the adult concerned reaches adulthood.

276. Subsection (5) requires a person appointed as substitute guardian to find caution or insurance against liability. Where the substitute guardian's powers will relate to property or financial affairs, caution will be required by the sheriff unless the substitute guardian is unable to get such insurance, in which case, if the sheriff is still satisfied that the person is appropriate for appointment, the requirement can be waived.

277. Subsection (6) establishes that when a substitute guardian replaces an original guardian, they should be referred to as the "original guardian" for the purposes of this section, to allow for the appointment of a replacement substitute guardian.

278. Subsection (7) states that when a substitute guardian is appointed, other than in the original guardianship order, it is the duty of the court to notify the Public Guardian. The Public Guardian must notify those listed in subsection (7)(b), and record the appointment of the substitute guardian in the public register.

279. Subsection (8) states the duties of a substitute guardian on the death or incapacity of the original guardian. They must notify the Public Guardian, providing a death certificate where the original guardian has died. The substitute guardian must also state at this stage whether they will accept the appointment as guardian. This means that even if the substitute

guardian does not wish to accept the appointment, it is still their duty to inform the Public Guardian if the original guardian can no longer act by reason of incapacity or death.

280. Subsection (9) provides for the Public Guardian to authorise the substitute guardian to act in the place of the original guardian, after notification under subsection (8) has occurred. The new guardian's details will be entered in the public register, a certificate will be issued and the adult and the appropriate statutory bodies will be notified.

281. Subsection (10) establishes that the scope of a substitute guardian's powers is the same as those of the original guardian, unless the sheriff has specified otherwise.

### ***Functions etc. of guardian***

#### **Section 64: Functions and duties of guardian**

282. Subsection (1) defines the powers that a guardian may be given by the order of the sheriff court appointing them. Powers may be granted over specific aspects of the property, financial affairs and the personal welfare of the adult. Alternatively, the guardian may be given power over all areas of personal welfare, all of the adult's property and finances, or both.

283. Subsection (1)(c) allows the guardian to be given the power to act in relation to a declarator of nullity of marriage, divorce or separation in the adult's name. This power has to be specifically set out in the guardianship order.

284. Subsection (1)(e) provides for the guardian to authorise the adult to control certain parts of his affairs, for example, small amounts of money. This agrees with the general principles outlined in section 1 of encouraging the adult to use their existing skills and develop new skills, and being the least restrictive measure to the adult's freedom.

285. Subsection (2) provides that a guardian cannot authorise the detention of an adult in a hospital for the treatment of mental disorder, nor can they consent to any of the excepted treatments for which specific provisions are made under section 48.

286. Subsection (3) allows a guardian to act as the legal representative of the adult, where the matter relates to an area within the guardian's powers, unless the court has specifically ruled this out. For example, the guardian might instruct a solicitor on the adult's behalf.

287. Subsection (5) allows a financial guardian to use the adult's estate, both their income and capital, including any savings or investments of the adult, as set out in the Act. The purpose must be to enhance the adult's quality of life. This is subject to any conditions the court has imposed, the management plan required at schedule 2, and the provisions for buying and selling property also in that schedule.

288. Subsection (6) allows a guardian to delegate duties to other people, for example, to give a primary carer funds to manage day to day expenses. However, the guardian cannot transfer powers conferred by the guardianship order to another person. This means that the

guardian remains responsible for all areas covered by the order, until their appointment is terminated.

289. Subsection (7) gives the Public Guardian the general function of supervising and directing financial guardians. This would, for example, allow the Public Guardian to require a guardian to desist from using the adult's funds in a particular way. The Public Guardian may apply to the sheriff for an order where the guardian has not complied with an order issued by him.

290. Subsection (8) safeguards an adult who has an interim guardian with welfare or financial powers. Monthly reports must be made by the interim guardian to allow extra supervision of the exercise of interim guardianship powers since they were appointed without the safeguards required when a permanent guardian is appointed. These reports will be made to the local authority in the case of welfare powers and the Public Guardian in the case of financial powers.

291. Subsection (9) applies where the chief social work officer has been appointed as an adult's guardian. It is likely that another official will actually exercise the day to day responsibilities of the guardian, and this provision ensures that those who would be informed about guardianship are informed quickly of who the nominated official is at any particular point.

292. Subsection (11) provides for the scope and conditions of a guardian's powers to be prescribed in Regulations.

293. Subsection (12) provides for schedule 2, which gives detailed conditions for guardians managing aspects of the estate of an adult, to take effect.

### **Section 65: Records: guardians**

294. This section requires a guardian to keep a record of their actions. The code of practice for guardians will include information on record-keeping.

### **Section 66: Gifts**

295. There is no implied power for a guardian to make gifts out of the adult's estate. Subsection (1) states that guardians with powers over an adult's property and financial affairs cannot make gifts on the adult's behalf unless the Public Guardian has authorised the gifts.

296. Subsection (2) provides for the Public Guardian to authorise specific gifts to be made, or give general authorisation for a particular type of gift. For example, the Public Guardian could authorise a series of birthday presents of specified value to be made to specified people.

297. Subsection (3) provides for the Public Guardian to inform the persons listed in this subsection, who have an interest in the adult and their estate, about applications by the guardian to make gifts. They will be given a period in which to object to the gift being granted. If any objections are made, the Public Guardian is required to hear these objections, before making a decision.

298. Subsection (4) allows the Public Guardian to make an exception to the requirement for intimation, where he thinks that the value of the gift is not significant.

299. Subsection (6) says that where the Public Guardian is considering refusing an application, the guardian must be told and has the right to be heard by the Public Guardian before a final decision is made.

300. Subsection (7) establishes that the Public Guardian may refer an application to make a gift to the sheriff for a decision, at his own instigation or that of the guardian or any person objecting to authorising the gift. This would allow the sheriff rather than the Public Guardian to make the decision.

301. Subsection (8) provides for decisions of the Public Guardian to be appealed to the sheriff. There is no further appeal against decisions of the sheriff.

### **Section 67: Effect of appointment and transactions of guardian**

302. This section makes various provisions about the exercise of a guardian's powers.

303. Subsection (1) clarifies that the adult may not enter into transactions on matters within the guardian's authority and any decision of the adult on such a matter is invalid. For example, if a guardian was appointed with powers over the adult's property, the adult could not sell their house. However, the guardian may choose to delegate to the adult if the terms of their appointment allow this.

304. The appointment of a guardian does not imply that the adult loses capacity in an area that the guardianship order does not cover. In particular, the appointment of a guardian need not affect the adult's legal capacity to make a will, or enter into a valid marriage.

305. Subsection (2) provides that the certificate of appointment that a financial guardian receives from the Public Guardian, gives the guardian authority to manage the adult's moveable and immovable property and to receive any relevant payments due to the adult.

306. Subsection (3) establishes that a welfare guardian can act even when the adult is outside Scotland.

307. Subsection (4) deals with the liability of a guardian. Guardians are not personally liable for transactions where it is made clear that they are acting as guardian, and within the scope of their authority. In those circumstances, the guardian is a representative of the adult and the adult's estate is liable. If, however, the guardian has not made it clear that they are acting as guardian, then they are personally liable. However, where their actions are within the authority granted them, they can be reimbursed for costs incurred in this way, from the adult's estate. This provision is necessary to ensure that guardians are not deterred from carrying out their duties because they might unintentionally fail to clarify their authority to a third party.

308. Subsection (4)(b) provides that the guardian is personally liable if they act outwith the scope of their authority.

309. Subsection (5) provides for the validity of the adult's actions, where the guardian delegated matters under section 64(1)(e), despite the adult's incapacity, but provided that the third party involved is aware that the guardian has delegated to the adult.

310. Subsection (6) provides protection for third parties who enter into transactions for value and in good faith with a guardian, for example, by buying something belonging to the adult. That transaction will not be invalidated because the guardian has acted outwith their authority, incorrectly or was appointed invalidly. Without this protection, third parties might be reluctant to deal with guardians.

311. Subsection (7) provides that where the appointment of a foreign welfare guardian is recognised in Scotland, they are covered by subsections (3) and (4).

### **Section 68: Reimbursement and remuneration of guardian**

312. This section sets out whether and how a guardian may be remunerated for work done performing duties as a guardian and reimbursed for expenses so incurred.

313. Subsection (1) states that a guardian is entitled to reimbursement, with the restriction that it should only be for expenses that the guardian incurred carrying out his function as a guardian. Reimbursement will come from the adult's estate.

314. Subsection (2)(a) provides for the guardian to be reimbursed for items and services they provide that are not part of their functions as a guardian. For example, if the guardian was also the adult's solicitor, this allows them to continue to be paid by the adult for services provided that are not included in the appointment as a guardian.

315. Subsection (2)(b) protects the adult from being subject to extra local authority charges due to the appointment of a local authority guardian. If services provided would be free of charge to someone not under guardianship, a charge cannot now be made for those services.

316. Subsection (3) relates to costs that a local authority may be reimbursed, where it applies for appointment of the chief social work officer as a guardian. It differentiates between guardianship orders covering property and financial affairs, and those covering welfare matters. Only in the former case can the local authority be reimbursed. Where an order covers both finance and welfare matters, it is at the sheriff's discretion to apportion the costs between the adult and the local authority respectively. The effect of this subsection is that an adult's estate will bear the cost of administering it properly, but that the protection of the adult through the appointment of a local authority welfare guardian will not cost the adult anything.

317. Subsection (4) also distinguishes remuneration (or pay) for welfare guardianship from that relating to property and financial affairs. Only where the sheriff decides that special cause is shown and has taken the value of the adult's estate into account, and never where the chief social work officer is exercising the role, should welfare guardians be paid for exercising their functions. The sheriff might, for example, consider remuneration for a guardian who was the adult's carer and dependent on the adult, with no other means of support.

318. Subsection (4)(b) states that financial guardians will normally be remunerated out of the adult's estate for exercising their functions, which may be more onerous and involve considerable responsibility. However, the sheriff may remove this provision, perhaps where the adult's estate is very small, and the task of managing it is straightforward.

319. Subsection (5) establishes that the work involved in administering the adult's estate, and the estate's value will be determining factors for the sheriff to use in allowing remuneration of a financial guardian.

320. Subsection (6) provides for the Public Guardian to set the level of remuneration, where the sheriff has allowed it, and outlays which will be reimbursed, for each guardian. The Public Guardian will determine the level of remuneration granted, taking into account the level of the adult's resources. Where accounts are submitted by the guardian, levels of remuneration and reimbursement of expenses will be determined at the end of each accounting period.

321. Subsection (7) allows the Public Guardian to award interim remuneration to a guardian if it is unreasonable to wait for the end of an accounting period, for example, where the guardian has spent a considerable time carrying out his financial duties, the accounting period is long, and it could cause hardship to withhold remuneration.

322. Subsection (8) concerns appeals against decisions of the Public Guardian. The decision to award remuneration, or reimburse outlays or to award an interim payment can be appealed to the sheriff, whose decision is final.

### **Section 69: Forfeiture of guardian's remuneration**

323. This section provides for forfeiture of the guardian's remuneration where there is misconduct or the guardian has not performed duties properly. Any interested party, for example, the adult, or the local authority, can apply to the sheriff, bringing the guardian's conduct to the court's attention, and the sheriff can forfeit all or part of the guardian's remuneration.

### **Section 70: Non-compliance with decisions of guardian with welfare powers**

324. This section sets out the measures a welfare guardian can take to ensure that certain decisions are implemented.

325. Subsection (1) provides for where the adult or another person does not comply with a reasonable decision by the welfare guardian. The guardian can apply to the sheriff for an order or warrant to make the adult or another person comply with their decision. The sheriff would have to be satisfied that the order would benefit the adult, that the adult or other person could reasonably be expected to obey the decision and it was the only reasonable way of achieving that benefit.

326. Subsection (1)(a) provides for the sheriff to issue an order specifically instructing the adult or a third party to implement the guardian's decision.

327. Subsection (1)(b) provides for situations where the adult does not comply with the decision of the welfare guardian as to where they are to live. In this case, the sheriff can issue a warrant for a police officer to arrest the adult and remove them to the place that the guardian requires. Section 117 of the Mental Health (Scotland) Act 1984 sets out a similar provision for removal to a place of safety of a mentally disordered adult who is being ill-treated or is unable to care for himself.

328. Subsection (2) provides for cases where a third party has refused to comply with a decision of a welfare guardian. The guardian may apply to the sheriff, who can make an order to the third party, where the guardian's decision is justified and it is reasonable to expect the third party to comply with the decision.

329. Subsection (3) provides for the court to notify any persons against whom the order or warrant is made, including the adult concerned, that an application has been made. They must be given a prescribed period to object, and any objections must be heard, before any order or warrant is granted. However, the sheriff is not bound to take objections into account in deciding to grant the application.

330. Subsection (5) permits a constable executing a warrant granted according to subsection (1)(b) to use reasonable force if required. The constable must be accompanied by the guardian, or another person authorised by the guardian.

331. Subsection (6) provides that a foreign welfare guardian whose appointment is recognised in Scotland, shall have the same rights and restrictions under this section as a welfare guardian appointed in Scotland.

### ***Termination and variation of guardianship and replacement, removal or resignation of guardian***

#### **Section 71: Replacement or removal of guardian or recall of guardianship by sheriff**

332. This section provides that the sheriff may order a guardian to be replaced, removed (where a substitute or joint guardian exists who would act or continue to act) or have their powers recalled (where a guardian is no longer required or appropriate).

333. Subsection (1) provides that the adult or any other interested party can make an application to the sheriff under this section. On granting any application, the court will notify the Public Guardian and the other statutory bodies, where appropriate.

334. Subsection (1)(a) provides for replacement where the application nominates another individual or office-holder to be appointed. Before appointing the new guardian, the sheriff must consider their suitability as set out in section 59.

335. Subsection (1)(b) allows a sheriff to remove a guardian from office, where another guardian exists who is prepared to act, or continue to act: either a substitute guardian, or a remaining joint guardian or joint guardians where the guardian being removed was a joint guardian. This would involve the sheriff deciding whether the application is justified and, if so, removing the powers of the existing guardian.

336. Subsection (1)(c) provides for a guardianship order to be recalled in situations where a guardian is no longer needed, for example, if the adult has recovered capacity, or another measure than guardianship would be more appropriate, for example, one or more intervention orders.

337. Subsection (2) provides for a new guardian appointed under this section to be required by the sheriff to find caution or insurance against liability. The sheriff will order that caution must be found by a guardian with powers relating to property or financial matters, unless the guardian proves unable to find caution, in which case, if the sheriff is satisfied that they are still suitable to be appointed, the requirement can be waived.

338. Subsection (3) sets out the actions of the Public Guardian on notification of a decision under subsection (1). The details of the sheriff's decision will be entered in the public register.

339. Subsection (3)(b) provides that when satisfied that any new guardian has found caution if required by the sheriff, the Public Guardian will issue a new certificate of appointment. After issuing a certificate of appointment, the Public Guardian will notify the adult and relevant statutory authorities, according to subsection (3)(c).

340. Subsection (4) provides that the sheriff may recall a guardianship order under this section and make an intervention order. An intervention order may be the most appropriate replacement for guardianship, according to the minimum intervention principle in section 1.

341. Subsection (5) clarifies that foreign guardians may be replaced or removed, or have their powers recalled, by the sheriff under this section, if their appointment is recognised in Scotland.

## **Section 72: Discharge of guardian with financial powers**

342. This section provides for the Public Guardian to discharge a guardian with financial powers, following that guardian's recall, resignation, removal, replacement or death, or the death of the adult concerned. This gives a guardian, or after the guardian's death, their representative, an exoneration from any future challenge relating to their handling of the adult's financial affairs.

343. Subsection (1) establishes that under all the circumstances listed, the Public Guardian may, on application from the former guardian, or his representative where the former guardian has died, grant a discharge. This would cover all of the former guardian's activities in managing the adult's affairs.

344. Subsection (2) provides that when the Public Guardian receives an application for the discharge of a former guardian, he will notify the people stated, and give them a period in which to object. Where objections are made, the Public Guardian must give the objector an opportunity to be heard.

345. Subsection (4) states that where the Public Guardian is considering refusing an application for discharge, he must notify the former guardian or his representative. They will

be given time to object to this decision and only after hearing their objections can the Public Guardian refuse the application.

346. Subsection (5) provides for the Public Guardian to remit an application for discharge to the sheriff for a decision. He may do this at the request of the applicant or any person objecting to the granting of the application, or at his own discretion.

347. Subsection (6) concerns appeals against decisions of the Public Guardian. These can be made to the sheriff on three counts: the Public Guardian's decision to grant or refuse the discharge, or to grant or refuse the application, or to refuse to remit the application to the sheriff. In each case, the decision of the sheriff cannot be appealed against.

### **Section 73: Recall of powers of guardianship**

348. This section provides for the Public Guardian, Mental Welfare Commission or local authority to recall, or in other words terminate, the powers of a guardian, either on application or at their own instance.

349. Subsection (1) establishes that the Public Guardian can recall a guardian's property or financial powers. Any person claiming an interest, including the adult, may apply to the Public Guardian for a recall.

350. The Public Guardian can recall the powers of a guardian on either of two grounds: firstly, that the reasons for appointing a guardian no longer apply, for example, where the adult has regained capacity. Secondly, that another and less intrusive measure than guardianship would be as satisfactory, for example, an intervention order, or access to the adult's funds under Part 3 of the Act.

351. Subsection (2) provides for the Public Guardian to update the public register and notify the adult and other interested parties where he has recalled the powers of a guardian.

352. Subsection (3) establishes that the Mental Welfare Commission or the local authority can recall welfare guardianship powers on the same grounds provided at subsection (1). This can be done at their own instigation, for example, where an adult has no other interested person prepared to apply; or where another party claiming an interest in any of the adult's affairs, including the adult themselves, has applied to them. The relevant local authority is the one in which the adult lives. Where the chief social work officer of the local authority has been appointed guardian, welfare powers cannot be recalled by the local authority. If a local authority thinks that powers conferred on their chief social work officer should be recalled, they can apply to the Mental Welfare Commission under this section.

353. Subsection (4) provides for the Public Guardian to be informed of recall of guardians' powers under subsection (3), to allow the update of the public registers, and to notify the adult and guardian. The local authority and Mental Welfare Commission must notify each other of recalls that they make.

354. Subsection (5) provides for the Public Guardian, Mental Welfare Commission or local authority to notify the adult and other interested parties, as listed, when considering recalling

a guardians' powers, either at their own instance, or on application from a third party. All parties notified will be given a prescribed period to lodge objections, and no recall will be made without giving an objector an opportunity of being heard.

355. Subsection (7) provides that where the Public Guardian, Mental Welfare Commission or local authority intend to refuse an application for recall, they will inform the applicant and the adult and give a prescribed period in which they can object. The application will not be refused until any objections have been heard.

356. Subsection (8) allows the Public Guardian, Mental Welfare Commission or local authority to choose to, or on the request of an applicant or any person objecting to recall, decide to, remit the matter to the sheriff.

357. Subsection (9) provides for appeals to the sheriff against decisions by the Public Guardian, local authority and Mental Welfare Commission on recall or to remit or not to remit an application to the sheriff. The sheriff's decision is final and cannot be appealed against. While an appeal to the sheriff is in progress, the decision on the application to recall will remain in force.

358. Subsection (10) gives the Scottish Ministers the power to make regulations prescribing the procedures for recall by the Mental Welfare Commission or the local authority. Such a power exists in relation to recall by the Public Guardian under section 7.

#### **Section 74: Variation of guardianship order**

359. Subsection (1) establishes that the sheriff has the authority to vary a guardianship order, or any related order. This would allow the sheriff, for example to alter the powers conferred on a guardian. Any interested party, including the adult, can apply to the sheriff for a variation to a guardianship order.

360. Subsection (2) provides for the sheriff to require caution to be found when varying any powers relating to an adult's property or financial affairs, in the same terms as it is required under section 58(6), when a guardian is appointed. This provides protection for an adult in a case where the variation has increased a guardian's responsibilities for the adult's property or financial affairs.

361. Subsection (3) provides for the sheriff to consider any previous orders, variations to orders or ancillary orders made under Part 6 of the Act when considering an application for a variation. This will ensure the sheriff is aware of past or existing orders, informing of what has been appropriate in the past and ensuring an informed decision is taken on this application.

362. Subsection (4) prohibits using section 74 to extend the powers of a welfare guardian to matters relating to property or financial affairs, or those of a financial guardian to welfare matters. A change as important as this should be made through a new application for a guardianship order under section 57.

363. Subsection (5) provides that the sheriff court will notify the Public Guardian of any variation to a guardianship order, allowing the public registers to be updated, the appropriate parties notified and a new certificate of appointment issued to the guardian.

### **Section 75: Resignation of guardian**

364. This section sets out the procedure for a guardian to resign. To protect the adult from an interval in which no guardian is acting, resignation cannot become effective until the appropriate notifications and appointment of another guardian have been completed.

365. Subsection (1) establishes that a joint guardian, or a guardian where a substitute guardian has been appointed, may resign by notifying the Public Guardian, the local authority and, where appropriate, the Mental Welfare Commission.

366. Subsection (2) qualifies subsection (1) with the provision that resignation shall not be effective unless the remaining guardian, whether joint or substitute, is willing to act under the new circumstances. If this is the case, the resignation is effective from the time the Public Guardian has received the written resignation of the guardian, and evidence that the substitute or remaining joint guardian is prepared to act.

367. Subsection (3) provides for the Public Guardian, to update the public registers, issue a new certificate of appointment and notify the adult and others of the new arrangement. In the case of a remaining joint guardian, the Public Guardian will already be satisfied that they have caution (insurance against liability) where required, and can issue a new certificate straight away. A substitute guardian will not have required caution before; however the sheriff will have made a decision to require caution or not when they were appointed, and if it was required, they must now demonstrate they have caution before a certificate of appointment can be issued.

368. Subsection (4) provides for substitute guardians, who have not been called upon to act, to resign. This will not affect an adult's affairs and is therefore effective simply by notifying the Public Guardian, local authority and, where appropriate, the Mental Welfare Commission, in writing. The Public Guardian will notify the guardian and the adult, and update the public register.

369. Subsection (5) covers the circumstances in which a guardian wishes to resign but no substitute or joint guardian is available to take over. Subsection (5)(c) includes guardians where the remaining joint guardian or substitute guardian is unwilling to act. Resignation will only be effective after a replacement guardian has been appointed, using section 71. Therefore a guardian seeking to resign with no joint or substitute guardian willing to act could apply to the sheriff under this section, but would also have to ensure that an application for a replacement guardian was made.

### **Section 76: Change of habitual residence**

370. This section provides for notifications where an adult moves from one local authority area to another, where the adult's guardian is the chief social work officer of their local authority.

371. Subsection (1) requires the chief social work officer of the first local authority to notify their counterpart in the second local authority. On receiving notification, the latter becomes the guardian and is then obliged to notify the relevant parties within 7 days. This provides that there is little or no interim period when the guardian's powers are not being exercised.

372. Subsection (2) provides that the Public Guardian will update the public registers and notify the adult within 7 days.

373. Subsection (3) provides for notifying the adult of the officer of the second local authority who will be responsible for acting as guardian on behalf of the chief social work officer, within 7 working days of the local authority receiving notification of the adult's move.

374. Subsection (4) allows notification to the adult to be withheld where, in hearing the original application for guardianship, the sheriff decided that intimation would pose a serious risk to health.

#### **Section 77: Termination of authority to intervene and guardianship on death of adult**

375. Subsection (1) states that when the adult dies, any existing intervention order or guardianship order is terminated. For example, this means that a guardian with powers over an adult's property and financial affairs could not continue to act after the adult's death. This is essential because such an action could not benefit the adult. The situation with respect to the adult's estate should be the same as if a person with no guardian had died.

376. Subsections (2), (3) and (4) allow those who work with guardians and the guardian themselves to carry out valid transactions without having to double check that a guardianship is still valid, unless there is a particular reason to doubt it. For example, if a third party were aware that an application to remove the guardian was pending in the court, they should confirm with the guardian that their appointment was still valid. These provisions apply similarly to people authorised to act under intervention orders.

377. Subsection (2) provides that a guardian or person authorised under an intervention order who acts in good faith, carrying out their functions, when their authority has actually terminated, including through the death of the adult, should be entitled so to act.

378. Subsection (3) protects third parties who deal with those whose authority has ended, providing they are unaware of the termination of authority.

379. Subsection (4) provides specific protection where heritable property has changed hands after the authority of a person authorised to intervene or a guardian has come to an end, provided there was no other fault in the transaction.

380. Subsection (5) provides that foreign guardians are to be treated in the same way under this section as guardians appointed in Scotland.

**Section 78: Amendment of registration under section 61 on events affecting guardianship or death of adult**

381. This section deals with action required when there are changes affecting guardianship orders that relate to heritable property. Where such orders have been made, and recorded or registered under section 61, any subsequent amendments, for example, recall of guardianship, must also be recorded or registered in the Register of Sasines or Land Register of Scotland. Otherwise an out of date guardianship order would be found in a conveyancing search of a property.

382. Subsection (1) provides that the Public Guardian shall apply to the Keeper of the Registers to record any change to a guardianship order that has previously been recorded in the Registers under section 61. The change could be due to one of the circumstances referred to in subsection (1)(a), for example, recall of guardianship by the sheriff, or it could be, as in subsection (1)(b), the death of the adult and consequent termination of the guardianship order. Applications to the Keeper must be accompanied by evidence of the reason for amendment.

383. Subsection (2) provides for the Keeper of the Registers to record or register the change in the Register of Sasines or Land Register, as appropriate.

**Section 79: Protection of third parties: guardianship**

384. This section provides protection for third parties who, in good faith, acquire heritable property from a guardian. If the order appointing the guardian turns out to be invalid on grounds of procedure, or the guardian lacked the power to act as they did, the third party will retain the property or interest in property that they bought in good faith.

385. Without this protection, third parties would be reluctant to deal with guardians, as it would have added risks. Similar protection is provided for acquisitions from those authorised under an intervention order in section 53(13).

**PART 7: MISCELLANEOUS**

**Section 80: Future appointment of curator bonis etc incompetent**

386. This section confirms that no new appointments can be made once the relevant provisions of the Act come into force to the ancient offices of curator bonis, tutor-dative or tutor at law to an adult. Schedules 5 and 6 amend and repeal statutory provisions for the exercise of these offices. The position of existing curators and tutors once the provisions of the Act are commenced is covered at schedule 4.

**Section 81: Repayment of funds**

387. This section requires those with functions under the Act listed in subsection (1) to refund to the adult any funds that they misuse, with interest. The rate of interest is fixed by Rules of Court.

388. Subsection (2) clarifies that repayment under this section is to be considered as a separate matter to forfeiture of a guardian's remuneration under section 69. Section 82

clarifies limits on the liability of those with responsibility for an adult's financial affairs under the Act.

### **Section 82: Limitation of liability**

389. Attorneys, guardians and others with functions under the Act are held at common law to owe a duty of care to the adult with incapacity. This duty requires the exercise of due skill and care in carrying out the functions required on the adult's behalf. Where the proxy is a professional person they must demonstrate the skill and care that would be expected of a reasonably competent member of that profession.

390. There will also be a common law fiduciary relationship between an adult with incapacity and a person acting on their behalf under the Act. A fiduciary duty is one based on trust. It is a general principle that those having fiduciary duties to discharge are not allowed to enter into engagements in which they have or can have a personal interest conflicting or which may conflict with the interests of those whom they are bound to protect. There are other fiduciary duties: the undivided loyalty rule and the confidentiality rule. The undivided loyalty rule requires those with a fiduciary duty not to place themselves in a position where their duty towards one beneficiary conflicts with the duty owed to another. A fiduciary must make available to a beneficiary all the information that is relevant to the beneficiary's affairs. The confidentiality rule requires that a fiduciary must use information obtained in confidence from a beneficiary for the benefit of that beneficiary and must not use it for his or her own advantage or for the benefit of others. These rules are of particular importance where, for example, a guardian acts for several adults with incapacity.

391. Breach of a fiduciary duty normally gives rise to liability on the part of the fiduciary. However, where a person acting under this legislation is a member of the adult's family it may be very difficult or even impossible to avoid breaches of fiduciary duty completely. In many cases those acting for the adult will be family members. Actions such as the apportionment of household expenses between them, or decisions on investments, either to generate maximum income or for capital growth, involve a conflict or potential conflict between the adult and the person acting for them.

392. This section allows breaches of common law duties of care and fiduciary duties owed to an adult with incapacity to be excused, where actions have been reasonable and in good faith, and the general principles in section 1 have been followed, without the courts being required to grant dispensations in individual instances. That would, in many cases, require repeated applications to court which would involve unnecessary expense and might in the long run be prejudicial to the appointment of family members and, indeed, others to act under the legislation.

393. Subsection (2) clarifies that foreign guardians and attorneys are also excused breaches of fiduciary duty, where they act in accordance with subsection (1)(a) and (b).

### **Section 83: Offence of ill-treatment and wilful neglect**

394. This section replicates the criminal offence, created by section 105 of the Mental Health (Scotland) Act 1984, therefore ensuring that an equivalent offence will apply to all those exercising welfare powers under this legislation.

395. The penalties for someone found guilty of an offence under this section are set out at subsection (2). These are in line with the penalties for the current Mental Health Act offence. At subsection (2)(a) someone found guilty of an offence under this section on summary conviction may be imprisoned for up to 6 months or fined up to £5,000. Someone convicted of this offence on indictment may be imprisoned for up to 2 years or given an unlimited fine.

#### **Section 84: Application to guardians appointed under Criminal Procedure (Scotland) Act 1995**

396. Section 84 and the consequential amendments at paragraph 26 of schedule 5 change the current provisions for guardianship orders made under the Criminal Procedure (Scotland) Act 1995. The 1995 Act allows the High Court or the sheriff court, on convicting a person of an offence punishable by imprisonment, to place that person under the guardianship of a local authority or of a person approved by a local authority. This option is available if the person is suffering from mental disorder, but not for particularly serious offences for which the sentence is fixed by law.

397. Section 84 and paragraph 26 of schedule 5 allow the criminal courts to appoint a welfare guardian or to make an intervention order under the new legislation. Amendments are required to the 1995 Act, because the existing office of Mental Health Act guardian is being abolished and replaced with the new form of guardianship. Several of the provisions of Parts 1, 5, 6 and 7 must therefore be inserted into the 1995 Act. For example, to provide for the court to confer specific powers on the guardian and determine the period for which the guardian is appointed, to make provision for joint and substitute guardians, to require registration of the order by the Public Guardian, to clarify the role of the Mental Welfare Commission in relation to the adult under guardianship and to allow for recall of guardianship by the Mental Welfare Commission or the local authority. The incapacity conditions for guardianship under the new legislation must also be satisfied.

#### **Section 85: Jurisdiction and private international law**

398. This section brings into effect schedule 3 which describes the jurisdiction under the Act of the Scottish courts and other statutory authorities. It also makes provision for the private international law of Scotland affecting adults with incapacity.

#### **Section 86: Regulations**

399. Subsection (1) provides that regulations made by the Scottish Ministers under this legislation are to be subject to negative procedure in the Parliament. The procedure requires the regulations to be laid before the Parliament not less than 21 days before they are due to come into force. If any objection is raised within a period of 40 days then a debate on the regulations as a whole is held. Regulations are either approved or rejected in their entirety by the Parliament. If they are rejected, then the Scottish Ministers are required to lay a revised set before the Parliament, subject to the same procedure.

400. Subsection (2) is a standard provision to allow regulations to make flexible provision for different circumstances and to cover incidental, related matters.

#### **Section 87: Interpretation**

401. This section provides definitions of various terms used within the Act and includes cross-references to sections of the Act where terms are defined.

402. The definition of nearest relative is based on that in the Mental Health (Scotland) Act 1984. The nearest relative is the person first listed among the adult's spouse or partner, child, father or mother, brother or sister, grandparent, grandchild, uncle or aunt, nephew or niece.

403. Subsections (2) and (3) allow a same-sex partner to be treated as the adult's nearest relative, in the same way as the Mental Health (Scotland) Act 1984 allows an unmarried opposite-sex partner to be so treated.

404. Subsection (4) defines when a person is held to be bankrupt for the purposes of the legislation. Under common law a financial power of attorney falls on the bankruptcy of either the granter of the power or the attorney. Section 16 (7) of the Act clarifies, however, that a welfare power need not terminate if the attorney becomes bankrupt.

### **Section 88: Continuation of existing powers, minor and consequential amendments and repeals**

405. Subsection (1) brings into effect schedule 4 which clarifies the position when the provisions of the Act are enacted of existing curators bonis, tutors, guardians and continuing attorneys.

406. Subsection (2) brings into effect schedule 5 which contains amendments to existing legislation as a consequence of the provisions of the Act.

407. Subsection (3) brings into effect the repeals of the existing legislation set out in schedule 6.

### **Section 89: Citation and commencement**

408. Subsection (1) confirms the short title of the legislation, by which it will be commonly known.

409. Subsection (2) allows the Scottish Ministers to bring different parts of the legislation into force on different dates, by means of Orders which are not subject to any Parliamentary procedure.

410. Subsection (3) is a standard provision for commencement Orders under subsection (2) to make transitional provisions relating to existing statutory arrangements. Some transitional provisions are already included in schedule 4.

### **Schedule 1: Managers of an Establishment**

411. This schedule set out in detail the definition of manager as used in relation to the establishments referred to in Part 4 of the Act.

412. Paragraph 1 identifies the "managers" of a given establishment.

413. Sub-paragraph (a) provides that for a hospital managed by a Health Board (rather than a NHS Trust) the Health Board responsible for that hospital constitutes the "managers" as referred to in Part 4.

414. Sub-paragraph (b) provides that where a NHS Trust exists to run a hospital, the managers are the directors of the Trust.

415. Sub-paragraph (c) provides that in the case of a State hospital, depending upon the arrangements in place for its management, the “managers” are either the Scottish Ministers, a State Hospital Management Committee or one of the bodies referred to in (c) (iii) to whom management responsibility may be delegated. There is currently only one such establishment in Scotland, the State hospital at Carstairs which is managed by a Special Health Board, the State Hospitals Board for Scotland.

416. Sub-paragraph (d) provides that in the case of a private hospital registered under the Mental Health (Scotland) Act 1984 or an unregistered hospital, the “managers” are either the persons operating the business in question or someone appointed manager of the establishment by them. There are currently no such establishments in Scotland.

417. Sub-paragraph (e) provides that for local authority residential establishments either the local authority in question or anyone appointed by them to manage the establishment constitutes the “managers”.

418. Sub-paragraphs (f) and (g) provide that for an independent sector care establishment registered with the local authority and a nursing home registered with the Health Board respectively the “managers” shall be the individual registered as running the establishment or anyone they appoint managers so long as that person is named in the application for registration.

419. Paragraph 2 provides that the Scottish Ministers may amend this list in Regulations.

## **Schedule 2: Management of Estate of Adult**

420. This schedule makes detailed provision for the Public Guardian’s supervision of guardians with powers over the property and financial affairs of an adult and sets out where the Public Guardian’s consent is required to some specific activities of such guardians.

421. Paragraph 1 requires a financial guardian to draw up a management plan setting out how the adult’s estate falling within the scope of the guardian’s powers should be handled. The management plan must be submitted to the Public Guardian for approval, generally within a month of the inventory of the adult’s assets required at paragraph 3. The Public Guardian may require the draft management plan to be amended. The plan is subsequently to be kept under review by both the guardian and the Public Guardian. Until the plan has been approved, the guardian will generally have only limited powers to spend the adult’s resources for their day to day needs. The sheriff may dispense with the need for a management plan, for example in the case of a small or simple estate or where the guardian has only very limited powers. There are provisions for decisions of both the Public Guardian and the sheriff in relation to the management plan to be appealed.

422. Paragraph 3 requires a financial guardian to produce an inventory of the adult’s estate falling within the scope of the guardian’s authority within 3 months of the guardian’s appointment. The Public Guardian may decide that there is no need for an inventory or may

allow for an alternative, for example, in the case of a small estate or a guardian with very limited powers.

423. Paragraph 4 requires the guardian to lodge all money received on behalf of the adult in a bank or building society account in an account in the adult's name. Any sum over £500 must be placed in an interest-bearing account. This figure may be varied in regulations made by the Scottish Ministers. These provisions are required to guard against the possibility of the guardian using the adult's funds for their own purposes.

424. Paragraph 5 governs the activities of a guardian in relation to the adult's investments and business. Guardians are allowed to retain existing investments if they get proper professional advice and also to make new investments in the name of the adult, with the agreement of the Public Guardian. When considering any investment strategy the guardian is specifically required to have regard to current general investment principles as set out at subparagraph (3). The guardian is allowed to continue running the adult's business subject to any requirements that may be imposed by the Public Guardian.

425. Paragraph 6 deals with the disposal of an adult's house or acquisition of new accommodation for the adult by the guardian. The Public Guardian is required to consent to a sale or purchase of accommodation and this is to be a 2-stage process. The first stage requires the guardian to apply to the Public Guardian for consent to the principle of selling or buying the house. At this point, the adult and others with an interest are to be informed and given the chance to object. Appeals may be made to the sheriff against the Public Guardian's decision. In the second stage, once the authority to the principle of sale or purchase has been obtained, the guardian is required to seek the Public Guardian's consent to the actual sale or purchase price. This will generally need to be done very quickly because of the Scottish legal system and there is no requirement to notify the actual price to anyone else or to allow any objections to be made at this stage.

426. Paragraph 7 requires financial guardians to submit annual accounts to the Public Guardian for audit. There is some flexibility for the Public Guardian to allow accounts at intervals greater than a year, for example, when the estate is modest and there is little change from year to year. The Public Guardian may also waive the requirement for accounts altogether in such cases and ask for information in another form. The Public Guardian will accept alternative information where the guardian has powers over the adult's business. The Public Guardian is to arrange for all accounts to be audited.

427. Paragraph 8 provides for the Public Guardian to approve accounts if they appear to be a true and fair view of the guardian's management of the adult's estate. At that point, the guardian's remuneration is to be determined. If the Public Guardian is not satisfied with the accounts, he is required to prepare a report and the accounts are to be adjusted. There are provisions for an appeal to the sheriff against the Public Guardian's decision. If the accounts show that the adult has not had the benefit of any part of their resources, the guardian will be required to pay interest on the relevant amount to the adult.

### **Schedule 3: Jurisdiction and Private International Law**

428. The private international law provisions of this schedule bring the law of Scotland in this regard into line with the Hague Convention of 13 January 2000 on the International

Protection of Adults. This has the effect of regulating the relations between the Scottish legal system and other legal systems with respect to the matters dealt with under the Act. Provision is made for the jurisdiction of the Scottish judicial and administrative authorities. The schedule also provides for which country's law will apply in any given case and what legal decisions made in other countries will be recognised and given effect to in Scotland.

429. Paragraph 2 deals with the domestic jurisdiction of the sheriff. It clarifies which sheriff is to deal with applications and other measures. This will normally be the sheriff in whose sheriffdom the adult concerned lives, with certain exceptions. For example, where an adult who normally lives in France owns a flat in Dundee, the sheriff court in Dundee will have jurisdiction to make orders or appoint a guardian with powers in relation to that flat, but no powers in relation to the adult's personal welfare or other financial affairs.

430. Sub-paragraph (1)(c) allows the sheriff to make an order which is urgently needed for the protection of the adult, if the adult is present within the sheriffdom at the date of application.

#### **Schedule 4: Continuation of Existing Curators, Tutors, Guardians and Attorneys Under This Act**

431. Paragraph 1 describes what happens on the "relevant dates" i.e. the dates on which provisions of the Act come into effect, of people who hold the offices of curator bonis, tutor-dative and tutor-at-law. Each of these office-holders will become a guardian to the adult concerned under the new legislation. Former curators bonis will have powers over the whole of the adult's property and financial affairs as they did previously. Former tutors-dative will retain the powers that they were granted by the court when they were appointed; these are generally welfare powers, but it is possible for the court to confer financial powers. Former tutors-at-law will have powers over the adult's finances and welfare.

432. Paragraph 1 further provides that court proceedings for the appointment of a curator bonis, tutor-dative or tutor-at-law already underway when the provisions of the Act are enacted, should continue on the basis of the former law. The effect will be that a curator bonis, tutor-dative or tutor-at-law is appointed, rather than a guardian under the new statutory provisions.

433. Paragraph 2 deals with the position of people appointed as guardians under the Mental Health (Scotland) Act 1984 when the guardianship provisions of the Act are enacted. They will continue to have the powers conferred on them: to require the adult to reside at a specified place, to require the adult to attend for treatment or training and to require access to be given to doctors, mental health officers and others.

434. Paragraph 3 provides that any court proceedings in relation to existing office-holders other than their initial appointment, underway when the provisions of the Act are enacted should continue on the basis of the former law. This would apply, for instance, where there was an appeal against the appointment of an existing office-holder.

435. Paragraph 4 deals with the position when the provisions of the Act are enacted of attorneys with financial or welfare powers that continue on the incapacity of the granter of the power. Such attorneys are to become continuing or welfare attorneys as defined in Part 2

of the Act. However, there is no requirement for the Public Guardian to register the power. There is no need for the documents conferring the power of the attorney to be in the form prescribed in the Act. The attorney does not need to keep records, nor notify the Public Guardian of changes of address, or of his or her proposed resignation.

436. Paragraph 4 does, however, require continuing and welfare attorneys appointed before the Act to observe the general principles at section 1 and come under the general supervisory and investigative jurisdiction of the relevant statutory authority. The statutory authority would investigate if a complaint was made about such an attorney and would supervise them if ordered to do so by the courts. The attorney's authority would terminate on his or her divorce from the grantor, unless the power of attorney provides otherwise.

437. Paragraph 5 deals with the position, when the Act comes into force, of hospital managers who have been managing patients' money under section 94 of the 1984 Act. They may continue to do so, but will be subject to the new requirements imposed on managers in Part 4.

438. Paragraph 6 sets out which provisions of the new legislation are to apply to former curators bonis, tutors-dative and tutors-at-law and Mental Health Act guardians, who have become guardians under the provisions of the legislation.

439. Sub-paragraph (2) provides that the court order appointing the office-holder is to have the same effect as the Public Guardian's certificate of appointment in authorising the guardian to manage the adult's property and financial affairs and receive payments due to the adult. These provisions would only apply where the guardian had the relevant powers over the adult's finances, by virtue of having been a curator or tutor.

440. Sub-paragraphs (3) and (4) deal with the renewal of existing office-holders' powers after the Act comes into force. Under sub-paragraph (3), the appointments of curator bonis, tutors-dative and tutors-at-law will have to be reconsidered by the court within 5 years. Guardians who were formally Mental Health Act guardians will have their appointment reconsidered by the court at the periods set out in the 1984 Act: 6 months after appointment in the first instance and annually thereafter. At that point the court will consider the extent of the guardian's powers which need not be the same as the 3 powers formerly conferred on Mental Health Act guardians.

441. Sub-paragraph (6) provides that the Public Guardian may decide to what extent to apply the provisions of schedule 2: Management of Estate of Adult to existing office holders who become guardians under the provisions of the Act. This will, for example, allow the Public Guardian to require a former curator bonis to produce a management plan and accounts.

442. Sub-paragraph (8) clarifies that former office-holders who become guardians do not have to have their appointment registered by the Public Guardian, as do guardians appointed under the provisions of the Act.

443. Paragraph 7 makes transitional arrangements for the period during which Parts 2, 3 and 4 of the Act will have been commenced but guardianship under Part 6 will not yet have come into force.

#### **Schedule 5: Minor and Consequential Amendments**

444. Paragraph 1 is a general provision that references in existing legislation or private documents to curators bonis, tutors or curators to adults are, after the provisions of the Act are enacted, to be taken as references to guardians with the appropriate financial or welfare powers. The following paragraphs of this schedule deal with specific statutory references which require amendment or repeal, but it may not have been possible to identify all of these, hence a general provision is required. There are also some United Kingdom enactments which it would not be appropriate to change for Scotland only, for example, the Taxes Management Act 1970, which includes references to tutors and curators.

445. Most of the consequential amendments in this schedule are self-explanatory.

446. Amendments to the Judicial Factors (Scotland) Act 1889, in paragraph 6, confirm that the Public Guardian will in future carry out many of the functions that the Accountant of Court used to perform in relation to curators bonis.

447. Paragraph 17 includes numerous amendments to the Mental Health (Scotland) Act 1984. The amendments between section 19 and section 35I of that Act are to ensure that welfare guardians and attorneys with relevant powers should be treated in the same way as the nearest relative in relation to various aspects of detention and community care orders under the 1984 Act.

#### **Schedule 6: Repeals**

448. The repeals at schedule 6 are mainly required as a consequence of the replacement of the existing offices of curator bonis, tutor-dative, tutor-at-law and Mental Health Act guardian by the new form of guardianship under this legislation. Most of the repeals are self-explanatory but specific reference is made in these Notes to the changes to the Judicial Factors Acts, the Trusts (Scotland) Act 1921 and the Mental Health (Scotland) Act 1984.

449. The repeals of provisions in the Judicial Factors Acts 1849, 1880 and 1889 remove references to curators and tutors from the Acts and the detailed accounting regime imposed on curators bonis and tutors with financial powers. This regime is replaced by the more flexible regime, provided in Part 6 and schedule 2 of the Act, tailored to the needs of each adult and supervised by the Public Guardian.

450. The repeals of references to tutors and curators in the Trusts (Scotland) Act 1921 are required because, under that Act, these office holders were treated as trustees. This Act does not confer trustee status on guardians with financial powers as it is intended that guardians should be regulated in the exercise of their powers solely by the provisions of the new legislation. References to guardians are also repealed as they were not intended to refer to guardians under this Act, nor do they refer to any other type of guardian.

451. The repeal of sections 36 to 52 of the Mental Health (Scotland) Act 1984 has the effect of abolishing Mental Health Act guardianship which is replaced by the new form of

guardianship. The protective and supervisory roles of the Mental Welfare Commission and local authorities in relation to guardianship under the 1984 Act are being replaced by similar roles in relation to welfare guardians under the new legislation. The powers of hospital managers to look after money and valuables belonging to in-patients with mental disorder are being repealed, and replaced with powers in Part 4.

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