

Consultation on
vulnerable adults



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INTRODUCTION

The purpose of this consultation paper

1. In 1997, the Scottish Law Commission (SLC) published a report on Vulnerable Adults¹. In January 2001, the Scottish Executive published the report on the Review of the Mental Health (Scotland) Act 1984 (the “Millan report”)². The Millan report recommended that the SLC’s proposals relating to vulnerable adults should be accepted in respect of adults with mental disorder. The Scottish Executive is taking forward the recommendations in the Millan report as described in paragraph 14. The purpose of this consultation paper is to seek views on:

- the extension of the vulnerable adults provisions to groups other than persons with mental disorder;
- the possible introduction of provisions to exclude persons living with a vulnerable adult, where the adult’s health is at risk.

2. Responses received to this consultation will assist the Executive’s consideration of whether legislation should be brought forward to extend the provisions to a wider group of adults and whether to introduce exclusion provisions relating to all vulnerable adults.

Responses to this consultation

3. Please send your response to this consultation paper **by 8 March 2002** by e-mail if possible to VulnerableAdults@scotland.gsi.gov.uk or by post to

Mrs Jean Wilson
Scottish Executive Justice Department
Spur V1
Saughton House
Broomhouse Drive
Edinburgh
EH11 3XD

or by fax to 0131 244 2195.

4. It would be very helpful if you would comment in response to the consultation questions in the paper (these are summarised on pages 18 and 19) although you should not feel you need to respond to all the questions and you may wish to comment on other aspects. A form for responding electronically is available by e-mail from the address above. Please include in your response your name and address, telephone number and e-mail address if you have one. Please state the organisation you represent or on whose behalf you are responding.

¹ Scottish Law Commission: Report on Vulnerable Adults (SCOT LAW COM No 158): ISBN 0-10-257997-0; available from the Stationery Office, price £10.95, or at www.scotlawcom.gov.uk

² Report on the Review of the Mental Health (Scotland) Act 1984: ISBN 1-84268-892-8; available from the Stationery Office, price £25, or on computer disk from 0131 244 5076, or at www.scotland.gov.uk/health/mentalhealthlaw

5. It is standard practice for the Scottish Executive to make responses to consultation documents publicly available. Unless you indicate that you wish your response to be kept confidential, we will make it publicly available.

BACKGROUND

Present position

6. Section 117 of the Mental Health (Scotland) Act 1984 (“the 1984 Act”) contains provisions for emergency interventions, where there is reason to believe that a mentally disordered person is being ill treated or neglected, or is without adequate care. It confers a power on a mental health officer (MHO), or a Medical Commissioner of the Mental Welfare Commission, to take action if they have reasonable cause to believe that a person with mental disorder is suffering ill-treatment or neglect or is being kept “otherwise than under control”, or else is living alone or uncared for and is unable to care for him or herself. The power allows the MHO or Medical Commissioner to demand entry to premises and to inspect them if admission is not refused. If admission is refused or a refusal is anticipated, a justice of the peace, sheriff or stipendiary magistrate may issue a warrant authorising a named constable to enter, if need be by force, and to remove the person to a place of safety with a view to the making of an emergency recommendation or an application for admission under Part V of the 1984 Act, or other arrangements for treatment and care. The constable must be accompanied by a doctor. The person once removed can be detained in a place of safety for up to 72 hours.

7. There are also separate provisions in Section 47 of the National Assistance Act 1948 (“the 1948 Act”), as amended by the National Assistance (Amendment) Act 1951, which provide a power to remove from home to a hospital or other place persons who are “suffering from chronic disease or, being aged, infirm or physically incapacitated, are living in insanitary conditions”, and who are unable to look after themselves or are not receiving proper care and attention. This power is exercisable by the local authority after the granting of an order by a sheriff.

8. More broadly, local authorities have a duty to assess the needs of “persons in need” who may require community care services (section 12, Social Work (Scotland) Act 1968). Although the duty to assess does not depend on the consent of the person in need, there is no power to require a person under the 1968 Act to co-operate with such an assessment, or to accept services.

The SLC report on Vulnerable Adults

9. The Scottish Law Commission’s Report on Vulnerable Adults was published in February 1997. The report includes a draft Bill of 20 sections. The full report can be viewed at and downloaded from the Scottish Law Commission website at: www.scotlawcom.gov.uk. A small stock of printed copies is also available (telephone 0131 244 2193). However, certain sections are reproduced with this consultation paper for ease of reference as follows:

- Appendix 1 summary of the SLC’s report’s recommendations
- Appendix 2 SLC’s draft Vulnerable Adults Bill
- Appendix 5 section of SLC’s report dealing with exclusion of abusers

10. In brief, the SLC found the following problems with the law:

- the right of admission to inspect premises only applies where mental disorder is known to be present, not where it is suspected, or the person is vulnerable for other reasons;
- there is no power under the 1984 Act to remove the person if access is granted to see the person, even if there are grounds to suspect abuse;
- the warrant for forcible entry is granted to a named constable, which creates practical difficulties;
- there is no right of appeal against the most commonly used power of removal in the National Assistance Act, which probably breaches the European Convention on Human Rights. Once removed to hospital under that Act, the safeguards contained in the 1984 Act do not necessarily apply;
- the powers concentrate unduly on removing the person from home, to the exclusion of less intrusive methods of ensuring care is delivered.

11. The SLC's report sets out proposals to replace section 117 of 1984 Act and section 47 of the 1948 Act with a new framework for the protection of vulnerable adults at risk of neglect or abuse. A summary of the report's recommendations is provided in Appendix 1. The SLC's draft Bill is reproduced in Appendix 2³. In brief:

- vulnerable adults are defined as persons aged 16 or over who are infirm, elderly, suffering from illness or mental disorder, or disabled; and who are unable to safeguard their own welfare, property or financial affairs;
- local authorities would be made subject to a duty to enquire into any case where it appeared to them that it might be necessary to intervene to safeguard the welfare, property or financial affairs of a vulnerable adult. The Mental Welfare Commission would also be able to make enquiry where a vulnerable adult was mentally disordered;
- if there were grounds for concern, an authorised person would be able to visit the home of the vulnerable adult and demand admission – with a warrant if admission was refused or refusal was likely. The authorised person would be able to insist on seeing the vulnerable adult and a doctor could carry out a medical examination. The local authority could also seek an order from a sheriff to carry out a more detailed assessment of the needs of the vulnerable adult, and to inspect any records;
- the local authority would be able to seek a power from the sheriff to remove the vulnerable adult if satisfied that the adult was likely to suffer significant harm. The power of removal would last for up to 7 days. The adult or any other interested person would be able to go to court to seek variation or recall of the order;

³ In this paper we refer to the clauses in the SLC's draft Bill as "sections", because that is the terminology which has been adopted for Acts of the Scottish Parliament.

- none of the powers to interview, assess or remove the vulnerable adult would be able to be used if the adult refused consent, unless there was reason to believe that the adult's refusal was a consequence of mental disorder or pressure from some other person;
- a new power of exclusion of a suspected abuser is proposed, on the lines of existing powers to exclude child abusers and violent partners. It would have to be shown that the vulnerable adult was at risk of suffering significant physical or mental harm as a result of the conduct of the person. The order would be made by a sheriff, and could be coupled with an interdict.

Millan Committee

12. The Millan Committee found strong support for the SLC's proposals and most respondents to the Committee's second consultation paper supported a suggestion that they should be incorporated in a new Mental Health Act. The Committee was satisfied that the current provisions do require to be reformed and that the SLC proposals offer a comprehensive and well considered set of proposals for such reform. The Millan report recommended that the Vulnerable Adults report's proposals should be implemented in respect of adults with mental disorder.

13. The Millan report makes no recommendations about the Vulnerable Adults report as it relates to persons other than those with mental disorder, as this would have been outwith its remit. It notes that it will be for the Executive and Parliament to decide if others should also be included.

Mental Health Bill Policy Statement

14. The Scottish Executive responded to the recommendations in the Millan report on 18 October in the policy statement "Renewing Mental Health Law".⁴ The policy statement announced that the Mental Health Bill will include a new statutory framework to protect vulnerable adults with mental disorder, based on the recommendations in the SLC's report. The relevant paragraphs from the policy statement are reproduced at Appendix 3.

Adults with Incapacity (Scotland) Act 2000

15. Since the SLC published its report on Vulnerable Adults, the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") has come into effect⁵. This important new piece of legislation changes the system for safeguarding the welfare, and managing the finances and property, of adults aged 16 and over who lack the capacity to take some or all decisions for themselves because of mental disorder or inability to communicate by any means.

16. Local authorities and the Mental Welfare Commission have statutory duties under the 2000 Act but these duties relate only to persons who are or may be adults with incapacity in terms of the Act, which would be a different but overlapping group from those who may be vulnerable because of mental disorder or for some other reason. Also, even in relation to persons who have already been identified as adults with incapacity in terms of the 2000 Act,

⁴ Renewing Mental Health Law: ISBN 0-7559-0198-3; available from the Stationery Office, price £10, or on computer disk from 0131 244 2451 or at www.scotland.gov.uk/health/mentalhealthlaw

⁵ The 2000 Act and associated material can be viewed at www.scotland.gov.uk/justice/incapacity

the Act, generally speaking, does not contain specific provision to enable the authorities to deal with emergencies. The vulnerable adults provisions would allow early action to be taken where it is necessary and the adult appears to be vulnerable. The statutory authorities would then be able to consider what action would be in the best interests of the adult, including powers available under the 2000 Act and the new Mental Health Act. The SLC itself took the view that its proposals relating to vulnerable adults were consistent with its report on Incapable Adults which preceded the 2000 Act and the Executive shares this view.

ISSUES FOR CONSIDERATION

General

17. As already noted, the Millan Committee found strong support for the SLC's proposals and the Committee was satisfied that they provide a sound basis for reform. Except in relation to a possible power to exclude abusers (see paragraphs 38 to 54), this consultation paper is not therefore about the merits of the proposals in relation to people with mental disorder, but about the case for extending them to other groups and issues arising. However, if comments are received on the SLC's recommendations themselves, rather than extension of the provisions to other groups, we shall take these into account as the Mental Health Bill proceeds through Parliament. To help consultees' consideration of extension to other groups, we have included at Appendix 4 a note of some specific points we are considering in relation to inclusion of vulnerable adults provisions in the Mental Health Bill.

18. The Executive's preliminary view is that there is a case for extension beyond vulnerable adults with mental disorder, on the grounds of equity of treatment of, and protection for, adults who are vulnerable, irrespective of the presence of mental disorder. Essentially, it is possible to distinguish 4 categories of vulnerable adult:

- mentally disordered, vulnerable and incapable (in terms of the 2000 Act) by reason of mental disorder
- mentally disordered, vulnerable and not incapable
- not mentally disordered but vulnerable and incapable (in terms of the 2000 Act) because of inability to communicate due to physical disability
- not mentally disordered and not incapable but vulnerable because of age, infirmity, illness or physical disability

Only the first 2 of these categories will be covered by the Mental Health Bill. The proposals in this paper would extend the protection to be provided to vulnerable adults to the other 2 categories. While not all vulnerable adults are elderly, many are and the Executive is committed both to reducing the incidence of elder abuse and to supporting those who are abused.

19. If the provisions are extended to other groups in due course, we will consider consolidation of provisions relating to all vulnerable adults into a single statute, as this might assist all interested parties in understanding and applying the legislation.

Code of Practice

20. The SLC recommends (recommendation 21) that Scottish Ministers should prepare and publish a code of practice providing guidance to those carrying out functions under the

vulnerable adults provisions. It is the Executive's intention that matters relating specifically to vulnerable adults with mental disorder will be covered in the code of practice for the new Mental Health Act. However, we appreciate that if separate provisions are brought forward to extend the vulnerable adults provisions to other groups, it would not be sensible or desirable for the guidance to be in 2 separate codes of practice. We will consider and consult on a separate code of practice should extending legislation be brought forward.

Extension to other groups

Who are vulnerable adults?

21. The SLC considered that confining its proposals to persons with mental disorder would have left some classes of vulnerable people unprotected. In the discussion paper which preceded its report⁶ the SLC proposed that a definition of vulnerable was not necessary because the ordinary meaning -

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

seemed appropriate.

22. Respondents to the discussion paper took the view that the use of the ordinary meaning of vulnerable produced too extensive and diffuse a class of people. The SLC accepted that a wide definition would place too great a strain on local authority resources and prevent the local authority from focussing its attention on those genuinely in need of it. The SLC therefore recommended that a vulnerable adult should be defined for the purposes of its proposals as an adult (aged 16 or over) who is unable to safeguard his or her personal welfare, property, or financial affairs, and is:

in need of care and attention arising out of age or infirmity, or
suffering from illness or mental disorder, or
substantially handicapped by any disability.

23. Persons coming within this definition would fall within the categories of “persons in need” as provided for in the Social Work (Scotland) Act 1968 (see paragraph 8), coupled with the functional test of inability. Local authorities would be likely to have long-term responsibilities in relation to those who were subject to these provisions. “Inability” would, for example, cover inability to communicate because of physical disability which, as noted above, would not be covered by the Mental Health Bill.

Consultation questions

1. Do you agree with the SLC that a new legislative framework is required to protect vulnerable adults, beyond those with mental disorder? If not, why not?

2. If you have answered yes to question 1, do you agree with the definition of vulnerable adult in paragraph 22?

⁶ Scottish Law Commission discussion paper no. 96 – August 1993

3. If you do not agree with the definition in paragraph 22, what changes (in either terminology or scope) do you think require to be made to it?

What issues arise in considering extending the provisions to adults without mental disorder?

General Principles

24. As outlined in paragraph 2 of Appendix 4, it is the intention that the Mental Health Bill will have a clear set of underlying principles, which will apply to the vulnerable adults provisions in the Bill. The 2000 Act (section 1) contains a different but similar set of principles which those carrying out interventions under the Act must follow, namely:

all decisions made on behalf of an adult with impaired capacity must:

- benefit the adult
- restrict the adult's freedom as little as possible while still achieving the desired benefit
- take account of the adult's wishes, if these can be ascertained
- take account of the views of relevant others, as far as it is reasonable and practical to do so
- encourage the adult to use existing skills or develop new skills

Consent

25. A main reservation of respondents to the SLC's discussion paper was that 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. The SLC therefore recommended that certain powers should not be exercisable in the face of opposition unless the objection could be disregarded because of the vulnerable adult's mental disorder or undue pressure from others. (See also paragraph 3 of Appendix 4.) Where there is a case for intervention and the vulnerable adult is incapable because of inability to communicate, consent would not be an issue in the way that it would in relation to a vulnerable adult who is capable of understanding and communicating.

Consultation question

4. What principles do you think should underpin any legislation extending the vulnerable adults provisions to persons without mental disorder?

Admission to premises

26. In its discussion paper the SLC proposed that authorised people should be entitled to demand admission, and if necessary obtain a warrant for forcible entry, to premises where a vulnerable adult or suspected vulnerable adult was present. As already noted, some adults, not covered by the Mental Health Bill, may be potentially vulnerable as a result of inability to communicate because of physical disability (which also renders them incapable in terms of the 2000 Act). The case for forcible entry powers seems clear in such situations. The SLC's proposals did not, however, exclude vulnerable adults who were capable and objected to the intervention. There were no adverse responses to these proposals and the SLC report therefore recommends that 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. Such enquiries would be directed to whether steps needed to be taken in order to safeguard the welfare or property of an adult who is, or is reasonably believed to be, vulnerable. The SLC report notes that the local authority or MWC could not carry out their investigative duties if an objection could prevent matters of concern being looked into.

27. The SLC took the view that the public interest in protecting vulnerable persons against abuse and exploitation outweighs any temporary disturbance to their autonomy and privacy. In the SLC's opinion, provisions authorising such intervention would not be in breach of the European Convention on Human Rights (ECHR). Article 8 of the Convention provides:

“Everyone has the right to respect for his private and family life, his home and his correspondence.

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.”

28. Entry to premises by public officials under a statutory procedure could be justified on the grounds of “the protection of health” or the “prevention of disorder or crime”. (Both the 2000 Act and the 1984 Act/Mental Health Bill contain offences relating to ill treatment and neglect of adults with incapacity/mentally disordered people.) If admission were refused then the local authority would have to apply to a sheriff or justice of the peace for a warrant for forcible entry. Consultees may wish to note that proceedings relating to vulnerable adults in the Mental Health Bill will be before the sheriff and not the new mental health tribunal, so if the provisions are extended to persons without mental disorder, all vulnerable adults would be dealt with in the same forum.

Consultation question

5. Do you agree that the local authority 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 is present, whether or not the adult objects?

Examination, assessment and removal

29. The SLC report considered the circumstances in which it might be justified to subject an adult who is vulnerable but not mentally disordered to examination, assessment or removal against his or her will. (Consent to be interviewed would not appear to be an issue, as under the SLC's proposals the adult would not be required to answer questions.) The SLC noted that some vulnerable adults are intimidated by abusive or exploitative carers or others and concluded that 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. The SLC noted that Article 5 of the ECHR confers on everyone a right to liberty and security of person. One ground for deprivation of liberty is the “lawful detention of persons of unsound mind”. The SLC took the view 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”.

30. The SLC’s proposals on compulsory assessment and removal contain certain protection for adults who object:

- the applicant for the necessary orders would be required to have a reasonable belief that the adult in question was vulnerable and either mentally disordered or subject to undue pressure;
- the adult would, except in urgent cases, receive intimation of the application and be given an opportunity to oppose it;
- an assessment order would not be granted unless the sheriff was satisfied that there was reasonable cause to believe that the adult was vulnerable;
- for removal orders, the sheriff would have to be satisfied that the person was a vulnerable adult;
- sheriffs granting assessment or removal orders should not do so if the adult objects unless they reasonably believe that the adult is mentally disordered or subject to undue pressure.

31. There would be a need for guidance for local authorities on how to judge whether a vulnerable adult was subject to undue pressure. This would not be without precedent, however. The code of practice for local authorities exercising functions under the 2000 Act⁷ contains guidance on assessing an adult’s needs, including ascertaining whether the person is open to influence from others. As with the code of practice under the 2000 Act, the Executive would work closely with authorities themselves to develop appropriate guidance for local authorities about their duties in respect of vulnerable adults (see also paragraph 20).

Consultation question

6. Do you agree that there should be no examination, assessment or removal of an adult who objects and who has sufficient understanding of what is involved, unless those authorising or carrying out the intervention reasonably believe that the adult is vulnerable and is subject to undue pressure?

Role of local authorities and Mental Welfare Commission (MWC)

32. The SLC report recommends (recommendation 4) that

“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.

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.”

⁷ Adults with Incapacity (Scotland) Act 2000: Code of practice for local authorities exercising functions under the Act: ISBN 0-7559-00367; available for viewing and downloading at www.scotland.gov.uk/justice/incapacity

33. Local authorities' and the MWC's roles would therefore overlap in relation to vulnerable adults with mental disorder. Vulnerable adults who are not mentally disordered would, under the SLC's proposals, be dealt with by local authorities. In responding to the SLC's discussion paper, the MWC commented that it should continue to limit its role to persons suffering from a mental disorder and should not become involved with other types of vulnerable people.

Consultation question

7. Do you agree that local authorities should be the responsible agencies under any provisions which are brought forward relating to non-mentally disordered vulnerable adults?

Role of the Public Guardian

34. Under the Adults with Incapacity Act, the Public Guardian has a duty to investigate any circumstances made known to him in which the property or financial affairs of an adult seem to be at risk. We propose to include a provision in the Mental Health Bill, requiring local authorities and the MWC to consult the Public Guardian on cases or matters relating to the exercise of their functions under the Bill in which there is, or appears to be, a common interest. This might be appropriate, for example, if in the course of investigating a mentally disordered vulnerable adult's situation, a local authority found that the adult had a continuing attorney appointed under the 2000 Act who was not deploying the adult's funds in his or her best interests. We would propose that, as a corollary, the Public Guardian should have a duty to consult local authorities and the Mental Welfare Commission if it appears that someone he is dealing with under the 2000 Act may be a vulnerable adult. We would envisage that local authorities and the Public Guardian would be under the same requirement in relation to vulnerable adults without mental disorder, if extending legislation is brought forward.

A multi-agency approach

35. The SLC report notes that the expectation would be that, in carrying out their duties in relation to vulnerable adults, local authorities would work closely with other relevant agencies and involve them as appropriate. For example, any assessment of the risks to and protection needed for a vulnerable adult might need to involve not only social workers, but also doctors or Health Board officials. Voluntary agencies might also be providing informal or formal support and would be expected to be involved in any multi-agency approach to assessment of someone's welfare. The police might also be involved. While the SLC included a requirement for local authorities and the MWC to collaborate with each other in its draft Bill (section 4), it takes the view that collaboration between local authorities and various other agencies would be better dealt with in a code of practice.

Consultation question

8. Do you agree that collaboration between local authorities and agencies such as NHSScotland and the police is a matter best dealt with in a code of practice rather than legislation?

Authorised officers

36. The SLC's draft Bill contains the following definition of a person authorised to enter premises, inspect them, carry out interviews and discharge removal orders:

“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.”

(a)(ii) above will be omitted in the drafting of the Mental Health Bill, because MHOs will be required in all cases of vulnerable adults with mental disorder. It was suggested in response to the SLC's discussion paper that if the category of vulnerable adults was extended from the mentally disordered to other groups, other properly qualified and trained members of the social work department besides MHOs could be authorised.

Consultation question

9. Which classes of officers of a local authority do you consider should be authorised under provisions relating to non-mentally disordered vulnerable adults?

National Assistance Act 1948

37. As noted in paragraph 9, the provisions in the 1948 Act are inconsistent with modern expectations in relation to human rights and due process. Section 47, as amended by the 1951 Act, has no express right of appeal when the expedited procedure is used. That procedure is, in fact, normally used, and the order for removal is normally granted without an opportunity to oppose it. A person removed to hospital under that section would not necessarily come within the safeguards contained in the 1984 Act. As noted in Appendix 4, for the moment we will not be repealing these provisions because this would leave non-mentally disordered vulnerable adults with less protection than at the moment. If a local authority, being a public authority under the Human Rights Act 1998, took action under section 47, which did not comply with the European Convention on Human Rights, it might be vulnerable to a claim for damages under the 1998 Act.

Exclusion of abusers

38. In its discussion paper, the SLC sought 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. Most respondents to the SLC's paper agreed with the proposal to exclude abusers, although exclusion was generally regarded as a draconian measure to be used only in the last resort.

Among the main issues raised by respondents were the exclusion of people who are tenants or home owners and the care of the vulnerable adult following an exclusion. The SLC concluded that exclusion of abusers was justified as a last resort measure as it would enable vulnerable adult victims of abuse to remain at home rather than be forced to move elsewhere. However, in view of the somewhat guarded response on consultation, the SLC thought it best to adopt a fairly cautious approach.

Consultation question

10. In principle, do you agree with the SLC that the court should have power to exclude a person living with a vulnerable adult, if necessary for the protection of the adult? If you answer no to this, please explain your key reservations.

39. The SLC's detailed consideration and recommendations are set out in paragraphs 4.36 to 4.61 of its report. These paragraphs are reproduced in full at Appendix 5 and the next sections of this paper are organised with reference to these paragraphs and on the assumption that respondents will have read them. Respondents will also wish to refer to sections 11 and 12 in the SLC's draft Bill.

Grounds for exclusion (paragraphs 4.41 to 4.47)

40. The SLC's report discusses the provisions in the Matrimonial Homes (Family Protection) (Scotland) Act 1981, allowing the suspension of a spouse's right to occupy the matrimonial home, and similar powers of exclusion in the Children (Scotland) Act 1995.

41. The SLC proposes that the concern of respondents about the exclusion of owners or tenants should be met by restricting exclusion to those cases where the vulnerable adult is entitled to occupy the home. Where the vulnerable adult and abuser were each entitled to occupy the home, the exclusion order would suspend the abuser's right to occupy the home. If the vulnerable adult and the abuser were married to each other, or were both cohabitants with occupancy rights, there would be a choice of legal remedies. An application for exclusion could be made under the 1981 Act or the vulnerable adults provisions. It could well be the case for married vulnerable adults that the use of the 1981 Act would be appropriate because of the protection against disposal of the home (see paragraph 44). Where a sole owner or tenant is being abused in his or her own home but is mentally incapable of terminating the abuser's permission to occupy, there will be a remedy under the Adults with Incapacity Act. It will be possible from April 2002 for an intervention order to be taken out to effect the termination on the vulnerable adult's behalf.

Consultation question

11. Do you agree that the exclusion provisions would apply only where a vulnerable adult has entitlement to occupy the home? If not, please say in which circumstances you think they should apply.

42. The SLC's recommendations for the conditions which would apply to the granting of exclusion orders are set out in recommendation 12 in paragraph 4.45. We would draw consultees' attention in particular to the following points:

42.1 there is no explicit provision for the care of the vulnerable adult after exclusion, on the grounds that this would be amongst the factors to be taken into account in considering whether an exclusion order would best safeguard the adult's welfare. Where the abuser is also the principal care provider, the local authority would need to carry out an assessment of the vulnerable adult's care needs and deploy services to meet those needs;

42.2 it would be a condition that exclusion would better safeguard the vulnerable adult's welfare than removal of the vulnerable adult from the home;

42.3 the significant harm to the adult which would be part of the grounds for exclusion would be harm to physical or mental health. The SLC did not consult on exclusion of those who financially exploit vulnerable adults, which would be a radical innovation. As already noted, however, the Public Guardian has a duty under the Adults with Incapacity Act to investigate any circumstances made known to him in which the property or financial affairs of an adult seem to be at risk. The Mental Welfare Commission also has a duty to investigate any circumstances made known to them in which the property of an adult may, because of the adult's mental disorder, be at risk of loss or damage. Under part 6 of the Act which will come into effect on 1 April 2002, the courts will be able to grant intervention orders and guardianship orders where an adult is incapable of taking decisions about or actions to safeguard his or her property, financial affairs or personal welfare. (A draft code of practice on guardianship and intervention orders can be viewed at www.scotland.gov.uk/justice/incapacity.)

Consultation question

12. Do you agree with the grounds for exclusion set out in paragraph 4.45 of the SLC's report?

Objections by vulnerable adult (paragraph 4.48)

43. As discussed in paragraphs 29 to 31 above, compulsory measures in relation to a vulnerable adult are only seen as necessary where the adult objects if certain conditions pertain.

Consultation question

13. Do you agree that an exclusion order should not be granted if the vulnerable adult objects, unless it is reasonable to believe that the objection is wholly or mainly a consequence of mental disorder and/or undue pressure?

Duration of exclusion (paragraphs 4.49 and 4.50)

Consultation questions

14. Do you agree with the SLC that there should be a maximum 6 month time limit on an exclusion order?

15. Do you agree with the SLC that an excluded person who occupies by virtue of the adult's permission should not be re-entitled to occupy just because the period of the exclusion order has lapsed?

Prevention of disposal of the home (paragraph 4.50)

44. The SLC report notes that the Matrimonial Homes (Family Protection) (Scotland) Act 1981 contains provisions to prevent a spouse with entitlement to occupy the matrimonial home who has been excluded from it from disposing of the home or bringing an action of division and sale. On the basis that these provisions in the 1981 Act do not extend to cohabitants with entitlement to occupy who have been excluded from their homes, the SLC took the view that to apply such provisions to vulnerable adults and their abusers would be wrong in principle and unnecessary in practice. We are inclined to agree that it would be wrong to deprive a person of the right to sell his or her property because of exclusion under the vulnerable adults provisions. The person may need to sell to avoid becoming homeless himself or herself. Were the home to be sold, there are arrangements under community care to ensure that the vulnerable adult will receive appropriate accommodation and care.

Consultation question

16. Do you agree with the SLC that there should be no statutory provisions preventing a person excluded under the vulnerable adults provisions from disposing of the home or bringing an action for its division and sale?

Interim exclusion (paragraph 4.51)

45. The SLC report notes that it may be necessary for urgent action to be taken, while an application for an exclusion order was being decided.

Consultation question

17. Do you agree with the SLC that, pending the making of an exclusion order, a sheriff should be able to make an interim exclusion order, provided the person who may be excluded has been given an opportunity to be heard?

Recall and ancillary orders (paragraphs 4.52 to 4.56)

46. The SLC report notes that an exclusion order by itself only suspends the right of the excluded adult to occupy the home. Ancillary orders would be necessary to make exclusion effective through, eg interdicts against re-entry to the premises and warrants for the ejection of the excluded person. Paragraphs 4.52 to 4.56 of the SLC's report discuss the different approaches to such ancillary orders in the 1981 and 1995 Acts and essentially argue for the court to have flexibility in granting interdicts and attaching powers of arrest in the case of exclusion orders against abusers of vulnerable adults. It is worth noting in the context of these proposals that powers of arrest should only be attached under one Act at a time, as is provided for in section 1(2)(b) of the Protection from Abuse (Scotland) Act 2001 in relation to the 1981 Act.

Consultation questions

18. Do you agree with the SLC that the sheriff, in granting an 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)?

19. Do you agree that the sheriff should have power to vary or recall any exclusion order, interim order or associated ancillary order?

Who may apply for exclusion? (paragraphs 4.57 to 4.60)

47. Paragraphs 4.57 to 4.59 of the SLC report discuss the question of who should be able to apply for an exclusion order and, in particular, the role of the local authority. The SLC takes the view that, where an adult is able to apply for an exclusion order, the role of the local authority would be to advise and assist the adult if asked. The adult might of course also seek help from elsewhere, eg a law centre or voluntary body. Where the adult was unable to take proceedings, an application could be made by the local authority or by the adult's legal representative. The local authority would have a duty to apply if: the adult was unable to; no-one else was doing so; no other proceedings for the removal of the abuser were pending or under consideration (eg under the 1981 Act); and the grounds for exclusion (as set out in paragraph 4.45 of the SLC's report) were met.

48. As already noted, part 6 of the Adults with Incapacity Act, which provides for guardianship and intervention orders, will come into effect in April 2002. Guardianship under the 2000 Act will replace guardianship under the Mental Health (Scotland) Act 1984 and the offices of tutor dative, tutor-at-law and curator bonis. Under the 2000 Act, local authorities have a duty to apply for welfare guardianship, where this is necessary and no-one else is doing so and a duty to apply for intervention orders if no-one else is doing so and this is necessary to protect the adult's welfare, property or finances.

49. One reason for the SLC proposing that a public body should be able to apply for an exclusion order, is so that a curator bonis would not need to be appointed in every case where a vulnerable adult was unable to make the application. However, under the new tailored range of actions available under the 2000 Act, it will be possible from April 2002 for a person with an interest in an adult who is unable to undertake legal proceedings to apply for an intervention order allowing this to be done on the adult's behalf. Someone with relevant powers under the 2000 Act in relation to an adult, ie an attorney or guardian, would be able to take action on the adult's behalf, or could apply for an intervention order to do so if their existing powers were inadequate. A local authority could take action under the 2000 Act on an adult's behalf if the Chief Social Work Officer was the adult's guardian or by applying for an intervention order, if no-one else was doing so.

50. It could therefore be questioned whether there is a need for an explicit duty on local authorities to apply for an exclusion order under the vulnerable adults provisions, given the scope for appointees under the 2000 Act to take action on an adult's behalf and the duty of local authorities to do so where necessary. In other words, would it be sufficient for any provision simply to state that where an adult was unable to apply for an exclusion order, the application could be made by someone acting on the adult's behalf under the 2000 Act? The

Executive's view, without prejudice to consideration of the proposal for exclusion itself, is that where there is a need to act quickly to safeguard a vulnerable person who cannot apply for an exclusion order, and for whom the Chief Social Work Officer has not been appointed welfare guardian, it would assist local authorities if they had an explicit duty under the vulnerable adults provisions, instead of having first to apply for an intervention order under the 2000 Act.

51. Under the 2000 Act, interventions are carried out on an adult's behalf after a doctor/doctors has/have certified that the adult is incapable in relation to the decision or action in question. Where a local authority took action under the vulnerable adults provisions to apply for an exclusion order on an adult's behalf, the authority would be bound to act in accordance with whatever general principles were set out in the statute (see paragraph 24). However, the SLC's report and draft Bill make no mention of a doctor having to certify that the adult is incapable of making the application before the authority could proceed.

Consultation questions

20. Do you agree that where the vulnerable adult is able to apply for an exclusion order only he or she may do so?

21. Do you agree that if the vulnerable adult is not able to make an application, it may be made on the adult's behalf by an appointee under the Adults with Incapacity (Scotland) Act 2000 or by the local authority?

22. Do you agree that the local authority should have a duty to apply if satisfied that no one else was doing so; no other proceedings for the removal of the abuser were pending or under consideration; and the grounds for exclusion (as set out in paragraph 4.45 of the SLC's report) were met?

23. Do you think that, before a local authority could take action under these provisions, where it was not an appointee under the 2000 Act, it should be necessary for a doctor to certify that the adult is incapable of making the application for an exclusion order?

Safeguarders (paragraph 4.58)

52. The SLC proposes that, where a local authority applies for an exclusion order, the court should consider appointing a safeguarder to ensure that the interests of the adult were put before the court. The 2000 Act contains general provisions allowing the sheriff to appoint someone to safeguard the interest of a person who is the subject of an application or proceedings under the Act. We think that the sheriff should be able to appoint a safeguarder if necessary, regardless of who has applied on the adult's behalf for the exclusion order. It might also be helpful to include a general provision on safeguarders in relation to any proceedings before the sheriff court under vulnerable adult provisions.

Consultation questions

24. Do you agree that the courts should be able to consider appointing a safeguarder to a vulnerable adult where an application for an exclusion order is made on the adult's behalf?

25. Do you think that the courts should be able to consider appointing a safeguarder to a vulnerable adult in relation to any proceedings before the sheriff court under vulnerable adult provisions?

Application by another entitled person (paragraph 4.60)

53. Paragraph 4.60 proposes that a carer who is entitled to occupy the home should be able to apply for the exclusion of another person who is abusing the adult.

Consultation question

26. Do you agree that 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 paragraph 4.45 of the SLC's report?

Safeguards for people who are the subject of exclusion orders

54. The SLC's proposals contain a number of safeguards for persons who may be the subject of an exclusion order.

- before making an exclusion order or an interim order, the sheriff would have to be satisfied that the conditions for exclusion were met;
- the subject would have to be given an opportunity to be heard by, or represented before, the sheriff;
- the subject would be able to apply to the sheriff for recall or variation of an order or interdict under these provisions;
- an exclusion order could be appealed against to the sheriff principal or the Court of Session
- an interim exclusion order could also be appealed against, but with the leave of the sheriff.

Cost

55. We anticipate that the cost of the legislation would be modest. The duties which would be imposed on local authorities relate to people for whom authorities have existing responsibilities under social work legislation. In some cases, a power to act quickly could forestall more lengthy and complex investigations. We would be interested in views on the resource implications of the provisions discussed in this paper, including:

- the costs of the general duties on public authorities
- the number of cases which might require formal proceedings
- the likely costs of such proceedings to local authorities, the justice system and others.

Consultation question

27. Do you have views on the resource implications of the legislation discussed in this paper?

LIST OF CONSULTATION QUESTIONS

1. Do you agree with the SLC that a new legislative framework is required to protect vulnerable adults, beyond those with mental disorder? If not, why not?
2. If you have answered yes to question 1, do you agree with the definition of vulnerable adult in paragraph 22?
3. If you do not agree with the definition in paragraph 22, what changes (in either terminology or scope) do you think require to be made to it?
4. What principles do you think should underpin any legislation extending the vulnerable adults provisions to persons without mental disorder?
5. Do you agree that the local authority 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 is present, whether or not the adult objects?
6. Do you agree that there should be no examination, assessment or removal of an adult who objects and who has sufficient understanding of what is involved, unless those authorising or carrying out the intervention reasonably believe that the adult is vulnerable and is subject to undue pressure?
7. Do you agree that local authorities should be the responsible agencies under any provisions which are brought forward relating to non-mentally disordered vulnerable adults?
8. Do you agree that collaboration between local authorities and agencies such as NHSScotland and the police is a matter best dealt with in a code of practice rather than legislation?
9. Which classes of officers of a local authority do you consider should be authorised under provisions relating to non-mentally disordered vulnerable adults?
10. In principle, do you agree with the SLC that the court should have power to exclude a person living with a vulnerable adult, if necessary for the protection of the adult? If you answer no to this, please explain your key reservations.
11. Do you agree that the exclusion provisions would apply only where a vulnerable adult has entitlement to occupy the home? If not, please say in which circumstances they should apply.
12. Do you agree with the grounds for exclusion set out in paragraph 4.45 of the SLC's report?
13. Do you agree that an exclusion order should not be granted if the vulnerable adult objects, unless it is reasonable to believe that the objection is wholly or mainly a consequence of mental disorder and/or undue pressure?
14. Do you agree with the SLC that there should be a maximum 6 month time limit on an exclusion order?

15. Do you agree with the SLC that an excluded person who occupies by virtue of the adult's permission should not be re-entitled to occupy just because the period of the exclusion order has lapsed?
16. Do you agree with the SLC that there should be no statutory provisions preventing a person excluded under the vulnerable adults provisions from disposing of the home or bringing an action for its division and sale?
17. Do you agree with the SLC that, pending the making of an exclusion order, a sheriff should be able to make an interim exclusion order, provided the person who may be excluded has been given an opportunity to be heard?
18. Do you agree with the SLC that the sheriff, in granting an 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)?
19. Do you agree that the sheriff should have power to vary or recall any exclusion order, interim order or associated ancillary order?
20. Do you agree that where the vulnerable adult is able to apply for an exclusion order only he or she may do so?
21. Do you agree that if the vulnerable adult is not able to make an application, it may be made on the adult's behalf by an appointee under the Adults with Incapacity (Scotland) Act 2000 or by the local authority?
22. Do you agree that the local authority should have a duty to apply if satisfied that no-one else was doing so; no other proceedings for the removal of the abuser were pending or under consideration; and the grounds for exclusion (as set out in paragraph 4.45 of the SLC's report) were met?
23. Do you think that, before a local authority could take action under these provisions, where it was not an appointee under the 2000 Act, it should be necessary for a doctor to certify that the adult is incapable of making the application for an exclusion order?
24. Do you agree that the courts should be able to consider appointing a safeguarder to the vulnerable adult where the application is made on the adult's behalf?
25. Do you think that the courts should be able to consider appointing a safeguarder to a vulnerable adult in relation to any proceedings before the sheriff court under vulnerable adult provisions?
26. Do you agree that 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 paragraph 4.45 of the SLC's report?
27. Do you have views on the resource implications of the legislation discussed in this paper?

List of Recommendations in SLC's Vulnerable Adults report

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 and 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 II 7 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 4.5 1)

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.

(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 5.10)

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 sections 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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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.

Removals and exclusions

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.

**Extract from Policy Statement on Mental Health Bill – “Renewing Mental Health Law”
(pages 47 and 48)**

SLC PROPOSALS FOR VULNERABLE ADULTS

If an adult is vulnerable, as a result of mental disorder, it is important that local authorities and NHSScotland have the ability to investigate and take protective action. We agree with the Millan Committee that the current legislation is inadequate for this purpose. We will therefore include in the Mental Health Bill a new statutory framework, based on the recommendations of the Scottish Law Commission (SLC), in their report entitled ‘*Vulnerable Adults*’.

This will, for the first time, give a clear statutory responsibility to local authorities to make enquiries where there is evidence that a mentally disordered person may be at risk of neglect or abuse. That responsibility will be supported by a comprehensive framework of powers. In line with the principles of our Bill, there will be a staged set of possible interventions, tailored according to the needs of the individual.

The first stage will be a power for mental health officers to insist on obtaining access to a person who is thought to be mentally disordered and at risk. In most cases, that will be enough to allow an assessment to begin into the possible need for services, or for formal measures under the Mental Health Act or Adults with Incapacity Act.

For more difficult cases, a sheriff may grant powers for mental health officers or a doctor to interview and examine the adult, and inspect any relevant documents. If there is a serious risk of harm to the adult, it will also be possible for the sheriff to authorise removal to a place of safety for a short period. This will allow opportunity for assessment in a safe environment, to determine what longer term measures may be needed to meet the needs of the adult.

Although the Millan Committee only considered the position of people with mental disorder, the Scottish Law Commission proposals also covered other groups, including people who are elderly or physically disabled. It would not be appropriate to make provision for these wider groups in the Mental Health Bill. However, we believe that there is a case for considering more wide-ranging legislation, which would supersede the protective powers set out in section 47 of the National Assistance Act 1948. We will consult interested parties on the possible benefits and implications of such a reform. Any issues from the consultation, which would bear upon the provisions for people with mental disorders, will be taken into account.

The Commission also recommended a new power to exclude a suspected abuser from the home occupied by a vulnerable adult, including an adult who is vulnerable as a result of a mental disorder. We will include in our consultation the question of whether to introduce such a power, which might be useful in a small number of cases. However, this raises complex issues of human rights in relation to both the vulnerable adult and the excluded person, which need to be considered carefully, and the SLC report recognised that caution may be needed.

Vulnerable adults: points being considered by the Executive for draft Mental Health Bill

General

1. The broad intention is to implement the provisions contained in the SLC Bill, insofar as they relate to persons with mental disorder and excepting the provisions relating to exclusion orders.

Principles

2. The Millan Committee recommended that a new Mental Health Act should have a clear underlying set of principles. As indicated in the Policy Statement on the Mental Health Bill (ref to para nos in policy statement), the Executive accepts the principles as stated by Millan and will consider how they can best be expressed in the Bill, to ensure that they can be applied effectively. The principles are:

- non-discrimination
- equality
- respect for diversity
- reciprocity
- informal care
- participation
- respect for carers
- least restrictive alternative
- benefit

The principles will apply to the provisions on vulnerable adults within the Mental Health Bill.

Consent of adult to intervention

3. The SLC report recommends that (recommendation 3):

“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.”

The separate ground of being subject to undue pressure is primarily intended by the SLC to cover vulnerable adults who are not mentally disordered but are at risk of abuse. However, it could also apply to a person who has some degree of mental disorder and whose autonomy is further reduced by such pressure. We propose in the Mental Health Bill to retain both grounds of mental disorder and undue pressure as a basis on which to disregard refusal of consent, but some degree of mental disorder, or suspected mental disorder, would always need to be present. A refusal caused by a combination of mental disorder and undue pressure would therefore allow consent to be disregarded.

Liaison between local authorities and the MWC

4. Sections 3 and 4 of the draft SLC Bill relate to the role of local authorities and the Mental Welfare Commission (MWC). These draft provisions include a requirement on local authorities to inform the MWC if they are carrying out enquiries into a case involving a mentally disordered vulnerable adult or intervening in such an adult's affairs. We do not think it would be desirable for all cases where the local authority is making enquiries to be reported to the MWC. This could be burdensome for routine enquiries. Local authorities should be required to report to the MWC any action taken under their vulnerable adult powers in relation to an adult with mental disorder.

Person accompanying adult

5. Under sections 7, 9 and 10 of the SLC's draft Bill, the adult would be entitled to be accompanied by "a friend" at a hearing. The Executive takes the view that the "friend" might or might not be someone providing advocacy services.

Removal to a place of safety

Place of Safety

6. A "place of safety" is defined in section 117(7)(b) of the 1984 Act as:

"...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."

This definition also applies to section 118, under which a constable can remove a mentally disordered person from a public place.

7. The SLC proposes that the applicant for a removal order under the vulnerable adult proposals would have to nominate in the application for the removal order a place willing to accept the adult and satisfy the sheriff that it was the most suitable place for that particular adult. The Millan report makes a number of recommendations relating to place of safety (recommendations 20.1 to 20.8). The Executive's view, as set out in Chapter 5 of "Renewing Mental Health Law", is that there is a range of provision which may be appropriate and that we expect local care agencies to continue to work together to develop local arrangements to provide suitable places of safety. We will set out principles for the provision of places of safety in the code of practice for the Mental Health Act.

Re-establishment of adult in own home

8. The SLC sought views on whether local authorities should be under a duty to re-establish a removed adult in his or her home as far as reasonably practicable. Most respondents were in favour of this but the SLC proposes that it should be left to the code of practice. The Executive agrees with this, on the basis that LAs will be bound by the general principle of 'least restrictive alternative'.

National Assistance Act 1948

9. Section 19 of the draft Bill and the Schedule propose repeals to the 1948 and 1951 Acts. However, as the vulnerable adults provisions within the Mental Health Bill will only relate to persons with mental disorder, these repeals will only be carried out in the Mental Health Bill in relation to vulnerable adults with mental disorder. For the moment, we will not be repealing these provisions entirely because this would leave non-mentally disordered vulnerable adults with less protection than at the moment.

Extract from SLC report on Vulnerable Adults: 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 health⁵¹. 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 home⁵². 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 family⁵³. Child of the family is defined so as to include a child of any age⁵⁴. In certain circumstances one cohabitant can exclude the other on similar grounds⁵⁵. 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 children⁵⁶, generally persons under the age of 16⁵⁷. 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 children⁵⁸.

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 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 home⁵⁹. 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.

51 Proposal 10, para 2.73.

52 S 4.

53 1981 Act, 64(2).

54 1981 Act, 622.

55 1981 Act, 18.

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

57 But see para 2.11 above.

58 1995 Act, s 76(2)(c).

59 But see para 4.60 below.

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 .

(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 paragraph⁶⁰.

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.

⁶⁰ 1995 Act. s 76(9).

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 (mandatory⁶¹ or discretionary⁶² 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;

(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 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.

61 As in the 1981 Act.

62 As in the 1995 Act.

4.48 **Objections by vulnerable adult.** 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 pressure⁶³. 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 exclusion⁶⁴. 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

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 sale⁶⁵. 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 arranged⁶⁶. 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.

63 Paras 2.19 to 2.26.

64 A spouse or cohabitant may apply also on behalf of a child victim.

65 Ss 6, 7, 9 and 19.

66 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).

Rules of Court provide for a normal period of seven days between intimation and the hearing, although this may be reduced or even dispensed with⁶⁷. 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 herself, unless the situation is sufficiently urgent to grant an interim exclusion order at the initial hearing⁶⁸. 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 furnishings 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 order⁶⁹.

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 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 arrested⁷⁰. 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 directs the court to attach a power of arrest to any such interdict⁷¹. For vulnerable adults we prefer to follow the approach of the 1995 Act which confers a discretionary power on the sheriff⁷². 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.

67 Ordinary Cause Rules 1993, rules 33.69(1)(b) and 15.2

68 *Armitage v Armitage* 1993 SCLR 173.

69 1981 Act, s 15(1)(a).

70 *Gillespie v Hamilton* 1994 SLT 761.

71 1981 Act, s 15(1)(a).

72 1981 Act, s78(1)

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*⁷³ 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 proceedings⁷⁴. The application for the appointment of a curator bonis could be made by the local authority⁷⁵. 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 adult⁷⁶. 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 child⁷⁷. We are not in favour of this approach which was not followed in the Children (Scotland) Act 1995 where only a local authority may apply for exclusion⁷⁶. 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 apply⁷⁹. A similar test applies at the moment in relation to an application by a local authority for the appointment of a curator bonis⁸⁰. 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 order⁸¹.

73 Scot Law Coin No 135 (1992). Recommendation 62. para 11.45.

74 Macphail. *Sheriff Court Practice*. para 4-07.

75 1984Act.s92.

76 Proposal 10(2). para 2.73.

77 Macphail. para 4-12.

78 S 76W.

79 Recommendation 86(2). para 6.33.

81 1984 Act. s 92(1)

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 consideration⁸². 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.

(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.

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 legislation⁸³.

81 Recommendation 12(c), para 4.45.

82 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.

83 Housing (Scotland) Act 1987, Part II.