ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

GUIDANCE AND WORKBOOK
FOR SOCIAL AND HEALTHCARE STAFF

PACK 2

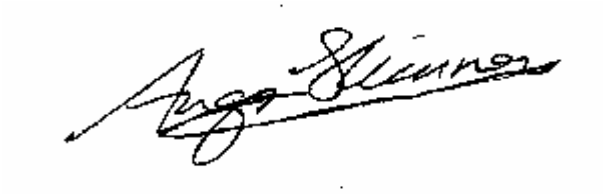
Foreword

The Adults with Incapacity (Scotland) Act 2000 will be fully implemented by 2003. This will improve the way in which welfare, financial and medical decisions are taken on behalf of adults who cannot act on their own behalf.

I am pleased that the Social Work Services Inspectorate, through the production of these training workbooks, is able to respond to a request from the Association of Directors of Social Work for focussed and in-depth material.

There are a number of packs, each designed to address the different levels of knowledge and skills that different interests will require. There is also a trainers' guide to assist those who intend to run related courses.

I am grateful to all those who helped us to complete this work. Particular thanks goes to the Advisory Group who assisted in developing the product. Thanks must also go to the staff team at Robert Gordon University. Mike Lowit's contribution is especially appreciated.



Chief Social Work Inspector
May 2002

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NB All words in bold are terms which are explained in the glossary

1. Introduction

1.1 This pack is intended primarily for practitioners, including Mental Health Officers and front line managers, involved in assessment and care management. It will be useful, however, to a wider range of practitioners involved in the delivery of the broad spectrum of health and social services. The reasons for this are explained below and are outlined in greater detail in the Trainers' Guide that accompanies this pack.

1.2 It is intended as well for use by candidates on accredited MHO training programmes. The Trainers' Guide addresses how programmes may make use of the pack. MHOs and candidates on MHO programmes, should note that Pack 3 is specifically designed to address the practice issues exclusive to MHOs. Pack 2 introduces the entire scope of the Adults with Incapacity (Scotland) Act 2000 and deals with practice issues that will be shared in common by MHO and non-MHO practitioners. It is essential that MHOs and MHO candidates read both Pack 2 and Pack 3.

1.3 The pack refers to the general group of local authority practitioners as Social Work Officers, adopting the term used in the Codes of Practice that accompany the Act.

1.4 It is for your employing authority to decide how relevant the pack is for you as a practitioner and what sort of detailed understanding of its contents you require. It is for them to make available the suitable training resources for you to assimilate the contents of the pack.

A note for employees of social and healthcare services outwith local authorities

1.5 There are many settings beyond the local authority in which professionally qualified practitioners will have key roles under the Act. Voluntary and/or private agency staff involved closely in assessment and care management, Health Visitors and Community Psychiatric Nursing Services are some of the examples of staff who will be working with and assessing adults with incapacity. While the pack is addressed primarily to a local authority audience, you may find most if not all of it equally relevant to you if you work in such a setting.

1.6 This material will further the Joint Future agenda when used to promote joint training initiatives involving all the relevant practitioners and agencies.

1.7 If you are an MHO, you will be involved in restricting people's freedom in order to protect them from serious harm or significant deterioration in their health. You will be aware of the seriousness of considering and implementing measures that involve the exercise of power over extremely vulnerable others. You will be aware of the burden of responsibility in making assessments and taking decisions that have the potential to affect the freedom and civil liberties of individuals. You will be aware that at times you have to balance consideration of imposing protective measures against the benefits of allowing an adult to take risks when a person may be struggling to understand the consequences of decisions and actions. You will be aware that assessing the fine line between protection and deprivation of civil liberties involves painful ethical considerations and difficult professional judgements.

1.8 The Adults with Incapacity Act is not only about the imposition of restrictions upon an adult's liberty in order to protect him or her. It is also an enabling piece of legislation, which, when properly used, can afford vulnerable adults the wherewithal to make assisted choices that affect their health, welfare, property and finances. It requires careful application of advocacy and empowering practice in a legal context.

1.9 This new Act involves a much wider section of practitioners in making a far broader range of assessments and in implementing a far greater scope of measures on behalf of adults who are vulnerable than does the Mental Health (Scotland) Act 1984. As such it will bring to all social work officers extremely challenging considerations as to how and when they might use this legislation.

1.10 Finally, this Act imposes fundamental new legal responsibilities on local authorities to take forward **financial and welfare intervention and guardianship orders** where they are necessary and no one else is doing so. This is a serious responsibility. All of these considerations should make it clear to you why you should give time and care in the study of this pack to ensure you have a proper understanding of the law and the organisational and practice issues which will enable you to fulfil your statutory and professional responsibilities in accordance with the principles of the Act.

The structure of the pack

1.11 The pack introduces the Adults with Incapacity (Scotland) Act 2000 in the following context:

- It outlines the general principles as the guiding focus for all activity done under the Act;

- It introduces the definitions of incapacity as gateways for intervention under the Act;

- It specifies the main duties and roles of the following:

    - The sheriff;
    - The Public Guardian;
    - The Mental Welfare Commission; and
    - The local authority;

- It explains the following powers of the Act:

    - **Continuing** and **welfare powers of attorney;**
    - **Intromission with funds;**
    - Management of residents' finances;
    - Medical treatment and research; and
    - **Intervention orders** and **Guardianship orders;**

- It focuses on the role of social work in general and care management and MHO work in particular in regard to all of the above and identifies the following roles for practitioners:

    - frontline screening for incapacity;
    - referring for specialist assessments;
    - implementing orders which authorise powers under the Act;

- It proposes a significant interdisciplinary role of working with medical colleagues, MHOs, relatives and carers, the Courts, the Office of the Public Guardian and the Mental Welfare Commission; and

- It identifies specific duties imposed upon MHOs and the Chief Social Work Officer, which are discussed in greater detail in Pack 3.

Knowledge audit

1.12 This pack assumes a basic knowledge of law, policy, structures of services and practice issues, such as would be required of a qualified social worker or occupational therapist. It does not assume the specialised knowledge of an MHO. It does anticipate, however, that readers of the pack will have a wide range of relevant experience and knowledge. This audit is an opportunity for you to question the scope of your knowledge and use the activity to plan your reading of the pack.

1.13 If you have a qualification other than social work, you may find that you have to focus on some of the discussion in greater detail. If some of this discussion assumes too much understanding, you are directed to Pack 1 for health and social care staff, which explains the law in greater detail.

1.14 From the start of the introduction, the terms MHO, **guardianship order**, the 1984 Act (a reference to the Mental Health (Scotland) Act 1984), curator bonis and **powers of attorney** are used. Most of them are well explained in the context of the 2000 Act although a good understanding of them in their pre-existing form in older legislation may be helpful. If, however, you have no understanding of the terms, it may suggest that you should read all of the pack in close detail or even refer to Pack 1. The same is the case for reference to the Mental Welfare Commission and the local authority.

1.15 Even if you do have a sound knowledge of the role of the MHO under the 1984 Act, the use of **guardianship** under the 1984 Act, the pre-2000 use of **powers of attorney** and an understanding of the legal use of the terms capacity and incapacity, you should read the sections addressing these in the text, as they acquire new meaning under the 2000 Act.

1.16 If you understand the principles of the Children (Scotland) Act 1995 and the way in which they influence practice, this will help with your reading of the section on the principles of this Act. The principles of the 2000 Act form a cornerstone of practice and a crucial aspect of the law. All practitioners should read the section with care.

1,17 There will be terms which you have only recently encountered, if at all, such as the office of the Public Guardian, **intervention orders** and the power to **intromit with funds**. These will be explained in the course of the text.

1.18 MHOs are specifically directed to the discussion of the 'Core role of the social work officer under the Act', the 'Role of the local authority' and the discussion of '**Guardianship** and **intervention orders'**.

History of the Act

1.19 In the early 1990s the Scottish Law Commission was charged with drafting two consultation documents, resulting in the Report on Incapable Adults (1995), which formed the basis for the Scottish Executive's own discussion paper and Bill in 1999, and the subsequent passage of the Adults with Incapacity (Scotland) Act 2000.

1.20 It is an Act that will have a major impact upon policy and practice in local authorities and on the services they purchase. Because it is an Act targeted upon incapacity (which the law defines in a very wide but precise sense), it will change the face of assessment and care management practice. Arguably, it brings to local authorities the same responsibility for protection of adults who are vulnerable because of incapacity as they have for children. Essentially, this will have over time a major impact on the practice of all social work officers. It will create new interactions between MHOs and other local authority staff.

1.21 The Act is a complex piece of legislation which addresses the protection and management of the finances, property and welfare of adults who lack capacity to do so for themselves. It also sets out the legal mechanisms by which people can make their own arrangements for the management of their affairs in the event that they lose the capacity to do so themselves.

1.22 Before the Adults with Incapacity (Scotland) Act 2000 (which will be referred to from now on as either 'the Act' or 'the 2000 Act', depending on the context) came into being, issues relating to the management of the property, financial affairs and personal welfare of adults lacking the capacity to manage their own affairs were dealt with under a variety of different pieces of legislation. These related to the appointment of curators bonis, tutors dative, tutors at law, **powers of attorney and continuing powers of attorney** and **guardianship** under

the Mental Health (Scotland) Act 1984 (the 1984 Act). Over the years it has become increasingly evident that the legislation was inadequate to the needs of a wide range of people and that there was a need to modernise and harmonise legislative provision in this area.

What was wrong with the pre-existing legal provision?

1.23 The 1984 Act **guardianship order** was of limited scope, offering only three inflexible powers. Many argued that the welfare grounds for application were too vague to be reasonably applied and this affected how widely it was used. Its use has increased in the past decade. This seems to have coincided with the advent of the NHS and Community Care Act, with an increasingly ageing population and with the closure of large institutions. The increased use was also related, possibly, to the fact that social workers and care managers have been presented increasingly with the practical, ethical and moral dilemmas involved in taking decisions in respect of the welfare, finances and property of individuals who are unable to look after their own interests due to the effects of mental disorder.

1.24 There was a slow rise in cases of guardianship under the 1984 Act that has become more dramatic in recent years:

- 1990 – 65 cases
- 1994 – 91 cases
- 1998 – 176 cases
- 2001 – 266 cases

1.25 Part IX of the 1984 Act (Protection of Property), made it a duty for local authorities to apply for a curator bonis for patients in certain circumstances where the person was unable to protect their own interests in property and financial affairs and no other arrangements were being made to take this forward. This rather cumbersome administrative and legal process was too costly to administer for smaller estates, and in many cases there were simply no lawful solutions to certain problems, such as who could make decisions about the management of the property or financial affairs of anyone who had not granted a **power of attorney** and lacked the considerable funds to make curator bonis viable. The expense and shortcomings of such interventions led to many authorities exercising a very loose interpretation of their statutory duties under the 1984 Act.

1.26 Overall there was no comprehensive legislative framework with which to secure the financial, property and welfare interests of an adult who was incapable of acting or communicating their own informed wishes, nor was there a legislative framework to create welfare directives in advance of incapacity. Informal, quasi-legal arrangements often sat uneasily with social workers, care managers and local authorities who were faced with statutory responsibilities for assessing and care planning for those who were unable to safeguard their own interests.

Legacy of the preceding legislation

1.27 This has led to an uncomfortable situation where the inflexibility and narrow focus of the law led to many professionals, relatives and carers operating informal arrangements outwith statutory law, acting in what they perceived to be the best interests of the adult with incapacity. If we consider **guardianship** under the 1984 Act as a model for making decisions about the welfare of adults with mental disorders who lack the capacity to do so for themselves, a look at statistics in Table 1 for use of **guardianship** over Scotland since 1984 will show that, in some areas, it has rarely, if ever, been used.

Table 1

Guardianship cases by local authority

	Number at 31-03-00	Approved 00 - 01	Discharged 00 - 01	Number at 31-03-01	Rate per 100,000 Local Authority Population 16 Years and over
Highland	34	18	9	43	26
Fife	18	17	8	27	10
Falkirk	10	5	4	11	9
Aberdeen City	11	16	13	14	8
East Lothian	5	2	1	6	8
Glasgow City	33	27	19	41	8
West Dunbartonshire	4	2	0	6	8
East Dunbartonshire	5	2	2	5	7
Perth & Kinross	9	1	2	8	7
West Lothian	5	6	3	8	7
Border (Scottish)	4	3	1	6	6
Dumfries & Galloway	4	3	0	7	6
Edinburgh City	15	17	9	23	6
Stirling	4	1	1	4	6
Angus	3	3	1	5	5
Clackmannanshire	1	1	0	2	5
Dundee City	7	3	4	6	5
Midlothian	8	1	6	3	5
South Ayrshire	1	6	2	5	5
Aberdeenshire	4	6	3	7	4
North Lanarkshire	6	9	5	10	4
East Ayrshire	1	2	0	3	3
East Renfrewshire	1	1	0	2	3
Renfrewshire	3	1	0	4	3
North Ayrshire	1	2	1	2	2
South Lanarkshire	4	2	2	4	2
Argyll & Bute	1	1	1	1	1
Inverclyde	0	1	0	1	1
Moray	0	1	0	1	1
Orkney Islands	0	0	0	0	0
Shetland Islands	0	0	0	0	0
Western Isles	0	0	0	0	0
Totals	**202**	**160**	**96**	**266**	**5**

Source: Mental Welfare Commission for Scotland Annual Report 2000/01

1.28 The new Act challenges professionals and local authorities in the need to transcend the previous culture in which informal actions were taken based on assumptions of what was considered to be in an individual's best interests, without always considering what the person and their carers might have wished and whether legal intervention would have best protected the interests of the adult. The importance of the new Act is that it provides the legal means to resolve a wide range of problems on behalf of a broad group of people who face difficulties in regard to their decision making capacities. The cultural legacy of pre-2000 legislation can be seen as understandable in the context of the legal provision of its time, but the new act demands new perspectives and new standards of practice.

1.29 You may note that the phrase 'in what is considered to be the best interests of the adult...' has been used instead of just saying 'in the best interests of the adult...'. This is because, even with the best

intentions, our view of what is in anyone's best interests is liable to be influenced by other factors such as our own prejudices, preconceptions and assumptions, as well as what is administratively and organisationally convenient. The overview of the Courts, the Office of The Public Guardian and the Mental Welfare Commission along with the legislation and associated Codes of Practice should now enable us to more truly determine and act in the best interests of an adult with incapacity. This will involve practitioners in the exercise of critical and fine-tuned judgements of when and how to use the Act in response to working with adults who lack capacity in relation to specific actions and/or decisions.

2. The core role of the social work officer in the 2000 Act

2.1 The following discussion refers to the role of those involved in assessment and care management. They will be in the frontline in the identification and management of individuals who lack capacity to look after their own interests. You should not dismiss the relevance of this process to you if you are in another social work officer role eg criminal justice worker or child protection worker. In reading this, MHOs should envisage how this role will relate to their specific tasks.

2.2 The core message is that the social work officer role in assessing needs must now take account of this Act. Whether that assessment is a care management assessment of need, the assessment of the needs of a parent in a child protection investigation, the future needs assessment of a young person not yet 16, or the assessment undertaken by a criminal justice worker, no assessment can safely meet the local authority's potential duties under the Act unless it screens for incapacity.

2.3 Assessment is a task carried out in all reviews of care across the spectrum of local authority interventions. People who are in receipt of social work services are often vulnerable. That vulnerability may be a consequence of any number of factors such as dementia, learning disability, mental illness or brain damage caused by substance abuse. The impact of these on an adult may impair their capacity to take certain actions or make certain decisions. All review processes should involve a screening process as well as a monitoring process to review the adult's capacity to take action and make decisions crucial to their health, welfare and financial security.

2.4 The MHO, as a specialist practitioner in the assessment of specific need for **guardianship** and other orders, takes on an independent role. The MHO assessment would only be activated normally following by the initial screening and reviewing process. The assessment and care management functions of social work provide the frontline screen for incapacity. Referrals for medical and MHO assessment will come in large part from this direction.

2.5 In a similar way, Pack 1, for social and healthcare staff, discusses the duty of workers to notify care management staff where they have concerns that an adult in a care home, day or domiciliary care is acting or making decisions beyond their capacity to do so which is detrimental to their interests. The social work officer role is a key link in the chain of screening, assessment and review. They will help ensure that the Act can be used by adults to make their own arrangements in the event of their loss of capacity in specific areas, as well as by the local authority and relatives to protect the adult and their interests wherever necessary, following the loss of capacity.

2.6 The wider scope of powers afforded under the Act, the more precise grounds for incapacity and the principles of the Act should work in a dynamic manner to meet the community care needs of vulnerable adults in creative ways that have not previously been possible. This is an exciting prospect for practitioners at every level.

2.7 The social work officer role has to be seen in the broad context of the range of duties and powers given to the local authority under the Act, and the relationship that the local authority will need to forge with the Office of The Public Guardian, the Mental Welfare Commission, the sheriff and the range of private citizens authorised with powers under the Act.

3. What is Incapacity?

3.1 In this section we begin our exploration of the 2000 Act by reflecting on important issues at the heart of the matter in relation to yourself. Think carefully about the questions asked in the related exercises and try to answer them fully. This is important as it lays a foundation for looking at the concept of incapacity as it is used in the Act.

3.2 Our capabilities deteriorate as we get older. Imagine that you are in advanced old age, and that you are losing some of your mental powers, as many people do with the on-set of dementia.

3.3 What do you think it would be like to find yourself incapable of making the ordinary, everyday decisions that you have been so used to making all your life? Such decisions are often virtually invisible to us because we are so used to making them. We may not even perceive it as a loss were we no longer to be capable of some of them. For example, you might not consider it a loss were you never to have to take responsibility for paying a heating bill again, or completing a tax return. However, the reality of this loss of capacity to do these things might be very different. Impaired capacity limits the choices open to you.

Do Exercise 1 now

3.4 The list is potentially endless. If, however, you came up with making decisions about agreeing to medical treatment on your list, you have already identified an issue of major importance in the Act. Having come up with a list of the sort of everyday, unremarkable decisions that you make, consider the following:

Do Exercise 2 and 3 now

3.5 The purpose of the first 3 exercises were to get you thinking about exactly how difficult it is for us to contemplate losing capacity to manage our own affairs. It is also intended that this would lead to consideration of the vast number of practical difficulties that having impaired capacity brings to ordinary life. In thinking about these things in relation to yourself, you will be aware of the importance of people in such difficult circumstances being treated with dignity and respect.

3.6 As we will see later in the text, the Act allows you to grant **powers of attorney** when you have capacity to do so to other people. They would exercise these powers on your behalf when you no longer have the capacity to make such decisions or take such actions as may be necessary to protect your welfare or financial interests. It also allows others to seek powers on your behalf when you no longer have the capacity to do so yourself (e.g. under **guardianship or intervention orders**), when you haven't made previous arrangements.

3.7 You may have guessed that this discussion is leading us to the first basic step in our exploration of the act itself - the definition of incapacity.

3.8 In considering what incapacity means in the legal sense, we firstly have to consider the assumption made in law that as adults we are all legally capable of making personal decisions for ourselves and of managing our own affairs. This encompasses contractual arrangements (such as entering into contracts of employment, marriage, financial arrangements - opening bank accounts, entering into hire purchase and mortgage agreements, etc) as well as wider rights to exercise choice without the interference of the law. This presumption of capacity can be overturned only on evidence of impaired capacity.

3.9 Consider the vast range of legally binding agreements and decisions that you may make during the course of your life. We live in a civil society. In it everyone is completely surrounded by civil law even though it often only becomes apparent when legal problems arise. Whether or not you realise it, many, if not all, of the things that occurred on your list of everyday decisions above will have a basis in one aspect of the law or another. Other, less everyday events, also are governed by law. These include such things as maintaining your side of a contract of employment by turning up at work on time and abiding by the rules, purchasing a house, entering into a mortgage agreement, getting married, getting divorced or making a will. All these decisions and agreements are considered to be legal in the eyes of the law because you are an adult (the age at which you are generally assumed capable of making such decisions being 16 years) and you have the capacity to make them.

3.10 Capacity in this sense means that you are capable of a good enough understanding of the nature, implications and consequences of your decisions. If something had happened to impair your capacity, you may not be able to enter into any legally binding contracts. However, whatever impaired your capacity would have to be something that the law would recognise. For example, complaining that your marriage should be nullified because you were so drunk at the time that you could not recall making the decision to get married, would definitely not be something that the law would recognise as incapacity.

Assessing capacity

3.11 Capacity and incapacity are about whether an adult can make certain decisions or not. The Act gives a general guide to what incapacity is in Section 1(6).

3.12 The Act gives doctors the principal responsibility in deciding whether an adult is incapable of making particular decisions or taking specific actions. In law there is a general principle that an adult is mentally capable until shown by an approved legal process not to be. The legal process may involve a court, as for **guardianship or intervention orders**, with the doctors providing reports on the adult's incapacity to the court; or it may involve a simpler certification by a medical practitioner following processes described in the Act. This is the case for **intromission with funds**, management of funds in establishments, or consent to medical treatment under the Act. No formal certificate is required for research under the Act, or for defining when a **power of attorney** that springs into action when the adult becomes incapable is to be put into effect, but in both these cases incapacity is still being determined according to a process approved under the law as laid down in the Act.

3.13 The assumption in law that a person is capable until formally proved otherwise means that we do not usually have to prove our capacity to make decisions, or have it certified. The Act makes one exception to this. Where an adult, when capable of doing so, decides to grant a **power of attorney**, the Act requires a solicitor (or a doctor or member of the Faculty of Advocates) to certify that the person appears to be capable of the decision, and not under undue pressure. It is hoped that this will reduce the likelihood of improper **powers of attorney** being granted, or of later being disputed.

3.14 The doctor's assessment of whether the adult is incapable of certain decisions or actions is central to most parts of the Act. Section 1(6) of the Act indicates that a number of factors should be considered in making this assessment. These include whether the adult has the following:

- Information to a level appropriate to his or her particular ability to understand;
- The ability to consider choices, reason and reach a decision;
- The ability to receive information and express views sufficiently to communicate a decision;

- Freedom from susceptibility to pressure from others; and
- The ability to be consistent in decision making.

3.15 These are in no way absolutes – they are merely factors to be considered. We all make decisions that are based on incomplete information, or we rush to a decision, don't communicate our views clearly, allow ourselves to be swayed by the views of those around us or change our mind about what we decide. In other words we are not always totally wise in our decision-making. Nevertheless, most of us have a customary style. The doctor's difficult task is to assess whether the adult's ability to decide is sufficiently impaired to consider them incapable of those decisions.

3.16 The types of people who might be considered to be incapable of some types of decision will include those with dementia, learning disabilities, head injuries, strokes and other neurological conditions, and people with severe mental illness, either chronic (long-lasting) or acute (in short episodes). But a diagnosis of any of these conditions does not in itself bring automatic incapacity. There are plenty of people with dementia or learning disabilities who are capable of all or nearly all decisions. However, if an adult does have one of these conditions, and decisions have to be taken on finances, welfare or healthcare, the possibility of some incapacity should at least be considered. If you think the adult may have impaired capacity, or there is some doubt, this should be discussed with your line manager and the adult's doctor.

3.17 You might assume that those with more severe illnesses were more likely to be mentally incapable, and there is some truth in that. But there are many with quite severe illnesses and quite severe impairments who are still fully capable of particular decisions. Tests of severity (such as the Mini Mental State Examination for dementia or IQ for learning disabilities) are not always good measures of incapacity.

3.18 Eventually there may be decision-specific tests or assessment procedures that are tried and tested, but these do not exist at present. For people with an illness, their previous normal ability and style is important. For people with lifelong learning disabilities, the requirements of the person's day-to-day living situation will be the nearest we can get. The 'norms' of society as a whole are not helpful here. Background information about the adult's past and present is far more important.

3.19 The Act is founded on the basic principle that capacity is decision-specific. We are not either capable of all decisions or capable

of none. We can be capable of some decisions but not others. The consequence of this is that the doctor has to assess on the particular type of decision. Can the adult make decisions or take action on particular aspects of finances, on that particular treatment, on that particular aspect of welfare?

3.20 The doctor has to make the final assessment of capacity but will be expected to use multi-disciplinary information as part of the overall assessment. So reports from nurses, occupational therapists, clinical psychologists, speech therapists, social workers, care staff and others will sometimes be asked for. And, of course, under the principles of the Act, the doctor must consider the adult's past and present wishes and feelings and, where reasonable and practicable, seek the views of significant others. All involved will have to use their own skills and common sense to help in the assessment.

3.21 There are obviously considerable difficulties at times in assessing capacity. An adult with a progressive or changeable condition may gradually become more incapable of certain decisions, or become incapable of more types of decision. It is sometimes very difficult to pinpoint the moment when an adult becomes incapable of one particular decision. An adult's ability to make a certain decision may come and go at different times of day, or in different circumstances, or depending on the person's mood or tiredness, or a whole host of other factors, again making assessment extremely difficult. Nevertheless, the doctor has to take into account all the information available in making an overall assessment. You may be in a crucial position to contribute to this assessment process.

3.22 The Act says quite a lot about trying to enhance the adult's ability to communicate. Before deciding that the adult is unable to communicate, all sorts of methods must be tried, including where appropriate, interpreters and mechanical means.

3.23 Finally, there is the problem of the subtler aspects of decision-making – judgement and susceptibility to pressure from others – what are sometimes called the executive or 'frontal lobe' aspects of decision-making. It is relatively easy to assess whether someone can count money, or understands what a tablet is supposed to be for, but much more difficult to decide whether he or she is making a 'wise' decision. Similarly, it is very difficult to assess whether someone is subject to undue influence from others because of the illness, yet this 'facility' is an

important part of incapacity. The doctor has to come to a judgement having carefully considered the evidence available.

3.24 It is possible to appeal against an assessment of incapacity. The adult, or anyone claiming an interest, can appeal to the sheriff court, or the Court of Session if it was the sheriff who accepted the assessment.

3.25 The qualifying factors such as dependency upon alcohol do not debar an adult from having incapacity. If the sole reason for considering a person to have incapacity is his dependence on alcohol, then he cannot be legally considered as lacking capacity. However, if a person has a degree of mental illness that renders him incapable **and** he is dependent upon alcohol, he can be viewed as having impaired capacity. In all the above regards, incapacity may be a life-long condition, a permanent acquisition or a transitory condition.

3.26 The complex matter of assessing when an adult has impaired capacity of sufficient degree to consider action under the Act is a challenging one which demands a multi disciplinary approach. Capacity should not be considered in a vacuum.

3.27 If much of this takes place in situations where the adult is reluctant to give agreement to a certain action or decision even though it may be in his or her interests, there is also the complication of recognising a point at which agreement in a broader sense may be considered to have been communicated.

3.28 For example, consider the hypothetical case of John, a 50 year old man who has moderate early onset dementia and who lives alone. He has been in receipt of services to his home but can no longer manage because of the growing risk to his personal welfare as the dementia progresses. He is now in need of residential care because of it.

3.29 John might not relish the thought of going into a care home even though he knows it to be necessary or he may lack the capacity to understand the risks and so may not see the need for the unwelcome move. Either way John may show an unwillingness to agree to it.

3.30 It is necessary to exercise judgement as to the extent of John's capacity before deciding that it is of no use trying to persuade him of the need for the move. Those involved in assessment and care

management should be well aware of the difficulties such choices present to all of us. We all value our independence. The prospective loss of our home and our independence places enormous emotional pressure on individuals. It is part of the task of those professionals involved in the process to help the person work through this. The relationship you form with the adult (and significant others) will put you in a key position to explore the issues. This relationship and the process in which you use it will be invaluable in informing and reaching a view as to the adult's capacity to make the decision for themselves.

3.31 Unless John is seen as lacking capacity as defined under the Act, the Act could not be used to authorise such a move against John's will. To use the compulsion of the law where John has the capacity to come to the decision on his own would not be lawful. Not meeting the definition of incapacity under the 2000 Act, you could not seek powers under the Act to take such decisions on John's behalf.

3.32 Were John to be affected by depression, as sometimes happens in dementia and were it to result in withdrawal and an inability to enter into discussion, could we take his passive and mute compliance with the move as agreement to it? For example, if he responded to you taking his arm and leading him to the car to go to the care home, would he be consenting to the move? If so, at what point in the range of actions that John might display would you begin to recognise a clear expression of reluctance to go? Verbal protests should not be ignored. The persistence, content, intensity and reliability of such verbal protests, however, should always be examined in reaching a view. You would need to consider as well, John's past wishes and views on the issue of moving into care.

3.33 The answers to these decisions are very difficult to determine and are the subject of debate that has no clear resolution. The case of R *v* Bournewood,[1] involved a man with profound learning disabilities who was admitted to hospital under the assumption that his passive compliance could be taken as informed consent. Initially a judge did rule that such compliance could not be taken as consent and that his admission to hospital did constitute unlawful detention. Such detention has been called de facto detention. However, subsequently this decision was overruled by the House of Lords. This area of law clearly will be subject to future decisions which might help clarify the issues.

[1] R v Bournewood Community and Mental Health ex parte L (1998) 3 WLR 107, as reported in the British Medical Journal, Potential Impact of the Human Rights Act on psychiatric practice, Macgregor - Morris R, et al. No 7290, 7th April 2001.

3.34 Complex, finely tuned judgements will need to be taken by the multidisciplinary teams involved in the assessment and care management of adults with impaired capacity. These judgements will need to be informed by a proper consideration of the principles of the Act. The views of the adult, of relatives, carers and significant others will all have to be weighed in the balance. What is clear, however, is that there would appear to be a new imperative that we must avoid taking decisions on behalf of adults with impaired capacity merely on the basis that we believe what we are proposing would be in their best interests.

3.35 If you find this discussion inconclusive, it should alert you to the need to exercise careful judgement in the assessment of capacity. Securing proper medical and legal advice will be necessary in many cases where these issues are being considered.

Specific tests for incapacity

3.36 On top of the general definition in Section 1 (6) of the Act, each power that may be taken out in respect of an adult's welfare, finances or property has a specific test of incapacity which must be applied in relation to the specific authority or powers being sought. This is a fundamental shift in the legislation, from considering incapacity as an 'all or nothing' condition to viewing it as a task specific concept. For example, an adult may have the capacity to agree to a **welfare attorney** being appointed while actually lacking the capacity to carry out the delegated tasks or decisions himself. Another example would be an individual having the ability to manage his state benefits but lacking the capacity to manage a £50,000 inheritance.

3.37 The Act sets out various ways in which intervention in the property, financial affairs or welfare, of the adult can be made:

- It allows for the appointment of proxy[2] decision makers, who are **continuing and welfare attorneys**, withdrawers (persons authorised to have access to the adults funds), managers of care establishments who are authorised to manage residents' **finances, financial or welfare guardians and interveners** (persons authorised to act under i**ntervention orders**);

[2] The term proxy refers to any person who has authority to act on another's behalf: It is probably best known in relation to voting by proxy - the authorisation that a member of the electorate can given to another to exercise his/her vote in his/her absence.

- It provides general authority for medical practitioners to give medical treatment to adults who are not capable of giving their own informed consent;

- It creates, in limited, defined circumstances, provision to authorise medical, nursing, dental or psychological research involving adults with incapacity; and

- It sets out the functions and duties of statutory organisations under the Act, including the new Office of the Public Guardian, the Mental Welfare Commission for Scotland and local authorities.

4. The general principles of the Act

4.1 All activity under the Act must be in accordance with the general principles which are set out in Section 1. The idea may be familiar to you if you are aware of the way in which the Children (Scotland) Act 1995 contains a set of principles through which all activity under the Act must be mediated. These principles are:

4.2 Section 1 (2) 'the person authorising any intervention must be satisfied that it will benefit the adult and that such benefit cannot be reasonably achieved without the intervention'.

4.2.1 'Benefit' may be interpreted as that which would enable the adult to do anything that they could reasonably be expected to do were it not for the existence of impaired capacity. This concept is not a simple one in application. If the adult's incapacity is such that he requires to be in a care home, how is the move into care of benefit? It might be argued that the care delivered in this setting represents a benefit in the sense that, before loosing capacity, the adult could organise their own care at home. It might be argued as well that, the adult lacks the insight they might have been able to apply otherwise and cannot understand that they are now no longer able to cope. Prior to the loss of capacity, the adult would have had the opportunity to benefit from this insight by arranging their own admission to a care home with the appropriate assistance.

4.2.2 It has to be anticipated that however professionals interpret benefit, it will be an area in which relatives, carers and the adult all have strong views. It may become an area of dispute between professionals. In resolution of such disputes, benefit must also be considered in relation to the adult's own standards insofar as they may be ascertained. We will return to this point in discussion of the account that must be taken of the adult's own views.

4.3 Section 1 (3) 'such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.'

4.3.1 As discussion develops in this pack, you will see that the least restrictive option is also a principle that requires much

consideration. It invites careful consideration of balancing risk taking and protecting vulnerable adults from unacceptable risk.

4.3.2 This discussion begs the question: what is the least restrictive option? It may be helpful to return to the consideration in the text above about de facto detention. Consideration of the least restrictive option requires judgements to be exercised in relation to the nature of consent, passive compliance and active resistance.

4.3.3 In reference to the hypothetical case of John, if it were decided that he lacked capacity to make proper judgements in his own interests due to his mental disorder, and welfare powers were to be sought under the Act, it would be important to demonstrate that a less restrictive use of the Act, such as using powers to put in augmented home supports against his wishes, would not be sufficient to meet his needs safely, before you would seek the power of residence to secure care home admission.

4.3.4 It will be issues such as this that challenge practitioners' judgement in respect of the least restrictive option.

4.4 Section 1 (4) 'in determining if an intervention is to be made (and if so, which one), account shall be taken of:

a) present and past wishes and feelings of the adult as far as they can be ascertained;

b) views of the nearest relative and primary carer of the adult, in so far as practicable;

c) (i) views of any **welfare attorney or guardian** who has powers relating to the proposed intervention; and

(ii) any person who the sheriff has directed to be consulted and the views of any person appearing to have an interest in the welfare of the adult.'

4.4.1 In determining the wishes and feelings of an adult the practitioner must demonstrate consideration of the sort of person they are. They must have regard for what can be

determined of the person's history. In this respect it can be seen that the principles interact with each other. What may be considered of benefit to the adult must be determined with regard to what the adult considers or once considered to be of benefit.

4.4.2 While you must take the adult's views and wishes into account, this does not mean that they necessarily must be followed. This consideration must be subject to analysis of risk to ensure that the pursuit of the wishes of the adult (or others) does not place the adult at unacceptable risk. Unacceptable risk could never be considered to be of benefit to the adult.

4.5 Section 1 (5) 'Anybody acting under the Act must encourage the adult to do as much as they are capable of in respect of managing the property and finances and making decisions about their personal welfare.'

4.5.1 The principles of the Act do not insist on a person with dementia for example, being assisted to acquire new skills of which they would not be capable, but they do require that the proxy enable the adult to utilise existing skills. A proxy with powers, for instance in respect of a younger person with a learning disability must help that person develop whatever capacity they have to manage finances, etc. This encourages the creative interface between law and practice rather than promoting an approach in which the choice is between total control over all aspects of an adult with incapacity's life or none at all.

4.6 Much of the consideration of above principles must be seen in the context of the person authorising an intervention making decisions on behalf of the adult. It implies an analysis of risk and the management of risk to the adult which weighs the relative costs and advantages to the adult of any powers exercised. In managing risk you must proceed in the way which demonstrates benefit to the adult with the use of the least restrictions possible to achieve that benefit. Consideration of research findings and evidence based interventions may provide guidance here.

4.7 The principles of the Act are not simply options that may be considered. They are the fundamental basis of the legislation and must be followed in any action taken. If not, the exercise of the powers may be subject to legal challenge. This is clearly demonstrated in section 82,

which protects anyone acting under the Act from liability for prosecution if the actions were done in reasonably good faith, and in keeping with the principles.

4.8 Social work officers will be involved in a range of actions within the scope of the Act, from assessments that result in referrals to an MHO for specialist assessment, to acting as the named **guardian** where a local authority holds a **guardianship order**. Social work officers will have to have regard to the principles in all actions taken under this legislation. Their performance also may come to be scrutinised by the Public Guardian or the Mental Welfare Commission, where they are operating with authority such as in a **guardianship order**. Part of the monitoring role of these organisations is to check that all actions are done in accordance with the principles.

4.9 Best practice would suggest that these principles should not just be considered in relation to specific application of the Act, but are used to inform all practice in relation to vulnerable adults. As assessment of need in a community care context becomes the major screen for incapacity, consideration of these principles will need to be woven into the fabric of care plans, reviews and the implementation of care for all adults in receipt of services.

5. Risk in the context of incapacity

5.1 The following brief discussion addresses risk in the context of the diverse causes of incapacity, the notion of partial capacity and the principles of the Act. Risk assessment is crucial to the local authority's function under the Act. It operates on several levels from the informal screening for incapacity to the formal assessment that is demanded of the MHO/Chief Social Work Officer in conjunction with medical colleagues in report writing for applications. The assessment and management of risk becomes a cornerstone in determining whether to remove specific rights and powers from an adult and entrust them to another. It is a process that requires careful consideration and, in so far as it may result in examination in court, the provision of evidence that will satisfy the sheriff.

5.2 The accurate prediction of risk is a notoriously difficult process that is clouded by numerous complicating factors. The first of these is that we are all exposed to risk as a result of daily life. To a large extent it is no one's business how we manage this fact of life unless we break the law or impose undue risk upon others. In this regard most of us

have taken undue risks at some point in our lives. We have acted 'as no prudent person would act', to use the term that is used to qualify the definition of mental disorder in section 87 of the Act.

5.3 Risk taking behaviour in others takes on another focus when the person is vulnerable and we feel a moral responsibility towards them. That focus sharpens when the moral responsibility becomes a legal duty. Some of the sharpened focus is drawn from the fact that a clearly articulated legal duty allows blame to be allocated when things go wrong (Lanagen, Parsloe ed, 1999[*]). Consider for example the implications of failing in your duty under section 10 (1) (d), in which 'the local authority has a duty to investigate circumstances made known to them in which the personal welfare of an adult with incapacity seems to be at risk'. In this sense the 2000 Act brings to social work the same level of responsibility for vulnerable adults with incapacity that has long preoccupied it in regard of children.

5.4 If this responsibility to protect an adult from undue risk brings with it the temptation of defensive practice (Fisher, Newton and Sainsbury (1984) in Lanagen, Parsloe ed, 1999[*]), it is also to be considered that an 'over cautious life style can bring its own hazards' (Wynne-Harley (1991, in Titterton, Parsloe ed, 1999[*]). In other words, there may unanticipated consequences in overprotecting a person which may themselves result in other risks to the adult. This is certainly true in respect of risk to one's mental health when being contained in an environment that is perceived as being over restrictive. It is also true to the extent that we all develop and learn to manage risks by being exposed to them and making mistakes within a reasonable margin of safety. Being denied this opportunity is to become entrapped in a cycle of over-protectiveness.

5.5 The only way to eliminate risks (if this is possible) would be to exert total control over all aspects of the adult's life; something which runs contrary to the principle of this Act. This Act demands that those professionals involved take reasonable risks to ensure that the adult maintains as much control over their life as possible.

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[*] Risk Assessment in Social Work, Parsloe, P. (ed), Research Highlights in Social Work 36, 1999, Jessica Kingsley.

[*] Risk Assessment in Social Work, Parsloe, P. (ed), Research Highlights in Social Work 36, 1999, Jessica Kingsley.

5.6 The principles of 'benefit to the adult' and encouragement of 'the adult in the exercise of whatever skills he has', must inform your assessment of acceptable risk.

5.7 Olive Stevenson could have been speaking of many adults who come within the scope of this Act when she wrote 'when an old person is intellectually competent and wishes to exercise choice to remain in an environment which presents risk of significant harm, most professionals accept this…However, for relatives, this decision may provoke anxiety and guilt' (Stevenson, Parsloe ed, 1999[*]). Here, the disputable territory of interpretation of the principle of 'benefit to the adult' may interact with the principle of the least restrictive option and the need to solicit the views of the nearest relative and adult. This is not an area of practice unfamiliar to many involved in the assessment and care management of vulnerable adults.

5.8 Where an adult lacks sufficient capacity to determine acceptable levels of risk, the local authority may have a duty to investigate under section 10 (1) (d). Intervention may be a duty under sections 53 or 57, although such interventions need not be preceded by an investigation under section 10 of the Act. Risk prediction, however, is not an exact science. There is a relative lack of research into significant aspects of it (Lanagen, Parsloe ed 1999[*]). By definition its success can not be proved.

5.9 Action is required under this Act to the extent that the presence of unacceptable risk can be demonstrated in the environment of an adult who lacks the capacity to manage it. The presence of such risk must be backed by evidence and decisions made on this basis must accommodate the principles. It is always helpful in focussing discussions on risk to ask what is likely to happen to the adult if no action is taken.

6. Piecing together the principles and the definitions of incapacity

6.1 Whatever we do under the Act, it can only be done if access is afforded by the general and specific tests of incapacity. In other words, no action can be taken unless it can be shown that there is evidence

[*] Risk Assessment in Social Work, Parsloe, P. (ed), Research Highlights in Social Work 36, 1999, Jessica Kingsley.

supporting the assertion that incapacity is directly relevant to any intervention being considered. It is these tests that allow us access to the range of interventions possible under the Act.

6.2 The task is to identify the appropriate intervention in relation to the specific areas in which the adult lacks capacity.

6.3 It is crucial to understand that we are moving from a global and all-pervasive model of incapacity to a model where we need to determine the specific extent to which an adult lacks capacity in the context of their own needs. For example, an adult may lack the capacity to sell their house, but it only becomes an issue when he needs to sell the house. Furthermore, an adult may have partial capacity to manage some of their disposable income but lack capacity to manage the complex activity of selling a house.

6.4 It is also crucial for Social Work Officers to understand the impact of the concept of partial capacity upon an adult's needs and the management of a package of care: The principles (particularly those of the least restrictive option and encouragement of the adult to do as much as they are capable of) demand that the powers of the Act are used only to implement certain aspects of any proposed care package. It is essential, in keeping with these principles, that incapacity is seen in relation to specific tasks or decisions of which the adult is incapable. The powers of the Act should be targeted upon no more than those specific areas of the adult's life which require intervention.

6.5 The specific assessment of which areas of need result from an adult's impaired capacity is largely the MHO's responsibility within the local authority. Those involved in providing medical reports will also be assessing this. It is in fact, ultimately, for them to determine. They as well as the MHO should liaise closely with the carers and relatives and relevant others involved in the adult's care and/or treatment. This broader assessment which pulls together all the information, including that provided by the specialist assessments, is the responsibility of the Social Work Officer, as is the responsibility for activating the referral to the MHO.

6.6 There is a crucial inter-relationship between:

1. The principles;

2. The definition of incapacity which shapes a view of the needs of the adult; and

3. The needs of the adult in relation to the powers being sought.

6.7 The MHO role in this process is to provide a specialised assessment which examines the effects of an adult's impaired capacity on their social functioning. They should focus on the needs that arise as a result of this and comment on elements of the care plan which could address these needs. Finally they must specify the intervention and powers under the Act which are necessary to support these elements.

Do Exercise 4 now

7. Roles, powers and duties

7.1 In this section we will look at the powers, duties and roles of the key bodies empowered under the Act. We keep the coverage of the roles, functions and duties of these organisations to a brief necessary minimum here and direct you to the Act and the Code of Practice for a fuller outline.

7.2 The discussion of the dividing line between the authority of the Public Guardian, the Mental Welfare Commission and the local authority focuses attention on an emerging discourse in the text, reflecting the structure of the Act. The Act distinguishes various powers in relation to incapacity as those involving the management of finances and property on the one hand and personal welfare on the other.

The Public Guardian

7.3 The Public Guardian is a new office set up under Section 6 of the Act. The Public Guardian has duties to register **powers of attorney**, **intervention and guardianship orders**, and to authorise the withdrawal of funds (**intromission with funds**) under Part 3 of the Act.

7.4 The Office of the Public Guardian has both investigatory and supervisory functions generally confined to property and financial affairs of adults. It receives and investigates complaints relating to the exercise of powers in relation to financial affairs and property, and it has a duty to give advice and information should a person authorised under an

intervention or guardianship order (with powers relating to finances or property), a c**ontinuing attorney** or a withdrawer of funds request it.

7.5 The Public Guardian also has power to recall any **financial guardianship order or intervention order** that authorises power in relation to property or financial affairs. This would effectively terminate the authority of the order.

The Public Guardian address:

The Office of the Public Guardian,
Hadrian House,
Callander Business Park,
Callander Road,
Falkirk
FK1 1XR

Telephone 01324 678 3000 Fax 01324 678 301
E-mail:opg@scotCourts.gov.uk
Web: http://www.publicGuardian-scotland.gov.uk

The Mental Welfare Commission

7.6 The Mental Welfare Commission for Scotland is an organisation established under the Mental Health (Scotland) Act 1984. It is charged with exercising protective functions in respect of persons with mental disorder who may, by reason of mental disorder, be incapable of adequately protecting their personal interests. It has the duty to enquire into any potential ill-treatment, deficiency in care or treatment, improper detention or possible loss or damage to the property of individuals with mental disorders caused by this disorder. It also has the power to hold formal enquiries where the proceeding shall have the privilege of a court of law. It can discharge patients detained under the Mental Health Act as well.

7.7 The 2000 Act extends this role in relation to the new powers and procedures of the Act itself. The Commission has a role only in relation to adults whose incapacity is caused by a mental disorder. The Act also generally restricts the Commission's role to matters relating to the personal welfare of adults, i.e. it will have fewer dealings in relation to financial and property related matters.

7.8 Key roles of the Commission are to:

- Investigate of complaints about anyone authorised with powers under the Act in relation to the personal welfare of adults whose incapacities are caused by mental disorder;

- Visit adults subject to **intervention or guardianship orders** and bring to the attention of the Health Board and/or local authority of the area in which the patient resides, or any other body, matters relating to the personal welfare of the adult which they consider ought to be brought to their attention;

- 'Recall' certain powers. The term 'recall' means that, in certain circumstances, the Commission may take power away from the person authorised to use it. The sort of circumstances in which this may be done are situations where that the Act is not being used to benefit the adult or the powers are no longer necessary or are not being used in accordance with the principles of the Act. This power is shared by the sheriff and the local authority

- Consult the Public Guardian and local authority where there is a common interest;

- Investigate any circumstances made known to them in which the personal welfare of the adult may be at risk; and

- Investigate complaints concerning the exercise of functions relating to the personal welfare of adults whose incapacity is a consequence of mental disorder where they are not satisfied with any investigation made by a local authority or where the local authority failed to investigate a complaint.

Implications for your work

7.9 Much as is the case in relation to the Public Guardian, you might have dealings with the Commission in situations where an adult is subject to orders under the Act which the Commission has a duty to supervise. In such cases, a member of the Commission will visit the person from time to time and may wish to speak to both managers and direct care staff about the care given to the resident.

7.10 You might have dealings with the Commission if a resident or their relative complains to it about any respect of that order.

7.11 If you were concerned about something done by anyone else under an order which relates to an adult's welfare, and the adult's incapacity is related to their mental disorder eg, if you felt that a resident's **guardian** was abusing their power you might wish to bring this to the attention of the Commission yourself.

Mental Welfare Commission contact address:

The Mental Welfare Commission for Scotland,
K Floor,
Argyle House,
3 Lady Lawson Street,
Edinburgh
EH3 9HS

Telephone: 0131 222 6111 Fax: 0131 222 6112
E-mail: support@mwcscot.org.uk

The local authority: main sections of the Act affecting local authorities

7.12 Section 10 (1) (a) - The local authority has a duty to supervise **guardians** appointed with functions relating to personal welfare. Social work officers, among others, will have a role in this task.

7.13 Section 10 (1) (c) - The local authority has a duty to investigate complaints relating to the exercise of powers authorised in respect of the personal welfare of an adult with incapacity.

7.14 Section 10 (1) (d) - The local authority has a duty to investigate circumstances made known to them in which the personal welfare of an adult with incapacity seems to be at risk. While the investigative duties at 10 (1) (c) and (d) may result in the local authority having to apply to the sheriff for the authority to exercise powers over an adult with incapacity (see sections 53 and 57 below), they may also result in a wide range of other outcomes. These vary from no action to increased supervision under 10 (1) (a), further advice and guidance under 10 (1) (e) or referral of the matter to the police.

7.15 Section 10 (e) - The local authority has a duty to provide a **guardian, welfare attorney** or person authorised **under intervention orders** with information and advice. This may involve social work officers. This function will be carried out as well in response to those enquiring about the Act and whether it may be useful in their circumstances.

7.16 Section 12 investigations - This requires the local authority to take such steps, including the making of an application, as necessary to safeguard the property, financial affairs or personal welfare of the adult. The type of investigation in which it might be helpful for the MHO or the social work officer to be involved are discussed fully below.

7.17 Section 53 (3) – This imposes a duty on the local authority to apply to the sheriff for an **intervention order** in respect of an adult with incapacity where such an application has not been made, or is not likely to be made by anyone else and where an application is necessary for the protection of the adult's property, financial affairs or personal welfare. While the reports that accompany such an application are specifically required by medical practitioners and an MHO or the Chief Social Work Officer, the applicant may be anyone. This duty upon the local authority to apply may be carried out by any social work officer.

7.18 Section 57 (2) – This section imposes the same duty upon the local authority in respect of **guardianship** applications as section 53 (3) does for **intervention orders**.

7.19 Sections 53 (4) and Section 57 (3) and (4) – This outlines the roles of the MHO or Chief Social Work Officer in the preparation of reports to accompany applications for **intervention and guardianship orders.**

7.20 All key staff involved in assessment and care management will require a wide understanding of almost all aspects of the Act in order to engage with it in terms of their ordinary duties as well as the new specialised role in screening for incapacity.

7.21 The local authority, as seen in the above sections, has investigatory and supervisory functions as well as duties to apply for **intervention and guardianship orders**. Later we will differentiate between the role of the social work officer (who might be the applicant for these orders) and the role of the MHO or Chief Social Work Officer in writing a report as part of the application.

7.22 For many social workers, investigation is a word that conjures up child protection work. It may appear to be in contrast to the word 'assessment', which many care managers would see more as their role. An investigation may be seen as only a particularly enquiring type of assessment. There are, however, specific responsibilities which are given to local authorities in the Act which require a more formal set of procedures, such as those duties detailed in Sections 10(1)(c) and (d).

7.23 While the Act is specific that the duty of investigation is a function of the local authority, rather than a duty specific to MHOs, it may be that MHOs become involved in many investigations in their role as expert practitioners in mental disorder. However, this will not be the case for every instance and there is nothing to suggest that MHOs should have any expertise in investigating situations, for instance, where incapacity is caused by physical disability.

7.24 It is likely that Social Work Officers will be involved in investigations as well. Much will depend on what is being investigated. In any case your authority will have procedures which outline how such investigations are to be managed, and by whom. The Act requires the Public Guardian, Mental Welfare Commission and local authority to collaborate over investigations (Section 12). In setting out the relationship between these agencies, the Act also outlines their investigatory functions and their mutual responsibility to provide each other with information.

7.25 In carrying out these investigative functions the Mental Welfare Commission has authority under Section 3 of the Mental Health Act as well and could require the attendance of persons for a related enquiry and the proceedings could have the privilege of a court of law. The Public Guardian may require people to produce records in certain circumstances. If it appears likely to local authority officers that access to the adult for purposes of an investigation will be denied, the investigating officer should be alert to the possible need for action under other statutory provisions. The local authority might use Section 117 of the 1984 Act in order to safeguard a vulnerable adult with mental disorder in a situation of urgency.

7.26 The sheriff has wide powers to make ancillary orders or attach conditions or restrictions to any order which may themselves be varied on application. This may be help in some cases where the local authority faces obstruction in carrying out its functions relating to

investigations. The local authority also could apply to the sheriff under Section 3(3) for a direction compelling the person offering the resistance to comply with the terms of the relevant regulations.

7.27 Other sections of the Act may come into play here. Section 83 stipulates that it shall be an offence for any person exercising powers under the Act relating to the personal welfare of the adult to ill-treat or wilfully neglect an adult subject to the powers of this Act. It would also be possible for any person claiming an interest in the adult's property, financial affairs, or personal welfare to apply to the sheriff to remove or replace a **guardian** or to recall the **guardianship**. There is a similar power in relation to **intervention orders**. In situations of abuse or neglect that may be uncovered in the process of investigation, this section may involve practitioners in work with the Police.

7.28 The local authority has the power to recall **guardianship and intervention orders** in relation to the welfare of adults, in the same way as the Mental Welfare Commission does but may not do so where they themselves are the **guardian**.

7.29 The other key functions of the local authority under section 10 are those of supervising **guardians** authorised with powers relating to the personal welfare of adults and giving information and advice to persons authorised with powers under the Act. The Act does not specify who should do it, or how this will be done. The Code of Practice for local authorities gives good advice on the general context of both functions and it is for your authority to set out clear and detailed policies on the matters. However, whether advice giving is responding to a request at intake duty or supervision as part of routine meeting with a guardian, it often will involve social work officers.

7.30 These will be the types of routine contacts in which the principles must be upheld. For example, section 65 requires **guardians** to keep records of the exercise of powers. In the supervision of the guardian there should be a reasonable record of the use of powers which demonstrates adherence to the principles of the Act.

The sheriff

7.31 The sheriff has the responsibility for hearing applications, determining orders, considering renewal, variation and termination of orders and the power to require an assessment of an adult.

7.32 The end of section 3 details the powers of the sheriff and the Court of Session in relation to the Act. The sheriff is given very wide powers in section 3, the relevance of which will become significant when we discuss options such as **guardianship orders**. The sheriff has wide powers to vary and approve orders, as well as the power to make any 'consequential or ancillary order, provision or direction as he considers appropriate' (Section 3 (1)). This means that, in considering any application, the sheriff may exercise wide discretion to empower others to intervene creatively. As the explanatory notes to the Act state in relation to the sheriff's powers and the investigative functions,'(in) some cases, administrative steps may be sufficient to deal with the problem but in others, legal proceedings could be required...'

7.33 Under section 3 (4) the sheriff must consider in all applications and other proceedings under the Act whether it is necessary to appoint a safeguarder. This is in addition to the power of the sheriff to appoint someone to represent the interests of the adult in court such as a curator ad litem. The safeguarder has a general function to safeguard the interests of the person who is the subject of the proceedings. This includes conveying the person's views to the sheriff as far as they can be ascertained.

7.34 The Court of Session, as the highest Civil Court in Scotland, is invested with the authority to hear appeals against the various orders granted by the Sheriff Court (one-off i**ntervention orders and guardianship orders**). The Court of Session also has a duty to hear appeals against the decision of doctors in respect of Part 5 of the Act (Medical Treatment).

7.35 Social work officers may be applicants for **guardianship and intervention orders**. These are by way of summary application. It is beyond the scope of this pack to work through the process of application, particularly as the process will vary from one Sheriff Court's area of jurisdiction to another, according to local policy. Social work officer applicants should obtain practical and legal advice from their local authority legal services and MHOs who will have procedures worked out with the courts. The relevant forms and sample summary applications are set out in Annex 5 at the back of this pack.

8. Codes of Practice

8.1 The Act requires the Scottish Executive to make Codes of Practice available under section 13. The Codes are an important guide

for practitioners, setting the law in a broader context. In particular the Code of Practice for Local Authorities Exercising Functions Under the Act is an important referral document for social work officers. You are advised to refer to it whenever use of the Act is being considered.

8.2 As with the Codes of Practice for the Mental Health (Scotland) Act 1984, the Codes will not impose a legal duty to comply, but they are statutory documents and as such, there may be legal consequences from not following the guidance in the Codes.

8.3 The Codes raise a variety of key practice issues around general as well as specific interventions under the Act. They draw attention, for instance, to advocacy as 'an important way of enabling people to make informed choices and remain in control of their lives.' The Codes also note two levels of expectation, in the application of powers and duties, under the Act. They are:

1) For **attorneys and guardians** (who may be drawn from a wide range of non-professional people) a common law duty of care is owed to the adult; and

2) For professionals there is an onus to 'demonstrate the skill and care that would be expected of a reasonably competent member of that profession.'

9. Powers of attorney

Continuing and welfare powers of attorney

9.1 Up to this point we have discussed the roles of various agencies, the definitions of incapacity, the principles and the law in general with numerous references to the available powers. Without directly discussing these powers, this must have seemed to the reader as a riddle yet to be answered. From this point up to the end, the text will redress this by discussing each of the powers in more or less detail as your role in the Act requires.

9.2 Part 2 of the Act introduces the creation of **continuing** (Section 15) and **welfare** (Section 16) **powers of attorney**. Both these powers have to be seen in contrast with the powers of **intromission** with and management of funds (under Parts 3 and 4), medical treatment and research (Part 5) and **intervention and guardianship orders** (Part 6). The contrast is that these **powers of attorney** are given by the adult

while capax, i.e. while they still have the capacity to understand the nature of the powers granted, while the powers under Parts 3 to 6 are imposed by those authorised under the Act following the adult's loss of capacity in relation to the matters at hand.

9.3 **Powers of attorney** have long been a means for one person to grant authority to another to exercise legal powers on their behalf with their consent. The person granting the powers is known as the granter and the person to whom the powers are granted, often called the **attorney**, is also known as the proxy. A proxy mean anyone exercising powers on an adult's behalf under the Act.

9.4 You may well be aware of **powers of attorney**, particularly if you are a care manager. It was not uncommon for people who required an assessment of needs, pre-2000, to have granted powers to another, although these would only have related to financial matters. Now these powers are relevant to social work officer practice under the 2000 Act in terms of investigation and advice and information giving. They may also have particular relevance to care managers who are likely to encounter adults subject to **powers of attorney** during the course of their work with vulnerable adults. Those involved in assessment and care management will be working with some adults who may wish to grant **powers of attorney** to a relative or other person. In the former case, the assessment and implementation of key aspects of a package of care may have to be negotiated with the proxy, in so far as it relates to aspects of the adult's life over which the proxy exercises authority.

9.5 In drafting a **power of attorney**, the solicitor must certify that the person granting the powers has the capacity to do so. A person may lack capacity to make decisions in some areas but still be capable of granting powers to another person. It is possible to have a mild to moderate learning disability, for example, or be in the earlier stages of dementia, and still be aware of the need for another person to make decisions for you that you yourself lack the capacity to make. Out of this awareness, you could then grant **power of attorney** to someone of your choosing, as long as your solicitor agreed that you were capable of an adequate understanding of this undertaking.

9.6 Under the 2000 Act, **powers of attorney**, which were implemented in April 2001, are two-fold ie **continuing and welfare powers**.

Continuing powers of attorney

9.7 It may be helpful to review the recent history of changes to better understand these powers. Before the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (Section 71), all **powers of attorney** ceased to have any effect after the granter lost capacity. In other words the power was conveyed solely by the granter's continuing ability to understand the nature and purpose of the **power of attorney** being exercised by the proxy.

9.8 As an increasing number of **powers of attorney** were being exercised beyond the loss of capacity, the 1990 Act sought to remedy a growing unlawful solution to the management of finances and property of adults with incapacity. Section 71 of the 1990 Act specified that, unless the granter specifically chose an opt-out clause, the powers would automatically continue beyond the loss of capacity. In other words these powers would endure even after the granter became incapable of authorising their use. Such a **power of attorney** was called a **continuing power of attorney**.

9.9 **Continuing powers** became a useful means of securing protection against the eventuality that you might become incapable of managing your affairs. It enabled you to identify the person(s) you would choose to invest with authority to manage your affairs on your behalf should you become unable to do so yourself. However, it was very rarely used in regard to personal welfare, remaining in the tradition of a largely finance and property focused intervention.

9.10 **Continuing powers of attorney** under the 2000 Act are intended to deal solely with the finances and property of an adult. **Continuing powers of attorney** under the 2000 Act are very much as they were under the 1990 Act but for the fact that, on application, instead of having a clause that invites the granter to opt-out of the powers continuing, the new powers have an opt-in clause. This gives greater emphasis to the applicant having to actively consider whether or not they wish to set up a power that will authorise the named proxy (or proxies) to exercise specified power over their affairs should they become incapable of doing so.

9.11 Such powers can start with immediate effect. For example, were you too physically frail to manage your affairs, you could grant powers to a proxy to do so. On the other hand, you could specify that

the powers should have no effect until the event of your loss of capacity in relation to these specific powers.

Welfare powers of attorney

9.12 As the first direct reference in the text to 'welfare' relates to **welfare powers of attorney**, this is a good point to discuss the meaning of the term in the Act. You may have noticed that the Act generally separates the adult's personal welfare from his or her interests in property and financial affairs. In reality these aspects of one's life may not be easily separated out. For example, loss of one's home may fit into the category of property and financial affairs. However, such a loss will have a serious impact upon one's personal welfare.

9.13 Personal welfare is a term which relates to that which affects the adult's physical and emotional well-being in a general sense. It relates to physical and mental health, and freedom from all sorts of abuse and exploitation (other than financial exploitation). Personal welfare consequently includes areas related to choice of medical care and treatment, diet, hygiene, clothing, meaningful social contact, stimulation and environment. The term is open to a wide interpretation.

9.14 **Welfare powers of attorney** confer authority to exercise control in decision making regarding the welfare of the granter once they lose capacity in relations to these power granted. This has more or less the potential for total control over the welfare decisions on an adult's behalf. In reality, however, the principles of the least restrictive option and the duty to encourage the maximum use of the adult's skills both mean that no more should be done on the adult's behalf than is required by their degree of incapacity.

9.15 There are two significant exclusions to **welfare power of attorney** (Sections 16 (6) and 48). The proxy is not permitted to authorise medical treatment for a mental disorder against the adult's will. Neither are certain special treatments (such as Electro-Convulsive Therapy - ECT), that are covered by Part X of the 1984 Act permitted if they are required without the consent of the patient. These issues will be revisited under the section relating to medical treatment.

Registration of powers of attorney

9.16 A **power of attorney** is taken out in the way one would create a will, by providing a statement in writing, usually with legal help. These

must be expressed in a written document which includes a certificate in the prescribed form from a solicitor who has interviewed the granter immediately before the document was signed. All **continuing** and **welfare powers of attorney** will have to be registered with the Public Guardian although they may contain a condition that the Public Guardian not register it until the occurrence of a specified event. In return, the Public Guardian issues the **welfare attorney** with a Certificate of Registration. Both the Mental Welfare Commission (if the capacity is a consequence of mental disorder) and local authority (regardless of whether **welfare powers of attorney** are exercised by virtue of mental disorder or physical incapacity) are notified of any registered powers and are informed of changes to those attorneys' circumstances.

9.17 Suspected abuse of **continuing and/or welfare powers of attorney** should be reported to the Public Guardian. Where the suspected abuse is in relation to an adult whose incapacity is caused by mental disorder, the Mental Welfare Commission should be advised as well. The local authority also should be notified as they may have a role in relation to their investigative duties under section 12, or their duty to take forward applications where necessary under the Act. The Implementation Guide for Managers developed under this series emphasises the need for local authorities to develop strong departmental procedures for investigations, detailing the roles for social work officers and MHOs.

9.18 The new powers repeal the **powers of attorney** in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. As of implementation in April 2001, existing **powers of attorney** automatically became either **welfare or continuing attorneys** or both under Schedule 4.4 (1) (a), (b) & (c) of the 2000 Act, although there are likely to be few cases where the equivalent of **welfare powers of attorney** had been granted prior to 1st April 2001.

Do Exercise 5 now

10. Accounts, funds and residents finances

10.1 Part 3 of the Act commences with (Section 25) the authority to **intromit with funds** of the adult. The dictionary defines **intromit** as meaning to allow entry to. It is therefore about gaining access to and using the contents of bank, building society or other savings accounts on behalf of a person.

10.2 Those who are expected to apply to **intromit with funds** are family members or carers and the Act specifically excludes ‘a person acting in his capacity as an officer of a local authority’ from applying for the authority to intromit. As a social work officer you may well come across adults who are subject to this authority in your work. This could have greater significance for care managers where payment for services becomes an issue, as this would have to be negotiated with the person authorised to withdraw funds. In applying to **intromit** with funds it is necessary to specify the amount and purpose of the funds you wish to manage.

10.3 The reference to informal arrangements includes any arrangements which are carried out without the expressed informed consent of the adults concerned such as when the consent is felt to be implicit or is assumed, or is carried out on the instructions of a third party not authorised under the Act. Distinctions should be made between adults requiring assistance in managing their finances and those lacking the capacity to agree to actions being taken on their behalf. There will be situations where an adult requires and receives assistance and this overcomes the difficulties they are experiencing. Arguably, with such assistance, they would be able to give informed consent to these informal arrangements. Anyone lacking the capacity to agree to any arrangements, however, should not have these imposed upon them.

10.4 In assessing this aspect of a person's care needs, if you are unsure of the legality of any aspect of handling money on behalf of an adult or you are unsure about the adult's capacity to consent to current arrangements, it would be prudent to seek advice from your line manager or your employing agency’s legal advisor. The Public Guardian's Office is also a good source of information, advice and guidance material as well as the relevant forms to be used to **intromit** with the funds of an adult with incapacity.

10.5 If you are aware of an adult who is unable or is becoming unable to manage their finances or property, and you are a local authority employee, you have a duty to draw this to the attention of the adult’s care manager or your line manager for action. Your duty springs from those imposed upon local authorities to take action in certain instances. Others involved in assessment and care management, as a matter of good practice, should refer the matter to the relevant person in your local authority.

Management of residents' finances

10.6 Part 4 of Act, the Management of Residents' Finances, is a part of the Act that will have more direct relevance to you if you are a manager of a care home than if your job involves you in the direct delivery of care to residents or you work in a non-residential environment. However, there are certain aspects of the management of finances that every worker in a care home needs to know. If your work doesn't bring you into contact with any residential setting, respite care or otherwise, you may move on to the next section.

10.7 Part 4 of the Act addresses the issue of adults who are unable to manage their own moveable property and financial affairs because of incapacity, where they live in a broad range of residential settings - called 'authorised establishments'. The things that are covered by moveable property and financial affairs are outlined below.

10.8 Being an authorised establishment is different from being registered to operate as a care home. The types of establishments that may become authorised establishments are NHS hospitals, the State hospital, care homes and independent sector hospitals. All of these establishments (except NHS hospitals and the State hospital) must be registered in order to operate regardless of whether or not they become authorised to manage residents' finances under the Act. For example, since the implementation of the Regulation of Care (Scotland) Act 2001, care homes have had to register with the Care Commission.

10.9 The requirements relating to the management of funds under Part 4 of the Act will be inspected as part of their first post 1 April 2003 inspection. Between 1 April 2003 and the time of the inspection taking place and their authorisation or opt out is confirmed, services will have to operate their systems for managing and monitoring service users' financial affairs on the basis of the requirements that Care Commission will place upon them in respect of all service users. Any prospective care home service applying to become a registered service after 1 April 2003 will have the matter of its authorisation under the Act dealt with by the Care Commission as part of the application process. The Care Commission has a responsibility to check the quality and standard of care given by homes registered under it.

10.10 Some facilities may seek authorisation to operate Part 4 arrangements as a limited registration service. This is a facility which provides accommodation and is not a care service i.e. is not otherwise

required to register with the Care Commission. Such a service could be a sheltered or intensively supported housing project where the landlord is also the support adviser.

10.11 NHS hospitals or the State hospital must become authorised establishments and they must operate Part 4 of the Act when it is implemented in April 2003. In other words, these hospitals must manage the finances of patients who reside in them and who are incapable of managing their own affairs if no one has the authority to do so. Care homes may opt out of the right to become an authorised establishment. When an establishment has been approved as an authorised establishment, the performance will be monitored by its 'supervisory body'. The supervising body is the Care Commission, in relation to care homes, independent hospitals and limited registration services and the relevant NHS Board in relation to NHS hospitals and the State hospital.

10.12 There are two Codes of Practice which provide guidance on best practice in the operation of Part 4 - one for Managers of Authorised Establishments and one for Supervisory Bodies.

10.13 Where an establishment is authorised by its supervisory body, provided there are no other arrangements such as **power of attorney**, **financial intervention** or **guardianship order** dealing with the matters giving rise to concern, and no-one else is available or willing to manage the resident's finances, the manager may ask a doctor to examine the adult. Before the managers of an establishment decide on this course of action they should first discuss the situation with the resident, relatives, and/or carers, and the adult's care manager. They have to advise the adult and their nearest relative of their intention of securing a medical examination of the person's capacity to manage their finances.

10.14 This notice to the adult can be dispensed with if it is felt by two medical practitioners that giving the adult this notice would pose a serious risk to their health. If the doctor agrees that the person lacks the capacity to safeguard their own interests, the doctor will issue a certificate which gives authority to the manager to manage the adult's affairs. Once a medical certificate, which is good for 3 years unless circumstances change to make this shorter is given the manager must send a copy to the resident and the supervisory body who must notify the resident's nearest relative. The managers must notify the resident and the supervisory body that they intend to manage the resident's affairs.

10.15 All such interventions should be within the planned context of continuing assessment and care management and all key professionals involved should address this issue collectively before deciding that this is the appropriate course of action.

10.16 You may have noticed above that, in the introduction to the powers under the Act, the discussion of devolved powers stated that 'apart from the section dealing with Part 4 of the Act, the management of residents' finances, all of the powers discussed below devolve to people like you, providing a service of direct care to adults with incapacity.' This is because the authority to manage finances of residents is held by the manager of the establishment. While the authority to manage an adult's funds remains with the manager of the establishment, key workers and other staff will play an important role due to their knowledge of the adult and their circumstances in advising how the adult's funds could be put to best use in enhancing their welfare. This is not a power held by a proxy external to the establishment as is most likely to be the case in **powers of attorney** and **guardianship orders**. You may be answerable to the manager of your workplace, but this is no different to your accountability on other aspects of your work.

10.17 The types of affairs that can be managed are:

- 'Claiming, receiving, holding and spending any pension, benefit allowance or other payment other than under the Social Security Contributions and Benefits Act 1992 (C.4)'. This Act relates to income related benefits;

- 'Claiming, receiving, holding and spending any money to which the resident is entitled' (Section 39 (1) (b));

- 'Holding any moveable property to which the resident is entitled' (Section 39 (1) (c)); and

- 'Disposing of such property' (Section 39 (1) (d)).

10.18 Part 4 does not replace existing arrangements (Department of Work and Pensions appointeeships) where people's social security benefits can be paid direct to a nominee.

10.19 If you work in day care or deliver services at home, this section has only passing relevance to you. If you work in a care home for

vulnerable adults, it is highly likely that some residents will not be capable of managing their own affairs.

10.20 In the past, many people have had their finances managed by informal arrangements. However, such arrangements will only be possible where adults can give valid consent to them. Therefore, it is likely that you will be asked to assist in the process of managing the funds of residents with incapacity by the manager of your establishment. It is also possible that, if you are a direct care worker, you may be aware of a resident who is becoming unable to manage their affairs, in which case you have a duty to draw this to the attention of the manager for action. If you are that manager, the route to activate the assessment would be to ask the adult's GP or psychiatrist for an assessment of the adult's capacity to manage their funds.

11. Medical treatment and research

11.1 This part of the Act, implemented in July 2002, discusses the specific issue of an adult's capacity to give consent to medical treatment. It introduces much needed statutory clarity to the previously uncertain common law position for those not capable of giving informed consent to their own medical treatment. This part of the Act's application will be of relevance to social work officer practice in a number of ways. It may be of some consequence in investigations or in the general practice of social work officers. It may become evident, for example, that an adult with learning disability with whom you are working lacks the capacity to consent to proposed medical or surgical intervention. Local authorities may be acting as **guardians** where consent for medical treatment is a power granted to them under the Act, or staff may be working with individuals where others are acting as proxies under the Act with the specific power to consent to medical treatment. Should you require to gain a greater understanding of these treatment issues, you are directed to the pack in this series for MHOs.

11.2 Medical treatment includes 'any procedure or treatment designed to safeguard or promote physical or mental health' (Section 47 (5)). It includes treatment for mental disorder. Apart from circumstances where treatment is considered immediately necessary, the 2000 Act only deals with treatment that does not require the use of force or detention to be administered. There may be difficult judgements to be made in deciding whether an adult who cannot consent to being treated for a mental disorder should be subject to the Mental Health Act even though a proxy has powers in respect of medical treatment. Close attention would have to be paid to the quality and consistency of the adult's compliance in deciding whether the authority should be supplemented by use of the Mental Health Act.

11.3 The Act also precludes treatment for a mental disorder which will place the adult in a hospital against their will. It further rules out special treatments in circumstances that are dealt with under Part X of the 1984 Act (i.e. irreversible treatments such as neuro-surgery for mental disorders, even when consent is given, and reversible ones such as ECT and drug therapy for mental disorder, where consent is not given and where the treatment lasts for more than 3 consecutive months). Regulations made under Part 5 of the 2000 Act set out treatments which are exceptions to the general authority to treat.

11.4 This general rule that sets parameters around certain powers to treat mental disorder was referred to above, in the exclusions to the powers available to a **welfare attorney**. It also applies to restriction of the powers available in **intervention and guardianship orders** where treatment is authorised, as discussed later in the text.

11.5 The authority to treat is conferred upon 'the medical practitioner primarily responsible for the medical treatment of the adult'. The guidance on this part of the Act suggests that such a medical practitioner would be the adult's GP unless the adult is in the care of a hospital consultant. However, the authority may be delegated under that practitioner's instructions or with their approval. This means that it may be delegated in part to providers of care, in so far as they are competent to administer treatment. This may, in certain circumstances, be delegated to staff working in local authorities, specifically those based in care homes and day centres.

11.6 The authority is conveyed on a certificate (in the prescribed form), specifying the period (not exceeding one year) of treatment considered appropriate to the condition or circumstances of the adult. This may be revoked or extended (up to a year) according to new circumstances.

11.7 Part 5 of the Act also covers research matters relating to adults who lack the capacity to consent to participate in such research. It may become relevant if, as a practitioner, you are considering undertaking research in any area of incapacity, or are aware of proposed research that may involve a client with whom you are working when there is a question as to their capacity to consent to this.

11.8 It covers situations where the adult may become the subject of medical, nursing, dental or psychological research while being incapable of making a decision to participate. This research must be intended to obtain knowledge of either the causes, diagnosis, treatment or care of/or relating to their incapacity. It must be likely to:

- Produce real and direct benefit;
- Be approved by an ethics committee;
- Entail minimal or no foreseeable risk; and

- Impose only minimal or no discomfort; and, be consented to by a **welfare attorney** or **welfare guardian** with appropriate powers (or if there isn't one, by the adult's nearest relative). The research decision may be appealed by any person declaring an interest in the adult to the sheriff and thence to the Court of Session.

11.9 While social work and related areas of research are not referred to in the Act, good practice would be to incorporate the principles of the Act and the parameters of Section 51 into any research you were considering undertaking in this area.

12. Intervention orders

12.1 Part 6 of the Act deals with those sections relating to i**ntervention and guardianship orders**. These orders will form an important part of the role of the local authority under the Act. Social work officers will often be practising in a role in which they will be acting as an important screen for incapacity especially when operating within assessment and care management structures. They may play an active role in assessment of adults where an order may be of benefit and no application has been made or is likely to be made and the local authority has a duty to apply under Sections 53 (3) and 57 (2)). They may also be the applicant. Therefore, the following discussion will be of great relevance to your practice.

12.2 One-off **intervention orders** authorise any specific action or decision, which the adult lacks the capacity to make. Such decisions may be in reference to property, financial affairs or personal welfare. It is intended that such orders should be sufficient to overcome specific problems which do not require more far reaching, continuous intervention into the life of the adult.

12.3 This has relevance to Section 1 (3), which outlines the principle of the least restrictive option. It is important to remember, however, that just because an **intervention order** may be less cumbersome administratively to the Courts or the Social Work Department than a **guardianship order**, it does not mean that the order is less restrictive in terms of its impact on the rights of the individual. Selling a house, and moving someone into a care home against their wishes, can be done administratively quite efficiently through an **intervention order**. The impact of this on the adult's welfare, their attitude towards this and their

response to having to remain in the care home, however, would all have to be considered.

12.4 It may be that **welfare guardianship** offers the flexibility and possibility of longer term supervision and monitoring more suited to the needs of the adult in such situations. What is important to remember is that whichever order is used, the powers sought and used should be those which are the least restrictive necessary to achieve the intended purpose. They should relate to the implementation of key aspects of a care plan which benefits the adult.

12.5 The specific test for incapacity is stated in section 53 (1). The sheriff must be satisfied that the adult is incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application relates'.

12.6 Where you have an adult in the area who conforms to this definition of incapacity in relation to key aspects of a care plan, you should consider whether an application has been or is being made by anyone, or if you should activate the process on behalf of the local authority. You should discuss this initially with your line manager and consult with a range of other professionals. It should be well known within your department the persons to be contacted regarding potential use of the Act. It would be best practice to air the full discussion in a multi-disciplinary conference.

12.7 The multi-disciplinary aspect of practice in applications is crucial. An application to the sheriff for an **intervention or guardianship order** must be accompanied by reports by two medical practitioners, confirming incapacity. A case conference may decide whether an application ought to be made or whether further assessment is required before deciding this. It may determine who ought to make the application, identify the doctors who should write the reports and help set out the areas in which the intervention of the Act may be necessary.

12.8 Were the only need to intervene created by the need to sell property, it would be overly restrictive to impose a **guardianship order** with its potentially wide powers and lengthy timescale. Similarly part 5 of the Act would normally be used in relation to consent to medical treatment of adults with incapacity. **Welfare attorneys or guardians**, however, may have such authority, and in rare cases where the medical practitioner primarily involved in the adult's care feels that proposed

treatment is of such a serious or risky nature and/or that it is likely to be contested by key people such as a relative, they might wish to seek an **intervention order** to obtain the specific authority for a proxy to consent to this treatment. This would move the decision making from the practitioner to the Sheriff Court and allow an open hearing on all the issues.

12.9 On the principle of the least restrictive option, more than one **intervention order** may be granted at one time, even empowering different people with different tasks. This too relates to the sheriff's powers under Section 3.

Who may apply?

12.10 Anyone claiming an interest in the adult, including the adult himself may apply. It is for the sheriff to decide, on scrutiny of the application, who has a valid interest in the adult. Reference to the principle of benefit to the adult would suggest that, for example, an application by an adult's relatives for an order to authorise the sale of an adult's house would not be valid were it solely to the benefit of that relative.

12.11 Section 53 (3) imposes a specific duty on the local authority to apply where it 'appears to them that no order has been or is likely to be made and an order is necessary'. Depending on the situation and how your local authority devises policies to carry this through, it may create a new role for social work officers. This will be explained below in reference to the distinct roles of applicant and report writer.

12.12 The Court requires the application to be accompanied by specific statutory reports. As the same types of reports are required before the Court in an application for an **intervention order** as are required in **guardianship** applications we will discuss the reports and application process in detail here, referring back to it later in discussion of **guardianship.**

12.13 If you have any experience of the application process for **guardianship** as it was under the 1984 Act, it may be useful to reflect upon the similarities and differences between the processes in the two. However, it is beyond the scope of this pack to go into the details of local procedures and Court arrangements. You should consult your employing authority's legal services and an MHO (in cases of application

in respect of an adult who has incapacity by virtue of mental disorder) when contemplating making an application.

12.14 There is a 30-day period before the application is lodged in Sheriff Court in which the adult must have been examined by at least two medical practitioners. The opinions of these practitioners as to the incapacity must be conveyed on the prescribed form. An application requires the confirmation of two doctors that incapacity exists in relation to the actions or decisions which are the subject of the application. The dependence upon the recommendations of two medical practitioners focuses the need for a multi-disciplinary conference in consideration of an application.

12.15 There are certain complicating factors as to the social work reports required as part of an application. The following points are among these:

- Only where the application is in regard of personal welfare, must it be accompanied by a report from a social worker;

- Only where the adult is incapacitated by mental disorder must this report be written by an MHO; and

- Where the adult's incapacity is manifested only by an inability to communicate, the report is required of the Chief Social Work Officer.

12.16 Because the law gives specific roles to the MHO by name, the role may not be delegated. An MHO and only an MHO may undertake the duties specifically assigned to them by law. On the other hand, the role of Chief Social Work Officer is a role within a line-management structure in which delegation is normal. In the case of report writing for the purposes of applications, the Act requires the Chief Social Work Officer to provide the report. This means that they will have to be the signatory to the report. However, it is unlikely that the Chief Social Work Officer will write such reports. The task of compiling the report may be delegated to experienced practitioners as long as the Chief Social Work Officer signs it. This might be a further role for social work officers, especially those staff with specific expertise in relation to physical disabilities which may result in impaired communication.

12.17 Social work officers may become involved in compilation of some Chief Social Work Officer reports and a good understanding of the assessment task in writing such a report is essential.

12.18 This report by the MHO or Chief Social Work Officer, written on the prescribed form, must discuss:

(i) the appropriateness of the order; and

(ii) the suitability of the person nominated as **guardian** or of the person to be empowered in the **intervention order**.

12.19 These reports, for example, Form AWI (4) the MHOs report accompanying application for **guardianship** (personal welfare), and Form AWI (7), the Chief Social Work Officer's Report for **guardianship** - are comprehensive forms that run to 11 pages. They ensure that all the principles are addressed.

12.20 The reference to 'appropriateness of the order' is a reference to the specific test for incapacity for the type of order (**intervention or guardianship**) being sought. For an **intervention order** the definition in Section 53 (1) is that the adult is, …'incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application relates...'.

12.21 It is clear from this and from the explanatory notes to the Act (Pages 29 & 30) that the two accompanying medical recommendations must confirm the existence of incapacity. Where the application is not solely concerned with property or financial affairs, the evidence in the statements by the Chief Social Work Officer/MHO must establish the precise relationship of that incapacity to the powers being argued for in the application. This is implicit in the requirement for a statement of 'the general appropriateness of the order sought...'.

12.22 Finally, in the process of application, there is another role in relation to accompanying reports where the application is in reference only to property or financial affairs. In this case it requires the medical reports and a report by a person who 'has sufficient knowledge'. The law does not specifically require here an MHO/Chief Social Work Officer's Report. In the Code of Practice for Local Authorities it is suggested that the author of such a report need not be an MHO or the Chief Social Work Officer. It could be an independent professional such as a solicitor, banker or accountant. It will be important that staff

involved in this process know how to obtain proper advice and guidance where the local authority is involved as the applicant in **financial intervention** as well as **guardianship orders**. Specialist advice is required in determining whether such orders are necessary, the powers to seek if they are, how to draft the required report and whether the proposed proxy is a suitable person.

12.23 It follows that where a **guardianship** application requests powers in relation to both welfare and finances/property, it will require the MHO/Chief Social Work Officer's report but no report from the person who has sufficient knowledge of the adult. The applicant, however, will have to demonstrate to the court that all the powers sought are necessary to the benefit of the adult and in keeping with the principles of the Act, and that the proposed proxy is a suitable person to carry out the powers, both welfare and financial. They should comment on this as far as possible.

12.24 Where an applicant claiming interest in the personal welfare of the adult is not the local authority, they must notify the MHO or Chief Social Work Officer (as the case may be) allowing the local authority 21 days to enable them to complete any required reports before the expiry of the 30-day period.

What does it mean to be an applicant?

12.25 MHOs will all be familiar with the responsibility of applying for orders both under Section 18 and **guardianship** under the 1984 Act. There are, however, distinct differences in the application process under the 2000 Act. As it is unlikely that other Social Work Officers will be aware of the implications of making an application and, as they may be called upon to do so under 2000 Act, they are advised to read this section carefully.

12.26 The sheriff will hold the applicant to be responsible for every aspect of the application. This responsibility includes:

- Being aware of the timescales for submission of the required reports,
- The co-ordination of these reports;
- The checking of dates and details in other peoples' reports;

- The obtaining of legal advice and representation where necessary; and,

- The presentation of the application in Court.

12.27 Because of the seriousness of the process and the fact that the sheriff would hold you as applicant responsible for it, you are advised to seek advice from a more experienced practitioner (probably an MHO), should you be confronted with this task. In some authorities it may be that the summary application will always be drafted and presented by a solicitor from the authority. You should read the Act and related Codes of Practice to make certain that you understand the reports, the roles and functions of the various people involved, and the timescales within which you must operate.

MHO/Chief Social Work Officer as report writer and/or applicant

12.28 Anyone with an interest may apply for **guardianship and intervention orders**. This includes anyone operating in their capacity as an officer of a local authority. Where no-one else has applied or is likely to apply, the local authority has a duty to do so. Where such applications are made, the MHO (for mental disorder) and the Chief Social Work Officer (for physical disability) must indicate their assessment in a report on the prescribed from, where these applications relate to the adult's welfare.

12.29 One interpretation of this is that it established a separate independent role of the applicant which is to be distinguished from the MHO/Chief Social Work Officer as report writer even where the local authority is applying. This view is drawn in part from the fact that the Act specifies that 'the local authority... shall apply' Sections 53 (3) and Section 57 (2), while it specifies that the MHO and Chief Social Work Officer will write the reports.

12.30 Counter to this view, pragmatic experience may dictate that at least some local authorities will not have the resources to dedicate separate MHOs and other officers of the local authority to the same application. Another view, familiar to MHOs, is the idea that the separate roles of applicant and report writer may be located in the one practitioner. MHOs are used to the idea that they must make an impartial assessment as part of an application that they are required by law to advance in Court, whether or not they support the application.

12.31 In the application for an **intervention order**, the applicant must articulate the specific powers being requested. The powers must relate to the definition of incapacity in so far as it is a request to the sheriff to grant authority to take an action or make a decision on behalf of the adult who lacks the capacity to do so.

12.32 The application also must propose a person who will be invested with the authority to carry out the intervention. This introduces yet another role in the process. The person authorised by the order may be a separate person from the applicant and the report writer. The most suitable person might be determined by the multi-disciplinary conference that plans the application in which the local authority is the applicant. The designated person to be given the power to intervene need not be a local authority employee. In fact, the Act leaves it unspecified who might be authorised under orders, as long as the sheriff agrees on their suitability. Remember, many of these applications will be brought forward by members of the public in their own right and they may have their own strong views on who should carry out the role of proxy. All applicants should check on their responsibilities to send the application to the adult, his primary carer and any other person who may have an interest. (See Section 75).

12.33 There is no time limit on the duration of an **intervention order**, its timescale being restricted to the completion of the decision or action authorised in it. The sheriff, however, has powers to vary, recall or extend the order. Anything done by the person empowered under the order would then have the same effect as it would were it done by the adult.

12.34 The Court must send a copy of the order to the Public Guardian who will in turn notify the local authority and, in the case of mental disorder the Mental Welfare Commission in reference to their monitoring, investigating and supervising duties.

Do Exercise 6 now

13. Guardianship orders

13.1 Much of the approach to the **intervention order** discussed has relevance to **guardianship** applications. The process of application and the required reports are the same.

13.2 Section 84 of the Act allows a Court to appoint a **guardian** or a person authorised with powers relating to an **intervention order** in respect of the personal welfare of an adult under the Criminal Procedure (Scotland) Act 1995. Note these powers are restricted to welfare powers only. A **guardianship or intervention order** through the Criminal Procedure (Scotland) Act has the same effect as orders approved through a civil court hearing. While the appointment of **guardians** into the framework of the 1984 Act via Criminal Procedure legislation was relatively rare, this is another potential source of involvement of social work officers and, in particular MHOs, working in Criminal Justice settings. The added flexibility of **guardianship and intervention orders** under the 2000 Act may increase its usefulness to courts as a possible disposal in cases where a defendant's actions were related to their impaired capacity.

13.3 While **intervention orders** are characterised by one single identified intervention, **guardianship orders** draw from an open ended menu of powers from which to choose remedies specific to the adult's situation. The powers requested in an application must be mediated by the principles of the Act in Section 1. They also must relate to those areas in which the adult is adversely affected by impaired capacity and be able to respond helpfully to these problem areas.

13.4 The grounds outlined in Section 58 (1) (a) are 'adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable'. It should be noted that this phrase 'and is likely to continue to be so incapable' is one way in which the purpose of **guardianship orders** is set out as distinctly different from intervention orders.

13.5 It might be well to pause at this point in your reading and compare these grounds to the grounds for **intervention orders** which state that, 'the adult is incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application relates'.

13.6 While intervention is focussed on the adult's incapacity in relation to one specific course of action or a series of discrete actions or decisions in an **intervention order**, **guardianship** is focussed on a range of decisions or actions over a prolonged period. **Guardianship** must also be considered the least restrictive option in so far as no other means provided by or under this Act would be sufficient to enable the adult's interests... to be safeguarded or promoted. (Section 58 (1) (b))

13.7 The report by an MHO or Chief Social Work Officer should focus upon an awareness of the relationship between the grounds for incapacity and the powers requested in the application. Any potential applicant is cautioned not to confuse administrative convenience of a particular order with the concept of least restrictive use of the Act. In respect of **intervention orders**, it is important to remember that just because an order may be less cumbersome administratively to the courts or the social work department, it does not mean that the order is less restrictive in terms of its impact on the rights of the individual. You have to be mindful of the longer term consequences as well as the need for continued supervision and authority to intervene.

Who may apply

13.8 As with **intervention orders**, virtually anyone declaring an interest may apply. The process of application (30-day timescale, etc), the accompanying reports and the duties of local authority to apply in certain circumstances are the same as they are for **intervention orders**. The registration and notification role of the Public Guardian are also the same.

13.9 The length of time for which **guardianship orders** under the 2000 Act are or may be approved is considerably longer than for **guardianship** under the 1984 Act. It is for 3 years or 'other period, including an indefinite period' as the sheriff dictates. On renewal, the period becomes 5 years or other period, including an indefinite period.

13.10 Renewal is by application following the same process and including the same reports as above. The local authority has the duty to apply for renewal where it appears that **guardianship** remains necessary and no one else has applied for renewal.

13.11 The Public Guardian is notified whether or not the renewal is granted or whether or not the sheriff varies the powers or changes the **guardian** upon renewal.

Suitability of guardians

13.12 The local authority must comment on the suitability of anyone proposed by the applicant as **guardian** in the case of **welfare guardianship**. The sheriff may appoint anyone who is approved by the local authority. It may be that the sheriff sees fit to appoint an **interim guardian** to take urgent action pending the determination of a hearing. **Joint guardians** can be appointed and where this happens, they must confer with each other upon the exercise of their powers. Different **guardians** may be appointed for the financial and welfare functions of an order. Anyone can apply to the sheriff for a **guardian** when they believe the **guardian** is no longer able to exercise the powers effectively. The sheriff can decide to treat any application for **guardianship** as though it were an application for an **intervention order** if he felt such an order would grant sufficient authority to achieve its purpose.

Powers of the guardian

13.13 Section 64 outlines the following powers of the **guardian**:

- Power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;

- Power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;

- Power to pursue or defend an action of declarator of nullity of marriage, or of divorce or separation in the name of the adult;

- Power to manage the property or financial affairs of the adult, or such parts of them as may be specified in the order; and

- Power to authorise the adult to carry out such transactions or categories of transactions as the **guardian** may specify.

13.14 Where the **guardianship order** relates to treatment, the same restrictions are imposed as with **intervention orders** (relating to

detention against the adult's will for treatment of a mental disorder and the context of treatment under Part X of the 1984 Act).

13.15 The **guardian** may arrange for some or all their functions to be discharged by others but remains responsible for them. The **guardian** can delegate their powers but not the statutory responsibility. Where it is the Chief Social Work Officer who is delegating the powers of **guardian**, they must notify the Mental Welfare Commission and others, naming the officer responsible for carrying out the role (no later than 7 days after the approval of the order). This is most likely to be a social work officer.

13.16 It should therefore be noted that any social work officer who is named by the Chief Social Work Officer as the person authorised to carry out the functions of **guardian** on behalf of the local authority, may arrange for some or all the functions to be discharged by others. For example, were you to be the effective **guardian**, in this sense, for a person residing in a care home, you could arrange for the manager (and by delegation, the staff) to carry out the direct care functions of the order on your behalf. You would still be responsible for these delegated functions. So, you would have to work very closely with the home to satisfy yourself that the functions were carried out according to your instructions and in keeping with the principles. In such circumstances, this delegation should be clearly outlined in the adult's care plan.

13.17 The **guardian** must keep records of the discharge of their powers. As the effective **guardian** for the local authority, you would need to maintain careful records of delegation of responsibility, checking that it was carried out in keeping with the principles.

13.18 The granting of these powers effectively terminates the adult's capacity to enter into transactions within the scope of the authority of the order, unless agreed by the **guardian**.

13.19 **Guardianship** under the 1984 Act was accused of having no power to enforce compliance. Section 70 of the 2000 Act attempts to address this. When faced with non-compliance by the adult or by any other person who might be reasonably expected to comply with a **guardian's** decision, the **guardian** may apply to the sheriff to make an order ordaining that person to implement that decision. Such an order may be enforced by an authorised constable. In the exercise of a warrant to implement this order, the constable may use reasonable force. This will be an area where delicate judgements will have to be made in weighing up the risks inherent in such action (e.g. to the

relationship with the adult or the adult's general sense of wellbeing) as opposed to the perceived benefits. Such action should only be taken after a full multi-disciplinary case discussion.

13.20 Finally, you will need to know that Schedule 4 (2) (1) transfers all 1984 **guardianship orders** to the new legislation upon implementation of Part 6 of the Act. Such orders will be deemed to carry the powers outlined in Section 41 (2) (a) to (c) of the 1984 Act.

13.21 It is very important not to consider as simply a bureaucratic exercise the transfer of the powers from the 1984 Act to the 2000 Act. In Section 41 (2), the 1984 Act conferred three powers upon the **guardian** regardless of the need for all three. They were:

a) To require the adult to reside at a place specified by the **guardian**;

b) To require the adult to attend at specified places and times for occupation, education, recreation, training or medical treatment; and,

c) To require access to the adult to be given at reasonable times.

13.22 In transfer to the 2000 Act, the powers may remain the same, but they transfer into the framework of the 2000 Act. Therefore, the **guardian** and those monitoring the use of powers need to think in terms of the principles of the 2000 Act. This demands that assessment of the use of the powers is made in the light of the principles. The principle of the least restrictive option (for example) suggests that the order be adjusted should all three powers not be required. Alternatively, it may be necessary to apply for a variation of the order to increase the powers to include those seen as essential, e.g. a power to convey, which were not available under the 1984 Act.

13.23 The **guardian** must demonstrate that the exercise of power takes account of the views of the adult, carer, etc. They must also demonstrate that implementation encourages maximisation of the adult's skills to the extent possible. The sheriff may treat an application for **guardianship orders** as an application for an **intervention order**. Applicants should be mindful of this in deciding whether **guardianship** is appropriate, so as to be in a position to argue their case should the sheriff suggest that an **intervention order** may be sufficient.

13.24 On implementation of Part 6 of the Act, all powers of tutor dative became **guardianship orders** carrying the powers as given by the courts under tutor dative. All powers of tutor-at-law became **guardianship orders** with powers to manage property, financial affairs and personal welfare of the adult. All offices of curator bonis became **guardianship orders** relating to financial affairs and property.

Do Exercise 7 now

Guardianship assessment

13.25 Throughout this text, there have been allusions to the specialist role of the MHO in assessment and the relationship of that role to broad community care assessments. It might be helpful to think of 3 levels of assessment. While the MHO's role as specialist is distinct from that of care manager, it is important to think of MHO assessments in the context of the assessment and care management process.

13.26 Best practice would suggest that the MHO role requires independence from care management roles. While it is not always possible to avoid MHOs having these joint responsibilities due to the variations in the structures and resourcing of services in different authorities, the roles themselves should remain distinct. While the MHO may write reports accompanying orders made by non-local authority applicants (relatives, carers, etc) it is envisaged that many applications will result from community care assessments. The packs in this series aimed at MHOs and at social work managers both highlight the role of assessment and care management procedures in screening for incapacity that affects finances, property or personal welfare.

13.27 It is therefore assumed that the first step towards an MHO's expert assessment is an assessment of need by assessment and care management staff and that the MHO is brought to the assessment process at the point where there is a question about the possible existence of incapacity which is affecting either the delivery of the care plan or the finances and/or property of the adult.

Do Exercise 8 now

Variation, recall and termination of guardianship

13.28 The sheriff has powers to vary the powers within an order. This means that, on application by any person, including the adult themselves, the sheriff may add to or remove powers contained in the order. The sheriff may also, on application, replace a **guardian** who is no longer suitable as **guardian**. The sheriff may appoint another suitable person to replace the **guardian** in such cases.

13.29 The sheriff has powers to recall **guardianship orders** relating to financial affairs, property and/or personal welfare, in the circumstances set out below.

13.30 If, at any point during the course of an order, the adult ceases to conform to the definition of incapacity contained in Section 58 (1) (a) and (b), the powers of the order should be recalled. Equally, should an order no longer be necessary to promote or safeguard the adult's interests in his/her property, financial affairs or personal welfare, even though the adult remains affected by incapacity, the **guardianship** should be recalled.

13.31 In reference to orders relating to financial affairs and property, the Public Guardian has a duty to recall orders in such circumstances provided they are satisfied from their own investigations or by application from any other person that this is the case. (Section 73 (1))

13.32 The Mental Welfare Commission or the local authority have the same powers of recall in respect of orders regarding the adult's personal welfare, with the exception that the local authority cannot recall a **guardianship order** where they are the **guardian**. In such cases an application for recall must be made to either the Mental Welfare Commission, or, where the application is likely to be contested, the Sheriff Court. (Section 73 (3)) An order is terminated by the death of the adult.

14. Other issues

14.1 Part 7 of the Act deals with Miscellaneous provision. The four aspects of this most related to social work officers are Sections 82, 83, 84 and 87.

14.2 Section 82 limits liability incurred by persons authorised under the Act, provided they have acted 'reasonably and in good faith and in

accordance with the general principles' or 'failed to act and the failure was reasonable and in good faith and in accordance with the... principles'.

14.3 Section 83 makes it an offence for any person under the Act to ill-treat or wilfully neglect the adult.

14.4 Section 84 allows a **welfare guardian** to be appointed by order of a Court as disposal under the Criminal Procedure (Scotland) Act 1995 a result of criminal procedure. An **intervention order** in respect of an adult's personal welfare may also be made by this process.

14.5 Finally, Section 87 contains a useful list of how the Act interprets terms such as 'mental disorder'.

14.6 While not mentioned in the 2000 Act itself, Legal Aid is available for proceedings under the Act.

15. EXERCISES

Exercise 1

Take a moment to reflect on the wide range of choices you exercise and the large number of decisions that you make in your daily life. To get you started here are a few examples:

- How you spend your money;
- How you access your bank account;
- How you choose the clothes you wear;
- How you protect yourself by locking the front door at night and going out appropriately dressed; and
- What food to buy, cook and eat.

Write your own list.

Exercise 2

What would it be like to have someone else decide these things for you? If you were not able to do it for yourself, someone else would have to do it for you to prevent you coming to harm or being at some unacceptable risk. Take a moment to reflect on what it might feel like to have another person making such personal decisions on your behalf.

Write down your responses. These are likely to include many negative and potentially upsetting emotions such as frustration, fear, anxiety and anger.

Exercise 3

Now consider whom you would wish to have made those decisions for you? Whom would you trust to appoint to this position, if you had the power to do so? Do not feel you need to write your answer down as this is a deeply personal choice to make. However, consider what difficulties you meet in trying to think of a person whom you would be prepared to trust with such a responsibility.

If, as is the case with many people who find themselves in this unfortunate situation, you were unable to choose any person you now know to act on your behalf, what sort of person would you wish to make these sort of everyday, personal decisions for you? How would you wish them to go about the task? Are there any special instructions you would wish them to know about? Write down your responses.

Exercise 4

Incapacity Case Examples

Notice the use of the word ‘extent’. This is to emphasise something that was raised earlier; it would be rare that a person was judged to be totally incapable of being able to make any decision in their life. Most often, people will be considered to have partial capacity. That means that they may be only capable of managing matters of welfare, property, or finance up to a certain point or in certain areas of their lives. For example, a person might have the ability to decide about matters of welfare such as the clothes they wear, the friends they choose, the food they eat but not other issues like where they will live and how they should spend portions of their time.

Consider the following situations and discuss the extent to which incapacity is demonstrated. Your answer must be justifiable in reference to the Act. The specific question being asked is: 'Were you involved in practice with these adults, would you consider incapacity present to the extent that you would refer to an MHO?'

Case example A

Duncan is 20 years old. Both his parents were killed and he suffered serious brain damage in a car crash when he was 8. Being an only child, he was left most of his parents’ £750,000 estate, which has been kept in a trust fund for him, to be released to his control on his 21st birthday.

Duncan has moderately restricted capacity for speech, but can read and write simple words. His numeric skills are also limited but he can budget with his weekly allowance of £30 spending money. He lives in a group living setting for adults with learning disabilities and he manages fairly well to care for himself, with staff support. However, he resents the constant intervention in his life and has plans for independence.

It is his intention to buy a house of his own where he could live alone or invite friends to stay.

Case example B

Rachel is a 39 year old married mother of two children, aged 11 and 15. She works as a care worker in a local private care home. Her husband is a schoolteacher. They own their three-bedroom home.

Rachel has a ten-year long history of bi-polar affective disorder (sometimes called manic depression). This illness is characterised by dramatic mood swings and great elation, disinhibition, wildly unrealistic ideas which she can carry into action and spending sprees in its manic phases. Usually well controlled by medication, Rachel has recently become unwell. Before this could be detected, she had already spent most of the couple's modest savings from their joint bank account on a deposit for a sports car. She is planning to take out a second mortgage on a holiday home in Tunisia where she plans to live and write screenplays for Hollywood.

Now consider the extent to which Rachel has impaired capacity and the extent to which it may justify intervention.

Case example C

Dorothy is a 40-year-old businesswoman who has been quadriplegic since a riding accident last year. Her only limited means of communication is by moving her eyes and only her partner can interpret this to the outside world. Her participation in some crucial business transactions is becoming urgently required.

Now consider the extent to which Dorothy has incapacity and the extent to which it may justify intervention.

Discussion of exercise 4

From the slight information available, it is difficult to accurately ascertain the extent of disability in the first two cases. Much of the group discussion of the exercises will highlight differences of opinion because of the varying experience and different perception of those in the group. This should lead to a healthy debate and a more thorough explanation of the issues.

One way of examining is to consider first of all if there is evidence of mental disorder or physical disability (which there is in all three cases). Then you need to relate the disorder/disability to an inability to act or

make, communicate or understand decisions or to retain memory of decisions. Finally, there is a need to evaluate the risk imposed by that disorder/disability. It is the extent to which incapacity imposes risk that justifies intervention.

In Duncan's case there is a mental disorder, which is a learning disability, and it might affect his capacity to understand the extent to which he can manage without support. From this, were there to be no intervention, he might be at risk of exploitation and loss of this estate if he followed through on his plans. This latter assumption is arguable and dependent upon Duncan's refusal to work with services.

In Rachel's case, she has a mental disorder, having a diagnosis of bi-polar affective disorder. It affects her ability to exercise caution as she would when not ill. This poses risks of loss of savings, home, job and family. It might be the clearest cut of the scenarios presented here. This might be the easiest case in which to determine the need for an expert assessment of capacity.

Could you see that Dorothy has no convincing evidence of incapacity because, through her partner, there did appear to exist a means of communicating, providing all those involved were convinced that her partner was able to assist her in communicating, accurately, her wishes. This, of course, assumes that she did not have a brain injury which caused her mental disorder which affected the content of her communication and her capacity to make decisions or to take actions required.

Before moving on to discuss other aspects of the Act, a final slightly more detailed case study is offered in acknowledgement that this pack does not address the complexity of physical disability, incapacity and communication fully elsewhere.

Case example D

Jim, a 67 year old retired teacher, has had Parkinson's disease for about 8 years. He has had medication for the condition but from time to time this has to be changed because of the side effects of the drugs. Currently Jim is off the drugs and has all the classic symptoms of the condition.

He has difficulty moving about, partly due to being unable to initiate movement but then once started he takes small steps and gets faster

and faster, often tripping and falling. He has difficulty with speech and his voice is so quiet and the words so indistinct that people find it hard to know what he is saying. Writing things down is not possible because his dexterity is also affected and his writing is very small and tails off into a scribble after a couple of words.

Because of the effects of the Parkinson's disease Jim has no facial expression, making it difficult to tell what his mood is. He has experienced anxiety attacks, which the doctor attributed to the effects of the drugs. He has also been depressed.

Jim's wife Mary has looked after him throughout his illness. They have had little contact with social services requiring only to arrange some bathing equipment to make life easier for Jim and for Mary assisting him. Otherwise they are a private couple who have managed their own affairs. However, Mary has now suffered a massive stroke and is in intensive care. Because of his physical needs the GP arranged for an emergency admission for Jim.

It is not clear whether Mary will recover and discussions are underway about Jim's future. Jim seems to be saying that he wants to go home but because of his communication difficulties the social worker is finding it difficult to work out whether Jim understands the situation and his care needs.

Again you are asked to consider the following situations and discuss the extent to which incapacity is demonstrated, taking notes for your answer, which must be justifiable in reference to the Act. Please remember the specific question you are asked is: 'Were you involved in practice with these adults, would you consider incapacity present to the extent that you would refer to an MHO?' If so, in what areas would you suggest to the MHO that the adult may be lacking capacity and which powers under the Act would have to be sought?

Discussion

This study is more complex than the preceding one relating to Dorothy. Setting aside the possibility that Dorothy may have a mental disorder as well as a physical disability, Dorothy simply serves to underline that if a method of communication exists, incapacity due solely to an inability to communicate does not. In Jim’s case there should be more debate about the extent to which his incoherent whispers can be understood enough to constitute a means of communication and the extent to which

every other avenue of communication has been exhausted. As with other cases, the words on these pages do not offer enough living detail to answer these questions. However they do open up the debate.

Assisted communication

Assisted communication may be broken into different areas. There are two groupings to aids to communication - technological and human. The human aids rely on interpretation while the technological means rely on prosthetic, mechanical and electronic devices:

To facilitate any communication there are basic things that must be checked - that teeth are in, glasses are on, hearing aids are in, and that any of these devices needed are fitted.

Low technological meansinclude such examples as personal books. High technological devices include lightwriters, touch talkers, delta talkers and computers. There are issues that have to be considered in communication with these devices: go at the pace of the user, use single subject questions and give time to complete sentences.

When the Act refers to human means of facilitating communication it means using, for example, interpreters of sign languages (such as British Sign Language and Makaton) and lip speakers. While language may be an issue, clear not speaking the mainstream language alone would never constitute an incapacity. It may complicate assisted communication, for example when a person is using a computer and can only speak another language.

Particular care should be taken in using family members or friends as interpreters as their relationship with the adult may hinder their ability to assist in this way. This is not to say, however, that their own views should not be sought, which they must in keeping with the principles of the Act.

Giving the interpreter appropriate information in advance is important. Even a skilled interpreter may have to research the best way to communicate the complexities of legal language. Use of plain language is important, especially in the area of incapacity and the law. You should always speak to the individual not the interpreter.

Only if all of the above has been exhausted, and Jim's whispers still remain incoherent to everybody, should he be considered to be incapable in regard of communicating his wishes for care.

Exercise 5

Continuing and welfare attorney case example

This case example asks you to think of the social work officer role specifically in relation to issues thrown up be **welfare powers** of **attorney**. Please give time to reflect and discuss these questions. Take a note of the main details of your answers for reference.

Trina Smith is 43 years old. Her mother brought the family up alone, after the death of Trina's father when she was 4. Mrs Smith was often physically abusive to Trina and her siblings, but Trina seemed to survive this better than did her brother and sister. Trina's brother resorted to heroin abuse and her sister has frequent bouts of depression.

10 years ago, when she went through the traumatic experience of nursing her mother through the terminal phases of Huntington's Disease, neither her brother or sister offered any assistance. This caused an unresolved rift in the family. 3 years later, after much discussion with her brother and sister, they all agreed to genetic counselling and testing, which in Trina's case proved positive.

This result devastated Trina because she and her partner, Dan, had hoped to have a family. The stress of these years manifested itself in Trina's increased dependency on alcohol (currently about ¾ of a bottle of vodka a day). In turn, this put pressure on her relationship with Dan, who remained supportive of her, but who increasingly resorted to the use of physical force to control her when she was drunk.

While Trina recognises that she needs to be controlled while very drunk, there is an uncomfortable dynamic in this, in that her acceptance of Dan's use of force reflects her low self esteem and awakes memories of her mother's abuse of her. Trina has now given up her part-time cleaning job and Dan has taken total control of their finances in order to restrict her access to alcohol.

Apart from her relationship with Dan and her frequent contact with her siblings, Trina only has friends who are associated with her drinking.

Two months ago Trina began to develop symptoms that have been identified as the onset of Huntington's Disease.

Were you involved in a professional capacity with Train, what advantages and disadvantages might there be in encouraging her to explore legal advice on granting **continuing** and/or **welfare powers** of **attorney**? (According to the Code of Practice for Local Authorities, giving advice under Section 10(1)(e) should extend to people who are considering the possibility of seeking authority to exercise powers.)

Assuming that you find merit in advising Trina to consider either **continuing or welfare powers** (or both), who, if anyone from the study might best be suited to become Trina's attorney/attorney's?

What issue relating to these powers do you think ought to be explored with Trina and the person/people identified as her **attorney?**

Discussion of case example

The advantage of **powers of attorney** in this case is that it enables someone like Trina to choose to whom she will entrust her decision making powers in the likely event that she loses her capacity to manage her own affairs. In this she has an opportunity to discuss and influence how these powers may be exercised on her behalf. While the law does not specifically allow for the granter to make any legally binding advance directive, were Trina to record her wishes, they would constitute a very clear statement which would help those proposing to intervene to act upon a core principle of the Act: taking account of the adult's past and present wishes. This would not necessarily mean, however, that these wishes would have to be respected.

The problem may appear to be that no one mentioned in the study seems to be absolutely ideal as her **attorney**. It might be that Trina could be encouraged to search wider for a suitable person. Alternatively you could work with Trina and Dan on how the power might be best used.

Exercise 6

Intervention order case example

Please read the following study and discuss the questions below, taking notes of your answers.

Roy Walker is a 40 year old man who lives with his girlfriend Sally in a privately owned top floor flat, which he inherited when his mother died. Roy has never worked, having lived with his parents until their deaths. Sally is a fish-filleter and between her income and interest on money that Roy was left by his mother, they manage to live a modest lifestyle.

Both Roy and Sally have mild degrees of learning disability. Roy's is exacerbated by the sheltered life he led before the deaths of his parents and by his isolated life with Sally. Neither Roy nor Sally wishes to receive any services and they ordinarily manage their lives adequately. On advice from his solicitor upon inheritance after Mrs Walker's death, Roy rigidly adheres to the principle that, as long as he does not touch the capital on his savings, he will have a sustainable income for life.

A referral to social work came from the fire brigade on a follow up visit following an emergency call out. A chip pan fire has caused structural damage to the kitchen of the flat and the fire prevention officer is concerned that the couple neither understands nor is coping with the seriousness of the situation. The officer reports that the flat is no longer weather tight (it being winter), the wiring is unsafe to use and the situation will deteriorate with the risk of a section of roof falling in. Roy and Sally meantime would find it hard to heat the flat and would have no apparent access to hot water or cooking facilities.

Repeated calls from a social worker have been met with hostility from Roy and Sally. They seem irretrievably suspicious and will not let any callers beyond the half opened door. However, in the short discussions that have taken place, it is evident that neither Roy nor Sally has any idea of the extent of the problem or the means to solve it. In response to questions about insurance cover, neither seems to know what insurance is. It appears, at this point, based on the limited evidence, that Roy and Sally's welfare may require actions taken or decisions made to which they would not agree.

There are at least 4 sets of problems that require resolution:

1) How can the existence of incapacity in relation to this situation be ascertained under the circumstances described above? (Ref - the definition of incapacity in Section 1 (6) and the gateway definition for **intervention order**, 53 (1)). In this regard, do you think that there would be sufficient grounds for concern in this situation to begin consideration of referral to an MHO and to activate a multi-disciplinary conference in pursuit of an order? If so, whom would you wish to invite to the conference?

2) A key issue to address is how to gain access to determine whether there is a legitimate case for concern.

3) There is the need to consider how Roy and Sally can be protected both immediately and in the long term while preserving to the extent possible their autonomy? (Ref - the principles in Section 1(2), (3) and (4) (a)). Assuming that there is merit in considering an order, in pursuit of protection from risk, you need to determine what power(s) to request in an order? (If you would request a single, limited power it might be appropriate to apply for in an **intervention order**. If the issue is more complex, requiring multiple powers, and needing to be exercised over an extended period it is likely that a **guardianship order** would be more appropriate.)

4) Looking back to the brief discussion in this pack relating to the roles and functions of the Office of the Public Guardian and Mental Welfare Commission, you should examine what role the Public Guardian and Mental Welfare Commission might have in such a case as this.

Discussion

The situation posed here is a difficult one, exacerbated by the fact that in real life, you may find ways to interact with Roy and Sally that are denied to you in a two dimensional paper exercise. In real life you do not have explicit legal powers to demand access to make the assessment that they require. On the other hand there is compelling evidence to suggest that Roy and Sally are in need.

There are several areas of concern in which you must seek further information and evidence. If Roy has a diagnosis of mild learning

disability, there may be medical or psychological assessments, even if they are now out dated. His GP may have records and may have an existing relationship. The solicitor seems to be a trusted advisor and there is the fire officer who gained access.

You would have to exercise judgement on whether to seek the advice of an MHO or to attempt a mutli-disciplinary conference to se if others were able to identify a means of advancing the assessment. This shows the importance of the multi-disciplinary working which is necessary.

You also may consider the ability of the local authority to make application to the sheriff under Section 3(3) for a direction compelling the person(s) offering resistance to the local authority in carrying out their functions under the Act, to comply with the terms of the regulations.

The local authority has a duty to investigate any circumstances made known to them in which the personal welfare of an adult seems to be at risk. It may be, from the above investigation and the discussions that you and a medical practitioners have had at the door of the flat, that you have enough information on the couple's lack of capacity to progress an application. Even in the early stages of an application the sheriff has authority to order further reports, for example from a building inspector and the fire officer, to determine the scale of damage/repairs required (Section 3 (2)).

If the information in the application is insufficient, the sheriff may order a further investigation under Section 3 (2)(c).

If the roof and wiring need repair, an **intervention order** would seem to be the least restrictive option. There may be however, more issues. If, for example, Roy has to be rehoused during the repair work and if there are implications about insurance as well as problems with the neighbours, and Roy lack the capacity to resolve them, with or without Sally, a **guardianship order** may be required. The sheriff does not have to stick with the 3 year time period for the duration of an order. He may grant one for a shorter period. Indeed, in keeping with the principle of least restrictive intervention, you may wish to seek an order for a shorter period than is normally granted (3 years).

Where an MHO is involved, he/she may well advise that this is the sort of difficult case where consultation and dialogue with the Public Guardian (over the property) and the Mental Welfare Commission (over the issues of personal welfare) might be of benefit.

It could be argued that the local authority has a duty under Section 10 (1)(d) to investigate this situation; the Public Guardian has a duty to supervise any subsequent **intervention** or **guardianship order** that authorises intervention in the property and financial affairs of the adults; and, the Mental Welfare Commission has a duty to supervise any subsequent orders where the incapacity of the adult is a consequence of mental disorder and the welfare of the adult is involved.

Exercise 7

Transfer of guardianship order case example

Please work through the questions below and take note of your answers.

George McCabe is 42 and has been unemployed for 10 years, since he was retired on health grounds from his job as a welder. At that time, George had suffered a work related injury which left him with cognitive impairment and some damage to his short term memory. George received a significant lump sum payment in compensation, with which he bought his own flat. He also has a substantial work related pension.

Until 2 years ago, George had lived in the flat with Janine, his partner of 1 year's standing. However, George's care manager raised increasing concerns that Janine was taking advantage of him and financially exploiting him. Janine, who is 10 years older than George, has a long history of problems with alcohol and, since the start of their relationship the previous year, George had also begun drinking heavily. The well ordered regime by which he had organised his life had deteriorated and he was losing weight, frequently appearing unkempt and living in chaotic and unhygienic conditions. There was often police involvement at George's flat and the neighbours had complained on several occasions to environmental health about the mounting, rotting rubbish.

Janine was obstructive of any intervention an George became increasingly un co-operative, to the point where **guardianship** under the 1984 Act was used to move George into a local voluntary agency's care home.

George has done well in his new home. Having stopped drinking his health recovered. However, his pension is not adequate to pay the costs of his care and such savings as he had left are now depleted. He still has some infrequent contact with Janine, who continues to live in his flat. While he shows no interest in returning to it, he refuses to demand that Janine leaves the flat, or to place his flat on the market to help finance the care her requires. This is effectively blocking plans for George to move on to some form of sheltered accommodation which he is assessed as needing.

Imagine you are George's care manager. Now that George's **guardianship order** is due to be transferred to the 2000 Act, would you consider convening a case conference to discuss whether it should be continued or terminated? (Remember to apply the principles of the Act).

Discussion

The study lacks the precise depth of information to determine George's capacity. He may have recovered capacity now that he is not drinking. He may have residual brain damage which affects his capacity to some extent in relation to the matters of concern. It may be that he has the capacity to understand and chooses to remain exploited (as others see it) by Janine. The relationship may be more important to him than the material loss of financing his care. This may be his expression of his feelings towards her. Many people chose to stay in relationships in which others see them as being exploited.

On the other hand, there is evidence that George led an organised life before he met Janine and she introduced chaotic and uncharacteristic behaviour into his life. This might indicate that he lacks the capacity to control the relationship that is exploitative of a vulnerable adult who lacks the capacity to look after his own interests.

If this is to be renewed, are the three powers conferred upon it under Schedule 4 (2)(1) adequate to the situation. In other words would you be content for a routine transfer of powers or ought you to activate the process for an application to be made to the sheriff to amend the powers? If so, what additional powers would you wish to see being granted? Are all of the three powers still essential to implementing the care plan based on George's assessed needs?

Discussion

Unless George is remaining in care because of the order, none of the three powers of **guardianship** appears to be needed at present. If however, issues discussed above indicate that George is at risk in relation to his property and financial affairs, perhaps a variation of the order is needed to evict Janine, or get her to pay rent at least. If it is a single issue of selling the house, an **intervention order** might be less restrictive. The ramifications of this, however, may be significant and long lasting.

Looking back to the brief discussion in this pack relating to the roles and functions of the Public Guardian and Mental Welfare Commission, outline the relationship between your role as an officer of the local authority and these organisations.

Discussion

The Public Guardian would supervise any order with authority to manage property or financial affairs. There might be a delicate issue of the local authority applying for an order to reclaim money from the flat, when that money would go into payment of care. Organising an appropriate proxy outwith the local authority to take such powers might be advisable.

This might also present some difficulties but your authority should have procedures for addressing how you might go about this. There will be complicated issues relating to property on which the Public Guardian may offer helpful advice.

Exercise 8

The final exercise in the pack is intended to focus your thinking upon the management of a **guardianship order**, whether you are the **guardian** or you are involved in the supervision and advice giving to someone in this capacity.

Jamil Kahn is a 75 year old widower who gave his Halal butchering business over to his son Ahmed 10 years ago when his wife died. Ahmed is married with his own family and lives in the tradition of Islam, in which his father brought him up.

In the last 3 years, Mr Kahn's physical and mental health has deteriorated markedly. A heavy smoker all his life, he now has emphysema and he has suffered a series of strokes which have left him with difficulties in walking and caring for himself. He has also begun to be affected by the onset of dementia. Once a very astute businessman and student of the Koran, who took a keen and active interest in politics, Mr Kahn is now frequently confused, disorientated and forgetful.

His son, his daughter in law and his older grandchild all take an active part in his care. However, Mr Kahn requires additional care since his daughter in law has herself became ill, following the birth of another child. Mr Kahn has had to attend a day centre 3 days a week to give his family respite. Hs is resistant to this, often becoming upset and disorientated by the change in his environment. While the family are deeply upset by this in turn, there is no viable alternative and they consider themselves fortunate in having a centre which caters to Mr Kahn's cultural and dietary needs. This is particularly important because, once fluent in English, Mr Kahn now frequently lapses into Arabic, the language he grew up speaking. He does this with no seeming awareness that others in his environment may not understand him. Luckily, there are care staff at the centre who do.

Mr Kahn also requires medical treatment for his physical illness. He is resistant to this as well, often rejecting medication, which the family then hide in his food. Out of concern about these issues of consent to respite care and treatment, the family discussed the matter with the care manager. A **guardianship order** was successfully applied for, granting the **guardian** authority to consent to treatment, authority to require Mr Kahn to attend the day centre and authority to agree to other services such as visits by a physiotherapist.

Assuming the role of care manager, firstly consider the relative advantages of the local authority having made the application to the sheriff as opposed to Ahmed having done so.

Now consider the relative advantages of either you being the **guardian** on behalf of the local authority or Ahmed being the **guardian**.

Were you the effective **guardian** on behalf of the local authority, how would you ensure that the principles of the Act were reflected in your application of the powers? Take special notice of the principles outlined in 4(a) of the Act which requires you to take account of the "the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult".

Please note your answers.

Were Ahmed the **guardian**, how would you monitor the use of the powers? Be mindful of the Regulations relating to the supervision by local authorities in the Annex 1.

Please note your answers.

In all of this discussion we have yet to acknowledge the significant issue of culture. The culture and religious views of the family would be a complicating factor here. The Race Relations Amendment Act 2000 provides a helpful legal framework in which to examine the complication of applying Adults with Incapacity law in such a case. The Amendment Act imposes a duty on local authorities (and a range of other public bodies) to counter discrimination and to facilitate good relations between different cultures. What issue does this bring to the discussion? How might these be reflected in the principles of the Act?

Please note your answers.

Discussion

Were Mr Kahn's son to be the applicant, the legal fees incurred in the application would be met from his father's limited estate. Some of the costs may be met through his father's eligibility for legal aid. He might feel ill at ease in presenting a case in court, effectively countering his father's immediate expressed wishes.

Were you on behalf of the local authority the applicant, you might deny Ahmed the opportunity to carry his responsibility for his father's care; something he might feel obliged or duty bound to do.

As the **guardian**, you would be delegating authority to the family and to the day centre for aspects of Mr Kahn's care as authorised in the order. You would need to work very closely with all parties to ensure that the principles of the Act were upheld in every action done under this authority. Were Mr Kahn' son to be the **guardian**, he would be delegating these powers to his family and the services that Mr Kahn receives. In monitoring the order, you might want to ask Ahmed to keep a record of how he was implementing the powers in such a way as to uphold the principles. He would not be under a legal duty to keep such records as this is not something which can be delegated by the **guardian**. You would have to reach an agreement with him as to what you could reasonably expect. Ideally this would be discussed before he decided to take on the role of the **guardian**.

The more you are familiar wit the Islamic faith and the culture in which the Kahn family lives, the better you will be able to answer the question relating to facilitation of good inter-cultural relationships. From the study it seems that the services offered to Mr Kahn are ethnically sensitive. However, you cannot simply assume this to be the case. It might be good practice to ensure that Mr Kahn's resistance to services is not related to some cultural dissonance. In any case you should make every effort to solicit his views.

This would be in keeping with the principle of taking account of the past wishes of the adult.

ANNEX 1 – Resource/Reading List

The items on this list are offered as documents that your establishment should have for reference in situations where an adult's care requires careful discussion

Legislation

The Adults with Incapacity (Scotland) Act 2000 can be viewed on the HMSO web-site: www.hmso.gov.uk or purchased from the Stationery Office – www.hmso.gov.uk and can be downloaded from the Scottish Executive's website, as can the **Explanatory Notes**
www.scotland.gov.uk/justice/incapacity/
Guidance from the Office of the Public Guardian can be downloaded from www.publicGuardian-scotland.gov.uk/

Regulations

The Adults With Incapacity (Scotland) Act 2000 (Commencement No. 1) Order 2001 (SSI No.81)

The Adults with Incapacity (Public Guardian's Fees) (Scotland) Regulations 2001 (SSI No.75)

The Adults with Incapacity (Certificates from Medical Practitioners) (Accounts and Funds) (Scotland) Regulations 2001(SSI No.76)

The Adults with Incapacity (Supervision of Welfare Attorneys by Local Authorities) (Scotland) Regulations 2001(SSI No. 77)

The Adults with Incapacity (Countersignatories of Applications for Authority to Intromit) (Scotland) Regulations 2001(SSI No.78)

The Adults with Incapacity (Evidence in Relation to Dispensing with Intimation or Notification) (Scotland) Regulations 2001 (SSI No.79)

The Adults with Incapacity (Certificates in Relation to Powers of Attorney) (Scotland) Regulations 2001(SSI No. 80)

The Civil Legal Aid (Scotland) Amendment Regulations 2001 (SSI 2001 No.82).

The Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Regulations 2002 (S.S.I. 2002/95)

The Adults with Incapacity (Reports in Relation to Guardianship and Intervention Orders) (Scotland) Regulations 2002 (S.S.I. 2002/96)

The Adults with Incapacity (Recall of Welfare Guardians' Powers) (Scotland) Regulations 2002(S.S.I. 2002/97)

The Adults with Incapacity (Non-compliance with Decisions of Welfare Guardians) (Scotland) Regulations 2002 (S.S.I. 2002/98)

Civil Legal Aid (Scotland) Amendment Regulations 2002 (S.S.I. 2002/88)

Copies of the act, explanatory notes and regulations are available from:

Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
Tel 0870 606 5566
Fax 0870 606 5588
www.scotland-legislation.hmso.gov.uk/

Codes of practice

Code of practice for local authorities exercising functions under the Act

Code of practice for persons authorised under part 3 to access funds of an adult

Code of practice for **continuing and welfare attorneys**

Code of practice for persons authorised under **intervention orders** and **guardianship**

Code of practice for persons authorised to carry out medical treatment or research

Awaiting publication

Code of practice for managers of authorised establishments

Code of practice for supervisory bodies

The codes of practice are available from the following address:

Scottish Executive
Justice Department
Civil Law Division
Floor 2 West (Rear)
St Andrew's House
Regent Road
Edinburgh EH1 3DG
Tel 0131 244 2193

Alternatively all documents may be downloaded from the Website www.scotland.gov.uk/justice/incapacity/

Forms

The forms required to accompany an application for an intervention or Guardianship order are schedules to the Adults with Incapacity (Reports in Relation to Guardianship and Intervention Orders) (Scotland) Regulations 2002. Details of the forms are as follows:-

AWI [1] Report of incapacity to accompany application for **guardianship**, renewal of **guardianship** or an **intervention order**

AWI [2] Mental Health Officer's report to accompany application for **guardianship** relating to personal welfare

AWI [3] Mental Health Officer's report to accompany application for renewal of **guardianship** relating to personal welfare

AWI [4] Mental Health Officer's report to accompany application for an **intervention order** relating to personal welfare

AWI [5] Chief Social Work Officer's report to accompany an application for **guardianship** relating to personal welfare

AWI [6] Chief Social Work Officer's report to accompany an application for renewal of **guardianship** relating to personal welfare

AWI [7] Chief Social Work Officer's report to accompany an application for an **intervention order** relating to personal welfare

These forms are available electronically from the Website at www.scotland.gov.uk/justice/incapacity. This facility allows the text boxes in the forms to be expanded as necessary. If you have difficulty accessing the forms please telephone 0131 244 2193.

The forms for applying to the local authority or the Mental Welfare Commission for recall of welfare powers of a **guardian** are schedules to the Adults with Incapacity (Recall of Guardian's Powers) (Scotland) Regulations 2002. Details of the forms are as follows:

AWI[11]	Application to Mental Welfare Commission for recall of powers of a **guardian** relating to personal welfare
AWI[12]	Application to local authority for recall of powers of a **guardian** relating to personal welfare
AWI[13]	Medical report of capacity to accompany an application to Mental Welfare Commission or local authority for recall of powers of a **guardian** relating to personal welfare
AWI[14]	Intimation by Mental Welfare Commission of application or intention to recall powers of a **guardian** relating to personal welfare
AWI[15]	Intimation by local authority of application or intention to recall powers of a **guardian** relating to personal welfare
AWI[16]	Intimation by Mental Welfare Commission of proposal to refuse an application for recall of powers of a **guardian** relating to personal welfare
AWI[17]	Intimation by local authority of proposal to refuse an application for recall of powers of a **guardian** relating to personal welfare
AWI[18]	Decision by Mental Welfare Commission on recall of powers of a **guardian** relation to personal welfare
AWI[19]	Decision by local authority on recall of powers of a **guardian** relation to personal welfare

These forms are available electronically from the Website at www.scotland.gov.uk/justice/incapacity. This facility allows the text boxes in the forms to be expanded as necessary. If you have difficulty accessing the forms please telephone 0131 244 2193.

Training resource pack

The Scottish Executive commissioned a series of training seminars on the Act organised by ENABLE and ASAD in Spring of 2001.
A training resource pack was produced for seminar participants and is now available on the Scottish Executive's website at www.scotland.gov.uk/justice/incapacity

The pack includes the following materials:

Section 1

- Introduction to the Act
- Principles and definitions
- Concept of capacity and assessing incapacity

Section 2

- Welfare interventions

Section 3

- Financial interventions

Section 4

- Roles and responsibilities of organisations and individuals

Reading

Astell A.J, Wilkinson H.A (2001) Adults with Incapacity (Scotland) Act 2000: A survey of Scottish professionals. University of Abertay Dundee.

Scottish Executive (2000) The same as you? A review of services for people with learning disabilities.

Jacques A, Jackson G (2000) Understanding Dementia. Churchill Livingstone.

McKay C, and Patrick H, The Community Care Maze – the law and your rights to community care in Scotland. ENABLE and Scottish Association for Mental Health. Now out of print but available in libraries.

Child Poverty Action Group (2001) Paying for Care Handbook. 2nd Edition.

The Law Society and British Medical Association (1995) Assessment of Mental Capacity. Guidance for Doctors and Lawyers.

The British Medical Association (1999) Withholding and Withdrawing Life-prolonging Medical Treatment. Guidance for Decision Making.

Scottish Executive (2001) New Directions. Report on the Review of the Mental Health (Scotland) Act 1984. (Millan Report).

Baumhover L.A,Beall S C (1996) Abuse, Neglect and Exploitation of Older Persons, Strategies for Assessment and Intervention. Jessica Kingsley.

The Inquiry into the care of Mrs K aged 90, The Mental Welfare Commission, November 2001

Useful addresses

Statutory authorities under the Act

The Office of the Public Guardian
Hadrian House
Callander Business Park
Falkirk FK1 1XR
Tel: 01324 678300
www.publicguardian-scotland.gov.uk/

The Mental Welfare Commission for Scotland
Argyle House
3 Lady Lawson Street
Edinburgh EH3 9SH
Tel: 0131 222 6111
www.mwc.scot.org.uk

Courts
Scottish Court Service
Hayweight House
23 Lauriston Street
Edinburgh EH3
Tel. 0131 229 9200
www.scotcourts.gov.uk

Contacts on specific issues

The Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh
EH3 7YR
Tel: 0131 226 7411
www.lawscot.org.uk

Legal Aid
Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh EH3 7RN
Tel. 0131 226 7061
www.slab.org.uk

Advocacy 2000
134 Ferry Road
Edinburgh EH6 4PQ
Tel. 0131 554 7878

Criminal Injuries Compensation Board
Tay House
300 Bath Street
Glasgow G2 4LN
0141 331 2726
www.cica.gov.uk

Other useful contacts

ASCS – Advice Service Capability Scotland
11 Ellersly Road
Edinburgh EH12 6HY
Textphone/Minicom 0131 346 2529

Age Concern Scotland
113 Rose Street
Edinburgh EH2 3DT
Tel: 0131 220 3345

Alzheimer Scotland-Action on Dementia
22 Drumsheugh Gardens
Edinburgh EH3 7RN
Tel. 24hr freephone Helpline 0808 808 3000
www.alzscot.org

Carers UK
3rd Floor
91 Mitchell Street
Glasgow G1 3LN
Tel.0141 221 9141

Citizens Advice Bureau
Address in your local phone book or from
Citizens Advice Scotland
26 George Street
Edinburgh
Tel. 0131 667 0156
www.cas.org.uk

ENABLE
6TH Floor
7 Buchanan Street
Glasgow G1 3HL
Tel. 0141 226 4541

Sense Scotland
5th Floor
45 Finnieston Street
Glasgow G3 8JU
Tel. 0141 564 2444
www.sensescotland.org.uk

Royal College of Speech and Language Therapists
2 White Hart Yard
London SE1 1NX
Tel: 020 7378 1200

Scottish Association for Mental Health
Cumbrae House
15 Carlton court
Glasgow G5 9JP
Tel. 0141 568 7000
www.samh.org.uk

Scottish Executive

Health Department
Community Care Division
Branch 3
Area 3ER
St Andrew's House
Regent Road
Edinburgh EH1 3DG
Tel. 0131 244 5389

Health Department
Social Work Services Inspectorate, Health Team
St Andrew's House
Regent Road
Edinburgh EH1 3DG
Tel. 0131 244 3752

Justice Department
Civil Law Division
Area 2WR
St Andrew's House
Regent Road
Edinburgh EH11 3DG
Tel. 0131 244 4212

Health Department
Public Health Division
Area 3E
St Andrew's House
Regent Road
Edinburgh EH1 1DG

ANNEX 2 - ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

Part of the Act	Type of Intervention		Previous Consent Required by Adult	Who can Intervene?					
	Welfare	Property/ Financial		Relative/ Friend/Carer/ Neighbour	Lawyer	Officer of Local Authority	Other Professionals eg CPN, Care Staff, Hospital	Doctor	Medical Certificate/ Report Required
2	Welfare Attorney	Continuing Attorney	Yes	Yes	(Certifies ability to understand) Yes	Cannot intervene	No	(Certifies ability to understand)	Not Statutory
3[3]		Intromission with funds	No	Yes	(Counter signature) can act as withdrawer but unpaid.	Cannot intervene (MHO can countersign)	No (Nurses may countersign)	(Counter signature)	Yes
4		Management of residents finances	No	No	No	Care Home Manager	Care Home and Hospital Managers	No	Yes
5	Authority to Treat		No	A person having an interest can appeal	As Proxy[4] can object or consent	As Proxy can object or consent	As Proxy can object or consent	Yes	Yes
6	Intervention Order	Intervention Order	No	Yes	Yes	Yes (also report)	Could make application	No	Yes
6	Guardianship Order	Guardianship Order	No	Yes	Yes (also report) (Finance only)	Yes (welfare only) (also report)	Could make application	No	Yes

[3] Under Part 3 'Intromission with Funds' Countersigning relates to a declaration in the application form that the applicant is a 'fit and proper person to intromit with funds' (Section 26(1)(c)

[4] Proxy means a person appointed under the Act to act for an adult with incapacity, to include welfare and continuing attorneys, guardians and persons authorised under intervention orders

ANNEX 3 – Adults with Incapacity Training Advisory Group

John Armstrong	Social Work Department City of Edinburgh Council
Susan Baird	Senior Officer Glasgow City Council Social Work Department
Juliet Cheetham	Social Work Commissioner Mental Welfare Commission for Scotland
Bill Cook	Highland Council Social Work Services
Sandra Costigan	Senior Manager Staff Development & Training Fife Social Work Department
Dr Alan Jacques	Consultant Psychiatrist Royal Edinburgh Hospital
Kitty Mason	Principal Planning & Commissioning Officer City of Edinburgh Council
Christina Naismith	Social Work Department City of Edinburgh Council
Mike Nolan	Principal Service Development Officer East Lothian Council
Pippa Sutton	Finance Manager Scottish Borders Council

Annex 4 – GLOSSARY

The following is an explanation of terms that occur in the text.

Adult	Refers to a person over the age of 16 years. It is usually a reference to an adult with incapacity.
Attorney	Is a person who has been selected by an adult while still capable of exercising informed choice to grant powers which take effect when the granter becomes incapable. Powers of attorney are separated in the 2000 Act into continuing powers (which deal with financial affairs of the adult) and welfare powers (which deal with the personal welfare of the adult).
Care Manager	Is the term used to refer to Social Work Officers who have specific duties in the assessment of need and the management of packages of care for people under the NHS and Community Care Act 1990.
Care Plan	This term is used generically in the text to cover all personal care plans which result from a multidisciplinary assessment of needs. The term must be read in context but can refer as well to treatment plans and/or nursing care plans for those in receipt of health care services.
Chief Social Work Officer	Is the most senior Social Work Officer in a local authority line management structure. It is the person with responsibility for the delivery of social work services in a local authority.
Curator Bonis	Is a power to manage the estate of a person who is not capable of doing. For any person over the age of 16, as of April 2002, this power has become financial guardianship under the framework of the 2000 Act.

Direct Care Staff	This refers to all staff who are providing care on an employed basis this includes such posts as care staff in care homes, home care staff and day care staff.
Duty of Care	Is a duty to exercise due skill and care in exercising powers one has been given in relation to another person.
Granter	Is the term for a person who grants power of attorney to another.
Guardian	Means a person appointed by the sheriff to set or make decisions for an adult under Part 6 of the Act. A financial guardian means a guardian with financial powers. A welfare guardian means a guardian with welfare powers. Guardianship under the Mental Health (Scotland) Act 1984 no longer exists with the implementation of Part 6 of the 2000 Act in April 2002.
Intervention Order	Means an order made by the sheriff, under Part 6 of the Act that something should be done, or a decision made, on behalf of an adult.
Intromission	Intromit means to 'deal with' the funds of an adult with incapacity as outlined in Part 3 of the Act.
Liability	In reference to Section 82, 'limitation of liability', means that the person liable is legally responsible for their actions or failure to act. It implies that a person who is liable may face legal action in either Civil or Criminal Court as a result of actions or failure to act if they failed to do so reasonably, with due care and in accordance with the principles of the Act.
Local authority	Is the term used in legislation to refer to any local government or Island Council in Scotland. By implication, it refers to the local authority's duties in relation to social work services as discussed in this text.

MHO	Mental Health Officer is the term given by the Mental Health (Scotland) Act 1984, to specially trained social workers appointed by their employing local authority to perform specific duties relating to detention in hospital and guardianship of people with mental disorder. The new roles that the 2000 Act gives to MHOs are explained throughout the text.
Proxy	Is the term used to describe any person authorised to make decisions or to take action on behalf of an adult whose capacity has become impaired.
Social Work Officer	Is the term used in this text and by the Codes of Practice to cover 'social work services staff in the broad sense, including, where appropriate, qualified social work officers, occupational therapists, etc, employed to provide social work or similar services.' (The Code of Practice for Local Authorities, 2001, Scottish Executive/Astron.)
Tutor Dative and Tutor-at-Law	Are people appointed by Court to exercise powers, manage aspects of an adults' welfare and, occasionally, to manage short-term aspects of financial affairs. As of April 2002, these powers have become Guardianship Orders under the framework of the 2000 Act.

ANNEX 5 – Sample summary application under the Adults with Incapacity (Scotland) Act 2000

SHERIFFDOM OF Anyarea

AT Anytown

Mr Robert Smith, 3 Birch Avenue, Anytown, son of Mrs Ann Smith, Pursuer

I crave the court to grant an order under section 57 of the Adults with Incapacity (Scotland) Act 2000 appointing me as **guardian** with powers relating to the personal welfare and property and financial affairs of Mrs Ann Smith. In particular I seek the following powers:

Powers relating to personal welfare

- to decide where Mrs Smith should live
- to have access to confidential documents or information relating to Mrs Smith where she would have access to such documents or information on a personal basis
- to consent or withhold consent to medical treatment

Powers relating to property and financial affairs

- to have vested in me the right of Mrs Smith to deal with, convey or manage the heritable property at 2 Rowan Drive, Anytown[5]
- to open, close and operate any account containing Mrs Smith's funds
- to claim and receive on behalf of Mrs Smith all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which Mrs Smith may be entitled: and to vary or appeal arrangements
- to deal with Mrs Smith's income tax
- to obtain and pay for any goods or services which are of benefit to Mrs Smith

[5] The application should specify each property affected by the order, in such terms as to enable it to be identified in the Register of Sasines or, as the case may be, the Land Register. If title to any given property has been registered in the Land Register of Scotland the only specification necessary will be to give the unique Title Number of the property (which appears on the Land Certificate) but it is likely to be helpful to everyone dealing with the application to give a postal address or similar as well as that number. If title to the property rests on deeds recorded in the Register of Sasines a formal conveyancing description (either a particular description or a description by reference) will be needed and again a postal address is likely to be helpful.

Statements of fact

1. I seek appointment as **guardian** with the powers set out above in respect of the following adult:

Ann Smith
2 Rowan Drive
Anytown

2. I am Mrs Smith's nearest relative. Her primary carer is Anyshire Council. My sister has an interest in this application. Her details are:

Mrs Joan Wilson
6 Laburnum Terrace
Inverness

3. Mrs Smith is an eighty year old widow who lives on her own. She has emphysema and has suffered a series of strokes which have left her with difficulties in walking and caring for herself. She is also affected by the onset of dementia. Anyshire Council has been monitoring Mrs Smith's welfare for the past 5 years and a package of support for her in her home has been in place for that time. Mrs Smith is now frequently confused and disorientated and she regularly forgets to take the medicine she needs. In my view, her needs have become complex and unpredictable and they cannot be met if she continues to live alone. As a result of mental disorder, she lacks the capacity to decide where she should live and what care and medical treatment she should receive and she is unable to manage her finances. I have therefore decided to seek appointment as my mother's **guardian.**

4. My application is supported by the attached reports, as required by section 57(3) of the Act:

- report by Dr XX of an examination and assessment of Mrs Smith, carried out on…….
- report by Dr YY, who is a medical practitioner approved for the purpose of section 20 of the Mental Health (Scotland) Act 1984, of an examination and assessment of Mrs Smith, carried out on….
- report by Mr Arthur Brown, Mental Health Officer, Anyshire Council based on an interview with and assessment of Mrs Smith on…….

Anytown
date

(signed) Robert Smith
or Robert Smith's Solicitor

Sample summary application under the Adults with Incapacity (Scotland) Act 2000

SHERIFFDOM OF Anyarea

AT Anytown

Mr James Wilson, Care Manager, Anyshire Council, Council Offices, Anytown, Pursuer

I crave the court to grant an order under section 57 of the Adults with Incapacity (Scotland) Act 2000 appointing Mr Robert Smith, 3 Birch Avenue, Anytown as **guardian** with powers relating to the personal welfare and property and financial affairs of Mrs Ann Smith. In particular I seek the following powers:

Powers relating to personal welfare

- to decide where Mrs Smith should live
- to have access to confidential documents or information relating to Mrs Smith where she would have access to such documents or information on a personal basis
- to consent or withhold consent to medical treatment

Powers relating to property and financial affairs

- to have vested in Mr Smith the right of Mrs Smith to deal with, convey or manage the heritable property at 2 Rowan Drive, Anytown[6]
- to open, close and operate any account containing Mrs Smith's funds
- to claim and receive on behalf of Mrs Smith all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which Mrs Smith may be entitled: and to vary or appeal arrangements
- to deal with Mrs Smith's income tax
- to obtain and pay for any goods or services which are of benefit to Mrs Smith

[6] The application should specify each property affected by the order, in such terms as to enable it to be identified in the Register of Sasines or, as the case may be, the Land Register. If title to any given property has been registered in the Land Register of Scotland the only specification necessary will be to give the unique Title Number of the property (which appears on the Land Certificate) but it is likely to be helpful to everyone dealing with the application to give a postal address or similar as well as that number. If title to the property rests on deeds recorded in the Register of Sasines a formal conveyancing description (either a particular description or a description by reference) will be needed and again a postal address is likely to be helpful.

Statements of fact

1. I seek the appointment of Mr Robert Smith as **guardian** with the powers set out above in respect of the following adult:

Ann Smith
2 Rowan Drive
Anytown

2. Mr Smith is Mrs Smith's son and nearest relative. Her primary carer is Anyshire Council. Mrs Smith's daughter has an interest in this application. Her details are:

Mrs Joan Wilson
6 Laburnum Terrace
Inverness

3. Mrs Smith is an eighty year old widow who lives on her own. She has emphysema and has suffered a series of strokes which have left her with difficulties in walking and caring for herself. She is also affected by the onset of dementia. Anyshire Council has been monitoring Mrs Smith's welfare for the past 5 years and a package of support for her in her home has been in place for that time. Mrs Smith is now frequently confused and disorientated and she regularly forgets to take the medicine she needs. In my view, her needs have become complex and unpredictable and they cannot be met if she continues to live alone. As a result of mental disorder, she lacks the capacity to decide where she should live and what care and medical treatment she should receive and she is unable to manage her finances. I have therefore decided to seek the appointment of Mr Robert Smith as Mrs Smith's **guardian**.

4. My application is supported by the attached reports, as required by section 57(3) of the Act:

- report by Dr XX of an examination and assessment of Mrs Smith, carried out on…….
- report by Dr YY, who is a medical practitioner approved for the purpose of section 20 of the Mental Health (Scotland) Act 1984, of an examination and assessment of Mrs Smith, carried out on….
- report by Mr Arthur Brown, Mental Health Officer, Anyshire Council based on an interview with and assessment of Mrs Smith on…….

Anytown
date

(signed) Elizabeth Robertson,
Anyshire Council
Solicitor for the Pursuer

Sample summary application under the Adults with Incapacity (Scotland) Act 2000

SHERIFFDOM OF Anyarea

AT Anytown

Mr Robert Smith, 3 Birch Avenue, Anytown, son of Mrs Ann Smith, Pursuer

I crave the court to grant an intervention order under section 53 of the Adults with Incapacity (Scotland) Act 2000 authorising me to take the following action in relation to the financial affairs of Mrs Ann Smith.

- to sell the heritable property belonging to Mrs Smith at 2 Rowan Drive, Anytown[7]
- to invest the proceeds from the sale of this property

Statements of fact

1. I seek an **intervention order** to take the action set out above in respect of the following adult:

Ann Smith
2 Rowan Drive
Anytown

2. I am Mrs Smith's nearest relative. Her primary carer is Sunnyside Nursing Home, Anytown. My sister is my mother's welfare **guardian**. Her details are:

Mrs Joan Wilson
6 Laburnum Terrace
Inverness

[7] The application should specify each property affected by the order, in such terms as to enable it to be identified in the Register of Sasines or, as the case may be, the Land Register. If title to any given property has been registered in the Land Register of Scotland the only specification necessary will be to give the unique Title Number of the property (which appears on the Land Certificate) but it is likely to be helpful to everyone dealing with the application to give a postal address or similar as well as that number. If title to the property rests on deeds recorded in the Register of Sasines a formal conveyancing description (either a particular description or a description by reference) will be needed and again a postal address is likely to be helpful.

3. Mrs Smith is an eighty year old widow. She has emphysema and has suffered a series of strokes which have left her with difficulties in walking and caring for herself. A year ago she left her home at 2 Rowan Drive, Anytown, where she had been living alone, and entered Sunnyside Nursing Home where she has settled in quite well and appears content. It was not clear at that time whether she would be able to return home but she is now also affected by the onset of dementia and is frequently confused and disorientated. She regularly forgets to take the medicine she needs. It is clear from assessment by those involved in her care that she would not be able to return to her home, even with support and she now requires to sell her house to meet the cost of the care which she is now assessed as needing. She does not appreciate that she is now living in a nursing home, believing she is still at home. I have therefore decided to seek authorisation to sell her house and invest the proceeds.

4. My application is supported by the attached reports, as required by section 57(3) of the Act:

- report by Dr XX of an examination and assessment of Mrs Smith, carried out on…….
- report by Dr YY, who is a medical practitioner approved for the purpose of section 20 of the Mental Health (Scotland) Act 1984, of an examination and assessment of Mrs Smith, carried out on….
- report by Mr William Scott, of Scott and Scott, Solicitors, High Street, Anytown based on an interview with and assessment of Mrs Smith on…….

Anytown
date

(signed) Robert Smith
or Robert Smith's Solicitor

Sample summary application under the Adults with Incapacity (Scotland) Act 2000

SHERIFFDOM OF Anyarea

AT Anytown

Mr James Wilson, Care Manager, Anyshire Council, Council Offices, Anytown, Pursuer

I crave the court to grant an intervention order under section 53 of the Adults with Incapacity (Scotland) Act 2000 authorising Mr Robert Smith, 3 Birch Avenue, Anytown to take the following action in relation to the financial affairs of Mrs Ann Smith.

- to sell the heritable property belonging to Mrs Smith at 2 Rowan Drive, Anytown[8]
- to invest the proceeds from the sale of this property

Statements of fact

1. I seek an intervention authorising Mr Robert Smith to take the action set out above in respect of the following adult:

Ann Smith
2 Rowan Drive
Anytown

2. Mr Smith is Mrs Smith's son and nearest relative. Her primary carer is Sunnyside Nursing Home, Anytown. Mrs Smith's daughter is her welfare **guardian**. Her details are:

Mrs Joan Wilson
6 Laburnum Terrace
Inverness

[8] The application should specify each property affected by the order, in such terms as to enable it to be identified in the Register of Sasines or, as the case may be, the Land Register. If title to any given property has been registered in the Land Register of Scotland the only specification necessary will be to give the unique Title Number of the property (which appears on the Land Certificate) but it is likely to be helpful to everyone dealing with the application to give a postal address or similar as well as that number. If title to the property rests on deeds recorded in the Register of Sasines a formal conveyancing description (either a particular description or a description by reference) will be needed and again a postal address is likely to be helpful.

3. Mrs Smith is an eighty year old widow. She has emphysema and has suffered a series of strokes which have left her with difficulties in walking and caring for herself. A year ago she left her home at 2 Rowan Drive, Anytown, where she had been living alone, and entered Sunnyside Care Home where she has settled in quite well and appears content. It was not clear at that time whether she would be able to return home but she is now also affected by the onset of dementia and is frequently confused and disorientated. She regularly forgets to take the medicine she needs. It is clear from assessment by those involved in her care that she would not be able to return to her home, even with support and she now requires to sell her house to meet the cost of the care which she is now assessed as needing. She does not appreciate that she is now living in a nursing home, believing she is still at home. I have therefore decided to seek authorisation for Mr Smith to sell her house and invest the proceeds.

4. My application is supported by the attached reports, as required by section 57(3) of the Act:

- report by Dr XX of an examination and assessment of Mrs Smith, carried out on…….
- report by Dr YY, who is a medical practitioner approved for the purpose of section 20 of the Mental Health (Scotland) Act 1984, of an examination and assessment of Mrs Smith, carried out on….
- report by Mr William Scott, of Scott and Scott, Solicitors, High Street, Anytown based on an interview with and assessment of Mrs Smith on…….

Anytown
date

(signed) Elizabeth Robertson
Anyshire Council
Solicitor for the Pursuer

ANNEX 6

How the pack should be used

The Trainers' Guide to this pack, which discusses the scope of use of the pack fully, is intended to reflect its potential for flexible application:

1. It may be used as distance learning material, through which you may work alone, at your own pace. This option has the advantage of maximum flexibility and may fit the needs of workers in more isolated settings. What you may lose by this approach is the quality of discussion and shared experiences of colleagues. It also requires a degree of self-discipline that more structured group approaches do not. This option should only be used in situations where there is no other option available.

2. It may be used as open learning material, whereby you read sections of the text alone within pre-agreed timescales and meet with a group of colleagues to work through the exercises relating to the text. This option has the advantage of flexibility while retaining the benefit of shared learning. However, it loses the structured approach outlined at 3 below.

3. As a preferred option, the Pack may be used in a structured training event, facilitated by a trainer who would provide a venue and timetable in which the group reads and discusses the text and works through the exercises. It is envisaged that this process could be achieved in two rather full days of training or spread over shorter periods. This may be the preferred option for authorities with greater concentrations of workers requiring this level of training.

It may be that an employing authority organises more focused training for key staff, such as care managers, and offers the pack to other staff to use by distance learning.