ADULT SUPPORT AND PROTECTION (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Adult Support and Protection (Scotland) Bill introduced in the Scottish Parliament on 30 March 2006. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 62–EN.

GENERAL OBJECTIVES OF THE BILL

2. This Bill, partly based on the Scottish Law Commission’s Report on Vulnerable Adults (Scot Law Com No 158, 1997), seeks to protect and benefit adults at risk of being abused. It will do so by introducing investigative rights and duties as well as a range of post-assessment interventions. These measures will be underpinned by the creation of local multi-disciplinary Adult Protection Committees to both oversee and coordinate the work of various agencies involved in abuse investigations and to develop prevention strategies. The proposals also take forward recommendations of the Social Work Services Inspectorate (now the Social Work Inspection Agency) and the Mental Welfare Commission investigation into Scottish Borders Council.

3. The Bill will also include a number of amendments to existing statutes including:

   • the Adults with Incapacity (Scotland) Act 2000 to simplify and streamline the protections for adults with incapacity and improve access to them;

   • the Social Work (Scotland) Act 1968 (the 1968 Act) to remove application of the liable relatives rule whereby the local authority is currently able to pursue spouses as liable for their partner’s care home fees;

   • section 12B of the 1968 Act to give local authorities the flexibility to allow direct payments to be paid to close relatives in exceptional circumstances to provide community care services that the family member is assessed as needing;

   • the 1968 Act to clarify and update ordinary residence rules that determine which local authority is responsible for providing a person’s community care services;

   • section 101(2)(b) of the Mental Health (Care and Treatment) (Scotland) Act 2003 to ensure that Mental Health Tribunal reviews take place every 2 years.

4. Each segment of the Bill is described in detail below.
ADULT PROTECTION MEASURES

Policy objectives

Background

5. In the introduction to their 1993 discussion paper on vulnerable adults, the Scottish Law Commission (SLC) observed that there was “little or nothing available” to protect adults who are vulnerable but not mentally disordered and that there is “an increasing awareness that abuse, deprivation and exploitation of vulnerable adults generally occurs and that the existing law is often not capable of tackling it effectively”.

6. The relevant existing statutory powers available to public authorities are:
   - a power to demand admission to premises where a mentally disordered person is.
   - A power of forcible entry to premises where a mentally disordered person is and removal of that person to a place of safety.
   - a power to remove a person suffering from chronic disease or living in unsanitary conditions who lacks proper care and attention from home to a hospital or other place (The National Assistance Act 1948, section 47 (as amended)).
   - a power to take mentally disordered people found in a public place and in need of care to a place of safety.
   - a power of entry and inspection of residential and other accommodation provided by a local authority, voluntary organisation or other person under the Social Work (Scotland) Act 1968, section 6.

7. There are also various powers contained in the Mental Health (Care and Treatment) (Scotland) Act 2003 which came into force in October 2005. These are:
   - a power to enter premises in order to take a person over 16 who has, or appears to have, a mental disorder to any place authorised under the 2003 Act.
   - a power to enter premises to remove to a place of safety a person over 16 with a mental disorder who is at risk and is likely to suffer significant harm if not removed to a place of safety.
   - a power to remove a person reasonably suspected to have a mental disorder from a public place to a place of safety.

8. The definition of mental disorder in the 2003 Act is a wide definition which includes mental illness, learning disability and personality disorder. One in four of the population may have a mental disorder at some time but only a small number will need compulsion under the Mental Health Act or ongoing care and support from mental health services. The 2003 Act and this legislation are seen as being complementary. This legislation will provide additional protections for those adults who might be vulnerable through the actions of others. In reality, practitioners will take a view as to which piece of legislation is best to proceed under, based on the individual circumstances of those with a mental disorder. The 2003 Act does not, however, contain provisions to enable the exclusion of a perpetrator from the residence of a mentally disordered victim.
9. There are some limited common law powers of entry without warrant available to the police, although these are primarily limited to dealing with serious disturbances or when actively in pursuit of persons who have committed serious crimes.

10. So whilst there have been advances since then in the protection of adults who lack capacity and adults who are mentally disordered by the Adults with Incapacity (Scotland) Act 2000 and by the Mental Health (Care and Treatment) (Scotland) Act 2003, the position of those vulnerable adults mentioned in the SLC discussion paper remains largely the same. Local authorities currently have no power to intervene to help those adults who have no apparent mental disorder or incapacity but who are subject to or at risk of harm.

11. Abuse can be physical, including neglect, emotional, sexual or financial or a combination of these and victims, whether they are people that are being cared for or carers, may not wish to disclose abuse for a variety of reasons ranging from dependence to fear of reprisal.

12. The main groups who may benefit from the proposed changes are thought to be those who are subject to elder abuse and those with a learning disability, although there are many other adults who may be at risk and who do not fit neatly into one category or situation. There are also those whose needs fluctuate and who may be subject to mental health legislation but who remain vulnerable when their treatment concludes. There may also be a small number of young people who move into adult services having been previously housed in care environments, including secure units, whose lifestyle is unsettled which may mean that they are at risk.

13. The Age Concern Scotland Elder Abuse Project estimates that between 7% and 9% of older people in Scotland are victims of at least one form of abuse. The actual number affected in any given year is unknown because of its hidden and under-reported nature, although a major UK quantification study is currently being undertaken by Age Concern in conjunction with Comic Relief.

14. Abuse is not confined to older people as the Mental Welfare Commission has highlighted in its Deficiency in Care reports (www.mwscot.org.uk). Most recently, the Commission worked closely with the Social Work Services Inspectorate (now the Social Work Inspection Agency (SWIA)) in investigations into Scottish Borders Council and NHS Borders services for people with learning disabilities, the findings of which were published in May 2004.

15. These investigations related to the circumstances of a woman with a learning disability who had multiple injuries from physical and sexual assault. Other individuals who were receiving care under the same circumstances had varying degrees of learning and physical disabilities and mental health needs.

16. The findings highlighted a failure to investigate very serious allegations of abuse appropriately, because of a lack of understanding of the legislative framework for intervention and its capacity to provide protection. This was compounded by a failure to understand the complexities of child/adult protection and the need to explore all allegations of abuse and the possible reasons for retraction of these. There was also a failure to undertake appropriate risk assessment which may have assisted in balancing issues of self-determination and protection.
17. As the Borders case illustrates, having structures and procedures may be insufficient. Whilst it is important that each area has the flexibility to meet the needs of its own community, it is essential to have consistent high quality assessment and intervention to recognised national standards which is led and managed by local specialist Adult Protection Committees. The boundaries between protection of adults from abuse (including investigation of allegations of abuse) and supporting those who are subject to domestic violence will also need to be drawn.

Specific Objectives

18. What is required is a strengthening of expectation that when there are allegations of abuse these will be taken seriously and pursued stringently. Evidence suggests that when allegations are made, social work staff will make efforts to establish the facts. If, however, they do not get access or the alleged victim refuses contact then active pursuit may not follow. Some local procedures acknowledge that having no right of entry adversely affects their ability to intervene. They advise staff that they should take legal advice and that this is likely to confirm current limitations. Then they are to assess the risk and respond accordingly. This opens the possibility of a wide range of responses that may well lead to inconsistent practice across Scotland.

19. The Bill will provide new powers to:
   - investigate suspected abuse;
   - carry out assessments of the person and their circumstances;
   - intervene to remove the adult or manage the risk of abuse;
   - if necessary and in the last resort, to exclude the perpetrator;
   - if necessary and in the last resort, to force entry to perform the above functions.

20. These measures will be complemented by other interventions for which statute is not required including informal mediation between victim and perpetrator to negotiate and agree future plans. Both parties may sometimes wish to continue to live together. Mediation is thought to be a valuable means through which to review what has happened and to agree a plan for the future, based on risk assessment of the factors that led to the abuse.

21. While the main emphasis on intervention must be to protect adults at risk, such intervention must be proportionate. For this reason, the Bill provides a set of guiding principles intended to assist those required to operate the provisions, and have regard to the intended purpose and outcomes desired. Section 1 sets out the general principle which those considering intervention must bear in mind when performing any adult protection functions. This requires that anything done for an adult under the provisions of Part 1 should produce a benefit for the adult personally. It 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. Section 2 is more operative in that it requires public bodies and office holders to heed the matters listed when performing adult protection functions. It provides that those investigating and intervening under this Bill must have regard to the views and feelings of the adult and those connected to them i.e. nearest relative, or guardian, where these views are known. Where necessary, the adult must be provided with assistance to enable their participation. It also requires that the adult is not, without justification, treated less favourably than any other adult who is not at risk in a
comparable situation. Consideration should also be given to equal opportunities requirements when exercising the adult protection functions.

22. The Bill will also create a duty to establish a multi-agency Adult Protection Committee which will take a strategic overview in jointly managing adult protection policies, systems and procedures at a local level. Whilst it is anticipated that the local authority will be the lead agency for routing of referrals, the intention is to ensure that all public agencies share responsibility, investigation being delegated to the most appropriate agency.

23. The Committee will have a clearly defined remit and lines of accountability as well as clear objectives and priorities. Its main functions will be:

- to ensure that local inter-agency guidelines on procedures to be followed in individual cases are produced, maintained and regularly reviewed and that the procedures, including referral procedures, are known about by those who may need to know;
- to promote good inter-disciplinary practice in preventing and dealing with the immediate causes and effects of abuse;
- to assess significant issues of collaborative working which arise from the handling of cases and from reports on inquiries;
- to review arrangements for providing expert advice and inter-agency liaison;
- to monitor and review information about the operation of the Adult Protection procedures;
- to identify inter-agency training needs and take a leading role in developing and promoting inter-disciplinary training programmes;
- to publish an annual report and submit this to the Scottish Executive.

24. Many local authorities do have multi-disciplinary adult protection policies in place but these are at varying stages of development and some over-arching Adult Protection Committees do exist although, again, the structures, roles and responsibilities vary.

Alternative approaches

25. The alternative to including the adult protection measures would be to issue improved and detailed guidance on the kinds of circumstance and referrals that should prompt an assessment, and on the issues that should be included to ensure that abuse or potential abuse is adequately covered.

26. While this may offer some improvement compared to the current position there are likely to be problems with this approach. Aside from effectiveness, as agencies may be more inclined to follow guidance that is based on a legal requirement, there would be a concern about how long it would take for all the relevant central authorities to agree the content and format of guidance and to whom it should be addressed. This presents a real risk that abuse could continue without appropriate assessment or investigation. In addition, without an explicit duty for agencies to share information, there is a risk that some vital information will not be shared, or it will be shared too late, or that agencies receiving information on suspected abuse from another agency may give a low priority to the response.
27. Again, as an alternative to the specific power to intervene and exclude, guidance could be issued to all agencies, and particularly the police, about the availability of alternative measures which exist under current legislation (such as the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Adults with Incapacity (Scotland) Act 2000) with a clear explanation of how, when and in which circumstances of abuse or vulnerability these existing powers can be used. However, this approach does not provide parity for all adults at risk. While it may result in more targeted and effective use of existing legislation for those adults whom it covers, it does nothing to improve the levels of protection for those adults who are subject to or at risk of harm but who have no apparent mental disorder or incapacity.

Consultation

28. In 2002 an initial consultation, “Consultation on Vulnerable Adults”, asked if a new legislative framework was needed to protect vulnerable adults. A copy of the consultation paper can be found at http://www.scotland.gov.uk/consultations/justice/vacp-00.asp. Specific proposals included the rights of entry to settings where abuse was alleged and exclusion orders for perpetrators. Respondents to the consultation broadly welcomed the proposed introduction of new measures for vulnerable adults.

29. There were 59 responses to the consultation from four broad sectors: health, local authority, legal and voluntary organisations. There was a high level of agreement with the proposals that the vulnerable adults provisions should be extended to groups other than persons with mental disorder and the possible introduction of provisions to exclude persons living with vulnerable adults, where the adult’s health is at risk. There was little difference between sectors and opinions could differ as much within sectors as between sectors. A copy of the full analysis of consultation responses can be found at http://www.scotland.gov.uk/Publications/2002/12/15871/14424

30. A further consultation, “Protecting Vulnerable Adults – Securing their Safety”, was completed in September 2005 which concentrated on the proposed protection measures for vulnerable adults. A copy of the consultation paper can be found at: http://www.scotland.gov.uk/Topics/Health/care/VAUnit/3rdVAConsultation. The consultation paper asked consultees to provide their views on:

- the definition of a vulnerable adult
- the definition of abuse
- the need for, and the role, structures and powers of Adult Protection Committees
- risk assessment and risk management
- the role of mediation where abuse is detected
- the use of guardianship in protecting people with learning disabilities
- the need for an alternative to the Mental Health (Care and Treatment) (Scotland) Act 2003 for the compulsory care of people with learning disabilities.

31. There were 138 responses to this consultation and respondents were broken down into eight broad interest groups: voluntary and independent sector organisations, local authorities, regulatory bodies, NHS, professional medical associations, police bodies, higher/further
education and representative bodies. Again there was generally little difference in opinion between groupings and, where possible, the analysis does provide a breakdown by grouping.

32. Respondents were broadly in favour of the revised definition of a vulnerable adult as presented within the consultation paper, however, by contrast, a majority of respondents disagreed with the definition of abuse as presented. The overwhelming reason given was concern over the inclusion of the word “distress”. There was broad support from respondents for the proposed role, structures and powers of the Adult Protection Committees and the vast majority felt that the Committee powers should be defined in statute. There was less consensus from respondents about what particular risk assessment and management should take place following an allegation of abuse but all were clear that they were a vital aspect of managing protection following abuse. A copy of the full analysis of consultation responses can be found at http://www.scotland.gov.uk/Topics/Health/care/VAUnit/VAAnalysisDi

33. In addition, key stakeholders have the opportunity to inform policy development through a national Steering Group. The group brings together representatives from a range of statutory, representative and voluntary agencies including, amongst others, Age Concern Scotland, Association of Chief Police Officers in Scotland (ACPOS), Association of Directors of Social Work (ADSW), Care Commission, Mental Welfare Commission, Community Care Providers Scotland, ENABLE, Scottish Association for Mental Health (SAMH) and Vulnerable Adults Alliance for Scotland (VAAS). The group has met on a number of occasions to discuss and provide views on the major issues connected with the Bill. The group will continue to meet throughout the passage of the Bill and then, in the period following Royal Assent and prior to the implementation of the adult protection measures, the group will be assisting in the preparation of a detailed code of practice. In addition, to the Steering Group a number of face to face meetings have been carried out with groups of stakeholders to discuss the proposed measures.

34. All responses to consultations (including a consultation on the partial Regulatory Impact Assessment) and wider discussions with stakeholders have contributed to the development and shaping of the provisions as they currently stand. The 2005 consultation, in particular, prompted changes to the definition of abuse and the qualifying test for an adult at risk. It also made clear that further specific legislation relating to the compulsory care of those with a learning disability was premature in light of the new Mental Health (Care and Treatment) Act and this element was subsequently dropped from the current Bill.

35. Feedback has also resulted in the development of the guiding principles which now preface this Part of the Bill. These enable stakeholders to understand the approach to be taken regarding intervention in an adult’s affairs. The guiding principles were developed with the assistance of the National Steering Group.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

36. When considered in a broad context, the proposed adult protection measures have the potential to impact on all citizens at some point in their lives. The measures are designed to benefit those adults who may be at risk from abuse and who, because they are affected by disability, mental disorder, illness, infirmity or ageing, are less able to protect themselves from
abuse. The guiding principles, contained at the beginning of this Part, make it clear that the measures will be triggered only if the intervention is considered necessary and beneficial to the individual concerned. In addition, an adult at risk should not, without justification, be treated any less favourably than the way in which any other adult might be treated in a comparable situation and those intervening must have regard to the adult’s abilities, background and characteristics (including age, sex, sexual orientation, religious persuasion and racial origin).

**Human rights**

37. The Executive has considered carefully the effect of these proposals on human rights and the proposed interventions, detailed in this Part. Whilst these provisions are thought to engage Article 8 of the Convention on Human Rights great care has been taken to ensure the proper balance has been struck between proportionate interference by authorities and ensuring the protection of health of adults at risk. In particular, care was taken to ensure appropriate appeal provisions were in place, that medical examinations could not be enforced against the wishes of an adult, and to ensure refusals by the adult at risk in certain circumstances are adhered to. In this way the provisions are in accordance with law and meet the primary aim of protecting the individual from abuse.

**Island communities**

38. Careful consideration will need to be given to ensuring that structures, procedures and processes allow for flexible models of delivery to enable remote and rural communities to participate fully. It is recognised, for example, that island communities may not be able readily to access appropriate expertise for complex cases and strategies to make this possible will need to be devised.

**Local government**

39. The local authority is expected to be the lead public authority although overall responsibility will be collective across local authorities, Health Boards, the Police Service and other participating bodies. The associated costs are acknowledged and addressed in the Financial Memorandum.

**Sustainable development**

40. The proposed changes will not have any effect on sustainable development issues.

**AMENDMENTS TO ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000**

**Policy objectives**

**Background**

41. The 2000 Act was one of the earliest pieces of legislation passed by the Scottish Parliament and the changes being taken forward stem from the Scottish Executive’s commitment to ensure that this ground-breaking legislation is meeting its objectives fully to protect adults who lack capacity and support their families and carers.

42. The 2000 Act substantially reformed fragmented, outdated provisions which could have inappropriate and harmful outcomes for adults; and removed barriers to decision-making on
behalf of the adult by family members and others caring for the adult. It introduced comprehensive legal reforms to protect the interests (welfare and/or finance and/or property) of adults (persons of 16 and over) who are not able to make all or some decisions for themselves. It is founded on the principles of autonomy and equity. Adults who are unable to make decisions for themselves should not be disadvantaged because of a lack of legal provisions to support them. The legislation aims to strike a fair balance between empowering and protecting adults with incapacity and enabling their carers and others to manage their day to day welfare and financial affairs.

43. It has been estimated that this legislation could potentially apply to around 100,000 affected adults, as well as their carers and families. It applies to individuals who are assessed as incapable of acting, making, communicating or understanding decisions because of mental disorder or an inability to communicate caused by a physical disorder. The main groups to benefit from the provisions of the Act are people with dementia, people with learning disability, people with severe acquired brain injury and people with severe mental illness.

Specific policy objectives

44. The changes do not deviate from the original policy intentions of the 2000 Act. The aim of the changes is to address issues arising from the early days of implementation and so ensure that the legislation is better able to meet its objectives by simplifying and streamlining the protections for adults with incapacity and improving access to them.

Alternative approaches

45. The proposed legislative changes are only one part of a range of approaches to meet the policy objective. Other work being progressed includes: changes to regulations, including regulations to provide for free legal aid for welfare guardianship applications and for advice and assistance in relation to the Act to be based on the resources of the adult, not the applicant; the appointment of a National AWI Practice Coordinator to take forward further work in implementing the Act (see letter of 28 October 2004 to the Justice 2 Committee referred to in paragraph 48); and the preparation of new guidance on practice issues.

46. Legislative changes have been brought forward to address issues only where there is no alternative way of meeting the policy objective. The alternative to not bringing forward legislative changes to address these issues would be to retain the status quo. However, it is clear from monitoring of implementation, evidence to the Justice 2 Committee and ongoing approaches to the Scottish Executive that this would not be an acceptable option as it would prevent the Act from reaching its full potential.

Consultation

47. The Scottish Executive commissioned a two year consultancy in 2002 to monitor implementation of the 2000 Act, explore issues arising and to undertake research relating to the Act’s operation. The Project’s findings were based on extensive consultation. The project report, published in October 2004, highlighted that the 2000 Act had been widely welcomed and in general is working well and providing benefit to adults with incapacity and their carers, but that some changes are required to streamline the processes and to improve accessibility.
48. The Justice 2 Committee of the Scottish Parliament has also been monitoring the implementation of the Act and called for evidence from stakeholders on its operation. The response by Hugh Henry, Deputy Minister for Justice, to the report of the monitoring project was contained in a letter of 28 October 2004 to the Committee. This set out an action plan responding to the issues raised in the project report and also acknowledged that changes to the Act itself might be required. Update letters were sent to the Committee in June and December 2005. Hugh Henry gave an oral update on progress on 13 December 2005. The report and letters can be accessed at www.scotland.gov.uk/topics/justice/civil/16360/10120.

49. The Scottish Executive Justice Department launched a consultation on 24 August 2005, which closed on 4 November, on proposed changes to the 2000 Act, which took into account the findings in the monitoring project report and views expressed by stakeholders to the Justice 2 Committee. Around 100 responses to the consultation were received. All key stakeholders (local authorities, voluntary organisations, carers’ organisations, medical professional bodies, legal profession) were well represented. All proposals received support from the vast majority of respondents. Some proposals received unanimous or near-unanimous support. Some concerns were raised in relation to certain aspects of the proposals and the need to ensure that changes include sufficient safeguards to protect the adult for example in relation to the proposal to reduce the period for which a countersignatory to an application for authority to intromit with funds under Part 3 of the Act is required to have known the applicant from two years to six months. Although only raised by a minority of respondents, the concerns have been carefully considered and some refinements have been made to the original proposals. Taking on board the concern outlined above in relation to countersignatories, the period in the Bill for which a countersignatory must have known an applicant is one year. Some useful additional changes to simplify procedures have been suggested which are included in the Bill for example an expedited renewal process in relation to applications for authority to intromit with funds under Part 3 of the Act.


51. Additional consultation has been carried out on the Intromission with Funds Scheme at key stakeholder events organised by both the Scottish Executive and the Public Guardian. This helped inform both the legislation and the new procedures being developed by the Public Guardian. Issues such as, not being able to make an application for an individual aged under sixteen and the difficulty in obtaining caution, have also been raised directly with the Scottish Executive through correspondence.

Changes

Intromission with funds

52. Intromission with funds is a means by which an individual family member, friend or carer can have the legal authority to access and manage the day to day finances of someone who lacks the ability to do so for themselves. It was intended that this low-cost, non-court-based measure would be the means by which many adults with modest means would be assisted with managing day to day living expenses, but take-up has been very disappointing so far. It is clear that changes need to be made to make it easier for people to apply to use the provisions, while
maintaining safeguards for adults with incapacity. The changes therefore include a package of measures to improve access to and take-up of intromission with funds.

53. The proposals comprise:

- more flexible arrangements for countersigning of applications (a countersignatory can be any person - no longer has to be a member of a prescribed class) who has known the applicant for at least one year (currently two years) and who can state that he or she has sufficient knowledge of the applicant to support the application. In addition, it will no longer be necessary for a countersignatory to know the adult;

- more flexible arrangements for managing the bank accounts of adults with incapacity and transferring funds between accounts;

- the provision of authority for access to confidential information about an adult’s bank account to enable an application to be taken forward – this is a major barrier at the moment because of restrictions on the banks, relating to the release of confidential information;

- the provision for joint and reserve withdrawers (persons authorised to intromit with funds) who may be named either at the time of application or a later stage to overcome current difficulties when a withdrawer is unable to act;

- more streamlined arrangements for renewing authority to intromit with funds and moving from financial guardianship to intromission with funds.

54. It has not been possible to bring forward, for introduction of the Bill, provision for the proposal in our consultation paper to enable the Public Guardian to give authority to open a bank account for an adult with incapacity. However, it remains our intention to do so as, at present, only those with bank accounts can benefit from the provisions under Part 3 of the Act.

55. The Bill also provides for the extension of authority to intromit with funds to organisations as well as individuals so that adults with incapacity without family members/other individuals to act for them will be able to benefit from this provision. This will reduce the need to resort to financial guardianship – a far more costly and restrictive measure – in such cases. This change was welcomed by respondents to the consultation and by those who attended a key stakeholder day to discuss. The Bill provides that organisations wishing to intromit with funds will need to satisfy the Public Guardian as to matters prescribed by Scottish Ministers. The Public Guardian is working with stakeholders to develop operational procedures and guidance for organisations as to how she will assess whether they meet the prescribed matters (which will relate to features such as organisations’ financial procedures).

Guardianship and intervention orders

56. Under Part 6 of the Act, which came into force in April 2002, an application can be made to the sheriff for a guardianship or intervention order. Intervention orders are usually concerned with a one-off or time-limited action or decision to be made on behalf of an adult with incapacity and can relate to the adult’s personal welfare, financial affairs and/or property. Guardianship orders are intended for longer-term help or continuous management and can also cover personal welfare, financial affairs and/or property. In the period April 2002 to December 2005 around 2,350 guardianship orders and 520 intervention orders were granted.
57. The Scottish Executive is aware that there are a number of factors preventing Part 6 of the Act reaching its full potential for users and the Bill includes the following provisions to help streamline and simplify the process.

- Caution is insurance to safeguard the estate of the adult with incapacity from any loss due to the actions of someone acting on his or her behalf. Currently where a sheriff grants an intervention order, or appoints a guardian in relation to financial affairs, he or she must ask the person appointed to find caution except where the person appointed is unable to find caution, but is nonetheless suitable to be authorised under the order. There are difficulties in both finding and funding caution. Delays encountered when seeking caution cause frustration and prevent intervention orders being implemented and guardianships commencing – which may clearly not be beneficial to the adult. The Bill therefore provides that sheriffs will be able to dispense with caution.

- Currently there is a 30 day limit within which reports supporting intervention and guardianship applications must be lodged. It can be difficult to obtain and lodge all reports within the time limit. The Bill provides that the sheriff will have discretion to accept reports which fall outwith this period, where he or she is satisfied that the adult’s condition is unlikely to have improved since the examination and assessment took place.

- Intervention and guardianship order applications must be supported by two medical certificates and, if the cause of incapacity is mental disorder, one of the reports must be signed by a medical practitioner approved for the purposes under section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act). A regulatory provision is included to enable Ministers to prescribe new classes of medical practitioners in addition to those approved under section 22 so that if or when appropriate new qualifications or training are available, they can be taken account of.

- Where an adult lives outwith Scotland, in respect of whom a guardianship or intervention order is required in Scotland (e.g. in relation to property), there is still a requirement for one of the reports to be signed by a section 22 approved medical practitioner as described above. In order to overcome the difficulty in finding, and paying the cost of, a section 22 approved medical practitioner visiting the adult, provision is being made for a suitably qualified local practitioner to visit and to prepare a report after discussion with an officer or Commissioner of the Mental Welfare Commission for Scotland.

- Currently, a sheriff may appoint an interim guardian for a period up to three months. In complex cases, a longer period can be required but this can only be done by the parties reapplying to the court. To overcome this, there is provision in the Bill to allow sheriffs to make interim orders for a period of more than three months, up to a maximum of six months, where this is appropriate in the circumstances of the case.

- A number of minor changes will also be taken forward including the issuing of a certificate of appointment by the Public Guardian when an intervention order is granted, the provision of an equivalent time limit for interveners as for guardians for notification of a change of address and a requirement that the personal representatives of an intervener or guardian must notify the Public Guardian of the death of either. There are also amendments to: clarify the original policy intention and split the provisions in relation to the enforcement of a guardian’s decision against an adult and against a third party; and to allow the sheriff to disapply or modify the provisions which relate to intimation of an application for an order or a warrant in connection with non-compliance with a welfare guardian’s decision. There is a new provision that allows a guardianship order to be applied for in the three month period...
This document relates to the Adult Support and Protection (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 31 March 2006

prior to a person’s sixteenth birthday, to provide continuing protection for young adults who lack capacity.

Financial guardian of last resort

58. The consultation paper sought views on the possible need for a financial guardian of last resort, and on a series of linked questions, to cover situations where there is no other way of meeting the assessed need of an adult for management of his/her finances. This issue has been raised in the past as a problem. Under the 2000 Act, local authorities have a duty to apply for financial guardianship where this is necessary, but they cannot nominate themselves and must nominate, for example, a local solicitor. It is not always possible to find someone to nominate. We believe that the proposed improvements to intromission with funds and, in particular, the extension of this to local authorities and other organisations, will address the needs of many adults with modest resources. Guardianship will, however, remain necessary where an adult’s needs cannot be met through other interventions. It would seem from discussions held with stakeholders and responses to the consultation, that any residue of ‘last resort’ cases might be very small once the changes to intromission with funds are in place and it is not clear that any legislative change would be needed to address residual cases. Officials will continue to develop policy in this area in consultation with stakeholders.

Powers of attorney

59. Powers of attorney are one of the early successes of the Act with over 64,500 already registered with the Public Guardian. As this part of the Act is working well we are proposing only limited changes relating to certification that the grantee is of sound mind and evidencing of incapacity for the power to become effective. There are further minor changes including clarification that a power of attorney comes to an end on bankruptcy and on what is required to revoke a power of attorney. We are also proposing that the Public Guardian should send welfare powers of attorney to local authorities as well as the Mental Welfare Commission for Scotland and that all changes in welfare powers of attorney should be sent to the Mental Welfare Commission for Scotland, not just those which relate to mental disorder.

Other issues

60. There is provision in the Act for an adult’s nearest relative to be displaced, but the only person who can apply for an order to do this is the adult with incapacity. This is not reasonable and is out of step with provisions in the 2003 Act. We propose, following earlier consultation, to broaden this provision to allow for an application by a person with an interest in the adult and also for the sheriff to grant an order naming a different person from the person specified in the application.

61. We propose to extend the powers of the Public Guardian to take part in or initiate court proceedings, when it appears to him or her to be necessary, to safeguard the property or financial affairs of an adult with incapacity. There is existing provision in the 2000 Act which limits the Public Guardian’s ability to enter into court proceedings to where this is explicitly tied to an investigation he or she has carried out. An example of when these new powers might be used is where the Public Guardian is aware of particular facts about an applicant for guardianship which he or she considers may impact adversely on an adult’s property or financial interests, derived from prior dealings with the adult’s affairs rather than from an investigation.

62. There are also a number of technical amendments.
Certification of incapacity under the 2000 Act

63. Only a medical practitioner can sign certificates of incapacity under the Act, except that, under Part 5 of the Act, as amended by the Smoking, Health and Social Care (Scotland) Act 2005, the range of professionals who can sign certificates relating to medical treatment has been extended beyond medical practitioners. The extension is limited as it relates only to the fields in which these individuals practise and is for the purpose of giving treatment within their areas of expertise. The consultation paper sought views on whether the range of professionals who can sign certificates of incapacity for other parts of the Act should be extended. The majority of the responses favoured retention of the restriction to medical practitioners and the Executive is not therefore proposing to change this position.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

64. The 2000 Act takes a person-centred approach, with measures tailored to meet the needs of the individual. It was designed to allow those who lacked capacity to exercise the same legal rights as other adults in a way that meets their needs and protects their interests. These changes will simplify and streamline the protections for adults with incapacity and improve access to them, and will thus further enhance the equal opportunities of those who lack capacity.

65. The original legislation does not discriminate on the grounds of sexual orientation, marital status, gender, race, culture or religion – nor will the changes in these proposals. As with the original legislation the proposals are likely to have more impact on women than men, because they live longer and because they are more likely to be involved in care giving.

Human rights

66. The Executive has considered carefully the effect of these proposals on human rights, since the Parliament requires to be satisfied that legislation is in line with the European Convention on Human Rights. The Executive believes that the proposed changes in Part 2 will meet this requirement as this part of the Bill provides for appropriate appeal procedures within the scheme of the existing provisions of the Adults with Incapacity (Scotland) Act 2000.

Island communities

67. The proposals to streamline the operation of and improve accessibility to the legislation will benefit both those who live within and outside the main centres of population.

Local government

68. The Act confers a wide range of functions on local authorities relating to: investigation; supervision; provision of information and advice; and applying for intervention orders and guardianship where necessary and no-one else is doing so. The changes in the Bill should assist local authorities in carrying out their functions. In particular, the provisions to extend intromission with funds to organisations should result in a reduction in the numbers of cases needing to be addressed through applications to court for financial guardianships (which is a significantly more expensive process).
Sustainable development

69. The proposed changes will not have any effect on sustainable development issues.

AMENDMENTS TO THE SOCIAL WORK (SCOTLAND) ACT 1968 IN RESPECT OF ORDINARY RESIDENCE

Policy objectives

Background

70. Current guidance on how to identify the ordinary residence of people assessed as needing social work services under the Social Work (Scotland) Act 1968 is contained in Circular SWSG 1/96. The purpose of the circular was to clarify where responsibility lies between social work authorities. With the changing patterns of care, including free personal and nursing care and the growing use of supported accommodation, local authorities requested a review of the guidance to help reduce unnecessary disputes between authorities, which are costly and time-consuming to resolve. The Scottish Executive’s long established policy and guidance is that, normally, the local authority in which a person is ordinarily resident is financially responsible for the community care services for that person. In reviewing the guidance it became apparent that the current legislation is not clear on this point and disputes occur in relation to where a person is ordinarily resident. In addition, a policy for how those placed in one part of the United Kingdom or the Channel Islands or the Isle of Man from another is being negotiated between the relevant authorities and the Scottish Ministers require the power to amend the 1968 Act to implement this policy when it is agreed. Ministers already have the power under section 5 of the Community Care and Health (Scotland) Act 2002 to amend the 1968 Act to permit placements by Scottish local authorities in any other part of the United Kingdom or the Channel Islands or the Isle of Mann although this power has not yet been commenced or required.

Specific policy objectives

71. The purpose is to clarify and update the legislation determining which local authority is financially responsible for providing community care services including direct payments under section 12B of the 1968 Act, especially when a person moves between local authority areas. The technical changes to the legislation are intended to ensure a fair division of financial responsibility among authorities and responds to concerns about the lack of clarity in the interpretation of the existing legislation and the need to respond to changes in patterns of care provision.

Alternative approaches

72. A range of options for addressing the issues was considered:

- Do nothing – disputes which are costly and time consuming would continue.
- Revised guidance – without clarifying the associated legislation, this would have limited effectiveness.
Consultation

73. A consultation letter headed – *Ordinary Residence, Consultation on Proposed amendments to the Social Work (Scotland) Act 1968, Functions of Local Authorities in Respect of Place Persons* - was distributed on 2 September 2005 to: Directors of Social Work, Chief Executives, Directors of Finance and Directors of Housing in Local Authorities; Association of Directors of Social Work; COSLA; Voluntary Sector Organisations with an interest; other relevant bodies. It is published on the Scottish Executive website at [http://www.scotland.gov.uk/resource/doc/924/0017116.pdf](http://www.scotland.gov.uk/resource/doc/924/0017116.pdf). 38 responses were received by the closing date of 4 November 2005 and most generally welcomed the review and supported the Scottish Executive’s proposals whilst raising points of detail about the precise operation of the rules. Points raised included the need for all existing funding arrangements to be honoured and for clear definitions. The proposed revised guidance and regulations which will complement the legislation will aim to address the points of detail and will be consulted on.

**Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.**

*Equal opportunities*

74. The proposals will not compromise the level of care provided to individuals and will have no impact on entitlement to community care services which are provided on the basis of an assessment of need. The provisions will clarify which authority is responsible for paying for these services where they are provided by an authority other than the authority which carried out the assessment of need. The impact on the individual in receipt of the service will therefore be minimal and no impact on equal opportunities is envisaged.

*Human rights*

75. For the reasons set out above for equal opportunities, no impact on Human Rights is envisaged.

*Island communities*

76. For the reasons set out above for equal opportunities the direct impact on individual will be minimal wherever they reside. Clarifying responsibility for paying for community care services will benefit the Island Communities to the same extent as mainland communities.

*Local government*

77. Engaging in disputes about ordinary residence is time consuming and costly for local authorities. Clarifying the position will be beneficial. The associated guidance and regulations will be developed in consultation with local government representatives.

*Sustainable development*

78. No impact is envisaged.
AMENDMENTS TO THE SOCIAL WORK (SCOTLAND) ACT 1968 IN RESPECT OF LIABLE RELATIVES

Policy objectives

Background

79. An individual’s contribution towards the care home fees paid for them by the local authority is normally calculated solely on the basis of his or her own resources. However, section 42 and 43 of the National Assistance Act 1948 state that a man is liable to maintain his wife and children and this same duty applies equally to a woman who is liable to support her husband and children. This is known as the “liable relative rule” which allows local authorities to demand a contribution from the spouse or parent of care home residents. The rule has long been unpopular.

Specific policy objectives

80. The proposals remove the liable relative rule as it applies to charging for care home fees in Scotland. The rule has long been unpopular and is seldom used. Where it is used there is inconsistency in its application and it can cause considerable distress to those concerned.

Alternative approaches

81. To do nothing would mean that the inequity of the current position would continue. The proposals fulfil a commitment to remove the liable relative rule from Scottish residential care charging at the first appropriate legislative opportunity given by Ministers in answer to a Parliamentary Question in May 2004 (S2W-07639).

Consultation

82. A consultation letter headed – Residential Care Charging Rules – Taking Account of the Pension Credit – which included a section on the liable relatives rule, was distributed on 23 July 2003 to: Local Authority Directors of Social Work, COSLA, Association of the Directors of Social Work (ADSW) and voluntary organisations with an interest. 14 local authorities, COSLA, ADSW, Age Concern and Help the Aged gave views and there was clear support for the change. Only two local authorities said that they were currently receiving contributions from liable relatives. Most said that they rarely or never used the rule.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

83. Removing the liable relatives rule will remove the current inequities in support of equal opportunity principles.

Human rights

84. The proposals will not compromise the level of care provided to individuals and will have no impact on entitlement to community care services which are provided on the basis of an assessment of need. No adverse impact on Human Rights is therefore envisaged.
Island communities

85. The removal of the rule will not have specific consequences for Island Communities.

Local government

86. Most local authorities endorse the removal of the liable relatives rule and do not currently derive any financial benefit from it. The change is part of the cost neutral response to the introduction of Pension Credit which is explained in more detail in the Financial Memorandum.

Sustainable development

87. No impact on sustainable development is envisaged.

AMENDMENTS TO THE SOCIAL WORK (SCOTLAND) ACT 1968 IN RESPECT OF DIRECT PAYMENTS

Policy objectives

Background

88. Direct payments are a self-directed community care service that provide flexibility, choice and control to individuals over how their assessed care needs are met, and which enables them to live more independently in the community. Since June 2003 it has been a duty for local authorities to give direct payments to eligible client groups which are currently disabled adults and children, young carers and older people who are assessed as needing community care services.

89. Regulations presently specify those who are ineligible for direct payments. The effect is that the people who are eligible are those who do not fall within an ineligible group and are either (a) disabled, (b) 65 or over, or (c) in relation only to a service under section 22(1) of the Children (Scotland) Act 1995 (i) children who are 16 or 17; and (ii) those entitled to such a service either because they are a parent of, or because they have parental responsibility for, that child. Ineligible groups are generally those who are under supervision for mental disorder or drug or alcohol dependency.

90. Under subsection (3) of section 12B of the Social Work (Scotland) Act 1968 the Scottish Ministers can prescribe people who cannot be employed using a direct payment to provide services to the person entitled to the direct payment (“the beneficiary”). The way the Act works is that categories of people are either ‘on’ or ‘off’ this list and there is no flexibility for local authorities to make exceptions under exceptional circumstances in order to meet an individual’s assessed needs.

91. Regulation 4 of the Community Care (Direct Payments) (Scotland) Regulations 2003 (SSI 2003/243) specifies that certain types of close relative living at the same address, or in the case of the beneficiary’s spouse at different addresses to the beneficiary, are not to be employed using direct payments.
Specific policy objectives

92. The objective is to amend the 1968 Act to allow the Scottish Ministers to make provision for the delegation of functions under section 12B of the 1968 Act to local authorities so that the local authorities can exercise flexibility in designing an individual’s direct payments care package. The intention is to use the new power to allow local authorities to determine whether exceptional circumstances exist which would justify using direct payments to employ a close relative in a particular case.

Alternative approaches

93. Continuing to debar all close relatives would mean that the potential tensions of having a relative as an employee would be avoided. However, it would also result in individuals not being able to access the support that they sometimes need in exceptional circumstances. To illustrate, an example is of someone in the final stage of a terminal illness who may feel more comfortable with a relative who knows them well. Legislative change is the only means to achieve this outcome.

Consultation

94. A consultation letter was issued on 16 November 2004 to local authority Chief Executives, Directors of Social Work/Chief Social Workers, Heads of Children’s Services, Directors of Housing, Directors of Finance, health and social work professional bodies, voluntary sector organisations, NHS Board Chief Executives and individuals. 37 local authorities, health and social work professional bodies, voluntary sector organisations and individuals gave views, and there was clear support for the proposed change.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities/human rights

95. The proposal makes it possible to employ relatives in exceptional circumstances and removes the perception that some individuals have expressed, that preventing users employing relatives to deliver their care through direct payments may contravene their human rights.

Island communities

96. None

Local government

97. The impact on local authorities will be small. It will be for them to judge on a case by case basis whether exceptional circumstance apply.

Sustainable development

98. None.
AMENDMENTS TO THE MENTAL HEALTH (SCOTLAND) ACT 2003

Policy objectives

Background

99. The Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) introduced a new Mental Health Tribunal for Scotland as the main forum for hearing applications, reviews and appeals against compulsory measures. The Tribunal may review cases when compulsory measures are extended or revised. Patients and their named person may also appeal to the Tribunal against their detention each year. However it was also recognised that there might be patients who were on long term compulsory measures which had not been reviewed by the Tribunal for a number of years. Under the 2003 Act a compulsory treatment order (CTO) is initially made by the Tribunal for a period of 6 months. Thereafter the patient’s responsible medical officer can extend the CTO for a further period of 6 months and then for further periods of 1 year. There are provisions permitting the CTO, and any determinations extending the CTO to be reviewed by the Tribunal. However if the right to apply for such reviews were not exercised, it would have been possible for a CTO to be extended year on year without the CTO being reconsidered by the Tribunal. The 2003 Act therefore also introduced provisions aimed at ensuring that any patient subject to a CTO whose order has not been considered by the Tribunal for two years, will have their case reviewed by the Tribunal.

Specific policy objectives

100. The 2003 Act contains separate provisions in relation to ensuring that no more than 2 years will elapse without a review by the Tribunal being triggered for patients on compulsory treatment orders (CTOs) and compulsion orders (COs). The drafting of the provisions in relation to patients on CTOs does not meet the original policy intention in that the provision presently takes no account of the Tribunal’s role in making the CTO in the first place when calculating when reviews by the Tribunal will be triggered. The effect of this is that the automatic review by the Tribunal would be triggered 6 months after the CTO was granted by the Tribunal instead of after 2 years. Section 67 amends section 101 of the 2003 Act to provide that the Tribunal is under a duty to review any determination to extend a CTO where (a) the CTO itself was made at least 2 years before the beginning of the extension authorised by the determination, (b) no other review under section 101 has been triggered already in the 2 years prior to the extension of the CTO effected by the determination and (c) no application for review has been made to the Tribunal for review of the CTO or the determination in those 2 years. The effect will be that, at each extension of the CTO by a determination under section 86 of the 2003 Act, the Tribunal will have a duty to review that determination if (i) the CTO was made at least 2 years prior to the first day of the extension of the CTO by the determination, (ii) there has been no application for review in the 2 year period prior to the first day of the extension of the CTO and (iii) no review under section 101 has been triggered in that 2 year period.

Alternative approaches

101. The amendment requires to be made by primary legislation. This amendment represents the first opportunity to make the necessary change.
Consultation

102. There was extensive consultation on the original policy intention for the 2003 Act and the Tribunal. It has not been considered necessary to consult on this change as it aims to implement the original policy intention of the Act.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

103. None

Human rights

104. The two year review of patient’s case is a safeguard which will help to protect the patient’s rights.

Island communities

105. None. (Arrangements are in place to hold Tribunal hearings in Orkney Shetland and the Western Isles when required.)

Local government

106. None

Sustainable development

107. None
This document relates to the Adult Support and Protection (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 31 March 2006

ADULT SUPPORT AND PROTECTION (SCOTLAND) BILL

POLICY MEMORANDUM

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