

SCOTTISH LAW COMMISSION  
(Scot Law Com No 158)



# Report on Vulnerable Adults

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland.

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# SCOTTISH LAW COMMISSION

*Item 17 of our Fourth Programme of Law Reform*

## **Judicial Factors, Powers of Attorney and Guardianship of the Incapable**

To: The Right Honourable the Lord Mackay of Drumadoon, QC  
*Her Majesty's Advocate*

We have the honour to submit our Report on Vulnerable Adults.

*(Signed)*

BRIAN GILL, *Chairman*  
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J G S MACLEAN, *Secretary*  
20 December 1996

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# Summary

This report makes recommendations to assist local authorities and the Mental Welfare Commission for Scotland in making enquiries and in taking steps to protect the welfare and property of vulnerable adults. It follows on our Discussion Paper No 96, *Mentally Disordered and Vulnerable Adults: Public Authority Powers*, published in August 1993 and takes account of the responses received. In this report vulnerable adults are taken to be people aged 16 or over who are unable to safeguard their welfare or property and are (a) in need of care and attention due to age or infirmity, (b) suffering from illness or mental disorder or (c) substantially handicapped by a disability.

We recommend that the local authority should come under a new duty to find out whether the welfare or property of a vulnerable adult (or an adult suspected of being vulnerable) is in need of protection. In pursuance of this duty the local authority should be entitled to inspect premises and in the course of an inspection to interview people there and have vulnerable adults examined by a doctor. If entry to premises is refused then a warrant for forcible entry should be obtained from a sheriff, or in urgent cases from a justice of the peace. More extensive examinations could be carried out under an assessment order granted by a sheriff. An order from a sheriff should also be required if the local authority wished to inspect documents or records relating to vulnerable adults which were not produced voluntarily.

We further recommend replacement of the existing statutory provisions on removal of mentally disordered people, or adults living uncared for in insanitary conditions, under the Mental Health (Scotland) Act 1984 and the National Assistance legislation respectively. Under our recommendations removal would require an order from a sheriff (or in urgent cases a justice) who was satisfied that the adult was vulnerable and at risk of substantial harm unless removed. The removal order would authorise detention of the adult in a suitable place for up to seven days.

We also recommend that a person who lives with a vulnerable adult and is violent towards, or threatens violence to, that adult should be capable of being excluded from the house. Exclusion would require an order from the sheriff who would have to be satisfied that the adult was vulnerable and likely to suffer significant harm, and that exclusion was necessary to protect the adult and would be better than the removal of the adult. Detailed provisions for ancillary orders and enforcement are modelled on those in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 dealing with exclusion orders against violent spouses.

Procedural safeguards are recommended so as to ensure that adults have an adequate opportunity of objecting to any proposed intervention, except where urgent action is necessary. Adults who are neither mentally disordered nor subject to undue pressure from others should not be subject to compulsory measures, but enquiries may be made and premises inspected in spite of objections.

The local authority Social Work Departments are to take the lead in carrying out the recommended functions, but they should work closely with other agencies including the Mental Welfare Commission. The Mental Welfare Commission would be entitled to take direct action itself where vulnerability was due to mental disorder.

# Part 1 Introduction

## Background to the report

1.1 This report makes recommendations for reform of the powers possessed by local authorities, the Mental Welfare Commission for Scotland and the police to protect the mentally disordered and for the extension of some of these powers to vulnerable adults. It follows on our Discussion Paper No 96 *Mentally Disordered and Vulnerable Adults: Public Authority Powers* which we published in August 1993 and which is referred to in the rest of this report as "our discussion paper". We wish to stress that this report is not concerned with the provision of health care and social work services to people who need them or the structure or funding of such services.

1.2 We received many comments on our discussion paper and are grateful to all those who responded. A list of those who submitted written comments forms Appendix B to this report. Representatives of this Commission participated in several meetings and seminars organised by bodies involved in the area of mental disability and vulnerability. We wish to thank the bodies concerned as we derived great benefit from the comments and views expressed by participants. An earlier version of the draft Bill was considered in detail at a meeting attended by representatives of the Association of Directors of Social Work, the Mental Health Committee of the Law Society of Scotland and the Mental Welfare Commission for Scotland. We found this most useful and wish to express our gratitude to all those who took part.

1.3 The following abbreviations are used in the rest of this report:

- (a) "The 1984 Act" for the Mental Health (Scotland) Act 1984.
- (b) "The Mental Welfare Commission" for the Mental Welfare Commission for Scotland.
- (c) "The Law Society" for the Law Society of Scotland.

1.4 In September 1995 we published our *Report on Incapable Adults*<sup>1</sup> which dealt with adults who were or might become mentally incapable of making decisions as regards their property or personal welfare. It made recommendations relating to: attorneys in the personal welfare and financial fields; guardians appointed by the courts with welfare and financial powers; medical treatment, medical research and the withdrawal of treatment; and schemes for managing bank accounts or the finances of those in hospital or approved institutions which would not involve court proceedings. Although we have ensured that the reforms we put forward in this report are consistent with those in our *Report on Incapable Adults* they are not dependent on the latter being implemented.

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<sup>1</sup> Scot Law Com No 151.

1.5 Since our discussion paper was published the Disability Discrimination Act 1995 has been enacted and much of it has been brought into force<sup>2</sup>. Disabled persons are those who have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Vulnerable adults who are the subject of this report would also be disabled, but the 1995 Act deals mainly with discrimination by employers and access by disabled people to goods, facilities and services. The National Disability Council established under the Act is an advisory body without monitoring or investigative functions.

### **The wider context**

1.6 The Law Commission of England and Wales has also been involved in the field of mental incapacity and vulnerable adults. Following several consultation papers<sup>3</sup>, it published in March 1995 a Report on *Mental Incapacity*<sup>4</sup>. We have been in close touch with commissioners and staff throughout and have had many useful and constructive discussions with them. The general approach of this report is much the same as that of the relevant section of the Law Commission's report. However, there are many differences between the two sets of recommendations and draft Bills. This is mainly due to differences in the existing law, in particular the wider functions of the Mental Welfare Commission for Scotland as compared with those of the Mental Health Act Commission for England and Wales.

1.7 The Council of Europe has produced recommendations dealing with emergency measures concerning children, disabled adults and those in need of special protection and assistance<sup>5</sup>. It noted that existing measures do not always enable the courts and other competent bodies to deal satisfactorily with urgent cases and pointed out the need for prompt action to prevent adverse or even irreversible consequences. The recommendations set out a number of principles which member states should implement. These include the following:

1. Courts and other competent authorities dealing with family matters should have sufficient emergency powers and resources to protect children and other persons in need of special protection and assistance and whose interests are in serious danger.
2. The courts and competent authorities should be ready to act at any time in extremely urgent cases.
3. Simple and expeditious procedures should be available to ensure that decisions are reached quickly.

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<sup>2</sup> See, for example, the Disability Discrimination Act 1995 (Commencement No 3 and Saving and Transitional Provisions) Order 1996, SI 1996/1474 bringing provisions into force in June, July and December 1996.

<sup>3</sup> *Mentally Incapacitated Adults and Decision-Making: An Overview* No 119 (1991), *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* No 128 (1993), *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* No 129 (1993) and *Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection* No 130 (1993).

<sup>4</sup> Law Com No 231.

<sup>5</sup> Recommendation No R(91)9, *Emergency Measures in Family Matters*, 9 Sept 1991.

The recommendations we put forward in this report are in line with these principles and recommendations.

### **Scope of the report**

1.8 Part 2 of the report sets out the existing law and its defects. It then discusses the concept of vulnerability in adults and considers what measures should be capable of being taken in relation to vulnerable adults who object to them. Part 3 recommends that local authorities should have a duty to investigate the circumstances of adults who appear to be vulnerable and in need of protection. This would be similar to the Mental Welfare Commission's investigative duty in relation to the mentally disordered. To enable these investigative duties to be carried out local authorities and the Mental Welfare Commission are to be entitled to demand entry to premises where adults who are, or who are considered to be, vulnerable are situated, obtain warrants for forcible entry and to carry out inspections, interviews and examinations once they have entered the premises. In Part 4 we deal with orders granted by a sheriff for examination and assessment of vulnerable adults, for their removal from their homes on an emergency basis and for the exclusion of those who live with, but abuse or exploit, vulnerable adults. Part 5 concerns miscellaneous matters; protection of property by local authorities of vulnerable adults absent or removed from their homes, police powers, offences in connection with obstructing duly authorised officials and appeals against decisions of sheriffs. Part 6 lists our recommendations and a draft of the legislation required to implement them forms Appendix A.

1.9 Implementing the recommendations in this report will have resource implications, especially for local authorities, but it is difficult to predict the extent. More staff and more training would be needed, but on the other hand new and clearer legislation may speed up proceedings by removing the uncertainties surrounding the present procedures and the hesitation many feel about using them.

## Part 2 General Matters

### The existing law

2.1 In this part we examine the existing duties laid upon public authorities and the powers available to them in relation to the safeguarding of the personal welfare and property of mentally disordered and vulnerable people. We also discuss the definition of vulnerable adults, the people who are the subject of this report. In outline the existing legislation provides for:

- (a) a right to demand admission to premises where a mentally disordered person is. This is exercisable by a mental health officer from the local authority or a medical commissioner of the Mental Welfare Commission<sup>1</sup>.
- (b) a power of forcible entry to premises where a mentally disordered person is and removal of that person to a place of safety. This is exercisable by a mental health officer or a medical commissioner on a warrant from a justice of the peace or sheriff<sup>2</sup>.
- (c) a power to remove from home to a hospital or other place a person suffering from chronic disease who lacks proper care and attention. This is exercisable by the local authority after the granting of an order by a sheriff.
- (d) a power to take to a place of safety a mentally disordered person in need of care and control found in a public place. This power is exercisable by the police<sup>4</sup>.
- (e) a duty on the local authority to take steps to protect the property of a mentally disordered person admitted to hospital, subject to guardianship or removed from home under the National Assistance Act 1948<sup>5</sup>, if no-one else is doing this.

2.2 There are also emergency powers to detain mentally disordered people. Under section 24 of the 1984 Act a medical practitioner after examining the individual may make an emergency recommendation. The recommendation must state that by reason of the individual's mental disorder it is urgently necessary for his or her health or safety or for the protection of others that the individual should be detained in hospital. The recommendation authorises detention for up to 72 hours. A nurse of a prescribed class may detain an informal patient already in hospital for up to two hours<sup>6</sup> so that he or she may be examined with a view to making an emergency application. At common law a private individual has "power lawfully to detain, in a situation of necessity, a person of unsound

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<sup>1</sup> 1984 Act, s 117(1).

<sup>2</sup> 1984 Act, s 117(2).

<sup>3</sup> National Assistance Act 1948, s 47 as amended by the National Assistance (Amendment) Act 1951.

<sup>4</sup> 1984 Act, s 118.

<sup>5</sup> 1948 Act, s 48 as amended by s 92(2) of the 1984 Act.

<sup>6</sup> 1984 Act, s 25.

mind who is a danger to himself or others”<sup>7</sup>. It is doubtful whether this power may be exercised by officials of a health board since it has been stated that a board's powers of detention are exhaustively set out in the 1984 Act<sup>7</sup>. We do not put forward any changes to these powers as such, but we do make recommendations in relation to detention by virtue of an emergency recommendation or by a nurse after a vulnerable adult has been removed to a psychiatric hospital under the new public authority powers<sup>8</sup>.

2.3 Local authorities and the Secretary of State have powers and duties of inspection and entry to certain establishments<sup>9</sup>. These include:

- (a) establishments providing people with personal care or support registered under the Social Work (Scotland) Act 1968,
- (b) establishments provided by a local authority, voluntary organisation or others under Part IV of the 1968 Act or residential accommodation provided by a local authority for mentally disordered people under sections 7 and 8 of the 1984 Act,
- (c) any place where a person is boarded out by a local authority or voluntary organisation.

There is also power to remove persons from establishments which are being conducted in contravention of the registration requirements or in urgent situations<sup>10</sup>. These powers and duties were excluded from our discussion paper on the basis that they had been recently reviewed and we were not aware of any criticism of them. None of the respondents referred to them and we exclude them from this report. Any recommendations we make are not to be taken as affecting these powers and duties.

### **Criticism of the existing law**

2.4 In our discussion paper we set out criticisms of these powers; some general, some specific to a particular power. The first main general criticism is that most of the powers apply only to mentally disordered people. The local authorities have no powers in relation to those who are vulnerable but not mentally disordered. We deal with inclusion of the vulnerable later in this Part. The second is that the powers concentrate unduly on removing people from their homes where their circumstances are regarded as unsatisfactory for some reason or another. We expressed the view that removal from home should take place only where there is no other reasonably practicable way of caring for, or protecting, the mentally disordered or vulnerable person. The powers of removal date from an era where institutional care was the main method of looking after those who were not receiving proper care and attention. Nowadays, the policy is community care; supporting people in their own homes so far as possible with the provision of services. The criticisms of each particular power are set out briefly below and considered in greater detail later.

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<sup>7</sup> *B v Forsey* 1988 SC (HL) 28, Lord Keith of Kinkell at pp 63-66. However, para 94 of the *Mental Health (Scotland) Act 1984: Notes on the Act* (HMSO 1986) states that other nurses and persons apart from those authorised by statute may prevent informal patients leaving hospital.

<sup>8</sup> See para 4.33.

<sup>9</sup> Social Work (Scotland) Act 1968, ss 6, 67 and 68.

<sup>10</sup> Social Work (Scotland) Act 1968, s 65.

2.5 **Right to demand admission.** The right of authorised people from the local authority or the Mental Welfare Commission to demand admission to premises seems to be available only if the adult living there is known to be mentally disordered. It is doubtful whether admission may be demanded if the adult is merely suspected of being mentally disordered. This doubt hampers investigative action. The right to demand admission is limited to the authorised person although an effective investigation may well require the presence of others. Finally, there is no express power conferred on a local authority mental health officer<sup>11</sup> to see, interview or examine the mentally disordered adult in private.

2.6 **Warrant for forcible entry.** The warrant for forcible entry is granted to a named constable who is accompanied by a medical practitioner. Only the named constable can execute the warrant which may cause difficulties in practice. The warrant has an indefinite life so that its existence can be used as a means of obtaining "voluntary" compliance with the applicant authority's wishes. There are no express powers given to see, interview or examine the mentally disordered adult in private. The constable may remove the adult from home "if it appears proper to do so", but presumably would be guided in the exercise of this discretion by the accompanying doctor. A representative from the applicant organisation (local authority or Mental Welfare Commission) ought to be present, with or without a doctor. The presence of others with special skills may also be required. Generally, the constable's task would be to ensure that these people can enter the premises and perform their duties. But where criminal activities are suspected the police should have a more prominent role.

2.7 **Removal under the National Assistance legislation.** People suffering from grave chronic disease (and the aged, infirm or physically incapacitated living in insanitary conditions) who are unable to care for themselves or who are not receiving proper care can be removed from their homes to a hospital or other place. The expedited procedure normally used allows removal on an order from the sheriff which is granted without the person being given an opportunity to oppose it. There is no express right of appeal against the order and the sheriff's power to revoke an order on application is expressly disappplied from orders granted on the expedited procedure. Many of those removed are mentally disordered. The Mental Welfare Commission has commented adversely on the practice of removal under the National Assistance legislation because it deprives the mentally disordered of the protection of the 1984 Act and the protection of the Commission<sup>12</sup>.

### **Our reforms in outline**

2.8 In view of these criticisms, both general and specific, we proposed in our discussion paper<sup>13</sup> replacing the existing provisions with a more flexible system of statutory powers. The powers were also graduated so that compulsory removal was not the only option. The main elements of the new scheme were as follows:

- (a) A duty to investigate where a vulnerable adult or an adult suspected of being vulnerable seems to be ill-treated, inadequately cared for or financially exploited.

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<sup>11</sup> S 3(5) of the 1984 Act gives such powers to a medical officer or commissioner of the Mental Welfare Commission.

<sup>12</sup> *Annual Report 1987*, paras 10.16 and 10.17.

<sup>13</sup> Para 2.7 and generally.

- (b) A power to see the adult and inspect the premises where he or she is, and to examine documents relating to the adult's financial affairs.
- (c) A power to carry out an examination or assessment of the adult and
- (d) A power to remove the risk of abuse from the adult or, in the last resort, to remove the adult to a place of safety.

2.9 Those responding to our discussion paper agreed in general with our criticisms and proposals, especially social work organisations and departments and Enable (a Scottish organisation for those with learning difficulties). Strathclyde Regional Council Social Work Department, for example, stated that the present powers were very unclear and welcomed our proposals to clarify and simplify them. It was particularly in favour of "de-emphasising" the removal of people from their homes. The Association of Directors of Social Work and the Highland Regional Council Social Work Department singled out the powers of removal under the National Assistance legislation for criticism and welcomed their proposed repeal. However, the Scottish Association for Mental Health doubted whether new legislation was necessary as it was not aware of cases where authorities had had difficulties with gaining access to, or carrying out assessments on, people who appeared to need help. Part of the problem in its view was unfamiliarity with the existing legislation. It observed that new legislation would not help unless resources were put into training those who would have to operate it. We would agree with the need for training. The new powers that we recommend are discussed in detail in Parts 3 to 5 of this report, but first we deal with some general issues.

### **Who are adults?**

2.10 To what age range should the public authority powers in this report be applicable? In our discussion paper we proposed<sup>14</sup> that they should apply to persons aged 16 and over. The age of 16 is already widely used in many areas of law to distinguish adults from children. People attain full legal capacity at 16 under the Age of Legal Capacity (Scotland) Act 1991<sup>15</sup>. Children's Hearings under the Social Work (Scotland) Act 1968<sup>16</sup>, and its forthcoming replacement the Children (Scotland) Act 1995, generally have jurisdiction in relation to persons under 16<sup>17</sup>. Guardianship under the 1984 Act is available only in relation to persons aged 16 or over<sup>18</sup>.

2.11 Most of those responding to our proposal were in favour. One organisation considered that Children's Hearings were more likely to provide adequate support and supervision for the 16 and 17 year olds than the proposals in the discussion paper, but jurisdiction exists in relation to this age group only if a supervision requirement was in force before the child attained 16<sup>19</sup>. There would be a slight overlap if the recommendations in this report applied to 16 and 17 year olds, but this seems preferable to the much wider gap that

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<sup>14</sup> Proposal 1, para 2.8.

<sup>15</sup> S 1(1)(b). There are two minor exceptions; 16 and 17 year olds have no capacity in relation to consenting to judicial variation of trusts, and the court may set aside a prejudicial transaction entered into by a 16 or 17 year old.

<sup>16</sup> S 30(1).

<sup>17</sup> S 93(2).

<sup>18</sup> S 37(1).

<sup>19</sup> Social Work (Scotland) Act 1968, s 30; Children (Scotland) Act 1995, s 93(2).

would exist if they applied only in relation to those aged 18 or over. Another body thought that there was no justification for any age limit since apart from guardianship the existing provisions of the 1984 Act apply to people of all ages. We remain of the view that people below the age of 16 who are vulnerable by reason of mental disorder or otherwise are best protected via the well-established Children's Hearings system and other provisions in the Social Work (Scotland) Act 1968 which have been re-enacted with amendments by the Children (Scotland) Act 1995. Detention in hospital under the 1984 Act is more concerned with treatment which should be available irrespective of age. We therefore recommend that:

- 1. The recommendations set out in the rest of this report should apply in relation to individuals aged 16 or over.**

Clauses 1 and 18(1)

In the rest of this report we use the term "adult" to refer to individuals aged 16 or over.

### **Who are the vulnerable?**

2.12 In our discussion paper we considered that where matters of concern were being investigated and emergency steps might have to be taken, the vulnerable as well as the mentally disordered ought to be included<sup>20</sup>. Mental disorder is defined in the 1984 Act as mental illness or mental handicap however caused or manifested<sup>21</sup>. This definition covers people with learning difficulties, dementia or head injuries, as well as those who are temporarily mentally incapacitated due to physical or mental illness. However, people are not to be regarded as mentally disordered for the purposes of the 1984 Act simply because of promiscuity, sexual deviancy or other immoral conduct or dependence on alcohol or drugs<sup>22</sup>. Confining our proposals to the mentally disordered would have left some classes of vulnerable people unprotected. This in our view would have been more harmful than intervening in a limited way with those who are vulnerable but mentally capable. Abuse, deprivation and exploitation of vulnerable adults occur and the existing law is often not capable of tackling them effectively. In our discussion paper we thought that a definition of vulnerable was not necessary because the ordinary meaning<sup>23</sup>:

"capable of being wounded, liable to injury, or hurt to feelings: open to successful attack: capable of being persuaded or tempted..."

seemed appropriate.

2.13 Those responding to our discussion paper welcomed the inclusion of the vulnerable in principle but two main reservations were expressed. First, vulnerable people who were not mentally disordered should not be subjected to compulsory measures, such as examination, assessment or removal from their homes, against their will. We deal with this point later in this part where we recommend that certain powers should not be exercisable in the face of opposition unless the objection may be disregarded because of the vulnerable adult's mental disorder or undue pressure from others<sup>24</sup>. Second, the use of the ordinary

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<sup>20</sup> Paras 1.6 and 2.9.

<sup>21</sup> S 1(2).

<sup>22</sup> 1984 Act, s 1(3).

<sup>23</sup> Chambers Twentieth Century Dictionary (1983 edn).

<sup>24</sup> Recommendation 3, para 2.26.

meaning of vulnerable produced too extensive and diffuse a class of people. A much narrower definition of vulnerable was said to be needed, many respondents commenting that at some point in their lives almost everyone was vulnerable in the sense we used in our discussion paper. We appreciate the force of this criticism. A wide definition would place too great a strain on local authority resources and would make it impossible for the local authority to confine its attentions to those genuinely in need of them.

2.14 A necessary element in any definition of vulnerability is what one is vulnerable in relation to, or unable to do by reason of vulnerability. We think this should be inability to protect oneself from harm or exploitation. On the personal welfare front protection is needed against physical or mental abuse. This may take the form of violence or threats of violence, but negative conduct such as neglect or a restrictive regime may be just as harmful. At many of the seminars and other meetings at which we were represented, financial exploitation was the subject of as much concern as physical abuse. In terms of the draft Bill annexed to our *Report on Incapable Adults* guardianship would be available to those who were, among other things, incapable (due to mental disorder or inability to communicate) of acting to safeguard or promote their interests in their property, financial affairs or personal welfare<sup>25</sup>. We would generally adopt this concept for defining the vulnerable, but would make two changes. First, inability should be substituted for incapacity as the latter is not appropriate where vulnerability arises from physical rather than mental factors. Second, promotion of interests should be omitted as it is a long-term consideration suitable for guardianship, but not for the short-term protective measures recommended in this report.

2.15 Inability to safeguard one's interests is a necessary element of vulnerability, but some further elements are required in order to focus only on those vulnerable persons in relation to whom it is reasonable to expect local authorities to have a role. Short term investigative and protective measures have to be linked to the longer term powers and duties currently possessed by local authorities. The Scottish Association for Mental Health suggested that "persons in need" in the Social Work (Scotland) Act 1968 might form the basis of a definition. Section 94(2) of the 1968 Act provides that "persons in need" means person who,

- "(a) are in need of care and attention arising out of infirmity, youth or age; or
- (b) suffer from illness or mental disorder or are substantially handicapped by any deformity or disability; or
- (c) [repealed]
- (d) being persons prescribed by the Secretary of State who have asked for assistance, are, in the opinion of a local authority, persons to whom the authority may appropriately make available the services and facilities provided by them under this Act."

Further discussions with representatives of a number of bodies have led us to adopt a definition based on "persons in need" coupled with the functional test of inability. This would have many advantages. First, local authority social work departments, who would be the main agencies operating any legislation implementing our recommendations, are

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<sup>25</sup> Clause 44(1) as read with Clause 67(2).

already familiar with the concept of "persons in need". Second, all those who are vulnerable adults would also be persons in need. This means that local authorities would have long-term functions in relation to all those who were subject to the short-term protective and investigative powers we recommend. Third, the definition includes the familiar concept of mental disorder so making the task of assessing vulnerability easier where that arises from non-physical causes. Furthermore, the mentally disordered would not form a separate main category (as they did in our discussion paper); they would simply form one of the categories of persons who could be considered vulnerable. Under the present law, and under our recommendations, the Mental Welfare Commission has functions only in relation to the mentally disordered. Utilising the concept of mental disorder in the definition of vulnerability enables this limitation to be maintained easily.

2.16 The power to prescribe further categories of people under paragraph (d) has not been exercised so far. We would omit this paragraph from our definition of vulnerability as a future category of people regarded as being in need for the purposes of the 1968 Act might not always be appropriately classed as vulnerable. We also consider that other minor changes should also be made. "Substantially handicapped by any disability" should replace "substantially handicapped by any deformity or disability". Deformity has an unpleasant ring to it and adds nothing to disability. Persons in need in the 1968 Act include children, hence the reference to in need of care and attention arising out of "youth". This reference is unnecessary in relation to vulnerable adults.

2.17 Summing up the previous paragraphs we recommend that:

2. **A vulnerable adult should be defined for the purposes of this report as an adult who is unable to safeguard his or her personal welfare, property or financial affairs, and is:**
  - (a) **in need of care and attention arising out of age or infirmity, or**
  - (b) **suffering from illness or mental disorder; or**
  - (c) **substantially handicapped by any disability.**

Clauses 1 and 18(1)

2.18 In the remainder of this report we use the term "vulnerable adult" to mean those individuals who satisfy the criteria set out in Recommendations 1 and 2. We would stress that vulnerability is a necessary, but not a sufficient, condition for the exercise by public authorities of the new powers that we recommend should be conferred on them. Depending on the power additional conditions would have to be satisfied. These are discussed in relation to each power.

### **Compulsory measures against vulnerable adults**

2.19 What powers should be exercisable and what measures should be authorised against vulnerable adults who object or refuse to co-operate, and should the presence of mental disorder affect the answer? At present compulsory measures are, by and large, confined to the mentally disordered. There is a right to demand admission to premises where a

mentally disordered person is and a warrant for forcible entry is available<sup>26</sup>. There is an express power to interview and examine a mentally disordered adult in private where the person obtaining entry is from the Mental Welfare Commission<sup>27</sup>. Where entry has been obtained by virtue of a warrant a mentally disordered person can be removed to a place of safety<sup>28</sup>. Otherwise a mentally disordered person may be admitted to and compulsorily detained in a hospital for up to 72 hours on an emergency application by a doctor and will be further examined and assessed there<sup>29</sup>. Adults who would be regarded as vulnerable according to our recommended definition, but who are not mentally disordered, may be removed from their homes under public health legislation or the National Assistance Act 1948. The latter permits those suffering from grave chronic disease (and the aged, infirm and physically incapacitated living in insanitary conditions) who are unable to care for themselves and who are not receiving proper care to be removed from their homes<sup>30</sup>. In practice many such people are mentally disordered.

2.20 In our discussion paper we proposed that duly authorised people from the local authority or the Mental Welfare Commission should be entitled to demand admission, and if necessary obtain a warrant for forcible entry, to premises where a vulnerable adult or a suspected vulnerable adult was<sup>31</sup>. Our proposals did not exclude vulnerable adults who were mentally capable and objected to the intervention. There were no adverse responses to these proposals. We would adhere to the approach in our discussion paper. Entry to premises (by force if necessary) where a vulnerable adult, or an adult reasonably suspected of being vulnerable, is living seems justified even in the face of objections. The local authority or Mental Welfare Commission could not carry out the investigative duties which we recommend in Part 3 if an objection could prevent matters of concern being looked into. We consider that the public interests in protecting the vulnerable against abuse and exploitation outweighs any temporary disturbance to their autonomy and privacy. Provisions authorising such intervention would not in our opinion be in breach of the European Convention on Human Rights. Article 8 of the Convention provides:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Entry to premises by public officials under a statutory procedure could be justified on the grounds of "the protection of health" (the vulnerable adult's own health or the health of others) or "the prevention of disorder or crime" in relation to physical abuse or financial exploitation. Some limited protection would exist under our recommended scheme. If admission was refused then the local authority or Mental Welfare Commission would have to apply to a sheriff or justice of the peace for a warrant for forcible entry. The applicant

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<sup>26</sup> 1984 Act, s 117.

<sup>27</sup> 1984 Act, s 3(5).

<sup>28</sup> 1984 Act, s 117(2).

<sup>29</sup> 1984 Act, s 24.

<sup>30</sup> National Assistance Act 1948, s 47. An expedited procedure exists under the National Assistance (Amendment) Act 1951.

<sup>31</sup> Proposal 3, para 2.22; Proposal 5, para 2.35.

would be required to disclose that objections had been made and this would be taken into account in deciding whether to grant the warrant.

2.21 In our discussion paper we stated that no assessment or examination order should be granted if the sheriff was satisfied that the adult did not wish to be examined or assessed and had sufficient understanding of what was involved<sup>32</sup>. Use of "sufficient understanding" was criticised, because some mentally disordered adults who nevertheless have some understanding need in certain circumstances to be subject to legal measures for their own protection or for the protection of others. For example, guardianship under the 1984 Act is available if the person is suffering from mental disorder and reception into guardianship is "necessary in the interests of the welfare of the patient"<sup>33</sup>. On reconsideration we agree with these criticisms. The 1984 Act contains many provisions relating to the examination or assessment of those who are, or appear to be, mentally disordered<sup>34</sup>. None of these provisions expressly prohibit a doctor from proceeding in the face of objections. We understand that in current practice patients who are incapable of giving or refusing consent because of mental disorder may be examined if the doctor thinks it to be in the best interests of the patient, especially if there is some serious risk to the patient's health. Such examinations are not in breach of Article 8 of the European Convention on Human Rights as they can be justified as being "for the protection of health". We now think that it should be competent to grant and carry out an examination or assessment order where the adult refuses consent, provided that those concerned reasonably believe that the adult is mentally disordered. Professional ethics and good practice guidelines should ensure that non-consensual examinations are not carried out unnecessarily and that any such examination is to the minimum extent required to achieve its purpose. A psychiatric examination for the purpose of an emergency recommendation for admission to hospital under section 24 of the 1984 Act may be carried out without consent from observations of the person's behaviour and his or her surroundings together with information from other sources such as a carer. In these cases no intrusive examination is necessary. We envisage that most of the examinations or assessments under our recommendations would be carried out in a similar fashion.

2.22 Our proposed order for the removal of a vulnerable adult and his or her detention in a suitable place for up to seven days applied only to the mentally disordered<sup>35</sup>. Before granting an order the sheriff had to be satisfied (among other things) that there were reasonable grounds for believing that the adult was mentally disordered. Except in urgent cases the adult was to be given an opportunity to oppose the application, but the sheriff could grant the order notwithstanding any objections by the adult. There were no adverse comments to these proposals on consultation and we would adhere to them. We note that Article 5 of the European Convention on Human Rights permits deprivation of liberty in the case of "the lawful detention ... of persons of unsound mind".

2.23 Turning now to adults who are vulnerable but not mentally disordered, should they be subjected to examination or removal against their will? As already mentioned<sup>36</sup>, we stated

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<sup>32</sup> Para 2.39.

<sup>33</sup> 1984 Act, s 36.

<sup>34</sup> S 3(5) medical commissioner or officer to examine, ss 20(1), 24(4) and 26(2) examination for detention, and s 39 examination for guardianship.

<sup>35</sup> Proposal 7, para 2.55.

<sup>36</sup> Para 2.21 above.

in our discussion paper that no assessment or examination order should be granted if the sheriff was satisfied that the adult did not wish to be examined or assessed and had sufficient understanding of what was involved. Compulsory removal was also limited to those adults who were mentally disordered<sup>37</sup>. The Law Society considered that vulnerable people should not be subjected to a compulsory interview or examination against their will during an inspection of the premises. Enable commented that in general:

"measures can only be justified where the vulnerable person:

- (a) consents,
- (b) is incapable of making a rational decision, or
- (c) is subject to influence from others."

It went on to observe that protective measures are more justified where they are investigative rather than coercive. The Faculty of Advocates adopted a similar approach. In its view the public authorities should be permitted to gather information about vulnerable people who were capable, but should then make voluntary arrangements or offer assistance but not proceed with compulsory measures. We remain of the view that, in general, examinations and assessments should not be authorised or carried out on vulnerable adults who are not mentally disordered and who object. However, we are grateful to Enable for bringing to our attention the position of adults who are so influenced by others that they are unable to make a free decision. The overwhelming majority of carers looking after vulnerable adults carry out their difficult tasks sensitively and appropriately. But some vulnerable adults are intimidated by abusive or exploitative carers or others. There would be a substantial gap in the protective provisions if some short-term compulsory measures could not be taken in respect of this category of vulnerable adults. Article 5 of the European Convention on Human Rights confers on everyone a right to liberty and security of person. It provides that no one shall be deprived of liberty save in certain specified cases, one of which is "the lawful detention ... of persons of unsound mind"<sup>38</sup>. It has been held by the Court of Human Rights that the meaning of the phrase "unsound mind" depends on the state of medical knowledge and society's attitudes towards the mentally disabled. Unsoundness of mind has to be determined by objective medical criteria and where detention is concerned the degree of unsoundness must be such as to justify such measures<sup>39</sup>. We think that in the context of emergency protective measures to include vulnerable people who have insufficient strength of mind to resist pressure from others and who are thus unable to make a free decision is not unduly stretching the meaning of "unsound mind". We would again draw attention to the Council of Europe's Recommendation of 1991 on *Emergency Measures in Family Matters*<sup>40</sup>.

2.24 Our recommendations on compulsory assessment and removal contain certain protections for adults who object<sup>41</sup>. First, the applicant would be required to have a reasonable belief that the adult in question was vulnerable and either mentally disordered or subject to undue pressure. Second, the adult would, except in urgent cases, receive

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<sup>37</sup> See para 2.22 above.

<sup>38</sup> Art 5(1)(e).

<sup>39</sup> *Winterwerp v Netherlands* (1979).

<sup>40</sup> Recommendation No R(91)9, Sept 1991, see para 1.7 above.

<sup>41</sup> Recommendation 9, para 4.8; Recommendation 11, para 4.35.

intimation of the application and be given an opportunity to oppose it. Third, an assessment order would not be granted unless the sheriff or justice was satisfied that there was reasonable cause to believe that the adult was vulnerable<sup>42</sup>. For removal orders the sheriff has to be satisfied that the person is a vulnerable adult<sup>43</sup>. Finally, sheriffs granting assessment or removal orders and those charged with carrying them out should not do so if the adult objected unless they reasonably believed that the adult was mentally disordered or subject to undue pressure.

2.25 Enable drew to our attention the problem of a tutor-dative who may be abusing the vulnerable adult. The tutor could use his or her power to object on behalf of the adult so as to prevent examination or removal of the adult. We think that only a mentally capable and unpressurised adult should have a veto. A tutor's views would have to be taken into account but should not be determinative.

2.26 Summing up the discussion in this section we recommend that:

3. (1) **No intervention in relation to an adult should be authorised or carried out if the adult objects unless those authorising or carrying out the intervention reasonably believe that the adult is vulnerable and is either mentally disordered or subject to undue pressure.**

(2) **For this purpose an intervention does not include mere enquiries or authorised inspections carried out to determine whether it is necessary to intervene to protect the welfare or property of adults who are, or who may be, vulnerable.**

Clause 2

### **Local authorities and the Mental Welfare Commission**

2.27 Under our recommendations a local authority would have a duty to make enquiries where intervention seemed to be necessary to protect a vulnerable adult. The Mental Welfare Commission already has a similar duty in relation to people who may be mentally disordered in terms of section 3(2) of the 1984 Act, and we recommend later<sup>44</sup> that this duty should be retained. There is a similar overlap of functions under many of our recommendations in relation to those vulnerable adults who are, or appear to be, mentally disordered. Either the local authority or the Commission may take action.

2.28 Investigations and other actions are in our view best carried out at a local level by people from the local authority concerned. A central body like the Mental Welfare Commission should generally have a secondary role, drawing matters to the attention of the local authority or other local bodies and taking action itself only if they fail to do so. We understand that that is how the concurrent functions under the 1984 Act are presently dealt with. For example, although a medical commissioner and a local authority mental health officer are each entitled to demand entry to premises and apply for a warrant for forcible entry under section 117, in current practice only local authority officers act. The Mental

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<sup>42</sup> Clause 7(6) as read with Clause 2.

<sup>43</sup> Clause 9(7) as read with Clause 2.

<sup>44</sup> Recommendation 5, para 3.12.

Welfare Commission has not got the resources to play a principal role. The Commission and the local authority should each be under a duty to provide information and assistance to each other in relation to vulnerable adults who are or may be mentally disordered.

2.29 We recommend that:

4. (1) **Local authorities should have the primary role in dealing with vulnerable adults who are, or who are thought to be, mentally disordered. The Mental Welfare Commission should be entitled to act but should not be bound to do so.**
- (2) **Local authorities and the Mental Welfare Commission should be under a duty to collaborate with each other in relation to investigations and other matters concerning such vulnerable adults.**

Clauses 3 and 4

### **The multi-agency approach**

2.30 The recommendations in this report give local authorities new powers to take action in relation to vulnerable adults. Although the local authority is entitled to act without involving others, we envisage that the social work department concerned would work closely with other relevant agencies and involve them as appropriate. This multi-agency approach is the norm in similar areas such as child-protection and the investigation of abuse of the elderly<sup>45</sup>. Any assessment of risks to a vulnerable adult and possible protective measures, for example, may need to involve not only social workers but also doctors or health board officials. Where substantial property was involved those with financial expertise might be brought in as well. The police should also be closely involved where criminal activity is suspected, and they may take the lead in interviewing the vulnerable adult and others. We have already recommended in the previous paragraph that local authorities and the Mental Welfare Commission should collaborate with each other, and Clause 4(2) of the draft Bill gives effect to this. However, we think that collaboration between local authorities and various agencies is better dealt with by the Code of Practice we recommend later<sup>46</sup> and by other good practice guidance rather than by legislation.

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<sup>45</sup> *Interagency Guidelines on the Investigation and Management of Abuse to Older People in Lothian*, Lothian Regional Council Social Work Department, October 1994; *Community Care: Care Programme Approach for People with Severe and Enduring Mental Illness Including Dementia*, Scottish Office Social Work Services Group, Circ No SWSG 16/96; *Draft Guidance on Joint Investigation and Interviewing in Child Protection*. Working Group set up by the Secretary of State for Scotland and the Lord Advocate, August 1996.

<sup>46</sup> Recommendation 21, para 5.12.

## Part 3 Investigative Powers

### A duty to investigate?

3.1 The first step a public authority needs to take in dealing with a possibly vulnerable adult is to investigate the situation. The Mental Welfare Commission has general investigative and protective functions in respect of mentally disordered persons. Section 3(2)(a) of the 1984 Act imposes on the Commission a duty:

"to make enquiry into any case where it appears to them that there may be ill-treatment, deficiency in care or treatment, or improper detention of any person who may be suffering from mental disorder, or where the property of any such person may, by reason of his mental disorder, be exposed to loss or damage."

Section 3(2)(d) directs the Commission to bring to the attention of any local authority any cases where the Commission thinks the authority ought to exercise its functions so as to secure the welfare of the mentally disordered, and section 3(2)(f) requires the Commission to bring to the attention of the Secretary of State, a Health Board, a local authority or any other body, any matter concerning the welfare of a mentally disordered person which the Commission considers ought to be so brought. The current practice is that the local authority or other body notified then takes appropriate action, but the Commission does have direct powers of its own<sup>1</sup> which it may exercise should no action be taken.

3.2 The powers and duties of local authorities and persons authorised by the Secretary of State in relation to registered establishments or persons boarded out by the local authority have already been noted<sup>2</sup>. Apart from these specific functions local authorities have no general duty to investigate matters of concern in relation to vulnerable people living in their own homes or those of relatives or carers. They do have a duty to assess people's needs in relation to the provision of community care services<sup>3</sup>, and this duty is not confined to the mentally disabled. There are similar duties in other legislation, either targeted at the mentally disabled or more generally at the disabled. The following is not an exhaustive list but merely illustrates the types of provision which exist.

Local authorities, by their social work departments, have a duty under section 12 of the Social Work (Scotland) Act 1968, "to promote social welfare by making available advice, guidance and assistance" to people in their area.

The Chronically Sick and Disabled Persons Act 1970 lays a duty on local authorities to make certain arrangements to meet the needs of those falling within the ambit of section 12 of the Social Work (Scotland) Act 1968<sup>4</sup>.

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<sup>1</sup> 1984 Act, s 117, see paras 3.13 and 3.24 below. The Commission is also entitled to apply to the court for a curator bonis to be appointed to a person who is incapable, by reason of mental disorder, of adequately managing and administering his or her financial affairs, 1984 Act, s 93.

<sup>2</sup> See para 2.3 above.

<sup>3</sup> Social Work (Scotland) Act 1968, s 12A, inserted by s 55 of the National Health Service and Community Care Act 1990.

<sup>4</sup> S 2(1), extended to Scotland by the Chronically Sick and Disabled Persons (Scotland) Act 1972.

Section 65B of the Education (Scotland) Act 1980 places a local authority under a duty to consider a child's needs for educational and welfare services after he or she ceases to be of school age if the child has been assessed as having special needs.

Section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 provides that a local authority shall decide whether a person's needs call for the provision of welfare services to him or her.

In order to perform an assessment local authorities would first have to investigate. But there is a difference between an investigation to see whether services are needed and an investigation to establish whether a vulnerable adult is at risk of significant abuse or exploitation.

3.3 In our discussion paper we proposed that local authorities should be under a duty to investigate cases of suspected ill-treatment, lack of care or loss or damage to property of persons who are, or appear to be vulnerable, other than those in hospitals or health care institutions<sup>5</sup>. We also proposed that the Mental Welfare Commission should retain its existing duty (set out in paragraph 3.1 above) in relation to the welfare and property of the mentally disordered<sup>6</sup>. Finally, we proposed that no other public authority should be under a statutory duty to investigate such cases<sup>7</sup>.

3.4 The purpose of the inspection would be to ascertain whether any measures need to be taken to safeguard the welfare or financial affairs of a person who is, or appears to be, a vulnerable adult. We recommend in the rest of this part and in Part 4 that the local authority and the Mental Welfare Commission should have various powers to enable them to carry out their investigative duties. These powers include obtaining entry to premises, assessing adults thought to be vulnerable and inspecting documents. As a result of its investigations the authority or Commission may decide to pursue longer-term measures such as seeking the appointment of a guardian or a curator bonis or offering care services or applying for the removal of an abuser living with the adult. Emergency action by other agencies may also be required, for example the water authority shutting off the water to deal with a leak in the supply pipe to the house. The rest of this report is written on the basis that these remedies and measures will continue to be available.

3.5 Only one organisation disagreed in principle with our proposals. Refuge suggested that a system of "personal guardian solicitors" should investigate and follow up cases of suspected abuse. Such solicitors would practice from legal centres and would be funded by central government. They would also give vulnerable people information and advice about assistance available to them from central and local government and other sources. Solicitors in our view do have a valuable role to play in safeguarding the interests of vulnerable people, and law centres and similar organisations already give advice and assistance. However, local authorities and the Mental Welfare Commission are well placed to carry out the proposed investigative duty and we do not think a new publicly-funded investigative body should be set up. Creating a new investigative body would require much greater resources than extending the functions of the existing bodies. It would also be a step backwards to proliferate social work bodies. The Social Work (Scotland) Act 1968 created local authority social work departments in place of the many previously separate entities.

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<sup>5</sup> Proposal 2(a), para 2.15.

<sup>6</sup> Proposal 2(b), para 2.15.

<sup>7</sup> Proposal 2(c), para 2.15.

3.6 Many respondents disagreed with our proposal to exclude the local authority from investigating vulnerable adults in hospitals and health-care institutions. In our discussion paper we took the view that local authorities were, by and large, not involved in medical and health-care matters and that the Mental Welfare Commission had the expertise and authority to carry out investigations into such matters. Our proposal sought to avoid any duplication of functions. However, it was pointed out on consultation that, as a result of community care and the reorganisation of the National Health Service, many vulnerable people are in residential or nursing homes or out-stations of hospitals, sometimes with medical care provided or supervised by the NHS. These are often regarded as health-care institutions<sup>8</sup> from which the local authority would be excluded under our proposals. Many respondents thought that the care and treatment of vulnerable people in such places was a matter of public concern and that some public body should have a duty to investigate. Even in NHS hospitals the personal welfare or property of patients may give rise to complaints. For example, patients might be being financially exploited by their relatives and the hospital managers might be unwilling to tackle this. The Mental Welfare Commission's remit extends only to the mentally disordered (whether in the community or in hospital<sup>9</sup>) and it does not have the resources as presently constituted to extend its functions to the vulnerable or indeed to act as the primary investigating body in relation to the mentally disordered<sup>10</sup>. Respondents considered that there would be a considerable gap if the local authority could not investigate vulnerable adults in health-care institutions. There is a great deal of force in these points. On reconsideration we think it better to have some overlap between local authorities and the Mental Welfare Commission rather than that a gap should exist. We have already recommended that local authorities and the Commission should liaise with each other<sup>11</sup>. As far as patients in NHS hospitals and other health-care institutions are concerned local authorities should confine their investigations to areas where they have expertise - general care and welfare of patients and their property. The Code of Practice we recommend later should make it clear that any concerns about the medical treatment of vulnerable patients should be passed on to the Mental Welfare Commission or the health-care providers.

3.7 In our *Report on Incapable Adults* we recommended that investigations into matters of concern relating to the property and financial affairs of the mentally incapable should be undertaken by the Public Guardian<sup>12</sup>. This new post would be held by the Accountant of Court. The Public Guardian should have to liaise with the Mental Welfare Commission and the local authorities in relation to investigations and each body would be under a duty to pass on information to the others<sup>13</sup>. If these recommendations were implemented the role of the Public Guardian could be expanded to deal with the property and finances of vulnerable adults. Until then they should continue to be the responsibility of the local authorities and, for the mentally disordered, the Mental Welfare Commission.

3.8 Two organisations considered that other bodies or individuals who became aware of suspected abuse should be under a statutory duty to pass on information to the local

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<sup>8</sup> *White v Chief Adjudication Officer*, Times, 2 August 1993 (private nursing home regarded as a "hospital or similar institution" for income support purposes).

<sup>9</sup> The Secretary of State is to afford the Commission all necessary facilities for carrying out its functions in NHS hospitals; 1984 Act, s 5.

<sup>10</sup> See para 2.28 above.

<sup>11</sup> Recommendation 4, para 2.29.

<sup>12</sup> Para 2.41.

<sup>13</sup> Recommendation 9, para 2.45 and Recommendation 10, para 2.46.

authority or the Mental Welfare Commission. Mandatory reporting is a feature in some other jurisdictions, especially in the area of child abuse<sup>14</sup>. Most of those who would be subject to mandatory reporting would be public employees. We adhere to the view which we expressed in our discussion paper<sup>15</sup> that this issue is best dealt with in codes of practice or guidelines issued by the various professional bodies. Such codes of practice could also deal with confidentiality clauses in contracts of employment which prohibit employees from disclosing matters to third parties.

3.9 The Nithsdale Council of Voluntary Services thought that there was a need for an independent element in investigations of local authority establishments. An internal investigation might not be prosecuted rigorously enough and would not be seen by complainers as impartial. The Mental Welfare Commission also raised the issue of establishing an independent monitoring body like itself with functions in relation to those who are vulnerable but not mentally disordered. We do not think the establishment of a new standing body is justified. Local authorities are required to have procedures for dealing with complaints about the social work services they provide<sup>16</sup>. The Secretary of State has power to order an independent inquiry to be held into the exercise by a local authority of its social work functions<sup>17</sup>, and as a result of the findings to give directions to the local authority<sup>18</sup>. In the case of Moorheads Old Folks Home in Dumfries, which was mentioned by the Nithsdale Council of Voluntary Services in its response to us, a former director of social work from another authority conducted the enquiry.

3.10 The proposal in our discussion paper<sup>19</sup> that only the local authority and the Mental Welfare Commission should be under a statutory duty to investigate abuses of vulnerable people was criticised by several respondents. They pointed out that many other bodies have a statutory investigative function. For example, the police have a duty to investigate crimes and the Department of Social Security to investigate benefit fraud. We accept these points but our proposal was never intended to detract in any way from other existing statutory duties.

3.11 In our discussion paper we proposed that a local authority should be under a duty to investigate cases of suspected ill-treatment, lack of care or loss or damage to property of adults who are or appear to be vulnerable. We now think that a duty to enquire whether steps should be taken to safeguard the welfare or finances of vulnerable adults or suspected vulnerable adults would be more helpful to local authorities. Enquiries are likely to be more focused if their purpose is clear.

3.12 We recommend that:

**5. Without prejudice to the existing powers and duties of other persons:**

- (a) A local authority should be under a duty to enquire as to whether steps need to be taken to protect the welfare or property of adults who are, or whom it believes to be, vulnerable.**

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<sup>14</sup> Ontario, Child Welfare Act, RSO 1980 c66, s 49(2).

<sup>15</sup> Para 2.14.

<sup>16</sup> Social Work (Scotland) Act 1968, s 5B; added by s 52 of the NHS and Community Care Act 1990.

<sup>17</sup> 1968 Act, s 6A; added by s 54 of the 1990 Act.

<sup>18</sup> 1968 Act, s 5(1A); added by s 51 of the 1990 Act.

<sup>19</sup> Proposal 2(c), para 2.15.

**(b) The Mental Welfare Commission should retain its existing duty under section 3(2) of the Mental Health (Scotland) Act 1984 to investigate cases of suspected ill-treatment, deficiency in care or treatment, improper detention or loss or damage to property of persons who may be mentally disordered. It should also be entitled to enquire as to whether steps need to be taken to protect the welfare or property of adults who are, or it believes to be, vulnerable by reason of mental disorder.**

Clauses 3 and 4

The right to demand admission, warrants for forcible entry and court orders for the assessment of adults and inspection of records relating to them which we go on to recommend are all designed to assist local authorities and the Mental Welfare Commission in carrying out their investigative duties recommended above.

### **Right to demand admission**

3.13 Section 117(1) of the Mental Health (Scotland) Act 1984 provides:

"Where a mental health officer or a medical commissioner has reasonable cause to believe that a person suffering from mental disorder -

(a) has been or is being ill-treated, neglected or kept otherwise than under control, in any place; or

(b) being unable to care for himself, is living alone or uncared for in any place,

he may, on production of some duly authenticated document showing that he is so authorised, demand admission at all reasonable times and, if admission is not refused, may enter and inspect that place."

3.14 Admission may be demanded only to any place where there is reasonable cause to believe "a person suffering from mental disorder" is. The use of this phrase rather than the word "patient" (which means a person suffering or appearing to be suffering from mental disorder<sup>20</sup>) suggests that the right to demand admission is limited to those cases where an assessment of a person's mental capacity has already been made and he or she has been found to be mentally disordered. It would seem not to be available where there is only reasonable cause to believe that someone is suffering from mental disorder. In our discussion paper we suggested that the right to demand admission should be available in respect of those who were reasonably believed to be mentally disordered or vulnerable<sup>21</sup>.

3.15 The right to demand admission is restricted to a mental health officer of the local authority or a medical commissioner of the Mental Welfare Commission. These requirements may be too restrictive if an investigation has to be carried out as a matter of urgency. There could well be occasions where an investigation might have to be postponed because of the absence or prior commitments of those currently entitled to demand admission. On the other hand, there are dangers in permitting untrained and relatively

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<sup>20</sup> 1984 Act, s 125(1).

<sup>21</sup> Proposal 3(1)(a), para 2.22.

junior staff to deal with sensitive issues like demanding admission to dwellinghouses. In our discussion paper we suggested that the right to demand admission should be extended to medical officers and social work commissioners and officers of the Mental Welfare Commission<sup>22</sup>. There was no dissent on consultation, but the Association of Chief Police Officers in Scotland suggested that as the category of adults was being extended from the mentally disordered to the vulnerable then perhaps other properly qualified and trained members of the social work department besides mental health officers could be authorised. We are attracted to this suggestion and consider that the Secretary of State should have power, after consulting the local authorities, to make regulations specifying other authorised categories. As far as the Commission is concerned we now think that it should be left to that body to authorise a suitable commissioner or officer to carry out its functions.

3.16 In our discussion paper we proposed that the person demanding admission should continue to be duly authorised in writing<sup>23</sup>. A written authorisation should be available to show on request to the person dealing with the demand for admission and would serve to impress on him or her that the demand was a lawful one. In view of recent cases involving bogus social workers we suggested that the person demanding admission should be required to carry, and exhibit on request, an official identity card bearing a photograph<sup>24</sup>. On consultation several bodies considered that the written authorisation should always be exhibited before admission was demanded rather than if requested. We agree and consider that the form of the authorisation should be prescribed in order to provide a uniform and more easily recognisable document. The person demanding admission should also have to explain briefly the purpose of the visit.

3.17 In terms of section 117(1) of the 1984 Act a duly authorised person may demand admission "at all reasonable times". We doubted in our discussion paper whether any greater specification was necessary<sup>25</sup>. Two bodies thought that some clarification was needed, but we do not think it is possible to define what is a reasonable time. It depends too much on the circumstances. If the situation was extremely serious and urgent then a demand for admission in the middle of the night could well be regarded as reasonable. In most cases, however, demands outwith normal working hours would not be reasonable. One body suggested replacing "at all reasonable times" with "at any time considered reasonable by the person demanding admission in all the circumstances". We prefer an objective test as it provides some check on over-zealous investigators.

3.18 The right to demand admission is at present exercisable only by the authorised person. In our discussion paper we proposed that one other individual should be entitled to accompany the authorised person<sup>26</sup>. For example, a local authority mental health officer may need the medical expertise of a doctor. Moreover, in tense situations the authorised person may be glad of a colleague's presence. The Association of Scottish Police Superintendents and Strathclyde Regional Council Social Work Department both commented that the authorised person may need to be accompanied by more than one other person, for example, where there was a likelihood of violent behaviour. There is a balance to be struck between having insufficient people to carry out the duties and swamping the premises. We

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<sup>22</sup> Proposal 3(1), para 2.22.

<sup>23</sup> Proposal 3(1), para 2.22.

<sup>24</sup> Para 2.18.

<sup>25</sup> Para 2.19.

<sup>26</sup> Proposal 3(2), para 2.22.

now think that the number of accompanying people is best left to the discretion of the authorised person, supplemented by formal or informal guidance, rather than by setting down arbitrary limits in legislation.

3.19 In our discussion paper we proposed that a mental health officer should not have any right to demand admission to hospitals or other health-care institutions in line with our proposal to exclude the local authority's duty to investigate from such premises<sup>27</sup>. Those responding criticised the exclusion in both proposals. We came to the view earlier<sup>28</sup> that the local authority should have a duty to investigate matters of concern relating to vulnerable adults, wherever they are living. The right to demand admission should be in line with this duty.

3.20 On what grounds should authorised persons be entitled to demand admission? The existing grounds are that the authorised person has:

"reasonable cause to believe that a person suffering from mental disorder:

- (a) has been or is being ill-treated, neglected or kept otherwise than under control, in any place; or
- (b) being unable to care for himself, is living alone and uncared for in any place".

In our discussion paper we proposed widening the category of people to include those who were vulnerable<sup>29</sup> and this has already been considered in paragraphs 2.12 to 2.18. We also suggested deleting the words "kept otherwise than under control". These reflect an outdated attitude and anyway are superfluous. No objection was raised to this change. However, as a consequence of adopting a different formula for the investigative duty<sup>30</sup>, we now favour different grounds. Authorised persons should be entitled to demand admission to premises if they believe that it is necessary to inspect the premises and see the adult in order to pursue their enquiries. As stated in Recommendation 5 such enquiries would be directed to whether steps need to be taken in order to safeguard the welfare or property of an adult who is, or is reasonably believed to be, vulnerable.

3.21 The Mental Welfare Commission was of the view that the grounds for demanding admission should also refer to some significant risk to the adult or others. We are not in favour of this addition. At the early stages of an investigation it might not be possible to evaluate the level of harm being suffered by the vulnerable adult. Moreover, "significant" is an imprecise term. There is a danger that investigators would be inhibited by the fear that on hindsight their actions were not justified in the light of this additional criterion. In practice, the need to concentrate resources will restrict investigations to cases where vulnerable adults or others are thought to be at significant risk.

3.22 At present the Mental Welfare Commission's functions are restricted to the mentally disordered under the 1984 Act. In responding to our discussion paper the Commission commented that it should continue to limit its role to persons suffering from a mental

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<sup>27</sup> Proposal 3(3), para 2.22.

<sup>28</sup> Para 3.6 above.

<sup>29</sup> Proposal 3(1)(a), para 2.22.

<sup>30</sup> Recommendation 5, para 3.12.

disorder and should not become involved with other types of vulnerable people. We agree with this view; a radical extension of the Commission's remit would require considerable expansion of the organisation. Vulnerable adults who are not mentally disordered would, under our recommendations, be dealt with by local authorities. Local authorities could also deal with vulnerable adults who were mentally disordered and to that extent their functions would overlap with the Commission's. Our previous recommendation<sup>31</sup> that the local authority should have the primary role but that each body should collaborate with the other should prevent duplication of effort.

3.23 We recommend that:

6. (1) **A mental health officer or other prescribed officer of the local authority should be entitled to demand admission to premises if he or she reasonably believes that entry to the premises would assist him or her with the enquiries under Recommendation 5. A commissioner or officer of the Mental Welfare Commission should be similarly entitled but only in relation to adults who are, or who are reasonably believed to be, mentally disordered.**
- (2) **The person demanding admission should be required to show written authority from the Commission or local authority as the case may be. Admission may be demanded at all reasonable times and the person should be entitled to be accompanied by one or more other individuals.**
- (3) **The Secretary of State should have power to make regulations prescribing other categories of officers of the local authority for the purpose of paragraph (1) above and the form of written authority referred to in paragraph (2) above.**
- (4) **This power to demand admission should be in addition to any other statutory powers under the Social Work (Scotland) Act 1968 or other legislation, but should replace the existing powers of mental health officers and medical commissioners under section 117 of the Mental Health (Scotland) Act 1984.**

Clauses 5(1), (2) and (5), 17(a) and 18(3)

### **Forcible entry**

3.24 The duly authorised person from the local authority or Mental Welfare Commission may be refused admission either by the vulnerable adult himself or herself or by those looking after the adult. Powers of forcible entry are therefore necessary. Section 117(2) of the 1984 Act empowers a justice of the peace (defined to include a sheriff or a stipendiary magistrate<sup>32</sup>) to issue a warrant authorising any constable named therein to enter specified premises if need be by force. Sworn information in writing must be submitted to the justice by a mental health officer or medical commissioner to the effect that admission in pursuance

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<sup>31</sup> Recommendation 4, para 2.29.

<sup>32</sup> S 117(7)(a).

of subsection (1)<sup>33</sup> has been demanded and refused or refusal is apprehended. The application for a warrant is not intimated to the suspected mentally disordered person or to the occupier of the premises. The constable is accompanied by a medical practitioner<sup>34</sup>.

3.25 As we noted in our discussion paper the existing provision is open to many criticisms<sup>35</sup>. First, the warrant authorises the removal of the person "if it appears proper so to do". We recommend later<sup>36</sup> that removal should be a remedy granted by a sheriff (or, in urgent cases where no sheriff is available, a justice) after proper consideration of the factors concerned. Removal should not be incidental to a warrant for entry and left to the discretion of those carrying out the warrant. Of course there will be situations where prompt removal is justified. In these cases an application for removal could be made to the sheriff which could be granted forthwith if the circumstances justified it. In the case of a mentally disordered person there is an alternative - an emergency recommendation for admission to hospital made by a doctor under section 24 of the 1984 Act.

3.26 A warrant under section 117(2) of the 1984 Act can be granted only where there is a right to demand admission to the premises in question. We recommend earlier that the right of persons authorised by the local authority<sup>37</sup> to demand admission should be extended to all premises (including hospitals and health care institutions) where vulnerable adults are situated<sup>38</sup>. If there is a right to demand admission it should be capable of being enforced by means of a warrant.

3.27 A warrant may be granted at present if refusal is apprehended and our discussion paper proposed no change in this. Three bodies considered that a warrant should be applied for only if an attempt had been made to gain access first. We consider that this should certainly be good practice in the majority of cases, but situations may arise where there is an urgent need to gain entry because of the risk of serious harm to the vulnerable adult if action is delayed. There is also a danger that a prior demand for admission might lead to the vulnerable adult being moved to other unknown premises. The Law Society thought that a warrant should be available on the ground of an apprehended refusal only if a person other than the vulnerable adult was likely to refuse entry. Where the vulnerable adult is being looked after by others it would be difficult to decide whether the apprehended refusal was likely to come from the adult or the carers. Where the adult lived alone a prior demand for admission ought to be made, but in certain cases action may need to be taken urgently. For these reasons we do not recommend any change to the warrant procedure in respect of apprehended refusals. The fact of refusal and the circumstances in which admission was refused should be disclosed in the application so that they can be taken into account in deciding whether to grant the warrant.

3.28 The warrant at present may be granted by a justice of the peace, a sheriff (including a temporary or honorary sheriff) or a stipendiary magistrate. The granting of a warrant for forcible entry requires the exercise of discretion after evaluating the information supplied by the applicant in the application and any further information supplied orally when the

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<sup>33</sup> See para 3.13 above.

<sup>34</sup> S 117(5).

<sup>35</sup> Paras 2.27 to 2.34.

<sup>36</sup> Recommendation 11, para 4.35.

<sup>37</sup> The Mental Welfare Commission is entitled to enter a hospital, interview mentally disordered patients and examine them in private, 1984 Act, s 3.

<sup>38</sup> Recommendation 6(1), para 3.23.

applicant appears personally before the justice, sheriff or magistrate. In our discussion paper we expressed the view that this was a task for which sheriffs and magistrates were best fitted<sup>39</sup>, but asked for views as to whether justices of the peace should continue to be entitled to grant warrants<sup>40</sup>.

3.29 The responses indicated that, although many bodies were opposed in principle to warrants being granted by justices, it would be virtually impossible in practice to rely on sheriffs or stipendiary magistrates alone. There are some six or so stipendiary magistrates in the whole of Scotland and they all sit in Glasgow District Court. Sheriffs (even honorary or temporary sheriffs) are not always readily available outwith normal working hours, especially in rural areas. As the Mental Welfare Commission pointed out, emergency situations often arise at awkward times. In view of these responses we favour a solution along the following lines. Generally only sheriffs should grant a warrant. However, if despite reasonable efforts having been made, a sheriff is not available then an application could be made to a justice of the peace. The applicant should have to satisfy the justice that delaying until the services of a sheriff can be obtained would be likely to be prejudicial to the adult.

3.30 In our discussion paper we criticised the present procedure on the ground that the warrant has an indefinite life<sup>41</sup>. Once granted it continues in effect and may be used at anytime in the future. Indeed it may not be used at all, but its existence may serve to strengthen the applicant authority's position in dealing with the adult or the occupier of the premises. A similar criticism was made of warrants granted in respect of children under section 37(2) of the Social Work (Scotland) Act 1968<sup>42</sup>. The Children (Scotland) Act 1995 now requires a child protection order granted by a sheriff or an authorisation from a justice of the peace to be implemented within a specified period<sup>43</sup>. In our discussion paper we proposed that a warrant should cease to have effect unless used within 72 hours of its being granted<sup>44</sup>. There was no dissent on consultation but one body queried whether the time limit applied only to the entry or whether all the other tasks to be carried out after entry also had to be completed within the 72 hours. Although that body favoured the former solution we think that the warrant as a whole should cease to be effective 72 hours after granting otherwise there would have to be a further time limit. A 72 hour life for the warrant would also enable a return visit to be paid within that period if necessary.

3.31 Two organisations queried whether a fresh warrant could be obtained if for any reason it proved impossible to execute the original warrant. Clearly this should be possible. On the other hand, an applicant who has been refused a warrant should generally not be entitled to apply to another sheriff or justice. Unless there had been a material change in circumstances the second application would not be made in good faith. Another exception would be where a justice refused a warrant on the ground that the application could be delayed until a sheriff was available.

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<sup>39</sup> Para 2.32.

<sup>40</sup> Proposal 5(a), para 2.35.

<sup>41</sup> Para 2.29.

<sup>42</sup> *The Report of the Inquiry into the Removal of Children from Orkney in February 1991* by Lord Clyde, para 16.2.

<sup>43</sup> Child protection order (24 hours) s 60(1); authorisation (12 hours) s 61(4).

<sup>44</sup> Proposal 5(d), para 2.35.

3.32 At present a medical practitioner accompanies the constable who executes the warrant. But, as we pointed out in our discussion paper<sup>45</sup>, the purpose of the visit may cover more than medical matters. The local authority or Mental Welfare Commission has statutory duties to perform and the person authorised by the relevant body should be present. We proposed that the authorised person should always be present but may be accompanied by one other person<sup>46</sup>. The Association of Chief Police Officers in Scotland thought that there might be situations where more than one other person was necessary. We think that the number of accompanying people should be left to the discretion of the authorised person.

3.33 Warrants for forcible entry in relation to mentally disordered persons must name the constable who is to execute the warrant and who is to be accompanied by a medical practitioner<sup>47</sup>. Naming the constable creates practical difficulties. Because of police duty rotas or sudden illness it may not be possible to obtain the services of the named constable at a time convenient to the others involved. In our discussion paper we considered that the constable need not be named and proposed that the warrant should be addressed to any constable of the relevant police service<sup>48</sup>. There was general agreement with this. The Law Society and the Scottish Police Superintendents suggested that more than one constable may be needed. We now consider that the warrant should not specify the number of constables, which should be a matter for discussion between the local police and the authorised person prior to the execution of the warrant. The role of the police would vary depending on the enquiries to be made. In some cases it would be to ensure that the authorised person and others are able to enter the premises and carry out their duties. But where criminal activities were suspected the police might take a more active part in interviewing people and inspecting the premises.

3.34 The applicant for the warrant has to swear the information supplied in support of the application. In our discussion paper we doubted whether swearing a statement was any greater guarantee of its accuracy than a simple signed statement<sup>49</sup>. We suggested that the application should have to be in writing but could be supplemented by further information presented orally. The applicant should have to appear personally before the sheriff or justice so that he or she could be questioned. No comments were made on consultation and we see no reason to change our views.

3.35 We recommend that:

7. (1) **A warrant for forcible entry to specified premises where a vulnerable adult, or a suspected vulnerable adult, is should be capable of being granted if a person from the local authority entitled to demand admission under Recommendation 6 has been refused admission or a refusal is apprehended.**
- (2) **A sheriff (including an honorary or a temporary sheriff) should be empowered to grant a warrant. A justice of the peace should be similarly**

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<sup>45</sup> Para 2.30.

<sup>46</sup> Proposal 5(e), para 2.35.

<sup>47</sup> 1984 Act, s 117(2).

<sup>48</sup> Proposal 5(a), para 2.35.

<sup>49</sup> Para 2.34.

empowered but only if a sheriff is not reasonably available and delaying until a sheriff is available would be likely to be prejudicial to the adult.

(3) The application should be made in writing signed by a duly authorised person from the local authority. It should no longer be a requirement that the applicant swears to the truth of the information in the application. The applicant should have to appear personally before the sheriff or justice dealing with the application.

(4) A warrant should authorise the police to take such steps (including the use of reasonable force) as are necessary to ensure that a duly authorised person from the local authority and those accompanying that person can enter and carry out their functions detailed in Recommendation 8.

(5) A warrant should cease to be effective 72 hours after it was granted.

(6) Paragraphs (1) to (5) above should apply to a duly authorised person from the Mental Welfare Commission but only in relation to a mentally disordered adult or a suspected mentally disordered adult. They should replace the existing provisions for forcible entry in section 117 of the Mental Health (Scotland) Act 1984.

Clauses 5(3), (4) and 17(a)

### **Powers after entry**

3.36 Section 117(1) of the 1984 Act merely provides that after demanding and gaining admission the duly authorised person may inspect the premises. After forcible entry in terms of a warrant there is no explicit right to inspect the premises or see the mentally disordered adult, although this might be implied from the power to remove the adult "if it appears proper so to do"<sup>50</sup>. Where the person (entering after demand or under a warrant) is a medical commissioner from the Mental Welfare Commission he or she may also interview or examine in private any mentally disordered individual there<sup>51</sup>. In our discussion paper we criticised the lack of other powers<sup>52</sup>. We proposed that every authorised person should be entitled to see the vulnerable adult or suspected vulnerable adult, to have a private interview with the adult and, where a doctor is the authorised person or accompanies the authorised person, to examine the adult in private<sup>53</sup>. We considered that having express statutory powers would be of assistance in enabling authorised people to carry out their duties. We also asked whether any other rights, such as the right to inspect records, might usefully be conferred.

3.37 There was general agreement with our proposed powers. The Association of Chief Police Officers in Scotland thought that listing powers might by implication exclude other useful powers. We consider that powers at this stage should be limited; the authorised person should not be permitted to do whatever he or she thinks fit once entry has been

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<sup>50</sup> 1984 Act, s 117(2).

<sup>51</sup> 1984 Act, s 3(5).

<sup>52</sup> Para 2.23.

<sup>53</sup> Proposal 4, para 2.24; Proposal 5(f), para 2.35.

gained to the premises. At present a mental health officer's only express power is to inspect the premises after gaining access following a demand. This is clearly insufficient. The Borders Health Board and the Borders Regional Council Social Work Department both queried whether it was only the part of the premises relating to the issue under investigation which the authorised person was entitled to investigate. In our view the legislation should refer only to the premises, leaving further detail to the Code of Practice or informal guidance. Much would depend on the circumstances and the type of premises being investigated so that it is not possible to lay down rigid rules in advance. The Law Society raised concerns about interviews with, and examinations of, vulnerable adults. These should in its opinion take place only with the consent of the adult concerned. Enable took a similar view in relation to consent to examinations. We have dealt with objections to examinations in Part 2 where we recommend that such steps should be capable of being carried out in the face of objections by the adult only if those carrying out the examination reasonably believe that the adult is mentally disordered or subject to undue pressure<sup>54</sup>. The issue of consent does not arise with interviews since objectors can simply stay silent. Clause 6(1) of the draft Bill makes it clear that they are not required to answer any question. Concerns were also raised about the duration and location of any interview or examination and whether an "appropriate adult" should also be present. Any interview under the right of entry should take place on the premises. Its duration should be left to the discretion of the interviewer supplemented by guidance under the Code of Practice or otherwise. While it would be better for an "appropriate adult" to be present we doubt whether this would be practical in all cases since the interview would not be pre-arranged. Moreover, the carer would normally be an appropriate adult, but would have to be excluded if suspected of abuse or providing inadequate care.

3.38 We also asked whether any other rights apart from inspection of the premises and seeing, interviewing and examining the vulnerable adult could usefully be conferred. The right to inspect records was suggested as a possible example. We deal with inspection of, and searching for, relevant records in Part 4. The Scottish Association for Mental Health suggested that the investigator might have a right to interview other adults in the same premises. We think this could be useful.

3.39 We recommend that:

8. (1) **The duly authorised person from the local authority and other persons (including any police constable) who have gained admission to premises under Recommendations 6 or 7 above should be entitled:**
  - (a) **to inspect the premises,**
  - (b) **to have access to the vulnerable adult or suspected vulnerable adult and to other adults present,**
  - (c) **to interview in private any adult on the premises, and**

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<sup>54</sup> Para 2.23 and Recommendation 3, para 2.26.

**(d) if the duly authorised person or other person is a medical practitioner, to examine in private any adult on the premises who is or appears to be vulnerable.**

**(2) Where the duly authorised person is from the Mental Welfare Commission only an adult who is, or appears to be, mentally disordered should be liable to be examined.**

Clause 6

## Part 4 Assessment, Removal and Other Orders

### Introduction

4.1 In this Part we discuss our recommendations in relation to the examination and assessment of vulnerable adults, the inspection of records concerning them, and their removal from their homes. We also deal with the removal of those living with vulnerable adults who have threatened or abused the vulnerable adults.

### Orders for assessment of vulnerable adults

4.2 At present a warrant may be granted to a constable under section 117(2) of the 1984 Act. The constable, accompanied by a medical practitioner, may enter the premises (by force if necessary) and remove to a place of safety any person suffering from mental disorder with a view to making arrangements for the person's admission to hospital, guardianship or other arrangements for treatment or care. This warrant procedure may be initiated by the local authority or the Mental Welfare Commission. We have recommended changes to this procedure so that those entering the premises would be entitled to interview the adult in private and an accompanying medical practitioner would be able to examine the adult in private<sup>1</sup>. Removal of the adult would however require separate authorisation from a sheriff or justice granted after consideration of an application<sup>2</sup>. The Mental Welfare Commission has existing statutory powers to interview mentally disordered persons in private. A medical commissioner or medical officer of the Commission may carry out a private examination and inspect any medical records<sup>3</sup>. Finally, section 24 of the 1984 Act provides that a medical practitioner may, after carrying out an examination, make an emergency recommendation in respect of a person stating that by reason of mental disorder it is urgently necessary for his or her health or safety or for the protection of other persons that the person should be admitted to hospital. This recommendation authorises detention for not more than 72 hours during which period further assessments and examinations may be carried out.

4.3 Even with the improvements we recommend, we think that there is still a need for assessment and examination orders. Any examination or interview after a demand for admission or under the warrant procedure is likely to be somewhat rushed and restricted. Lengthier and more thorough assessments may be necessary. If such assessments cannot be carried out voluntarily with the agreement of the vulnerable adult and those looking after him or her, then compulsory measures may be necessary. A local authority might also wish to carry out an examination or assessment without first having to conduct an inspection of the premises. We note that the Children (Scotland) Act 1995 contains provisions entitling a local authority to apply to the sheriff for a child assessment order along similar lines<sup>4</sup>. In our discussion paper we proposed that the local authority or Mental Welfare Commission

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<sup>1</sup> Recommendation 8, para 3.39.

<sup>2</sup> Recommendation 11, para 4.35.

<sup>3</sup> 1984 Act, s 3.

<sup>4</sup> S 55; not yet in force, expected commencement date April 1997.

should be entitled to apply to the sheriff for an assessment order in relation to a vulnerable adult who appeared to be in need of care or protection<sup>5</sup>. The application would be intimated to the vulnerable adult who would be given an opportunity to make representations. Any assessment and examination would be either carried out at home or the adult would be taken during the day to another place for assessment.

4.4 There was general agreement with our proposals. The main concern was whether it was realistic to have compulsory assessment while the adult remained living at home. We consider that if adults are to be assessed and examined in the face of objections by them or by those caring for them then it would be less traumatic to do so at home rather than in hospital after forcible removal there. Objections by vulnerable adults to actions concerning them have already been dealt with in Part 2. Clause 7(2)(a) of the draft Bill makes it clear that an adult is not required to answer any question. While the court should not be empowered to override the objections of a vulnerable adult if capable of making a free decision, others, such as carers, should not have a veto. The court should have power on application to make any ancillary orders necessary to ensure that the assessment can be carried out. For example, a doctor wishing to examine an adult might be refused entry to the adult's home by carers. Another use of an ancillary order would be to authorise an overnight stay where the adult had to be taken a considerable distance from home for the assessment. Enable considered that the purpose of any proposed assessment should be made clear. Depending on the circumstances, an assessment might cover the vulnerable adult's medical or care needs or whether protective or supportive measures were necessary.

4.5 Some respondents considered that a vulnerable adult should be given an effective opportunity to oppose the granting of the assessment order. A sufficient time after the intimation of the application should be given to enable the vulnerable adult to lodge objections and arrange representation. Intimation should also be made to the adult's nearest relative and any known guardian or lay advocate of the adult. The adult should be permitted to be accompanied at any hearing by a friend or lay advocate. We are generally in favour of these suggestions. In our *Report on Incapable Adults* we recommended that the sheriff hearing any application relating to an incapable adult should be required to consider whether a safeguarder should be appointed<sup>6</sup>. This recommendation should, we think, be extended to applications relating to vulnerable adults. Lay advocates are informal appointments and span a range of functions. It would be difficult to describe them with sufficient precision for the purpose of primary or subordinate legislation. We consider that Rules of Court should empower the sheriff to order intimation to other appropriate people in addition to the adult, nearest relative and any guardian. Being entitled to have "a friend" present at any hearing should be sufficient.

4.6 We proposed in our discussion paper that an assessment order should last for seven days, but should be capable of being extended on subsequent application<sup>7</sup>. Enable considered that the sheriff should, when granting the order, be empowered to fix a shorter period than seven days. We agree, but do not think that the sheriff should have power to grant an order for more than seven days initially. The seven day period should start to run not on the granting of the order but on a date specified in the order itself to suit the

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<sup>5</sup> Proposal 6, para 2.42.

<sup>6</sup> Recommendation 6, para 2.36.

<sup>7</sup> Proposal 6(3), para 2.42.

convenience of those involved in the assessment process. If an extension was necessary a further application for a new order should be made.

4.7 There may be a need for an urgent assessment or examination. In this case we think that the sheriff should have power to grant the order without prior intimation of the application to the vulnerable adult. Such a power already exists for examinations in relation to infectious diseases<sup>8</sup>.

4.8 We recommend that:

9. (1) **The sheriff should be empowered, on an application by the local authority, to grant an order authorising a private interview and a private examination by a doctor of an adult reasonably believed to be vulnerable in order to assess the adult's medical or care needs, or whether services or protective measures are necessary. The Mental Welfare Commission should be entitled to apply but only in relation to adults reasonably believed to be mentally disordered.**
- (2) **Rules of Court should provide for intimation of the application to the adult, the adult's nearest relative and any other person thought appropriate by the sheriff. All those receiving intimation should be given an opportunity of making representations.**
- (3) **At any hearing the adult should be permitted to be accompanied by a friend. The sheriff should consider whether to appoint a safeguarder to the adult.**
- (4) **Before granting the order the sheriff should have to be satisfied that there is reasonable cause to believe that the adult is vulnerable and that the examination or interview will assist the applicant with its enquiries.**
- (5) **An order should last for a specified period of not more than seven days. The period should start on a date specified in the order.**
- (6) **Those conducting the assessment should have power to interview (and in the case of a doctor examine) the adult in private.**
- (7) **The sheriff should have power on granting the order or subsequently to make any ancillary order required to make the principal order effective.**
- (8) **The sheriff may dispense with intimation and grant the order forthwith but only if satisfied that the delay if the normal procedure were to be followed would be prejudicial to the adult.**

Clause 7

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<sup>8</sup> Health Services and Public Health Act 1968, s 72.

## Orders to inspect documents

4.9 The Mental Welfare Commission has a general power in pursuance of its protective functions to require the production of medical records to a medical commissioner or medical officer for inspection<sup>9</sup>. The Commission is also to be afforded all facilities in relation to its functions by the Secretary of State (as regards patients in hospitals other than private hospitals), local authorities and guardians appointed under the 1984 Act<sup>10</sup>. Finally, the Commission in the case of any enquiry into the welfare or finances of the mentally disordered may require people to attend to give evidence on oath. Failure to attend is an offence punishable by a fine<sup>11</sup>. These powers are available only in relation to those who may be suffering from mental disorder.

4.10 Under section 6 of the Social Work (Scotland) Act 1968 a person authorised by the Secretary of State has extensive investigative powers in relation to, among others, residential establishments provided by a local authority or a voluntary organisation. The person may inspect records and obtain information either at the establishment or at the offices of the local authority or voluntary organisation. Medical records may be examined only by a doctor. There are similar powers in relation to nursing homes registered under the Nursing Homes Registration (Scotland) Act 1938, the powers being exercisable by a person authorised by the Health Board<sup>12</sup>.

4.11 We have identified a number of gaps in the powers set out above. First, no powers exist in relation to vulnerable adults living alone or in domestic settings unless they are also mentally disordered. A local authority conducting an investigation into financial exploitation might find personal financial documents very helpful. Medical records held by the adult's general practitioner could also throw light on whether the adult had been physically abused. Secondly, the Mental Welfare Commission has no direct right of access to records or documents other than medical records where such material is not held by a hospital, a local authority or a guardian. Thirdly, inspection of a nursing home's records is limited to records required to be kept under the 1938 Act. These contain mainly medical and personal details and would not include information relating to a patient's property or finances whilst resident in the home.

4.12 In our discussion paper we looked at the powers that persons had after gaining access to premises (either on demand or by virtue of a warrant), and suggested that the right to inspect records might be a useful addition<sup>13</sup>. Most of those responding were in favour of the right to inspect records. Strathclyde Regional Council Social Work Department commented that new powers were necessary if a local authority was to protect property properly, and that gaining access to financial records and accounts was difficult at present. However, concerns were expressed about medical records and uncontrolled access to records. We share these concerns. A person who gains entry to premises after demanding admission or forcible entry may request access to records and documents and this may be acceded to. Failure to produce records voluntarily should not amount to an offence. If the

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<sup>9</sup> 1984 Act, s 3(6).

<sup>10</sup> 1984 Act s 5, extended to local authorities providing after-care services for patients subject to community care orders by the Mental Health (Patients in the Community) Act 1995, Sch 2, para 2.

<sup>11</sup> 1984 Act, s 4.

<sup>12</sup> Nursing Homes Registration (Scotland) Regulations 1990 (SI 1990/1310), Regulation 11, made under s 3A of the Nursing Homes Registration (Scotland) Act 1938.

<sup>13</sup> Proposal 4, para 2.24.

inspector wished to see or search for documents that had not been produced voluntarily he or she should have to obtain authority from some independent body on cause being shown. We are not in favour of giving local authorities the power, which the Mental Welfare Commission enjoys, to call people to give evidence on oath on pain of a fine.

4.13 We are attracted by the solution adopted by section 18 of the Proceeds of Crime (Scotland) Act 1995<sup>14</sup> in relation to investigations of suspected drug trafficking. This empowers the sheriff to grant an order for material to be made available to the investigator if satisfied (among other things) that it would be of substantial value to the investigation. Our scheme, modelled on section 18, is as follows:

- (1) The local authority (or the Mental Welfare Commission) could apply to the sheriff for an order authorising an official of the applicant body to inspect specified material (or specified types of material) held at specified premises. The application should not be intimated to the holder of the material.
- (2) The sheriff may grant the order if satisfied that there are reasonable grounds for believing the adult to be vulnerable and that the material is likely to be of substantial value to the investigation.
- (3) "Material" should include any document, record or information belonging to or relating to the adult.
- (4) Only a doctor should have access to medical records - records prepared by a doctor who is or was treating the vulnerable adult.
- (5) Material subject to legal privilege should not be accessed<sup>15</sup> if such privilege is claimed.

The application need not be tied to an inspection of premises under our earlier recommendations. Relevant records may be held at other premises or the investigation may be concerned with financial exploitation rather than ill-treatment.

4.14 Section 19 of the Proceeds of Crime (Scotland) Act 1995<sup>16</sup> deals with warrants for searches of premises in order to obtain material. We think searches are necessary but the power to search should be exercised sparingly. It should not be necessary to have to apply for an additional search warrant. An inspection order should authorise the official to demand the production of documents for inspection and it should be an offence for any person other than the vulnerable adult to refuse such a demand. If the holder of the documents refuses to comply or there is no-one to ask then the official should be entitled, by virtue of the inspection order itself, to carry out a search for relevant documents. Where the vulnerable adult objected the official could proceed provided he or she reasonably believed that the objection should be disregarded because of the adult's mental disorder or being subjected to undue pressure. These powers should be in addition to the powers of the police

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<sup>14</sup> Formerly s 38 of the Criminal Justice (Scotland) Act 1987.

<sup>15</sup> In *R v Central Criminal Court ex p Francis and Francis* [1989]AC 346 the House of Lords held, in construing a similar provision in the Drug Trafficking Offences Act 1986, that documents held with the intention of furthering a criminal purpose lost their privilege.

<sup>16</sup> Formerly s 39 of the Criminal Justice (Scotland) Act 1987.

to apply for search and other warrants where the vulnerable adult appears to be the victim of a crime.

4.15 We recommend that:

**10. (1) Where documents, records or accounts belonging to or relating to the vulnerable adult are not produced voluntarily, inspection of such material should require an order to that effect from a sheriff. An application by the local authority should be made to a sheriff who should have power to grant an order for a duly authorised person to inspect (and if necessary search for) specified material or material of a specified class if satisfied that there is reasonable cause to believe that the adult is vulnerable and that the material is likely to be of substantial value to the investigation. Only a doctor should be allowed to inspect medical records. The premises in which inspection and search are authorised should have to be specified in the order.**

**(2) The Mental Welfare Commission and persons authorised by it should have the above functions, but only in relation to adults who are, or who are reasonably believed to be, mentally disordered.**

Clauses 8 and 18(1)

### **Orders for removal of vulnerable adults**

4.16 Section 65 of the Social Work (Scotland) Act 1968 empowers a local authority to remove persons from a residential or other establishment providing personal care and support. The local authority may so remove if the establishment is being carried on without being registered or after the authority has given notice of intention to cancel the registration. Where the establishment is registrable with the Secretary of State, the Secretary of State may in like circumstances direct the local authority to remove persons. In urgent cases the Secretary of State may direct the local authority to remove persons from any establishment<sup>17</sup>. In either case the local authority is bound to comply with the Secretary of State's directions<sup>18</sup>. The criticisms of, and recommendations made in relation to, powers of removal in the remainder of this section do not concern these powers of the local authority or the Secretary of State.

4.17 At present, a justice of the peace<sup>19</sup>, after consideration of sworn information in writing by a local authority mental health officer or a medical commissioner of the Mental Welfare Commission, may issue a warrant under section 117(2) of the 1984 Act authorising a constable named therein to enter the premises where a person suffering from mental disorder is and:

"to remove, if it appears proper so to do, any person suffering from mental disorder to whom subsection (1) of this section applies to a place of safety".

Subsection (1) applies to a person who:

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<sup>17</sup> 1968 Act, s 65(2).

<sup>18</sup> 1968 Act, s 65(1).

<sup>19</sup> A justice includes a sheriff or stipendiary magistrate; 1984 Act, s 117(7).

"(a) has been or is being ill-treated, neglected or kept otherwise than under control, in any place; or

(b) being unable to care for himself, is living alone or uncared for in any place,"

A person removed to a place of safety may be detained there for a period not exceeding 72 hours<sup>20</sup>. The object of removal is to allow the making of an application for detention in hospital under section 18 of the 1984 Act, an emergency recommendation for detention in hospital by a medical practitioner under section 24, a guardianship application or other arrangements for the person's treatment or care.

4.18 Section 47 of the National Assistance Act 1948 empowers a sheriff to order the removal from home to suitable premises and detention there of persons in need of care and attention. Persons liable to be removed are those who:

"(a) are suffering from grave chronic disease or, being aged, infirm or physically incapacitated, are living in insanitary conditions, and

(b) are unable to devote to themselves, and are not receiving from other persons, proper care and attention."

4.19 The designated medical officer certifies to the local authority concerned that it is necessary to remove the person in his or her own interests or for preventing injury to the health of, or serious nuisance to, others. The local authority then applies to the sheriff for a removal order. At least seven days notice of the application to the sheriff has to be given to the person sought to be removed. The order lasts for up to three months but may be renewed. The 1948 Act provides for a right of review, but only after the order has been in force for at least six weeks.

4.20 An expedited procedure is available under the National Assistance (Amendment) Act 1951. We understand that most removals are carried out under the expedited procedure rather than under the 1948 Act. The designated medical officer and another medical practitioner have to certify that in the interests of the person sought to be removed he or she should be removed without delay. An application to the sheriff is then made by the local authority or the medical officer on its behalf. The sheriff has power to dispense with intimation of the application to the person in question and usually does so. An order authorises removal and detention for up to three weeks but it may be renewed on an application requiring seven clear days notice to the removed person. There is no right of review of a removal order under the expedited procedure.

4.21 Section 47 of the National Assistance Act 1948 and the National Assistance (Amendment) Act 1951 are not confined to the mentally disordered. However, grave chronic disease is taken to include those suffering from dementia or mental illness. In England and Wales it has been estimated that up to half the people removed under the 1948 and 1951 Acts are mentally disordered and some of the rest may well be on the border line<sup>21</sup>. The 1951 Act can be, and has been, used to remove people to psychiatric hospitals who should have been the subject of an application for detention under the 1984 Act. The Mental

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<sup>20</sup> S 117(4).

<sup>21</sup> Law Commission Consultation Paper No 130, *Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection* (1993), para 2.10.

Welfare Commission has commented adversely on this practice<sup>22</sup> because it deprives the patients of the protection of the 1984 Act and the protection of the Commission.

4.22 In our discussion paper we proposed that the above statutory provisions for removal should be replaced by a new procedure<sup>23</sup>. This procedure would involve a sheriff granting, on application, an order for removal. There was no dissent on consultation from the general thrust of our proposals and we turn now to discuss the details.

4.23 **Removal of vulnerable adults?** Our proposed order authorising the removal of adults from their homes was restricted to mentally disordered adults or those suspected of being mentally disordered. Three organisations queried the exclusion of the merely vulnerable. Enable thought that vulnerable adults were in more need of this protective provision than the mentally disordered because the 1984 Act would not apply to them, but it suggested that a vulnerable adult should be able to be removed against his or her wishes only if the adult was mentally disordered or was unduly influenced by others. The Social Work Department of Highland Regional Council thought that persons vulnerable because of chronic ill-health or neglect should be capable of being compulsorily removed. We agree that there would be a gap in the protective provisions if vulnerable adults could not be removed, but we concluded in Part 2 that measures (other than obtaining entry to premises or making enquiries) should not be taken if an adult objected unless he or she was considered to be mentally disordered or subject to undue pressure<sup>24</sup>. In our view free decisions made by vulnerable adults who are not mentally disordered to stay in their own homes should be respected. The existing statutory provisions on removal date from an era when institutional care was the main method of looking after those who for whatever reason were not receiving proper care and attention. Nowadays, the emphasis is on community care; supporting people in their own homes so far as possible with appropriate services. Powers exist under sections 40 and 47 of the Public Health (Scotland) Act 1897 to deal with filthy houses without removing the occupants for extended periods. Abuse and exploitation may be prevented otherwise than by removal of the adult and these measures should be tried first. In some cases forcible removal from home causes greater trauma and distress to the adult than the continuation of an unsatisfactory state of affairs at home.

4.24 **Who may apply?** In our discussion paper we proposed that an application for removal of a mentally disordered adult (or one suspected of being in that condition) could be made by the local authority or the Mental Welfare Commission<sup>25</sup>. For reasons already mentioned<sup>26</sup> we think that applications in relation to adults who are vulnerable on grounds other than mental disorder should be made only by the local authority.

4.25 **Who should grant an order?** At present a warrant for forcible entry which may lead to removal may be granted by a justice of the peace, a sheriff or a stipendiary magistrate. Removal under the National Assistance legislation has to be authorised by a sheriff. In our discussion paper we asked whether an order for removal should also be capable of being granted by a justice of the peace<sup>27</sup>. Most of those who responded were not in favour of

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<sup>22</sup> *Annual Report 1987*, paras 10.16 and 10.17.

<sup>23</sup> Proposal 7, para 2.55.

<sup>24</sup> Paras 2.19 to 2.26, and Recommendation 3.

<sup>25</sup> Proposal 7(1), para 2.55.

<sup>26</sup> Para 3.22 above.

<sup>27</sup> Proposal 7(2).

justices being used, but some respondents pointed out that sheriffs were often unavailable outwith normal working hours. In relation to warrants for forcible entry we have recommended that a justice should be used only where a sheriff is not available and the delay in waiting until a sheriff is available would prejudice the adult<sup>28</sup>. Forcible entry to a dwellinghouse is a less serious invasion of rights than forcible removal of people from their homes. Under our recommendations the adult sought to be removed would generally be given an opportunity to oppose the granting of a removal order, although in urgent cases intimation of the application to the adult might be dispensed with and the application granted forthwith. We think that a justice of the peace should grant the order only where there is such a degree of urgency that intimation of the application is to be dispensed with and no sheriff is available. We do not favour justices of the peace dealing with opposed applications. The Code of Practice that we recommend later should make it clear to local authorities that applying for intimation to be dispensed with should be confined to exceptional cases and not be the norm as it is at present under the National Assistance legislation.

**4.26 Intimation of application.** In our discussion paper we proposed that the application for removal should in general be intimated to the adult and any other person whom the sheriff thinks should receive intimation<sup>29</sup>. Enable considered that intimation to a vulnerable or mentally disordered adult was often a pointless formality and suggested that intimation should also have to be made to the adult's nearest relative and lay advocate if he or she is known to have one. We are grateful for this suggestion which we think should apply to all intimations to vulnerable adults in this report. We would also adopt our earlier recommendation in connection with assessment orders whereby adults could be accompanied by a friend at any hearing and the sheriff should have to consider appointing a safeguarder to the adult<sup>30</sup>. Enable also suggested that a local authority application should be intimated to the Mental Welfare Commission. We agree and suggest that the converse should apply as well, so that each body is aware of proceedings initiated by the other. In urgent cases we proposed that the sheriff should have power to dispense with intimation<sup>31</sup>. There was no dissent on consultation. As already mentioned in paragraph 4.25 a justice rather than a sheriff might have to deal with such urgent cases.

**4.27 Grounds for removal.** Our recommended powers of removal must be compatible with the European Convention on Human Rights. To be compatible, it is not enough that the removal is for one or more of the stated purposes in Article 8, such as "protection of health", "the protection of the rights and freedoms of others", "the protection of disorder or crime" or "in the interests of public safety". In addition the powers of removal must also be "necessary in a democratic society" to achieve these purposes. The European Court of Human Rights has regarded this as a question of whether the interference is proportionate to the legitimate aims being pursued<sup>32</sup>. Removal from home where there is no immediate risk of significant harm could be regarded as a disproportionate response, and hence unnecessary in a democratic society.

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<sup>28</sup> Recommendation 7(2), para 3.35.

<sup>29</sup> Proposal 7(3), para 2.55.

<sup>30</sup> Recommendation 9(3), para 4.8.

<sup>31</sup> Proposal 7(3).

<sup>32</sup> *Silver and Others v UK* (Judgment 25 March 1983).

4.28 In our discussion paper we proposed<sup>33</sup> that an order for removal may be granted provided the sheriff is satisfied that:

- (a) there are reasonable grounds for believing that the person sought to be removed is mentally disordered,
- (b) the person is at risk of significant harm unless removed, and
- (c) prompt removal to, and detention in, a place of safety is the only reasonably practicable way of protecting the person.

In paragraph 4.23 above we set out our reasons for extending removal orders to vulnerable adults. Two organisations commented on paragraph (b). The Association of Chief Police Officers in Scotland thought that "at risk of harm" was sufficient. Strathclyde Regional Council Social Work Department considered that "significant harm" would be difficult to evaluate and suggested that paragraph (b) should be deleted. Removal to alleviate a minor problem would be a disproportionate response and hence in breach of the European Convention on Human Rights. In order to justify such a major intrusion as compulsory removal we continue to be of the view that risk of significant harm ought to be established. We note that a child protection order which authorises the removal of a child from home will require reasonable belief in the existence of significant harm<sup>34</sup>.

4.29 **Immediate use of order.** We proposed that an order for removal should have to be carried out within 72 hours<sup>35</sup>. This was to prevent it being used as a long term threat to encourage voluntary compliance with the applicant authority's wishes as had sometimes been the practice with similar warrants for removal of children<sup>36</sup>. Enable commented that it should not be necessary to complete the proceedings including transfer to a place of safety within the 72 hour time limit, and that it should be sufficient to have started the removal process before the order expired. We are not in favour of this. Starting the removal process is too vague to be a useful time limit. It could cover anything from administrative preliminaries to actually carrying out the removal. Moreover, there would be a danger that proceedings might be prolonged indefinitely unless yet another time limit was set. Two time limits complicate matters. Removal orders will be granted only in serious cases and it is right that they should be implemented promptly.

4.30 **Role of the police.** The two police respondents, the Association of Chief Police Officers in Scotland and the Scottish Police Superintendents, both considered that the role of the police should be one of supporting officials of the applicant authority and that they should not be involved with handling mentally disordered people. Their view, with which we concur, is that this task is best left to trained people. A police presence might be necessary to ensure that appropriate people gain entry to the premises and are able to remove the adult without any obstruction by others. The removal order should therefore authorise the police to take all steps required to achieve this. It would be up to the applicant authority to ensure that in addition to its duly authorised person others such as a medical practitioner, ambulance staff and the police where necessary were in attendance.

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<sup>33</sup> Proposal 7(4), para 2.55.

<sup>34</sup> Children (Scotland) Act 1995, s 57.

<sup>35</sup> Proposal 8(1), para 2.61.

<sup>36</sup> See para 3.30 above.

4.31 **Place of safety.** A mentally disordered adult removed under the 1984 Act is at present taken to a place of safety and detained there<sup>37</sup>. A place of safety is defined in section 117(7)(b) as meaning:

"a hospital as defined by this Act or residential home for persons suffering from mental disorder or any other suitable place the occupier of which is willing temporarily to receive the patient; but shall not include a police station unless by reason of emergency there is no place as aforesaid available for receiving the patient".

A person removed under section 47 of the National Assistance Act 1948 is to be detained in:

"a suitable hospital or other place in, or within convenient distance of, the area of the appropriate authority".

The Mental Welfare Commission has commented adversely on the practice of removing patients to psychiatric hospitals under the National Assistance legislation<sup>38</sup>. It deprives patients of the protections in the 1984 Act and, because the making of the order is not notified to the Mental Welfare Commission, the Commission is unable to exercise its protective functions. In our discussion paper we asked for views on whether it should remain competent to remove an adult to such a hospital<sup>39</sup>. Consultation revealed a difference of opinion. Fife Regional Council, the Law Society and Alzheimer Scotland-Action on Dementia considered that detention in a psychiatric hospital should be permitted only under the provisions of the 1984 Act. We agree with others who took the line that for some mentally disordered people a psychiatric hospital was the most appropriate place where they could receive proper short-term care and an expert assessment on which future plans could be based. Most thought that a placement in a psychiatric hospital should be the last resort. Nursing homes, residential homes or respite care facilities were all suggested as possible places of safety. We consider that the order should specify the place in which the adult is to be detained after removal. The applicant would therefore have to nominate in the application a place willing to accept the adult and satisfy the sheriff that it was the most suitable place for that particular adult.

4.32 **Period of detention.** In our discussion paper we suggested that the period of detention should be specified in the order and should not exceed seven days<sup>40</sup>. The Law Society commented that this was unduly long and that a shorter period should be the norm. While we do not wish to see adults detained for longer than necessary, deciding what to do and making the appropriate arrangements for the adult may take more than a day or so. The Code of Practice that we recommend later should make it clear that if arrangements are made sooner than expected then they should be put into action without waiting for the specified period of detention to expire<sup>41</sup>.

4.33 Another related concern expressed on consultation was whether the period of detention in a hospital as a place of safety could be followed by a period of detention under the 1984 Act. In brief the 1984 Act provides for:

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<sup>37</sup> S 117(2).

<sup>38</sup> *Annual Report 1987*, para 10.17.

<sup>39</sup> Proposal 8(4), para 2.61.

<sup>40</sup> Proposal 8(2), para 2.61.

<sup>41</sup> See next para in connection with emergency detention under the 1984 Act after detention in a place of safety.

(a) an application for detention for up to 6 months<sup>42</sup>. This application has to be supported by two medical certificates, at least one of which is from a doctor with special experience in the field of mental disorder. It is intimated to the proposed detainee who is given an opportunity to oppose it. The application is heard by a sheriff.

(b) an emergency recommendation which may be made by a medical practitioner and authorises without further procedure detention for up to 72 hours<sup>43</sup>. Only one such period of detention is allowed but a person may be detained whether or not they are already in hospital<sup>44</sup>.

(c) emergency detention by a prescribed class of nurse for up to two hours<sup>45</sup>.

(d) further detention for 28 days of a patient detained under an emergency recommendation if a doctor with special experience in the field of mental disorder states that it is necessary after examining the patient<sup>46</sup>. A patient so detained may not be immediately detained again under that provision or by virtue of an emergency recommendation<sup>47</sup>.

(e) detention after the expiry of the 28 day period of a patient detained under paragraph (d) if it is not possible to deal with an application for detention under paragraph (a) in time<sup>48</sup>.

As can be seen, there are certain prohibitions on detaining patients more than once under the short term provisions. The Law Society and the Scottish Association for Mental Health thought that it should not be competent to detain an adult who is removed to a psychiatric hospital under a removal order further by means of an emergency recommendation. The result would be that a full application for detention under section 18 would have to be made and carried through before the period of detention under the removal order expired<sup>49</sup>. This might not always be possible. Paragraph 1.20 of the Code of Practice on the 1984 Act deals with removal to a place of safety under section 118 of a mentally disordered person found in a public place. Where the place of safety is a hospital the person should be examined as soon as possible by a doctor and if detention under section 24 (emergency recommendation) is appropriate then this should take place straight away without waiting for the 72 hour period of detention authorised by section 118 to expire. We think that the same practice should be adopted by our recommended Code of Practice in connection with removal orders. It would meet the objections to consecutive powers of detention while ensuring that the adult receives proper health care.

**4.34 Duty to re-establish at home?** We asked for views as to whether a local authority should be under a duty to re-establish the removed adult in his or her own home in so far as

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<sup>42</sup> S 18.

<sup>43</sup> S 24.

<sup>44</sup> S 25(1).

<sup>45</sup> S 25(2).

<sup>46</sup> S 26.

<sup>47</sup> S 26(7); In *R Petr* 1990 SCLR 757 the opinion was expressed that detention the following day would still be "immediately", especially if the patient had not left hospital.

<sup>48</sup> S 26A, added by the Mental Health (Detention) (Scotland) Act 1991.

<sup>49</sup> 28 days detention under s 26 would not be competent because the adult would not have been admitted to hospital under an emergency recommendation.

it was reasonably practicable<sup>50</sup>. Nearly all of those responding were in favour of such a duty. The Highland Regional Council Social Work Department thought that this should be an aim, not a duty. We think that local authorities should retain flexibility and that the matter is best dealt with by the Code of Practice rather than legislation.

4.35 We recommend that:

**11. The provisions in section 47 of the National Assistance Act 1948, the National Assistance (Amendment) Act 1951 and section 117 of the Mental Health (Scotland) Act 1984 dealing with compulsory removal of people from premises to hospitals and other places of safety should be replaced by the following provisions:**

**(1) A local authority should be entitled to apply to a sheriff for an order authorising the removal of an adult, whom it reasonably believes to be vulnerable, from premises to a specified place within 72 hours of the granting of the order. The Mental Welfare Commission should be entitled to apply only in relation to adults reasonably believed to be mentally disordered.**

**(2) The order should further authorise the adult's detention in the specified place for a specified time, not exceeding seven days.**

**(3) An application for a removal order should be required to be intimated to the adult sought to be removed. Rules of Court should provide for intimation to his or her nearest relative and any other person the sheriff thinks should receive it. The Mental Welfare Commission should receive intimation of an application by the local authority and vice versa. All those receiving intimation should be given an opportunity to make representations.**

**(4) The sheriff may dispense with intimation and grant the order forthwith but only if satisfied that the delay if the normal procedure were to be followed would be prejudicial to the adult.**

**(5) At any hearing the adult should be permitted to be accompanied by a friend. The sheriff should have to consider whether to appoint a safeguarder to an otherwise unrepresented adult.**

**(6) The sheriff should not grant an order unless satisfied that the adult sought to be removed is vulnerable and is at risk of significant harm unless removed.**

**(7) The order should authorise the police to take such steps (including the use of reasonable force) as are necessary to ensure that a duly authorised person from the applicant authority and other personnel can gain entry to the premises and remove the adult from there to the specified place.**

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<sup>50</sup> Proposal 8(5), para 2.61.

**(8) A justice of the peace may deal with an application for the immediate grant of an order dispensing with intimation only if a sheriff is not reasonably available. A justice should not be empowered to deal with any other kind of application for removal.**

Clauses 9, 17(a), (c)-(f) and 19 and Sch 1

### **Exclusion of abusers**

4.36 In our discussion paper we invited views on whether the court should have power to exclude a person living with a vulnerable adult if exclusion was necessary to protect the adult from conduct or threatened conduct injurious to the adult's physical or mental health<sup>51</sup>. Similar provisions exist already in the family law field.

4.37 The Matrimonial Homes (Family Protection) (Scotland) Act 1981 empowers the court to grant, on the application of a spouse, an order (called an exclusion order) suspending the other spouse's right to occupy the matrimonial home<sup>52</sup>. Ancillary orders may be granted along with the exclusion order dealing with ejection of the excluded spouse and interdict against re-entry. The grounds for exclusion include violence or threats of violence to the applicant spouse or a child of the family<sup>53</sup>. Child of the family is defined so as to include a child of any age<sup>54</sup>. In certain circumstances one cohabitant can exclude the other on similar grounds<sup>55</sup>. The 1981 Act may therefore be used to exclude a person who was abusing his or her vulnerable spouse, partner or child (whether or not grown up).

4.38 The Children (Scotland) Act 1995 contains similar powers of exclusion for the purpose of protecting children<sup>56</sup> - generally persons under the age of 16<sup>57</sup>. The grounds for exclusion are that the child has suffered or is likely to suffer significant harm from conduct or threatened conduct and that the order is necessary to protect the child and would better safeguard the child's welfare than removal of the child from the family home. There also has to be a person left in the home who would look after the child and any other children<sup>58</sup>.

4.39 For others not covered by the statutory provisions described above the remedies available are interdict and the criminal law. These may not be satisfactory in ending the abuse. Certain interdicts under the 1981 and 1995 Acts may have powers of arrest added to them which entitle the police to arrest somebody reasonably suspected of having breached the interdict. Powers of arrest are not available for interdicts in general.

4.40 Most of those responding to our proposal to exclude abusers agreed with it, although exclusion was generally regarded as a draconian measure to be used only in the last resort. The exclusion of people who are owners or tenants of their homes was mentioned as an issue that ought to be addressed. Other respondents noted that exclusion might result in no-one being left at home to look after the vulnerable adult. We consider that exclusion of

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<sup>51</sup> Proposal 10, para 2.73.

<sup>52</sup> S 4.

<sup>53</sup> 1981 Act, s 4(2).

<sup>54</sup> 1981 Act, s 22.

<sup>55</sup> 1981 Act, s 18.

<sup>56</sup> Ss 76-80, not yet in force; expected commencement date April 1997.

<sup>57</sup> But see para 2.11 above.

<sup>58</sup> 1995 Act, s 76(2)(c).

abusers is justified as a last resort measure in that it would enable vulnerable adult victims of abuse to remain at home rather than be forced to move elsewhere. Where serious abuse occurs then it ought to be the abuser who has to face the upheaval of removal rather than the victim. However, in view of the somewhat guarded response on consultation, we think it is best to adopt a fairly cautious approach.

4.41 **Grounds for exclusion.** We would meet respondents' concerns about the exclusion of owners or tenants by restricting exclusion to those cases where the vulnerable adult is entitled to occupy the home<sup>59</sup>. In theory, sole owners or tenants who are abused in their own homes should be able to act under the existing law by terminating the abuser's permission to occupy and bringing legal proceedings for his or her removal. In practice, they may be mentally incapable of terminating the permission or be so much under the abuser's influence as to make termination very unlikely. For this reason we include them in our recommended new provisions. Each co-owner or co-tenant has rights of occupancy flowing from his or her ownership or tenancy and there would generally have been an expectation of living together indefinitely when the home was acquired. Exclusion of the abuser for a short period until matters can be resolved by disposal of the home or otherwise seems justified. The situation where the vulnerable adult has no entitlement to occupy (a temporary or long-term guest or lodger for example) seems to us to be very different. Unlike married couples or co-owners or co-tenants the abuser and the vulnerable adult probably had no expectation of a permanent establishment. The normal understanding would be that the vulnerable adult as relative, guest or lodger might stay as long as the relationship remained amicable, and that otherwise the adult would have to leave, to residential care perhaps.

4.42 Section 4(2) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 provides that a court shall make an exclusion order if it appears to the court that the making of the order is necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child. However, section 4(3) provides that the court shall not grant an exclusion order if it appears that the granting of it would be unjustified or unreasonable bearing in mind all the circumstances of the case including: the conduct, needs and financial resources of the spouses, the needs of any child of the family, any business use of the home, whether the entitled spouse has offered the other suitable alternative accommodation, and the consequences of excluding a spouse who is required to live in the house as an incident of employment.

4.43 Section 76(2) of the Children (Scotland) Act 1995 contains somewhat more elaborate provisions for the exclusion of abusers than the 1981 Act. The conditions which have to be satisfied before the sheriff may grant an exclusion order are:

- "(a) that the child has suffered, is suffering, or is likely to suffer, significant harm as a result of any conduct, or any threatened or reasonably apprehended conduct, of the named person;
- (b) that the making of an exclusion order against the named person -

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<sup>59</sup> But see para 4.60 below.

- (i) is necessary for the protection of the child, irrespective of whether the child is for the time being residing in the family home; and
  - (ii) would better safeguard the child's welfare than the removal of the child from the family home; and
- (c) that, if an order is made, there will be a person specified in the application who is capable of taking responsibility for the provision of appropriate care for the child and any other member of the family who requires such care and who is, or will be, residing in the family home ....."

But the sheriff is directed not to make an exclusion order if it appears that to do so would be unjustified or unreasonable having regard to the same facts as in section 4(3) of the 1981 Act, quoted in the previous paragraph<sup>60</sup>.

4.44 We prefer a provision along the lines of the more elaborate version in the 1995 Act because it would recognise explicitly that there is a choice between removal of the abuser and removal of the vulnerable adult. The advantages and disadvantages of each course of action will vary from one case to the next so that it is right that the sheriff should be required to balance them. However, we do not think that paragraph (c) is necessary. Vulnerable adults, unlike children, may be able to stay by themselves in their own homes with care provided by a non-resident or the local authority. Moreover, if adequate care could not be provided without the abuser as a resident carer then exclusion of the abuser could not be said to better safeguard the adult's welfare than removal of the adult. The significant harm to the adult that forms part of the grounds of exclusion should be limited to harm to the adult's health. Exclusion of those who financially exploit vulnerable adults would be a radical innovation which we did not consult on. We consider that the sheriff should have to exclude once satisfied that the grounds for exclusion have been established. The grounds are such that if established a sheriff would grant an exclusion order even though a discretionary power was conferred. The two step process in the 1981 and 1995 Acts (mandatory<sup>61</sup> or discretionary<sup>62</sup> exclusion on certain grounds followed by mandatory refusal of exclusion in certain circumstances) seems unnecessarily complicated. Matters such as the needs, resources and conduct of people living in the home, any business use of the home and the offer of alternative accommodation need not be enumerated since these are matters that would clearly have to be taken into account anyway. It also seems unnecessary to deal expressly with the rare case of tied accommodation. An order excluding an abusive service occupier would not better safeguard the adult's welfare than removal of the adult from the home if the employer terminated the occupancy agreement so forcing the adult to move anyway.

4.45 We recommend that:

**12. The sheriff should, on application, have power to make an order excluding a person living in the same home as a vulnerable adult if satisfied that:**

- (a) the vulnerable adult is entitled to occupy the home by virtue of ownership, tenancy or otherwise;**

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<sup>60</sup> 1995 Act, s 76(9).

<sup>61</sup> As in the 1981 Act.

<sup>62</sup> As in the 1995 Act.

- (b) **the vulnerable adult is suffering, or is likely to suffer, significant harm to health as a result of any conduct, or any threatened or reasonably apprehended conduct, of the person sought to be excluded; and**
- (c) **the making of an exclusion order -**
  - (i) **is necessary for the protection of the vulnerable adult, irrespective of whether he or she is for the time being residing in the home, and**
  - (ii) **would better safeguard the vulnerable adult's welfare than removal of the vulnerable adult from the home.**

Clause 11(1)(a), (4), (6)

4.46 This power would be in addition to the powers in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 to make exclusion orders. Thus, for example, if the vulnerable adult and abuser were married to each other an application could be made either under the 1981 Act or under our recommendations. There is also some overlap between our recommended powers and those in the Children (Scotland) Act 1995. This overlap should be minimal as not many children aged 16 or 17 will be subject to supervision orders and very few, if any, will be entitled to occupy a home.

4.47 Where the vulnerable adult and abuser were each entitled to occupy the home (as co-owners, for example) the exclusion order would suspend for the duration of the order the abuser's right to occupy the home. Suspension is also needed where the abuser occupies by virtue of a permission from the vulnerable adult which the adult is incapable of revoking. Where the adult is capable of revoking and does revoke the permission then removal proceedings, not an application for exclusion, would be the appropriate form of action if the abuser fails to leave voluntarily.

4.48 **Objections by vulnerable adults.** Earlier in this report we came to the view that most of the compulsory measures we recommend should not be taken if the vulnerable adult concerned objected unless he or she was mentally disordered or subjected to undue pressure<sup>63</sup>. We would adopt this approach to exclusion of abusers. The adult may prefer to tolerate an abusive situation rather than see the abuser excluded and the household broken up. As long as the vulnerable adult is capable of making such a decision freely, that preference should be respected. The 1981 Act achieves the same result by entitling only the "victim" spouse or cohabitant to apply for exclusion<sup>64</sup>. We recommend that:

- 13. The sheriff should not grant an exclusion order if the vulnerable adult objects unless he or she considers that the vulnerable adult's objections should be disregarded because of mental disorder or undue pressure.**

Clause 2

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<sup>63</sup> Paras 2.19 to 2.26.

<sup>64</sup> A spouse or cohabitant may apply also on behalf of a child victim.

4.49 **Duration of exclusion.** How long should an abuser's exclusion last for? In our view where the adult and the abuser are both entitled to occupy the home, an exclusion order should be a short-term remedy with a maximum time limit of six months. This should be sufficient for the parties concerned to make more permanent arrangements. For example, the home may have to be sold or the landlord approached with a view to making the vulnerable adult sole tenant. However, where the abuser occupies merely by virtue of the adult's permission such permission should lapse for the duration of the order and should not revive after the order terminates. In order to re-occupy the abuser should have to obtain fresh permission.

4.50 The Matrimonial Homes (Family Protection) (Scotland) Act 1981 contains elaborate provisions to prevent an entitled spouse who has been excluded from the matrimonial home from disposing of the home or bringing an action of division and sale<sup>65</sup>. We consider that to apply these provisions to vulnerable adults and their abusers would be wrong in principle and unnecessary in practice. The public commitment of spouses to each other by their marriage sets them apart from others who simply share accommodation. These provisions in the 1981 Act are not extended to entitled cohabitants who have been excluded from their homes. Their absence does not appear to have given rise to any difficulties in practice and we would not expect any problems in relation to vulnerable adults either. We therefore recommend that:

14. (1) **An exclusion order under Recommendation 12 should be granted for a period not exceeding six months as specified by the sheriff. An excluded person who occupied by permission of the vulnerable adult should not become re-entitled to occupy merely because the period has elapsed.**
- (2) **There should be no statutory provisions preventing an excluded person from disposing of the home or bringing an action for its division and sale.**

Clause 11(2), (3)

4.51 **Interim exclusion.** An application for an exclusion order would take some weeks to be decided. Time would have to be allowed for defences to be lodged, pleadings adjusted and the hearing arranged<sup>66</sup>. A power to exclude in the interim is necessary as the abuse may be such that urgent action has to be taken. Section 4(6) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 empowers the court to grant an interim exclusion order pending the making of an exclusion order. However, this power may be exercised only if the person sought to be excluded has been afforded an opportunity to be heard. Rules of Court provide for a normal period of seven days between intimation and the hearing, although this may be reduced or even dispensed with<sup>67</sup>. Allowing no time between intimation and the hearing would breach the statutory requirement to afford the defender an opportunity to be heard. It has been held that a spouse sought to be excluded should be given adequate time to consider the applicant's affidavits and lodge affidavits himself or

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<sup>65</sup> Ss 6, 7, 9 and 19.

<sup>66</sup> In *Smith-Milne v Gammack* 1995 SCLR 1058 the sheriff considered six weeks to be the minimum (an action by a cohabitant for occupancy rights where efforts were made to shorten the usual timescale).

<sup>67</sup> Ordinary Cause Rules 1993, rules 33.69(1)(b) and 15.2.

herself, unless the situation is sufficiently urgent to grant an interim exclusion order at the initial hearing<sup>68</sup>. We recommend that:

15. **The sheriff should have power pending the making of an exclusion order under Recommendation 12 to make an interim exclusion order, provided that the person sought to be excluded has been afforded an opportunity of being heard.**

Clause 11(7), (8)

4.52 **Recall and ancillary orders.** An exclusion order or an interim exclusion order by itself only suspends the right of the excluded adult to occupy the home. In order to make exclusion effective and to deal with consequential matters ancillary orders would be necessary. Subsections (4) and (5) of section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 empower the court to make various ancillary orders. First, the court must, if requested to do so, grant an interdict prohibiting the excluded spouse from entering the matrimonial home without the express permission of the other spouse. Secondly, the court must grant a warrant for the summary ejection of the excluded spouse from the matrimonial home and an interdict prohibiting him or her from removing any of the furniture and plenishings without the consent of the other spouse or the leave of the court. The court need not grant these orders if the excluded spouse satisfies the court that they are unnecessary. Thirdly, the court has a discretionary power to grant orders prohibiting the excluded spouse from a specified area in the vicinity of the matrimonial home, to give directions as to the preservation of the excluded spouse's goods which remain in the home, to make any order subject to conditions and to make any other orders necessary for the proper enforcement of the main orders. A power of arrest must be added to any interdict ancillary to an exclusion order<sup>69</sup>.

4.53 We would in general adopt these provisions, with suitable changes in terminology, for exclusion of abusers of vulnerable adults. However, we prefer to give the sheriff a discretion in all these ancillary orders as is done in the Children (Scotland) Act 1995 rather than the part mandatory, part discretionary approach of the 1981 Act described above. An exclusion order would be rendered pointless if the vulnerable adult could be induced to invite the excluded abuser back to re-occupy the home. On the other hand interdicts against entering a matrimonial home expressed in absolute terms have given rise to practical difficulties where people go back to their homes to see their children or collect their belongings. Where a power of arrest has been added to an absolute interdict even a person who enters with the express permission of the applicant may be arrested<sup>70</sup>. We consider that the interdict prohibiting re-entry of the excluded abuser should in general be absolute, but that the court should have power to modify this by way of making it subject to conditions. This would give a degree of flexibility.

4.54 Powers of arrest have proved useful in enforcing compliance with interdicts granted in connection with exclusion orders. A power of arrest entitles the police to arrest without a warrant a person reasonably suspected of having breached the interdict. The 1981 Act

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<sup>68</sup> *Armitage v Armitage* 1993 SCLR 173.

<sup>69</sup> 1981 Act, s 15(1)(a).

<sup>70</sup> *Gillespie v Hamilton* 1994 SLT 761.

directs the court to attach a power of arrest to any such interdict<sup>71</sup>. For vulnerable adults we prefer to follow the approach of the 1995 Act which confers a discretionary power on the sheriff<sup>72</sup>. Sections 16 and 17 of the 1981 Act set out a complicated procedure for what happens thereafter. Briefly the officer in charge of the police station to which the arrested person is taken may decide to liberate the person if further violence is unlikely. If the person is not liberated or subject to criminal proceedings he or she is brought before the sheriff by the procurator-fiscal with a request for detention for a further two days. This further detention is granted if the sheriff is satisfied that it appears the interdict was breached, that civil proceedings for breach will be brought and that there is a substantial risk of further violence. In our *Report on Family Law*<sup>73</sup> we recommended some improvements to this procedure which have been taken into account in the detailed provisions of the draft Bill annexed to this report.

4.55 After the exclusion order or interim order has been granted circumstances may change. The sheriff should have an express power to vary or recall any such order or associated ancillary order if satisfied that it is appropriate to do so.

4.56 We therefore recommend that:

**16. (1) The sheriff in granting an exclusion order or an interim exclusion order should have power to grant an interdict against re-entry, a warrant for summary ejection and other appropriate orders (including attaching a power of arrest to any interdict and granting the interdict against re-entry subject to conditions).**

**(2) The sheriff should have power to vary or recall any exclusion order, interim order or associated ancillary order.**

Clauses 11(9), (10), (11) and 12

4.57 **Who may apply for exclusion?** A mentally incapable adult is not entitled to pursue a civil action or application. A curator bonis or other legal representative has to be appointed who may then initiate proceedings<sup>74</sup>. The application for the appointment of a curator bonis could be made by the local authority<sup>75</sup>. In our discussion paper we asked whether the local authority should be entitled to take proceedings for exclusion in its own name or simply assist the vulnerable adult<sup>76</sup>. Giving assistance was supported by respondents, but opinion was divided on the question of a local authority being entitled to apply for an exclusion order in its own name. Enable and the Law Society suggested that the procedure in actions relating to children should be adopted. Where a child has no legal representative or the legal representative declines to act or in certain other circumstances, an action can be initiated on behalf of the child by any interested person. The court will then appoint a curator *ad litem* to take over the conduct of the proceedings on behalf of the child<sup>77</sup>. We are not in favour of this approach which was not followed in the Children (Scotland) Act

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<sup>71</sup> 1981 Act, s 15(1)(a).

<sup>72</sup> 1981 Act, s 78(1).

<sup>73</sup> Scot Law Com No 135 (1992), Recommendation 62, para 11.45.

<sup>74</sup> Macphail, *Sheriff Court Practice*, para 4-07.

<sup>75</sup> 1984 Act, s 92.

<sup>76</sup> Proposal 10(2), para 2.73.

<sup>77</sup> Macphail, para 4-12.

1995 where only a local authority may apply for exclusion<sup>78</sup>. Entitling any person to initiate exclusion proceedings could give rise to much resentment. On the other hand some public body should be able to act, otherwise a curator bonis would have to be appointed to every incapable vulnerable adult where exclusion was under consideration. The local authority seems the appropriate body and we think that one public body is sufficient.

4.58 Should the local authority have a duty to initiate exclusion proceedings or have only a power to do so? In our *Report on Incapable Adults* we recommended that a local authority should have a duty to apply for the appointment of a guardian to a mentally incapable adult but only if it is satisfied that the grounds for appointment exist, that the appointment of a guardian is necessary in the interests of the adult, and that no-one else is applying or is likely to apply<sup>79</sup>. A similar test applies at the moment in relation to an application by a local authority for the appointment of a curator bonis<sup>80</sup>. We would adopt this approach but the second of these conditions should be omitted as it is already incorporated in the grounds for making the exclusion order<sup>81</sup>. The local authority should also have to be satisfied that no other proceedings (such as ejection or exclusion under the Matrimonial Homes (Family Protection) (Scotland) Act 1981) for the removal of the abuser were pending or under consideration<sup>82</sup>. We would stress that a local authority would not be entitled to take proceedings where the vulnerable adult was able to do so. Its role in that case would be to advise and assist the adult if asked. Where a local authority does apply the court should consider appointing a safeguarder to the adult. The safeguarder's function would be to ensure that the interests of the adult (and his or her wishes or feelings in so far as they can be ascertained) were put before the court. It would remain open to the local authority to have one of its officials appointed curator bonis to the vulnerable adult and then for that official to apply for exclusion. This might be done if the adult was in need of a curator for other purposes.

4.59 We recommend that:

17. (1) **Where the vulnerable adult is able to apply for an exclusion order only he or she may do so.**
- (2) **Where the vulnerable adult is not so able, an application may be made on the adult's behalf by a curator bonis or other legal representative, or by the local authority. The local authority should have a duty to apply if satisfied that:**
  - (a) **the grounds for exclusion set out in Recommendation 12 exist, and**
  - (b) **that no application or other proceedings for removal of the abuser are pending or under consideration.**

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<sup>78</sup> S 76(1).

<sup>79</sup> Recommendation 86(2), para 6.33.

<sup>80</sup> 1984 Act, s 92(1).

<sup>81</sup> Recommendation 12(c), para 4.45.

<sup>82</sup> Where the home was let by the local authority on a secure tenancy and the abuser and vulnerable adult were spouses or cohabitants, the authority could repossess and re-allocate the tenancy to the vulnerable adult under the Housing (Scotland) Act 1987, Sch 3, Part I, para 16.

**(3) The court should consider appointing a safeguarder to the vulnerable adult in an application made by the local authority.**

Clause 11(5), (12)

4.60 Mr Adrian Ward, a solicitor with wide experience of the mentally disabled, suggested that exclusion ought to be available where one person entitled to occupy the home cares for a vulnerable adult at home and the adult is being abused by another entitled person. We agree as it seems better that the abuser should have to leave rather than that the carer and the adult should both have to find alternative accommodation. We would extend exclusion still further so as to include the case where the carer was the only person entitled to occupy. We recommend that:

**18. A person who is entitled to occupy a home which he or she shares with the vulnerable adult and any other person should be able to apply for that other person's exclusion on the same grounds as in Recommendation 12.**

Clause 11(1)(b)

4.61 Persons excluded from their homes under our recommendations on exclusion would have to find alternative accommodation. A local authority, even if it took the initiative in exclusion proceedings, should not be under a duty to provide accommodation except in so far as it has a duty under the homeless persons legislation<sup>83</sup>.

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<sup>83</sup> Housing (Scotland) Act 1987, Part II.

## Part 5 Miscellaneous

### Police powers of removal

5.1 Section 118 of the 1984 Act authorises a constable to remove to a place of safety a person found in a place to which the public have access who appears to be mentally disordered and in immediate need of care and control. No warrant is necessary. The person may thereafter be detained in the place of safety for up to 72 hours for the purpose of medical examination and arranging treatment and care. We understand that this provision is sometimes interpreted as authorising detention for 72 hours, even though the examination has been carried out and arrangements for any necessary treatment and care have been made. Apart from this we are not aware of any defects in the provision.

5.2 In our discussion paper we asked for views on whether the police should have power without a warrant to remove an adult suspected of being mentally disordered or vulnerable from premises to which the public do not have access to a place of safety where removal was necessary for that adult's immediate protection from serious harm<sup>1</sup>. The police have limited common law powers to enter premises without a warrant and without the consent of the occupier. We suggested that these might not be always be sufficient. For example, the police might be first on the scene of an accident or a violent situation within the home and might need to take immediate action to protect vulnerable adults.

5.3 Most respondents considered that the police should have the proposed powers. The Association of Chief Police Officers in Scotland commented that these powers would be of benefit to the police who had in the past experienced difficulty in dealing adequately with circumstances of the type mentioned in paragraph 5.2. However, there was some opposition to our proposal. The Mental Welfare Commission and Fife Regional Council both thought that the police should continue to work with the existing procedure, whereby a warrant for entry and removal has to be sought from a sheriff or justice. In their view an effective system of communication and liaison between the police and the local authority or general practitioners would enable a rapid and appropriate response to be made to any situation discovered which required urgent action in relation to a vulnerable adult. Either a warrant of entry and removal or an emergency recommendation for detention in hospital could be obtained within a short time. The Faculty of Advocates also thought that the proposed new powers were unnecessary.

5.4 In our discussion paper we proposed, and we have recommended in this report, that removal of an adult to a place of safety should be a last resort. It should require an order from a sheriff after an opportunity has been given to oppose the application or, in urgent cases, from a sheriff or a justice without such opportunity<sup>2</sup>. Some commentators were concerned that a police power to remove without a warrant might undermine the recommended procedures. We consider that these concerns are well-founded. The granting

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<sup>1</sup> Proposal 9, para 2.64.

<sup>2</sup> Recommendation 11, para 4.35.

of orders of removal without any opportunity to oppose them is intended to deal with urgent situations and it would be difficult to define the exceptionally urgent cases where removal without even applying to a sheriff or justice was justified. Good communications between the police and the local authority should enable an order to be obtained within a very short time. In our view the disadvantages of conferring powers on the police to remove vulnerable adults from premises without an order outweigh the benefits likely to be obtained.

## Protection of property

5.5 Section 48 of the National Assistance Act 1948 as amended by section 92(2) of the 1984 Act imposes a duty on a local authority to take steps to protect the property (heritable as well as moveable) of a person admitted to hospital (including a private hospital or local authority accommodation), subject to guardianship or removed from home in terms of an order under section 47 of the 1948 Act<sup>3</sup>. Using this provision the local authority may, for example, ensure that the person's home is secure, burst pipes are dealt with and personal possessions are stored in a safe place. The local authority is entitled to recover its reasonable expenses in carrying out these functions<sup>4</sup>. No action by the local authority is necessary if others are already taking steps to safeguard the property.

5.6 We recommend elsewhere in this report that adults may be removed from premises under an order from the sheriff or justice<sup>5</sup>. The above provisions should be extended to ensure that the adult's property is protected in these cases too. Extension is also necessary to deal with the case where the vulnerable adult is removed from a public place to a place of safety by the police. In our discussion paper we asked for views as to whether the existing duty required any changes apart from the suggested extensions<sup>6</sup>.

5.7 Most of those responding thought that the provisions were satisfactory but that some practical problems arose. We agree with Enable that detailed practical problems, such as disposal of property or looking after pets, are best tackled by a Code of Practice or local authority guidelines rather than legislation. The existing duty is to protect rather than to manage actively the adult's affairs. Fife Regional Council commented that there is a pressing need for local authorities to be given powers to look after the day-to-day interests of vulnerable persons, as a curator bonis is generally not worth appointing if the estate is small. In our *Report on Incapable Adults* we recommended low cost public management of small estates by the Public Guardian (which post would be held by the Accountant of Court)<sup>7</sup>. Apart from this where the vulnerable adult lacked capacity the local authority could look after his or her interests to some extent as a *negotiorum gestor*<sup>8</sup>.

5.8 Strathclyde Regional Council Social Work Department commented that local authorities were unable to regain possession of a house tenanted by the removed adult where it was no longer needed. Section 50 of the Housing (Scotland) Act 1987 provides a procedure for repossession of a dwellinghouse let on a secure tenancy where the house is

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<sup>3</sup> See paras 4.18 to 4.21 above.

<sup>4</sup> National Assistance Act 1948, s 48(3).

<sup>5</sup> Recommendation 11, para 4.35.

<sup>6</sup> Proposal 11, para 3.2.

<sup>7</sup> Recommendation 94(2), para 6.60.

<sup>8</sup> *Negotiorum gestio* is a common law rule whereby one person (the *gestor* or manager) may without any formal appointment manage the affairs of an individual who is absent or incapacitated.

unoccupied and the tenant does not intend to occupy it. We express no opinion as to whether it is possible to use this procedure where the tenant's incapacity prevents him or her forming any intention. We consider that further consultation should take place before any changes are made to a local authority's power to repossess dwellinghouses let on secure tenancies.

5.9 We recommend that:

19. **The duty of a local authority under section 48 of the National Assistance Act 1948 to protect property of people admitted to hospital etc. should be extended to those removed to a place of safety under section 118 of the Mental Health (Scotland) Act 1984 and vulnerable adults removed under Recommendation 11.**

Clause 16

### Recall from leave of absence

5.10 A person detained in hospital under the 1984 Act may be granted leave of absence but may be recalled at any time by written notice. A recalled patient who fails to return may:

"... be taken into custody and returned to the hospital or place by any mental health officer, by any officer on the staff of the hospital, by any constable, or by any person authorised in writing by the managers of the hospital."<sup>9</sup>

Section 117(3) of the 1984 Act provides that a constable or any other person authorised to take or retake a patient may apply to a justice of the peace for a warrant authorising a constable named therein to enter the premises, by force if necessary, in order to remove the patient.

5.11 In our discussion paper we said that the existing provisions seemed satisfactory. A constable (or other person) has power without a warrant to return a patient to hospital by force if necessary. However, if admission to premises is refused or if refusal is apprehended a warrant authorising forcible entry by a constable is necessary. This seems reasonable. In the civil field, powers of forcible entry to homes should be restricted to those who have demonstrated the need for them to some independent authority. We have already commented in the context of other provisions<sup>10</sup> on the practical difficulties that arise when the constable has to be named and proposed that this should not be necessary. We therefore proposed that a warrant authorising a constable to enter premises by force to retake a patient absent without leave should not be required to name the constable. All but one of those responding agreed without making any other comment. The dissenting organisation took the view that police should be involved only if a crime is suspected. We think that involvement of the police is essential for measures involving the use of force. We therefore recommend that:

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<sup>9</sup> S 28(1).

<sup>10</sup> Para 3.33 above.

20. **A warrant granted under section 117(3) of the Mental Health (Scotland) Act 1984 authorising a constable to enter premises by force to retake a patient absent without leave should be addressed to the police force for the area and should not be required to name the constable.**

Clause 17(b), (d)

### **Code of Practice**

5.12 Throughout this report we have referred to a Code of Practice. The code should be drawn up and published by the Secretary of State for Scotland after consultation with local authorities, the Mental Welfare Commission, the police, organisations concerned with mental disability and vulnerability and others involved in this area. The code would set out good practice for, and offer guidance as to appropriate courses of action to, local authorities, doctors and the management and staff of hospitals in the exercise of their functions under our recommendations. Unlike primary or subordinate legislation it would not lay down rules that must be followed. The code should be reviewed from time to time in the light of experience. We recommend that:

21. **The Secretary of State for Scotland should, after consultation with appropriate bodies, prepare, publish and keep under review a Code of Practice containing guidance to local authorities, medical practitioners and the managers and staff of hospitals as to the exercise of their functions under our recommendations.**

Clause 14

### **Offences**

5.13 Section 109 of the 1984 Act provides for criminal sanctions against various forms of obstructive conduct. A person commits an offence if he or she:

- (a) refuses to allow the inspection of any premises by a duly authorised person;
- (b) refuses to allow, without reasonable cause, the visiting, interview or examination of any person by a duly authorised person;
- (c) refuses to produce documents to a duly authorised person;
- (d) obstructs duly authorised people exercising their functions; and
- (e) refuses to withdraw so as to prevent a person being interviewed or examined in private.

Offenders are liable to imprisonment for a term not exceeding three months or to a fine not exceeding level 3 on the standard scale or both. In our discussion paper we expressed the view that similar offence provisions would be needed in relation to the new powers

proposed in the discussion paper<sup>11</sup>. No adverse comments were made by respondents and we continue to favour criminal sanctions in this area.

5.14 Some activities, such as obstructing or hindering the police in the execution of any warrant for forcible entry or removal of a vulnerable adult from premises, would be offences under existing statutes<sup>12</sup>. Others, such as breach of an interdict with power of arrest attached granted in connection with an order excluding an abuser from a vulnerable adult's home<sup>13</sup>, would be dealt with by the special quasi-criminal procedure adapted from the Matrimonial Homes (Family Protection) (Scotland) Act 1981. Yet others, such as refusing to obey ancillary orders granted by a sheriff in connection with an examination or assessment order<sup>14</sup> would be punishable as contempt of court. The list of criminal offences contained in section 109 and set out in the previous paragraph would suffice for obstructive behaviour which would not be otherwise criminal. Section 109 refers to "any person" so that the mentally disordered patient who refused to allow his or her own premises to be inspected or who obstructed a duly authorised person would in theory commit an offence. We understand that patients are not prosecuted in practice. We consider that there should be an express exclusion of vulnerable adults themselves from analogous offence provisions. Prosecution of a vulnerable adult for obstructing officials dealing with his or her own case would undermine the safeguards for the civil liberties of vulnerable adults contained in our recommendations. We therefore recommend that:

- 22. It should be an offence for any person, other than the vulnerable adult concerned, to obstruct or hinder a duly authorised person from the local authority or Mental Welfare Commission in carrying out the functions recommended in this report in relation to that adult.**

Clause 13

## Appeals

5.15 Sheriffs have power to decide various matters referred to them under a wide variety of statutes. Some statutes provide expressly for appeals or contain a finality clause. If neither is present it is often difficult to decide whether the sheriff's determination was intended to be administrative (and thus final) or judicial (subject to appeal in the normal manner)<sup>15</sup>. The 1984 Act provides for various determinations by sheriffs, either at first instance or reviewing the decisions of other bodies. It has been held that the sheriff is exercising a special jurisdiction largely administrative in character so that the decisions are not subject to appeal<sup>16</sup>. Warrants granted by justices or sheriffs under the 1984 Act are clearly administrative in character.

5.16 In view of the ambiguity where a statute is silent as to appeals we think it would be helpful to deal expressly with appeals from the decision of a sheriff under our

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<sup>11</sup> Para 2.25.

<sup>12</sup> Police (Scotland) Act 1967, s 41.

<sup>13</sup> Recommendation 16, para 4.56.

<sup>14</sup> Recommendation 9(7), para 4.8.

<sup>15</sup> Macphail, *Sheriff Court Practice*, para 26-35; *Arcari v Dumbartonshire County Council* 1948 SC 62, 68.

<sup>16</sup> *Ferns v Ravenscraig Hospital Management Committee* 1987 GWD 3-96; *T v Secretary of State for Scotland* 1987 SCLR 65.

recommendations. Clearly a warrant for forcible entry to premises<sup>17</sup> is an administrative act (whether done by a justice or a sheriff) and should not be appealable. Orders for production and inspection of documents and records<sup>18</sup> and orders for examination and assessment of vulnerable adults<sup>19</sup> would also fall into this category. On the other hand, an order excluding an abuser from the home of a vulnerable adult<sup>20</sup> should, by analogy with similar exclusion orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, be appealable in the normal way as provided for by the Sheriff Courts (Scotland) Act 1907<sup>21</sup>. In terms of the 1907 Act interim exclusion orders should be appealable only with the leave of the sheriff, but there is now a line of sheriff court authority that because the interlocutor will also contain one or more interdicts which are appealable without leave, the whole interlocutor is appealable without leave<sup>22</sup>. We think that this is an unfortunate and probably unintended aspect of the appeal provisions in the 1907 Act and would not extend it to interim exclusion orders under our recommendations. These we think should be appealable only with the leave of the sheriff.

5.17 The remaining order which may be made by a sheriff (or in exceptional cases a justice) under our recommendations is an order for the removal of a vulnerable adult from his or her home<sup>23</sup>. In our discussion paper we proposed giving an immediate right of review by means of an application to the sheriff<sup>24</sup>. Enable made several suggestions, some of which we would adopt. First, the application should be capable of being made by anyone with an interest in the adult's welfare and legal aid should be available based on the adult's means. Secondly, that the application for review should be heard by a different sheriff. This is not necessary since the review is not an appeal and the sheriff would take into account fresh material and decide on the basis of the situation at the time of the review. Moreover, it might not always be practicable to use another sheriff. Finally, the review application should be dealt with as quickly as possible and it should be competent to deal with it even though the adult has ceased to be detained under the removal order. The sheriff's decision, although ineffective as regards the adult in question, might serve as guidance in connection with future applications for removal orders. Section 60(7) of the Children (Scotland) Act 1995 provides that a sheriff, on application, may set aside or vary a child protection order previously made by a sheriff. The application is to be determined within three working days of its being made, in view of the short life of the original order. We would model our review procedure on this provision. However we think that a determination within this time scale would not always be feasible so that it should not be made a rigid rule.

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<sup>17</sup> Recommendation 7, para 3.35.

<sup>18</sup> Recommendation 10, para 4.15.

<sup>19</sup> Recommendation 9, para 4.8.

<sup>20</sup> Recommendation 12, para 4.45.

<sup>21</sup> Ss 27 and 28.

<sup>22</sup> *Oliver v Oliver* 1989 SLT (Sh Ct) 2; *Anthony v Anthony* (1996) Fam LB 20-6; see also *McCull v McCull* 1992 SCLR 187 (interdict rendering award of interim aliment appealable without leave).

<sup>23</sup> Recommendation 11, para 4.35.

<sup>24</sup> Proposal 8(3), para 2.61.

5.18 We recommend that:

23. (1) The decision of a sheriff or justice of the peace in relation to warrants for forcible entry to premises (Recommendation 7), a sheriff's order for assessment and examination of vulnerable adults and associated ancillary orders (Recommendation 9), and a sheriff's order for production and inspection of documents and records relating to vulnerable adults (Recommendation 10) should be final.

(2) The granting by a sheriff or justice of an order for the removal of a vulnerable adult (Recommendation 11) should be capable of being reviewed. The vulnerable adult or any person with an interest in the vulnerable adult's welfare should be entitled to apply for review. The review application should be determined within three working days of its being made or as soon as practicable thereafter.

(3) An order granted by a sheriff excluding a person living with a vulnerable adult (Recommendation 12) should be appealable either to the sheriff principal or the Court of Session in accordance with section 26 and 27 of the Sheriff Courts (Scotland) Act 1907. Any appeal against an interim exclusion order should require the leave of the sheriff whether or not the interlocutor also contains one or more interdicts.

Clauses 10 and 15

### Which local authority?

5.19 Throughout this report we have referred to the local authority without further specification. We think that in general the local authority in whose area the vulnerable adult is habitually resident should have the duties and exercise the powers. It is more likely than other authorities to be aware of relevant facts and circumstances and to be able to take action through its own officials. When action needs to be taken in another local authority area, the first local authority may appoint that other authority as its agent<sup>25</sup>. This agency might be used if records have to be inspected outwith the local authority's area.

5.20 Most of the recommendations in this report deal with short-term or emergency procedures. It would cause undesirable delays if the local authority in whose area a vulnerable adult was present had to inform the "habitual residence" authority, wait for it to take the necessary legal or administrative action, and finally receive instructions to act as that authority's agent. In urgent matters the authority in whose area a vulnerable adult is present should be able to take action directly. Competence based on presence is also necessary to deal with adults whose habitual residence is not readily determinable or who have no habitual residence. A local authority in whose area a vulnerable adult's property is situated also ought to be able to take action in urgent cases in respect of that property. We recommend that:

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<sup>25</sup> Local Government (Scotland) Act 1973, s 56(1).

24. (1) In general, the local authority to take action under the recommendations in this report should be the local authority for the area in which the vulnerable adult or suspected vulnerable adult is habitually resident.

(2) The local authority in whose area the vulnerable adult or suspected vulnerable adult is present should be able to take action if the adult has no habitual residence, if the adult's habitual residence cannot be readily determined, or if urgent action requires to be taken.

(3) The local authority in whose area property belonging to a vulnerable adult or a suspected vulnerable adult is situated should be able to take action in relation to that property if urgent action requires to be taken.

Clause 18(2)

### **Jurisdiction of sheriffs**

5.21 Nearly all the applications to a sheriff in this report relate to premises; for example warrant to enter premises, an order to inspect records on premises or orders for removal of adults or abusers from premises. In these cases the sheriff in whose sheriffdom the premises are situated should have jurisdiction. The exception is an order authorising an interview with and an examination of an adult. Here the sheriff dealing with the application should be the sheriff in whose sheriffdom the adult is present. An application that would be more conveniently heard in another sheriff court may be transferred there under existing rules of court<sup>26</sup>. We recommend that:

25. An application to the sheriff under the recommendations in this report (except for an assessment order under Recommendation 9) should be made to the sheriff in whose sheriffdom the premises concerned are situated. An application for an assessment order should be made to the sheriff in whose sheriffdom the adult to be assessed is present.

Clause 18(4)

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<sup>26</sup> Ordinary Cause Rules, rule 26.1.

## Part 6 List of Recommendations

1. The recommendations set out in the rest of this report should apply in relation to individuals aged 16 or over.

(Paragraph 2.11)

2. A vulnerable adult should be defined for the purposes of this report as an adult who is unable to safeguard his or her personal welfare, property or financial affairs, and is:

- (a) in need of care and attention arising out of age or infirmity, or
- (b) suffering from illness or mental disorder; or
- (c) substantially handicapped by any disability.

(Paragraph 2.17)

3. (1) No intervention in relation to an adult should be authorised or carried out if the adult objects unless those authorising or carrying out the intervention reasonably believe that the adult is vulnerable and is either mentally disordered or subject to undue pressure.

(2) For this purpose an intervention does not include mere enquiries or authorised inspections carried out to determine whether it is necessary to intervene to protect the welfare or property of adults who are, or who may be, vulnerable.

(Paragraph 2.26)

4. (1) Local authorities should have the primary role in dealing with vulnerable adults who are, or who are thought to be, mentally disordered. The Mental Welfare Commission should be entitled to act but should not be bound to do so.

(2) Local authorities and the Mental Welfare Commission should be under a duty to collaborate with each other in relation to investigations and other matters concerning such vulnerable adults.

(Paragraph 2.29)

5. Without prejudice to the existing powers and duties of other persons:

(a) A local authority should be under a duty to enquire as to whether steps need to be taken to protect the welfare or property of adults who are, or whom it believes to be, vulnerable.

(b) The Mental Welfare Commission should retain its existing duty under section 3(2) of the Mental Health (Scotland) Act 1984 to investigate cases of suspected ill-treatment, deficiency in care or treatment, improper detention or loss or damage to property of persons who may be mentally disordered. It should also be entitled to enquire as to whether steps need to be taken to protect the welfare or property of adults who are, or it believes to be, vulnerable by reason of mental disorder.

(Paragraph 3.12)

6. (1) A mental health officer or other prescribed officer of the local authority should be entitled to demand admission to premises if he or she reasonably believes that entry to the premises would assist him or her with the enquiries under Recommendation 5. A commissioner or officer of the Mental Welfare Commission should be similarly entitled but only in relation to adults who are, or who are reasonably believed to be, mentally disordered.

(2) The person demanding admission should be required to show written authority from the Commission or local authority as the case may be. Admission may be demanded at all reasonable times and the person should be entitled to be accompanied by one or more other individuals.

(3) The Secretary of State should have power to make regulations prescribing other categories of officers of the local authority for the purpose of paragraph (1) above and the form of written authority referred to in paragraph (2) above.

(4) This power to demand admission should be in addition to any other statutory powers under the Social Work (Scotland) Act 1968 or other legislation, but should replace the existing powers of mental health officers and medical commissioners under section 117 of the Mental Health (Scotland) Act 1984.

(Paragraph 3.23)

7. (1) A warrant for forcible entry to specified premises where a vulnerable adult, or a suspected vulnerable adult, is should be capable of being granted if a person from the local authority entitled to demand admission under Recommendation 6 has been refused admission or a refusal is apprehended.

(2) A sheriff (including an honorary or a temporary sheriff) should be empowered to grant a warrant. A justice of the peace should be similarly empowered but only if a sheriff is not reasonably available and delaying until a sheriff is available would be likely to be prejudicial to the adult.

(3) The application should be made in writing signed by a duly authorised person from the local authority. It should no longer be a requirement that the applicant swears to the truth of the information in the application. The applicant should have to appear personally before the sheriff or justice dealing with the application.

(4) A warrant should authorise the police to take such steps (including the use of reasonable force) as are necessary to ensure that a duly authorised person from the local authority and those accompanying that person can enter and carry out their functions detailed in Recommendation 8.

(5) A warrant should cease to be effective 72 hours after it was granted.

(6) Paragraphs (1) to (5) above should apply to a duly authorised person from the Mental Welfare Commission but only in relation to a mentally disordered adult or a suspected mentally disordered adult. They should replace the existing provisions for forcible entry in section 117 of the Mental Health (Scotland) Act 1984.

(Paragraph 3.35)

8. (1) The duly authorised person from the local authority and other persons (including any police constable) who have gained admission to premises under Recommendations 6 or 7 above should be entitled:

(a) to inspect the premises,

(b) to have access to the vulnerable adult or suspected vulnerable adult and to other adults present,

(c) to interview in private any adult on the premises, and

(d) if the duly authorised person or other person is a medical practitioner, to examine in private any adult on the premises who is or appears to be vulnerable.

(2) Where the duly authorised person is from the Mental Welfare Commission only an adult who is, or appears to be, mentally disordered should be liable to be examined.

(Paragraph 3.39)

9. (1) The sheriff should be empowered, on an application by the local authority, to grant an order authorising a private interview and a private examination by a doctor of an adult reasonably believed to be vulnerable in order to assess the adult's medical or care needs, or whether services or protective measures are necessary. The Mental Welfare Commission should be entitled to apply but only in relation to adults reasonably believed to be mentally disordered.

(2) Rules of Court should provide for intimation of the application to the adult, the adult's nearest relative and any other person thought appropriate by the sheriff. All those receiving intimation should be given an opportunity of making representations.

(3) At any hearing the adult should be permitted to be accompanied by a friend. The sheriff should consider whether to appoint a safeguarder to the adult.

(4) Before granting the order the sheriff should have to be satisfied that there is reasonable cause to believe that the adult is vulnerable and that the examination or interview will assist the applicant with its enquiries.

(5) An order should last for a specified period of not more than seven days. The period should start on a date specified in the order.

(6) Those conducting the assessment should have power to interview (and in the case of a doctor examine) the adult in private.

(7) The sheriff should have power on granting the order or subsequently to make any ancillary order required to make the principal order effective.

(8) The sheriff may dispense with intimation and grant the order forthwith but only if satisfied that the delay if the normal procedure were to be followed would be prejudicial to the adult.

(Paragraph 4.8)

10. (1) Where documents, records or accounts belonging to or relating to the vulnerable adult are not produced voluntarily, inspection of such material should require an order to that effect from a sheriff. An application by the local authority should be made to a sheriff who should have power to grant an order for a duly authorised person to inspect (and if necessary search for) specified material or material of a specified class if satisfied that there is reasonable cause to believe that the adult is vulnerable and that the material is likely to be of substantial value to the investigation. Only a doctor should be allowed to inspect medical records. The premises in which inspection and search are authorised should have to be specified in the order.

(2) The Mental Welfare Commission and persons authorised by it should have the above functions, but only in relation to adults who are, or who are reasonably believed to be, mentally disordered.

(Paragraph 4.15)

11. The provisions in section 47 of the National Assistance Act 1948, the National Assistance (Amendment) Act 1951 and section 117 of the Mental Health (Scotland) Act 1984 dealing with compulsory removal of people from premises to hospitals and other places of safety should be replaced by the following provisions:

(1) A local authority should be entitled to apply to a sheriff for an order authorising the removal of an adult, whom it reasonably believes to be vulnerable, from premises to a specified place within 72 hours of the granting of the order. The Mental Welfare Commission should be entitled to apply only in relation to adults reasonably believed to be mentally disordered.

(2) The order should further authorise the adult's detention in the specified place for a specified time, not exceeding seven days.

(3) An application for a removal order should be required to be intimated to the adult sought to be removed. Rules of Court should provide for intimation to his or her nearest relative and any other person the sheriff thinks should receive it. The Mental Welfare Commission should receive intimation of an application by the local authority and vice versa. All those receiving intimation should be given an opportunity to make representations.

(4) The sheriff may dispense with intimation and grant the order forthwith but only if satisfied that the delay if the normal procedure were to be followed would be prejudicial to the adult.

(5) At any hearing the adult should be permitted to be accompanied by a friend. The sheriff should have to consider whether to appoint a safeguarder to an otherwise unrepresented adult.

(6) The sheriff should not grant an order unless satisfied that the adult sought to be removed is vulnerable and is at risk of significant harm unless removed.

(7) The order should authorise the police to take such steps (including the use of reasonable force) as are necessary to ensure that a duly authorised person from the applicant authority and other personnel can gain entry to the premises and remove the adult from there to the specified place.

(8) A justice of the peace may deal with an application for the immediate grant of an order dispensing with intimation only if a sheriff is not reasonably available. A justice should not be empowered to deal with any other kind of application for removal.

(Paragraph 4.35)

12. The sheriff should, on application, have power to make an order excluding a person living in the same home as a vulnerable adult if satisfied that:

(a) the vulnerable adult is entitled to occupy the home by virtue of ownership, tenancy or otherwise;

(b) the vulnerable adult is suffering, or is likely to suffer, significant harm to health as a result of any conduct, or any threatened or reasonably apprehended conduct, of the person sought to be excluded; and

(c) the making of an exclusion order -

(i) is necessary for the protection of the vulnerable adult, irrespective of whether he or she is for the time being residing in the home, and

(ii) would better safeguard the vulnerable adult's welfare than removal of the vulnerable adult from the home.

(Paragraph 4.45)

13. The sheriff should not grant an exclusion order if the vulnerable adult objects unless he or she considers that the vulnerable adult's objections should be disregarded because of mental disorder or undue pressure.

(Paragraph 4.48)

14. (1) An exclusion order under Recommendation 12 should be granted for a period not exceeding six months as specified by the sheriff. An excluded person who occupied by

permission of the vulnerable adult should not become re-entitled to occupy merely because the period has elapsed.

(2) There should be no statutory provisions preventing an excluded person from disposing of the home or bringing an action for its division and sale.

(Paragraph 4.50)

15. The sheriff should have power pending the making of an exclusion order under Recommendation 12 to make an interim exclusion order, provided that the person sought to be excluded has been afforded an opportunity of being heard.

(Paragraph 4.51)

16. (1) The sheriff in granting an exclusion order or an interim exclusion order should have power to grant an interdict against re-entry, a warrant for summary ejection and other appropriate orders (including attaching a power of arrest to any interdict and granting the interdict against re-entry subject to conditions).

(2) The sheriff should have power to vary or recall any exclusion order, interim order or associated ancillary order.

(Paragraph 4.56)

17. (1) Where the vulnerable adult is able to apply for an exclusion order only he or she may do so.

(2) Where the vulnerable adult is not so able, an application may be made on the adult's behalf by a curator bonis or other legal representative, or by the local authority. The local authority should have a duty to apply if satisfied that:

(a) the grounds for exclusion set out in Recommendation 12 exist, and

(b) that no application or other proceedings for removal of the abuser are pending or under consideration.

(3) The court should consider appointing a safeguarder to the vulnerable adult in an application made by the local authority.

(Paragraph 4.59)

18. A person who is entitled to occupy a home which he or she shares with the vulnerable adult and any other person should be able to apply for that other person's exclusion on the same grounds as in Recommendation 12.

(Paragraph 4.60)

19. The duty of a local authority under section 48 of the National Assistance Act 1948 to protect property of people admitted to hospital etc. should be extended to those removed to a place of safety under section 118 of the Mental Health (Scotland) Act 1984 and vulnerable adults removed under Recommendation 11.

(Paragraph 5.9)

20. A warrant granted under section 117(3) of the Mental Health (Scotland) Act 1984 authorising a constable to enter premises by force to retake a patient absent without leave should be addressed to the police force for the area and should not be required to name the constable.

(Paragraph 5.11)

21. The Secretary of State for Scotland should, after consultation with appropriate bodies, prepare, publish and keep under review a Code of Practice containing guidance to local authorities, medical practitioners and the managers and staff of hospitals as to the exercise of their functions under our recommendations.

(Paragraph 5.12)

22. It should be an offence for any person, other than the vulnerable adult concerned, to obstruct or hinder a duly authorised person from the local authority or Mental Welfare Commission in carrying out the functions recommended in this report in relation to that adult.

(Paragraph 5.14)

23. (1) The decision of a sheriff or justice of the peace in relation to warrants for forcible entry to premises (Recommendation 7), a sheriff's order for assessment and examination of vulnerable adults and associated ancillary orders (Recommendation 9), and a sheriff's order for production and inspection of documents and records relating to vulnerable adults (Recommendation 10) should be final.

(2) The granting by a sheriff or justice of an order for the removal of a vulnerable adult (Recommendation 11) should be capable of being reviewed. The vulnerable adult or any person with an interest in the vulnerable adult's welfare should be entitled to apply for review. The review application should be determined within three working days of its being made or as soon as practicable thereafter.

(3) An order granted by a sheriff excluding a person living with a vulnerable adult (Recommendation 12) should be appealable either to the sheriff principal or the Court of Session in accordance with section 26 and 27 of the Sheriff Courts (Scotland) Act 1907. Any appeal against an interim exclusion order should require the leave of the sheriff whether or not the interlocutor also contains one or more interdicts.

(Paragraph 5.18)

24. (1) In general, the local authority to take action under the recommendations in this report should be the local authority for the area in which the vulnerable adult or suspected vulnerable adult is habitually resident.

(2) The local authority in whose area the vulnerable adult or suspected vulnerable adult is present should be able to take action if the adult has no habitual residence, if the adult's habitual residence cannot be readily determined, or if urgent action requires to be taken.

(3) The local authority in whose area property belonging to a vulnerable adult or a suspected vulnerable adult is situated should be able to take action in relation to that property if urgent action requires to be taken.

(Paragraph 5.20)

25. An application to the sheriff under the recommendations in this report (except for an assessment order under Recommendation 9) should be made to the sheriff in whose sheriffdom the premises concerned are situated. An application for an assessment order should be made to the sheriff in whose sheriffdom the adult to be assessed is present.

(Paragraph 5.21)

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# **BILL**

TO

Make provision for Scotland as to the personal welfare, the property and the financial affairs of certain adults who are unable to safeguard those things for themselves; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

*Application and provision for consent*

## **1 Vulnerable adults**

This Act applies to vulnerable adults, that is to say to adults who for the time being are both—

- (a) unable to safeguard their own welfare, property or financial affairs; and
- (b) in one or more of the following categories—
  - (i) persons in need of care and attention by reason either of infirmity or of the effects of ageing;
  - (ii) persons suffering from illness or mental disorder;
  - (iii) persons substantially handicapped by disability.

## **2 Requirement for consent of vulnerable adult to intervention in his affairs**

- (1) Intervention in the affairs of a vulnerable adult (or of someone believed or averred to be a vulnerable adult) shall not be authorised or effected by, under or by virtue of sections 6 to 12 of this Act if he is known to refuse consent to the intervention; except that his refusal may be disregarded by a court or other person to whom it falls to authorise or effect such intervention if it is reasonable to believe that it is a refusal wholly or mainly consequent upon—
  - (a) his being mentally disordered; or
  - (b) his having been pressurised by some other person.
- (2) Without prejudice to the generality of subsection (1) above, intervention in the affairs of a person includes for the purposes of that subsection—
  - (a) where he is the person who it is averred is suffering, or is likely to suffer, significant physical or mental harm as a result of the conduct, or threatened or reasonably apprehended conduct, of the subject of an exclusion order (“subject” having the meaning given by subsection (2)(a) of section 11 of this Act), the making of that order or of an order under subsection (8) or paragraph (f) of subsection (9) of that section, the granting of a warrant or interdict under the said subsection (9) or the attachment of a power of arrest to such an interdict; and

- (b) where he is the person to whom, or to whose affairs, records or documents (in whatever form) relate, anything done under section 8 of this Act in respect of those records or documents.

### *Enquiries and inspections*

#### **3 Local authority's duty to enquire into case involving vulnerable adult**

A local authority shall enquire under this section into any case where it appears to them that, in order to safeguard the welfare, property or financial affairs of a person who is (or who they believe is) a vulnerable adult, it may be necessary for them to intervene in the affairs of that person.

#### **4 Role of Commission and local authority's duty to liaise with Commission**

- (1) The Commission may enquire under this subsection into any case where it appears to them that, in order to safeguard the welfare, property or financial affairs of a person who is (or who they believe is) a vulnerable adult by reason of (or partly by reason of) mental disorder, it may be necessary for them to intervene in the affairs of that person.
- (2) A local authority—
  - (a) enquiring under section 3 of this Act into any case where the person in question is, or appears to be, a vulnerable adult by reason of (or partly by reason of) mental disorder; or
  - (b) intervening, under or by virtue of this Act, in the affairs of any such person,shall inform the Commission that they are doing so; and the authority and the Commission shall thereafter, in so far as is reasonably practicable, provide information and assistance to each other with a view to facilitating (and avoiding duplication of effort in) the performance of their respective functions in relation to the person.
- (3) Subsection (1) above and section 3 of this Act are without prejudice to any power exercisable by, or duty imposed on, the Commission under section 3 of the 1984 Act; and subsection (2) above is without prejudice to subsection (2)(d) to (f) of that section or to section 5(2) of that Act (duties of local authority in relation to the Commission).

#### **5 Admission to premises**

- (1) Where, for the purposes of an enquiry under section 3 or 4(1) of this Act, a person duly authorised (anyone so authorised being in this Act referred to as an “inspector”) considers that it is necessary to inspect any premises to determine whether the apparent circumstances giving rise to the enquiry can be substantiated and if so what, if anything, should be done to remedy those circumstances, the inspector may, at any reasonable time, visit the premises and, on stating his purpose and exhibiting his authorisation, demand admission for himself and such other person as he may choose to have accompany him; and unless admission is refused he may thereupon enter with any such other person and inspect the premises.
- (2) In subsection (1) above, “duly authorised” means authorised generally, for the purposes of this Act, by a local authority or (but only in relation to vulnerability by reason of, or partly by reason of, mental disorder) by the Commission; and those who may be so authorised are, where authorisation is by—
  - (a) a local authority—

- (i) a mental health officer; or
    - (ii) an officer of the authority who is of a class prescribed for those purposes by the Secretary of State; and
  - (b) the Commission, a commissioner or an officer of the Commission.
- (3) If admission to premises is demanded under subsection (1) above but is refused, or if there is an entitlement under that subsection to demand admission but refusal is reasonably apprehended, the local authority or as the case may be the Commission may make written application to the sheriff (or to a justice where application to the sheriff is not for the time being practicable and the circumstances are such that any delay is likely to be prejudicial to the vulnerable adult or believed vulnerable adult) for an appropriate warrant.
  - (4) The reference in subsection (3) above to an “appropriate” warrant is to a warrant, granted under that subsection, authorising any constable of the police force maintained for the area in which the premises are situated to take such steps as are requisite to ensure that the inspector, with the constable and anyone else whom the inspector wishes to accompany him, are able (whether on one occasion or, if the inspector thinks fit, on more than one occasion) to enter and inspect the premises for the purposes mentioned in subsection (1) above; but any such warrant shall only be granted after the inspector has appeared personally before the sheriff (or as the case may be before the justice), shall only be exercisable within seventy-two hours after being granted and shall not entitle any person to remain in the premises after that period has elapsed.
  - (5) The form of any such authorisation as is mentioned in subsection (2) above shall be prescribed.

#### *Interviews and examinations*

### **6 Interviews and medical examinations**

- (1) In the course of an inspection of premises under or by virtue of section 5 of this Act, the inspector and anyone accompanying him (including, without prejudice to the generality of this subsection, any constable who is doing so by virtue of subsections (3) and (4) of that section) shall be allowed access to any person there; and they shall be entitled to interview that person there and in private, though he shall not be required to answer any question.
- (2) If the inspector or anyone accompanying him is a medical practitioner, that practitioner shall be entitled to carry out there and in private, a medical examination of any person who appears to the practitioner—
  - (a) in a case where the inspector is duly authorised by a local authority, to be a vulnerable adult; and
  - (b) in a case where the inspector is duly authorised by the Commission, to be a vulnerable adult by reason of (or partly by reason of) mental disorder.

### **7 Assessment order**

- (1) Without prejudice to any powers enjoyed under or by virtue of section 6 of this Act, a local authority or the Commission may apply to the sheriff for an order under this subsection (in this Act referred to as an “assessment order”) as respects a person (in this section referred to as the “subject” of the application) who, where the application is by—

- (a) a local authority, the applicant avers may be a vulnerable adult;
  - (b) the Commission, the applicant avers may be a vulnerable adult by reason of (or partly by reason of) mental disorder.
- (2) An assessment order is an order authorising—
- (a) an inspector (or any person nominated by the applicant) to interview the subject in private, though the subject shall not be required to answer any question; and
  - (b) an inspector if he is a medical practitioner (or any medical practitioner nominated by the applicant) to conduct, in private, a medical examination of the subject,
- with a view to assessing the subject's state of health, whether he is in need of care and whether it is necessary to provide services for him or to ensure that measures are taken to protect him; but such authorisation shall relate only to an interview or examination carried out within a period (not exceeding seven days) specified in the order and beginning with a date so specified.
- (3) Subject to subsection (7) below, the applicant shall give notice of any application under subsection (1) above to the subject; and that application shall not be determined until the subject and any other person who may, in accordance with rules, have been given notice of it have been afforded an opportunity of being heard by, or represented before, the sheriff.
- (4) At any hearing conducted by virtue of subsection (3) above the subject shall be entitled to be accompanied by a friend.
- (5) Without prejudice to subsection (4) above, in determining any application under subsection (1) above the sheriff shall, if he considers it necessary to appoint a person for the purpose of safeguarding the interests of the subject in the proceedings, make such an appointment on such terms and conditions as the sheriff thinks fit.
- (6) The sheriff may make an assessment order if he is satisfied—
- (a) that there is reasonable cause to believe that the subject is, in the case of an application by—
    - (i) a local authority, a vulnerable adult; or
    - (ii) the Commission, a vulnerable adult by reason of (or partly by reason of) mental disorder; and
  - (b) that the interview and medical examination to be authorised are likely substantially to assist a local authority (whether or not the applicant authority) or, as the case may be, the Commission in deciding what (if any) intervention by them in the affairs of the subject would be appropriate.
- (7) The sheriff may—
- (a) dispense with the requirements of subsection (3) above; and
  - (b) grant an assessment order forthwith,
- if he considers that such delay as would result from compliance with those requirements would be likely to be prejudicial to the subject.

- (8) Where in the opinion of the sheriff it is necessary, for the purposes of the assessment, that the subject be taken somewhere other than the place where that person for the time being is, the sheriff may, whether in making the assessment order or on subsequent written application under this subsection, provide that during a period specified in the order (being a period no part of which is later than the period specified by virtue of subsection (2) above) the subject may be so taken.
- (9) An assessment order shall not authorise any use of force; but on cause shown the sheriff (whether when making an assessment order or subsequently) may make such further order as is requisite to ensure that the assessment order can be effected.

**8 Examination of records etc.**

- (1) A local authority or the Commission may apply to the sheriff for an order authorising an inspector to carry out an examination of records or documents (in whatever form) at premises where, it is averred, those records or documents are held (the premises, referred to in this section as the “relevant” premises, being specified in the application).
- (2) The sheriff may make an order under subsection (1) above if he is satisfied—
  - (a) that there is reasonable cause to believe that the person to whom, or to whose affairs, the records or documents relate is, in the case of an application by—
    - (i) a local authority, a vulnerable adult; or
    - (ii) the Commission, a vulnerable adult by reason of (or partly by reason of) mental disorder; and
  - (b) that examination of the records or documents is likely substantially to assist a local authority (whether or not the applicant authority), or as the case may be the Commission, in deciding what (if any) intervention by them in the affairs of the subject would be appropriate.
- (3) Subject to subsection (4) below, an order under subsection (1) above shall entitle the inspector and anyone accompanying him—
  - (a) to inspect, in the relevant premises—
    - (i) records and documents specified in the order; or
    - (ii) records and documents of a class so specified; and
  - (b) if the inspector considers it necessary to do so, to search the relevant premises for any such records and documents.
- (4) No person other than a medical practitioner shall be entitled, by virtue of paragraph (a) of subsection (3) above, to inspect medical records (other than to the extent necessary to determine that records are medical records).
- (5) An order under subsection (1) above shall not authorise any use of force; but on cause shown the sheriff (whether when making an order under subsection (1) above or subsequently) may make such further order as is requisite to ensure that the order under that subsection can be effected.

**9 Order for removal of vulnerable adult**

- (1) A local authority or the Commission may apply to the sheriff for an order under this subsection (in this Act referred to as a “removal order”) as respects a person (in this section and in section 10 of this Act referred to as the “subject” of the order) who, where the application is by—
  - (a) a local authority, the applicant avers may be a vulnerable adult; or
  - (b) the Commission, the applicant avers may be a vulnerable adult by reason of (or partly by reason of) mental disorder,the applicant being able to demonstrate reasonable cause for so averring.
- (2) A removal order is an order authorising—
  - (a) an inspector (or any person nominated by the applicant), on stating his purpose and exhibiting a copy of the order, to enter, within seventy-two hours after the order is granted, with such person as he may choose to have accompany him, any premises where the subject is and to remove the subject from there to a place specified in the order (whether or not a place within the jurisdiction of the sheriff);
  - (b) the detention of the subject in that place for a period so specified but not exceeding seven days; and
  - (c) a constable of the police force maintained for the area in which the premises so mentioned are situated to take such steps as are requisite to ensure that the inspector (or nominee), and any person accompanying him, are able to carry out what, by virtue of paragraph (a) above, they are authorised to do.
- (3) Subject to subsection (5) below, the applicant shall give notice of any application under subsection (1) above to the subject; and that application shall not be determined until the subject and any other person who may, in accordance with rules, have been given notice of it have been afforded an opportunity of being heard by, or represented before, the sheriff.
- (4) At any hearing conducted by virtue of subsection (3) above the subject shall be entitled to be accompanied by a friend.
- (5) The sheriff may—
  - (a) dispense with the requirements of subsection (3) above; and
  - (b) subject to subsection (7) below, grant a removal order forthwith,if he considers that such delay as would result from compliance with those requirements would be likely to be prejudicial to the subject.
- (6) Without prejudice to subsection (4) above, in determining any application under subsection (1) above the sheriff shall, if he considers it necessary to appoint a person for the purpose of safeguarding the interests of the subject in the proceedings, make such an appointment on such terms and conditions as the sheriff thinks fit.
- (7) Before making a removal order the sheriff shall be satisfied that the subject—
  - (a) is a vulnerable adult; and
  - (b) is likely to suffer significant harm if not removed from the premises mentioned in subsection (2)(a) above.

- (8) Where application to the sheriff under subsection (1) above is not practicable and the circumstances are such that any delay is likely to be prejudicial to the apparent vulnerable adult, application under that subsection may instead be made to a justice (with the reference in subsection (7) above to the sheriff being construed as a reference to the justice); and in relation to any application by virtue of this subsection, subsections (3) to (6) above shall not apply.
- (9) Subject to subsection (7) above, where application to a justice is made by virtue of subsection (8) above, the justice shall, if he grants a removal order, grant it forthwith.

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

- (1) The subject of, or applicant for, a removal order, or any other person claiming an interest in the welfare of the subject, may apply to the sheriff (whether or not the order was made by the sheriff) for the recall or variation of the order.
- (2) Any application under subsection (1) above—
  - (a) shall be made, and notice of the application given, in accordance with rules;
  - (b) shall not be determined until the subject and any person given notice by virtue of paragraph (a) above have been afforded an opportunity of being heard by, or represented before, the sheriff; and
  - (c) shall be determined within three days (not including any Saturday or Sunday or any day which is a court holiday) of being made or as soon thereafter as is practicable.
- (3) At any hearing conducted by virtue of subsection (2)(b) above the subject shall be entitled to be accompanied by a friend.
- (4) Where under subsection (1) above the sheriff recalls a removal order he may make such order as he thinks fit for the subject—
  - (a) to be returned to the premises from which he was removed; or
  - (b) to be taken to some other appropriate place of the subject's choice.

## **11 Exclusion order**

- (1) Where—
  - (a) a vulnerable adult is entitled to occupy a dwellinghouse which he shares with another person, the vulnerable adult;
  - (b) a person is entitled to occupy a dwellinghouse which he shares with a vulnerable adult and with another person, the person so entitled,may apply to the sheriff for an exclusion order, that is to say for an order such as is defined in subsection (2) below.
- (2) An exclusion order is an order under subsection (1) above—
  - (a) requiring that the other person (in this section and in section 12 of this Act referred to as the “subject” of the order) neither enter nor remain in the dwellinghouse during such period—
    - (i) not exceeding six months; and
    - (ii) commencing on such date,as is specified in the order; and

- (b) suspending the subject's rights of occupancy in the dwellinghouse (in so far as he may have any) for that period.
- (3) Where a period specified by virtue of paragraph (a) of subsection (2) above has elapsed, that shall not in itself entitle a subject who has no such rights as are mentioned in paragraph (b) of that subsection to recommence residence at the premises.
- (4) Subject to subsection (7) below, if the sheriff is satisfied as respects the application that the conditions mentioned in subsection (6) below are met, he shall make the exclusion order.
- (5) Where a local authority are satisfied—
  - (a) that the vulnerable adult is unable (for a reason other than that he lacks entitlement to occupy the dwellinghouse in question) to make an application under subsection (1)(a) above;
  - (b) that the conditions mentioned in subsection (6) below are met;
  - (c) that no other person has applied, or is likely to apply—
    - (i) under subsection (1)(a) above, on behalf of the vulnerable adult; or
    - (ii) under subsection (1)(b) above; and
  - (d) that no other proceedings (whether or not proceedings under or by virtue of this Act) are for the time being depending before a court for the ejection or exclusion of the subject from the dwellinghouse,

the local authority shall apply under subsection (1)(a) above on behalf of the vulnerable adult.

- (6) The conditions are—
  - (a) that the vulnerable adult is suffering or is likely to suffer, significant physical or mental harm as a result of any conduct, or any threatened or reasonably apprehended conduct, of the subject; and
  - (b) that the making of the order—
    - (i) is necessary for the protection of the vulnerable adult irrespective of whether he is for the time being residing in the dwellinghouse; and
    - (ii) would better safeguard his welfare than his removal from the dwellinghouse.
- (7) No application for an exclusion order shall be finally determined until the subject has been given an opportunity to be heard by, or represented before, the sheriff.
- (8) The sheriff may on application make an interim order, that is to say an order under this subsection—
  - (a) requiring that the subject neither enter nor remain in the premises; and
  - (b) suspending the subject's rights of occupancy in the dwellinghouse (in so far as he may have any),

during such period, pending the making of an exclusion order, as is specified in the interim order; and subsections (7) above and (12) below shall apply in respect of an interim order as they apply in respect of an exclusion order.

- (9) The sheriff, when making an exclusion order or interim order may, on application—
  - (a) grant warrant for the summary ejection of the subject from the dwellinghouse;

- (b) grant an interdict prohibiting the removal by the subject of any item mentioned, whether generally or specifically, in the interdict from the dwellinghouse;
  - (c) grant an interdict prohibiting the subject from entering the dwellinghouse during the period specified, by virtue of subsection (2)(a) or (8) above, in the order;
  - (d) grant an interdict prohibiting the subject from entering or remaining in a specified area in the vicinity of the dwellinghouse during that period;
  - (e) give directions as to the preservation of the subject's moveable property if any remains in the dwellinghouse; and
  - (f) make such other order as the sheriff considers necessary for the proper enforcement of any warrant granted under paragraph (a) above or any interdict granted under paragraph (b) or (d) above.
- (10) Any such interdict as is mentioned in subsection (9) above may be granted subject to exceptions or conditions specified in the interdict.
- (11) The subject of an exclusion order, of an order under subsection (8) above or of an interdict granted under subsection (9) above, or any other person claiming an interest, may apply to the sheriff for the recall or variation—
- (a) of that order or interdict;
  - (b) of any directions given under subsection (9)(e) above as respects the subject's moveable property; or
  - (c) of any order made under subsection (9)(f) above as respects—
    - (i) a warrant granted for the subject's ejection; or
    - (ii) an interdict prohibiting actings by the subject.
- (12) Without prejudice to subsection (13) below, in determining any application made—
- (a) under subsection (1)(b) or (11) above; or
  - (b) by virtue of subsection (5) above,
- the sheriff shall, if he considers it necessary to appoint a person for the purpose of safeguarding the interests of the vulnerable adult in the proceedings, make such an appointment on such terms and conditions as the sheriff thinks fit.
- (13) At any hearing conducted by virtue of this section the vulnerable adult shall be entitled to be accompanied by a friend.

**12 Powers of arrest attached to interdict granted in relation to exclusion order or interim order**

- (1) The sheriff may attach a power of arrest to any interdict granted under section 11(9) of this Act; but that power—
- (a) shall not have effect until the interdict, together with the attached power of arrest, is served on the subject of the order; and
  - (b) shall cease to have effect when the interdict ceases to have effect.

- (2) If a power of arrest is so attached to an interdict, the person on whose application the interdict was granted shall, as soon as possible after service under subsection (1)(a) above, ensure that there is delivered to the chief constable of the police force maintained for the area in which the dwellinghouse is situated (in this section referred to as the “relevant” chief constable) a copy of the interlocutor together with a copy of the application and a certificate of service of the interdict.
- (3) Where any interdict to which a power of arrest is so attached is varied or recalled, the person who applied for the variation or recall shall ensure that there is delivered to the relevant chief constable a copy of that application and of the interlocutor granting the variation or recall.
- (4) A constable may arrest the subject without warrant if he has reasonable cause to suspect that the subject is in breach of an interdict to which a power of arrest is so attached.
- (5) Where the subject is at a police station having been arrested under subsection (4) above, the constable in charge there—
  - (a) shall, if it appears to him that were the subject liberated there is no substantial risk that he would breach the interdict, liberate him unconditionally; and
  - (b) in any other case, shall detain him in custody until his appearance in court under subsection (9) below or under any provision of the Criminal Procedure (Scotland) Act 1995 (c.46).
- (6) That he has detained a subject under subsection (5)(b) above, shall not give rise to any claim whatsoever against a constable.
- (7) Where the subject is liberated under subsection (5)(a) above, the facts and circumstances which gave rise to his arrest shall forthwith be reported to the procurator fiscal by the constable.
- (8) Subsections (9) to (11) below apply only where—
  - (a) the subject is arrested under subsection (4), and is not thereafter liberated under subsection (5)(a) above; and
  - (b) the procurator fiscal decides that no criminal proceedings are to be taken in respect of the facts and circumstances which gave rise to the arrest.
- (9) The subject shall, wherever practicable, be brought before the sheriff not later than in the course of the first day after the arrest (not including any Saturday or Sunday or any day which is a court holiday).
- (10) Subsections (1), (2) and (4) of section 15 of the said Act of 1995 (intimation to a person named by a person arrested) shall apply to the subject as they apply to a person who has been arrested in respect of an offence.
- (11) Where the subject is brought before the sheriff under subsection (9) above—
  - (a) the procurator fiscal shall present to the sheriff a petition containing—
    - (i) a statement of the particulars of the subject;
    - (ii) a statement of the facts and circumstances which gave rise to the subject’s arrest; and
    - (iii) a request that the subject be detained for a further period not exceeding two days;
  - (b) the sheriff, if it appears to him—

- (i) that the statement mentioned in paragraph (a)(ii) above discloses a *prima facie* breach of interdict by the subject; and
- (ii) that were the subject released from custody there is a substantial risk he would breach the interdict,

may order that the subject be detained for such a further period; and

- (c) the sheriff shall, in any case in which paragraph (b) above does not apply, order the release of the subject from custody (except in so far as he may be in custody in respect of some other matter).

### *Miscellaneous*

## **13 Obstruction**

- (1) Any person who without reasonable cause—
  - (a) refuses to allow, in accordance with the provisions of this Act, the inspection of any premises;
  - (b) refuses to allow, in accordance with those provisions, access to, or the interviewing or examination of, any other person by an inspector, by anyone whom an inspector has chosen to have accompany him or, as the case may be, by an authorised nominee (“authorised nominee” being construed in accordance with section 7(2) of this Act);
  - (c) refuses to produce to an inspector or to anyone whom an inspector has chosen to have accompany him (or to allow them access to), any record or document the production of which (or access to which) is duly required in accordance with those provisions; or
  - (d) not being himself a vulnerable adult in relation to whom it is sought to exercise functions under or by virtue of this Act, otherwise obstructs any person in such exercise,

shall be guilty of an offence.

- (2) Without prejudice to the generality of subsection (1) above, any person who insists on being present at an interview or examination when requested to withdraw by any person entitled, under or by virtue of this Act, to conduct the interview or examination in private shall be guilty of an offence.
- (3) Any person guilty of an offence under this section shall be liable, on summary conviction, to a fine not exceeding level 3 on the standard scale or to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.
- (4) In subsection (1) above, “person” for the purposes of—
  - (a) paragraph (a) above does not include the vulnerable adult, or believed vulnerable adult, whose case has given rise to the inspection; and
  - (b) paragraph (c) above does not include the vulnerable adult, or believed vulnerable adult, to whom or to whose affairs the record or document relates.

## **14 Code of practice**

- (1) The Secretary of State shall prepare, and from time to time revise, a code of practice for the guidance of—

- (a) local authorities and medical practitioners as to the exercise of their functions under this Act; and
- (b) managers and other staff of hospitals as to—
  - (i) the detention and discharge of persons removed to hospital under this Act; and
  - (ii) any other matter arising under or by virtue of this Act.
- (2) He shall publish the code; and shall from time to time re-publish it as for the time being in force.
- (3) Before preparing the code, or before making any revision of it, he shall consult such bodies as appear to him to have an interest in the matter.

**15 Appeals**

- (1) No appeal shall be competent against—
  - (a) the granting of a warrant under section 5(3) of this Act;
  - (b) the making of an assessment order; or
  - (c) the making of a removal order.
- (2) An appeal shall be competent only with the leave of the sheriff against the making of an interim order under section 11(8) of this Act.

**16 Amendment of section 48 of National Assistance Act 1948**

In section 48(1) of the National Assistance Act 1948 (c.29) (temporary protection for property of persons admitted to hospital etc.), after paragraph (c) there shall be added—

“, or

- (d) is removed from any premises under a removal order (as defined in section 9(2) of the Vulnerable Adults (Scotland) Act 1996), or
- (e) is removed under section 118(1) of the Mental Health (Scotland) Act 1984 (c.36) (removal of mentally disordered person to place of safety from place to which the public has access),”.

**17 Amendment of section 117 of 1984 Act**

In section 117 of the 1984 Act (which provides for searching premises for, and removing, persons suffering from mental disorder etc.)—

- (a) subsections (1) and (2) shall cease to have effect;
- (b) in subsection (3), for the words “named therein” there shall be substituted “of the police force maintained for the area in which the premises are situated”;
- (c) subsection (4) shall cease to have effect;
- (d) in subsection (5)—
  - (i) the words “the execution of a warrant issued under subsection (2) of this section, the constable to whom it is addressed shall be accompanied by a medical practitioner, and in” shall cease to have effect; and

- (ii) for the words “the constable to whom it is addressed” there shall be substituted “a constable”;
- (e) subsection (6) shall cease to have effect; and
- (f) in subsection (7), paragraph (b) and the word “and” immediately preceding that paragraph shall cease to have effect.

*General*

**18 Interpretation**

- (1) In this Act, unless the context otherwise requires—
  - “adult” means a person who has attained the age of sixteen years;
  - “assessment order” has the meaning given by section 7(2);
  - “the Commission” means the Mental Welfare Commission for Scotland;
  - “exclusion order” has the meaning given by section 11(2);
  - “inspector” has the meaning given by section 5(1);
  - “justice” means a justice of the peace appointed (or deemed appointed) under section 9 of the District Courts (Scotland) Act 1975 (c.20);
  - “medical records” means records relating to the physical or mental health of an individual which have been prepared by a medical practitioner who is, or has been, responsible for the clinical care of the individual;
  - “mental disorder” has the same meaning as in the 1984 Act;
  - “mental health officer” means a person appointed (or deemed appointed) under section 9(1) of the 1984 Act;
  - “nearest relative”, in relation to a vulnerable adult, means the person who is his nearest relative within the meaning of the 1984 Act, except that for the purposes of this definition a vulnerable adult who is not a patient within the meaning of that Act (that is to say is not a person suffering or appearing to suffer from mental disorder) shall be deemed a patient in construing Part V of that Act;
  - “removal order” has the meaning given by section 9(2);
  - “rules” means such rules as the Court of Session has power to make by act of sederunt under section 32 of the Sheriff Courts (Scotland) Act 1971 (c.58);
  - “the 1984 Act” means the Mental Health (Scotland) Act 1984 (c.36); and
  - “vulnerable adult” shall be construed in accordance with section 1.
- (2) In this Act, unless the context otherwise requires, any reference to a local authority is a reference—
  - (a) except where paragraph (b) or (c) below applies, to the council for the local government area in which the vulnerable adult concerned (or as the case may be the person concerned who is believed or averred to be a vulnerable adult) is habitually resident;
  - (b) except in so far as paragraph (c) below applies, if—
    - (i) he has no habitual residence;
    - (ii) his habitual residence cannot readily be determined; or

- (iii) a matter requiring urgent action has arisen,  
to the council for the local government area in which for the time being he is; or
  - (c) where he has property in a local government area not mentioned in paragraph (a) or (b) above and in relation to that property a matter requiring urgent action has arisen, to the council for that area but only in respect of that matter.
- (3) Any reference in this Act to something being “prescribed” is a reference to its being prescribed by regulations; and any power conferred by this Act on the Secretary of State to make regulations shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (4) Any reference in this Act—
  - (a) to the sheriff, or to a justice, in connection with an application for an order (other than an assessment order) or for a warrant, shall be construed as a reference to the sheriff within whose sheriffdom, or as the case may be to a justice for the commission area within which, the premises to which the application relates are situated; and
  - (b) to the sheriff, in connection with an application for an assessment order, shall be construed as a reference to the sheriff within whose sheriffdom the subject for the time being is (“subject” having the meaning given by section 7(1) of this Act).

## **19 Repeals**

The enactments mentioned in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

## **20 Short title, commencement and extent**

- (1) This Act may be cited as the Vulnerable Adults (Scotland) Act 1996.
- (2) This Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint; and different days may be so appointed for different purposes.
- (3) Subject to subsection (4) below, this Act shall extend to Scotland only.
- (4) This section and section 16 extend also to England and Wales.

SCHEDULE  
(introduced by section 19)

REPEALS

<i>Chapter</i>	<i>Short title</i>	<i>Extent of repeal</i>
11 & 12 Geo. 6 c.29.	The National Assistance Act 1948.	Section 47.
14 & 15 Geo. 6 c.57.	The National Assistance (Amendment) Act 1951.	The whole Act.
1984 c.36.	The Mental Health (Scotland) Act 1984.	In section 117, subsections (1), (2) and (4); in subsection (5) the words “the execution of a warrant issued under subsection (2) of this section, the constable to whom it is addressed shall be accompanied by a medical practitioner, and in”; subsection (6); and in subsection (7), paragraph (b) and the word “and” immediately preceding that paragraph.

# Index to Bill

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# Appendix B

## **List of those who submitted written comments on the discussion paper**

Association of Chief Police Officers in Scotland

Association of Directors of Social Work

Borders Health Board

Borders Regional Council Social Work Department

Convention of Scottish Local Authorities

Court of Session Judges

Enable (The Scottish Society for the Mentally Handicapped)

Faculty of Advocates

Fife Regional Council

Highland Regional Council Social Work Department

Law Society of Scotland

Lothian Users Forum

Mental Welfare Commission for Scotland

Mothers Union (Edinburgh)

Nithsdale Council of Voluntary Services

National Schizophrenia Fellowship Scotland

Refuge

Scottish Association for Mental Health

Scottish Police Superintendents

Strathclyde Regional Council, Social Work Department

Mrs Jenny Tate, Principal Officer (Mental Health), Lothian Regional Council