

**ADULT SUPPORT AND PROTECTION  
(SCOTLAND) ACT 2007**

**CODE OF PRACTICE**

FOR LOCAL AUTHORITIES AND PRACTITIONERS EXERCISING  
FUNCTIONS UNDER PART 1 OF THE ACT

EFFECTIVE FROM OCTOBER 2008

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## **About this code**

### **What is the purpose of this code?**

1. The Adult Support and Protection Act 2007 was passed by the Scottish Parliament in spring 2007. This code of practice fulfils the obligation placed on Scottish Ministers by Section 48 of the Act, to prepare a code of practice containing guidance about the performance of functions by councils and their officers and health professionals under the Act.
2. It provides information and guidance on the principles of the Act, about the measures contained within the Act, including when and where it would normally be appropriate to use such powers.
3. This code should be used in conjunction with other relevant codes of practice as appropriate, such as the codes of practice for the Mental Health (Care and Treatment) (Scotland) Act 2003, the Adults with Incapacity (Scotland) Act 2000 and the code of practice for Social Service Workers and Employers of Social Service Workers.

### **What is the status of this code?**

4. Section 48 of the Act in addition to imposing a duty on Scottish Ministers to prepare a code of practice containing guidance for those exercising functions under Part 1 of the Act, places a duty on councils, council officers and health professionals performing functions under Part 1 to have regard to the code of practice.
5. The Scottish Government will keep the operation of the code under review. Those using this code are advised to check the relevant measures themselves and to seek their own legal advice as required, when referring to the relevant provisions of the Act.

### **Who developed this code?**

6. This code was prepared by a working group of professionals drawn from the public, voluntary and private sectors in Scotland, in conjunction with the Scottish Government Adult Care and Support Division.

### **Who is this code for?**

7. This code is addressed to anyone who is authorised or required to perform any of the functions under the Act. This means primarily council officers from local authorities, but also health professionals and the police, as well as the statutory bodies identified later in this code. It should also be considered by those working in the in the voluntary and private sectors.

### **European Convention on Human Rights compliance**

8. All Acts of the Scottish Parliament under the terms of the Scotland Act 1998 are required to comply with the requirements of the European Convention on Human Rights (ECHR). All bodies and practitioners must also ensure that they conduct their duties in a way which would be ECHR compliant.

## **Subordinate legislation**

9. The Act should be read in conjunction with all subordinate legislation made under the Act. Practitioners are advised to check the Adult Support and Protection pages on the Scottish Government website for current information and the Office of the Public Sector Information website for links to the subordinate legislation.

# **Introduction to the Act**

## **Background**

1. In 1997 the Scottish Law Commission published recommendations and a draft Bill in respect of 'vulnerable adults'. Since then policy in this area has developed considerably, resulting in the Adult Support and Protection Act 2007.
2. The Act makes new provisions intended to protect those adults who are unable to safeguard their own interests, such as those affected by disability, mental disorder, illness or physical or mental infirmity, and who are at risk of harm or self harm, including neglect.
3. Underpinning the provisions of the Act are the fundamental principles, contained in Section 1, namely that any intervention must provide benefit to the adult, that this benefit could not have reasonably achieved without intervention and that any intervention is the least restrictive option to the adult's freedom.

## **What does Part 1 of the Act do?**

4. Part 1 introduces new measures to identify and to provide support and protection for those individuals who are vulnerable to being harmed whether as a result of their own or someone else's conduct. These measures include:
  - a set of principles which must be taken into account when performing functions under the Act;
  - placing a duty on Councils to make the necessary inquiries and investigations to establish whether or not further action is required to protect the adult;
  - clarifying the roles and responsibilities in adult protection;
  - a duty to consider the importance of the provision of advocacy or other services after a decision has been made to intervene;
  - permitting practitioners to investigate circumstances where individuals may have capacity to choose but not the ability to exercise that choice because of undue pressure;
  - requiring specified public bodies to co-operate with local councils and each other about adult protection investigations;
  - a range of protection orders which are defined in the Act to include:
    - assessment orders;
    - removal orders; and
    - banning orders.
  - the establishment of multi-disciplinary Adult Protection Committees.



## **How does Part 1 safeguard the adult?**

5. There are a number of safeguards in place.
  - The principles emphasise the importance of striking a balance between an individual's right to freedom of choice and the risk of harm to that individual. Any intervention must be reasonable and proportionate.
  - Statements expressed in advance about an individual's preferred care or treatment must be taken into account in line with the guiding principles.
  - The principles must always be taken into account when an intervention under Part 1 of the Act is being considered.
  - Protection orders cannot be made if the court knows that the affected adult at risk has refused to consent to the granting of such an order. The only exception to this is where the adult at risk is found to have been unduly pressurised to refuse to consent and there is no other protective action, which the adult would consent to, which could be taken.
  - The adult at risk may refuse to be medically examined or interviewed.
  - Applications for all protection orders will be heard before a sheriff, where there will be an opportunity to make representations to the sheriff. However the sheriff may decide not to hold a hearing where they are satisfied that this will protect an adult at risk from serious harm or not prejudice any persons affected.
  - The adult at risk may apply for a banning order to ban a person from a specified place (e.g. the home of the adult at risk).
  - An appeals mechanism allows relevant parties to appeal against the granting of, or refusal to grant, a banning or temporary banning order.

## **How is this code structured?**

6. This code is divided into 13 chapters.

### *Chapter 1: Principles and definition of adult at risk*

7. This chapter provides a description of the principles of the legislation as set out in Sections 1 and 2 of the Act and the definition of "Adults at risk" and "harm" (under Sections 3 and 53).

### *Chapter 2: Council duties and powers, definition of council officer, duty to co-operate and role of voluntary organisations*

8. This chapter sets out the duties and powers of councils. It sets out who may act as "council officers" undertaking investigations and other duties under the Act. The chapter concludes with information about the duty of other bodies to co-operate with the council and a short overview on the role of other bodies, for example voluntary bodies.

### *Chapter 3: Adult representation*

9. This chapter examines issues which can be grouped together under the heading of representation. It looks at an adult's right to independent advocacy, advance statements, the appointment of safeguarders and provides a short overview of persons with communication difficulties. It concludes with examples of other assistance that may be available for an adult as well as support available for carers.

### *Chapter 4: Inquiries*

10. This chapter covers Section 4 of the Act which places a duty on councils to make inquiries about an adult at risk's well-being, property or financial affairs where the council knows or believes intervention may be necessary to protect the adult.

### *Chapter 5: Visits*

11. This chapter provides guidance on Section 7 of the Act. Under Section 7 certain council officers have the power to enter a residence or other property where an adult at risk may be, to investigate whether any action is required to protect the adult from harm.

### *Chapter 6: Interviews*

12. This chapter provides guidance on Section 8 of the Act which permits a council officer, or a person accompanying them, to interview any adult present at the place of the visit. It highlights the requirement for the adult to be made aware that they are not required to answer any questions. This interview can be carried out without applying for an assessment order.

### *Chapter 7: Medical examinations*

13. This chapter provides guidance on Section 9 of the Act which states that a medical examination can be carried out on an adult at risk, at the place being visited, or elsewhere if an assessment order is granted. This can be carried out only by a health professional, who may or may not be a council officer.

### *Chapter 8: Examination of records*

14. This chapter provides guidance on Section 10 of the Act which permits council officers to obtain copies of health, financial or other records relating to an adult known or believed to be at risk, if this is required to establish whether further action is necessary to protect that adult from harm. Only a health professional may inspect health records.

### *Chapter 9: Assessment orders*

15. This chapter provides guidance on Section 11 of the Act which allows a council to apply to a sheriff for an assessment order. This allows a council officer to conduct a private interview, and a health professional to conduct a medical examination in private. This order would be necessary only if it were not possible to carry out the interview or examination at the place of the visit. An assessment order will be granted only where there is reasonable cause to suspect that the subject of the

order is an adult at risk of serious harm, and that the action specified is necessary to establish this and to identify what further action may be required.

#### *Chapter 10: Removal orders*

16. This chapter provides guidance on Section 14 of the Act which allows a council to apply to the sheriff for a removal order. If granted, a removal order allows the council to remove the adult at risk to a specified place in order to assess their situation and to support and protect them.

#### *Chapter 11: Banning and temporary banning orders*

17. This chapter provides guidance on applications for banning orders and temporary banning orders. These orders will only be granted where the adult at risk is in danger of being seriously harmed, and that banning the subject of the order from a specified place is likely to safeguard the adult's well-being and property more effectively than would the removal of the adult at risk. Any decision to grant or refuse to grant a banning or temporary banning order can be appealed to the sheriff principal.

#### *Chapter 12: Offences*

18. This chapter provides a short overview of the offences under the Act.

#### *Chapter 13: Adult Protection Committees*

19. This chapter covers Sections 42 to 47 of the Act which set out the provisions relating to the establishment, composition and functions of Adult Protection Committees.

#### *Annexes*

20. Annex A provides links to other relevant guidance and Annex B contains a glossary.

## Chapter 1: Principles and definition of adult at risk

1. This chapter provides a description of the principles of the legislation as set out in Sections 1 and 2 of the Act and the definition of “Adults at risk” and “harm” (Sections 3 and 53 of the Act). It concludes with a short overview of offences under the Act.

### Taking account of the principles of the Act

2. Sections 1 and 2 set out the general principles of the Act. They apply to any public body or office holder authorising any intervention or carrying out a function in relation to an adult. For example, they apply to any social worker, care provider or health professional intervening or performing a function under the Act.

3. This means that the following persons are not bound by the principles: the adult; the adult’s nearest relative; the adult's primary carer; independent advocate; the adult's legal representative; and any guardian or attorney of the adult.

4. The Act requires the following principles to be applied when deciding which measure will be most suitable for meeting the needs of the individual. Any person or body taking a decision or action under the Act must be able to demonstrate that the principles in sections 1 and 2 have been applied.

5. The principles in Section 1 require that any intervention in an adult’s affairs under the Act should:

- provide **benefit** to the adult which could not reasonably be provided without intervening in the adult’s affairs; and
- is, of the range of options likely to fulfil the object of the intervention, the **least restrictive** to the adult’s freedom.

### Principles for performing functions

6. The principles in Section 2 require that any public body or office holder performing a function under Part 1 of the Act, in considering a decision or course of action, in addition to the general principles in Section 1, must have regard to the following:

- **the wishes of the adult** - any public body or office holder performing a function or making a decision must have regard to the present and past wishes and feelings of the adult, where they are relevant to the exercise of the function, and in so far as they can be ascertained. Efforts must be made to assist and facilitate communication using whatever method is appropriate to the needs of the individual. For example, where the adult has an Advance Statement made under Section 275 of the Mental Health (Care and Treatment) (Scotland) Act 2003 then this should be given due consideration.
- **the views of others** – the views of the adult's nearest relative, primary carer, and any guardian or attorney, and any other person who has an interest in the adult’s well-being or property, must be taken into account, if such views are relevant.

It is important that the adult has the choice to maintain existing family and social contacts. What the Act seeks to provide is support additional to the networks that may already be in place. Thus a person who may be an adult at risk may have neighbours or friends who have an interest in his/her well-being and are willing to give support. Every effort should be made to ensure that any action taken under the Act does not have an adverse affect on this.

- **the importance of the adult participating as fully as possible** – the adult should participate as fully as possible in any decisions being made. It is therefore essential that the adult is also provided with information to help that participation (in a way that is most likely to be understood by the adult). Where the adult needs help to communicate (for example, translation services or signing) then these needs should be considered. Any unmet need should be recorded.

Wherever practicable the adult should be kept fully informed at every stage of the process, for example, whether an order has been granted, what powers it carries, what will happen next, whether they have the right to refuse, what other options are available etc.

- **that the adult is not treated less favourably** – there is a need to ensure that the adult is not treated, without justification, any less favourably than the way in which a person who is not an “adult at risk” would be treated in a comparable situation; and
- **the adults abilities, background and characteristics** – including, the adult’s age, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage.

7. For the purposes of these principles, making a decision not to act is still considered as taking a decision and the reasons for taking this course of action should be recorded as a matter of good practice.

### **Who is an adult at risk?**

8. The Act refers throughout to “adult”. In terms of Section 53 of the Act, “adult” means a person aged 16 or over.

**Adult at risk** - Section 3(1) defines “adults at risk” as adults who:

- are unable to safeguard their own well-being, property, rights or other interests;
- are at risk of harm; and
- because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

9. The presence of a particular condition does not automatically mean an adult is an “adult at risk”. Someone could have a disability but be able to safeguard their well-being etc. It is important to stress that all three elements of this definition must be met. It is the whole of an adult’s particular circumstances which can combine to make them more vulnerable to harm than others.

**Risk of harm** - Section 3(2) makes clear that an “adult” is at risk of “harm” if:

- another person’s conduct is causing (or is likely to cause) the adult to be harmed, or
- the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm.

10. The assessment of “harm” and the “risk of harm” are important elements under the Act. The definition of “adults at risk” requires an assessment to be made about the “risk of harm” to the individual at the outset.

11. Because any protection order under the Act represents a serious intervention in an adult’s life, a sheriff must be satisfied that an adult is at risk of serious harm, rather than harm, before granting any such order.

**Harm** – Section 53 states harm includes all harmful conduct and, in particular includes:

- conduct which causes physical harm,
- conduct which causes psychological harm (for example by causing fear, alarm or distress),
- unlawful conduct which appropriates or adversely affects property, rights or interests (for example theft, fraud, embezzlement or extortion),
- conduct which causes self-harm.

12. The definition of “harm” in the Act sets out the main broad categories of harm that are included. The list in the definition is not exhaustive and no category of harm is excluded simply because it is not explicitly listed. In general terms, behaviours that constitute ‘harm’ to others can be physical (including neglect), emotional, financial, sexual or a combination of these. Also, what constitutes serious harm will be different for different persons.

## **Chapter 2: Council duties and powers, definition of council officer, duty to co-operate and role of voluntary organisations**

1. This chapter sets out the duties and powers of councils. It explains who may act as a council officer undertaking investigations and other duties under the Act. The chapter concludes with information about the duty of other bodies to co-operate with the council and a short overview on the role of voluntary organisations.

### **General principles**

2. Sections 1 and 2 of the Act set out the principles and other matters which those who propose to perform functions under the Act require to take into account. Section 1 only allows a person to exercise a function under the Act to where that is reasonably required to provide a benefit to the adult concerned and is, from the options available, the least restrictive to the adult's freedom. *(For further information on the principles, please refer to chapter 1)*

### **What are a council's duties under the Act?**

3. The Act places duties on the council to:
- make inquiries to establish whether action is required, where it is known or believed that an adult is at risk of harm and that intervention may be necessary to protect the adult (Section 4);
  - co-operate with other councils and other listed (or prescribed) bodies and office holders (Section 5);
  - have regard to the importance of the provision of appropriate services (including, in particular, independent advocacy services), where the council considers that it needs to intervene in order to protect an adult at risk of harm (Section 6);
  - inform any adult interviewed that they may refuse to answer any question put to them (Section 8);
  - inform an adult believed to be at risk that they may refuse to consent to a medical examination (Section 9);
  - protect property owned or controlled by an adult who is removed from a place under a removal order. This may include moving property belonging to the adult from that place, where this is considered reasonably necessary in order to prevent the property from being lost or damaged. The council must ensure the property is returned to the adult concerned as soon as reasonably practicable after the relevant removal order ceases to have effect (Section 18);
  - visit a place at reasonable times only, to state the object of the visit and produce evidence of authorisation to visit. Council officers may not use force to facilitate, or during, a visit. However, a sheriff or justice of the peace may authorise the police to use force (Sections 36 to 40);

- set up an Adult Protection Committee to carry out various functions in relation to adult protection in its area, and to review procedures under the Act (Section 42). The Adult Protection Committee may cover more than one council area. *(For further information on the involvement of independent providers in Adult Protection Committees please refer to Chapter 13.)*

### **What are a council's powers under the Act?**

4. The Act enables a council to:
  - visit any place necessary to assist inquiries under Section 4. Council officers may interview, in private, any adult found at the place being visited, and may arrange for a medical examination of an adult known or believed to be at risk to be carried out by a health professional. Health, financial and other records relating to an adult at risk may be requested and examined. Only a health professional may inspect health records (Sections 7 – 10); and
  - apply to the sheriff for the grant of a protection order. This may be an assessment order, a removal order, a banning order or temporary banning order (Sections 11 – 22).

### **Who can act as a council officer for the purposes of the Act?**

5. Where it is known or believed that an adult is at risk of harm, the Act places a duty on the council to make the necessary inquiries to establish whether or not action is required to stop or prevent harm occurring.
6. Council officers have rights of entry to places where adults are known or believed to be at risk of harm. If, following inquiries or investigations, a council officer believes that action is required, the council can apply to the sheriff for a protection order. The range of protection orders include assessment orders (which may be to carry out an interview or medical examination of a person), removal orders (removal of an adult at risk) and banning orders or temporary banning orders (banning of the person causing, or likely to cause, the harm from being in a specified place).
7. Given the need to act with sensitivity and professionalism in situations where interventions must be carried out, it is important that those authorised to intervene are suitably qualified and trained to do so.
8. Section 53 (1) of the Act defines a council officer as an individual appointed by a council under Section 64 of the Local Government (Scotland) Act 1973. Section 52(1) of the Act enables Ministers to restrict the type of individual who may be authorised by a council to perform council officer functions.

### **Duty to co-operate**

9. Section 5 provides that certain bodies and office holders must, so far as is consistent with the proper exercise of their functions, co-operate with a council making inquiries under Section 4. They must also co-operate with each other where this is likely to enable or assist the council making the inquiries and where this is consistent with the proper exercise of their functions. A proper exercise of a public body's functions may include being bound by a duty of confidentiality. However, it should be noted that under Section 5(3), if the public body or office holder knows or



believes that a person is an adult at risk of harm and that action needs to be taken under Part 1 of the Act to protect them from harm then the facts and circumstances of the case must be reported to the council for the area in which it considers the person to be located.

The bodies and office holders listed in Section 5 are:

- the Mental Welfare Commission for Scotland;
- the Care Commission;
- the Public Guardian;
- all councils;
- chief constables of police forces;
- the relevant Health Board; and
- any other public body or office-holder as the Scottish Ministers may by order specify. *(Scottish Ministers have not specified any other bodies at the time of publication)*

10. Where a named public body or office-holder knows or believes that a person is an adult at risk and action needs to be taken in order to protect that person from harm, then that public body or office-holder must report the facts and circumstances of the case to the council for the area where they believe the person to be located. Staff should also be clear who they have a duty to report to within their own organisations.

### **Co-operation between bodies**

11. What one person or public body may know may only be part of a more concerning picture. Good practice would be that all relevant stakeholders would co-operate with assisting inquiries, not only those who have a duty to do so under the Act. Councils may therefore wish to review their contract agreements with voluntary or private sector providers to ensure that their services are consistent with the principles of this Act. *(For further information about information sharing and confidentiality, please refer to Chapter 8)*

### **Multi-disciplinary approach**

12. Many different professionals in statutory agencies and other organisations have contact with adults at risk of harm including social workers, medical and nursing staff and other health professionals, psychologists, staff delivering care services, Procurators Fiscal, the police and staff of voluntary organisations. A multi-agency and multi-disciplinary approach to inquiries, investigations and training between the council, other bodies and specialist voluntary organisations is therefore appropriate. *(For further information on Adult Protection Committees, please refer to Chapter 13)*

## **The role of voluntary and private organisations**

13. A wide range of voluntary and private organisations in Scotland work with adults and provide a range of services. While these organisations do not have specific legal duties or powers under the Act, as care providers they have a responsibility to involve themselves with the Act where appropriate by contributing to investigations. These organisations should discuss and share with relevant statutory agencies information they may have about adults who may be at risk of harm. They may also be a source of advice and expertise for statutory agencies working with adults with disabilities, communication difficulties or other needs. Organisations will also have a legal duty to comply with requests for examination of records.

14. Adult Protection Committees will establish mechanisms for developing policies and strategies for protecting adults at risk of harm which should be formulated, not only in collaboration and consultation with all relevant agencies, but to also take account of the views of service users, families, carer representatives and local voluntary and private providers.

15. The council may appoint voluntary sector representatives onto Adult Protection Committees if they have the skills and knowledge relevant to the Committee.

## Chapter 3: Adult representation

1. This chapter covers the duty to consider the importance of providing advocacy and other services.

### Advocacy and other services

2. Section 6 places a duty on the council, if it considers that it needs to intervene in order to protect an adult at risk of harm, to consider the provision of appropriate services, including independent advocacy services, to the adult concerned, after making inquiries under Section 4 of the Act.

3. Other services are not defined in the Act but consideration should be given to practical and emotional support provided by social work, health, voluntary sector and private sector providers. For example the provision of mainstream health and social care services such as housing, independent living, financial, occupational therapy, counselling, support for carers, and Community Health Partnership services etc.

4. It is important that any assistance or intervention must be well planned so that wherever practicable the adult is provided with the right kind of support and that the situation does not escalate to the point where they feel that their perspective is not being actively considered.

### Independent advocacy services

5. The definition of independent advocacy services used in the Act is that given in Section 259(5) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) which defines independent advocacy services as independent where they are not provided by a local authority, NHS Board or a member of the local authority or NHS Board. The adult should never be expected to pay for the services. *(Section 6 of the Act requires the council to consider the provision of appropriate services, including independent advocacy services, in respect of all suspected adults at risk. Those adults at risk with a mental disorder have an automatic right to such a service under the 2003 Act).*

6. Independent advocacy aims to help people by supporting them to express their own needs and make their own informed decisions. Independent advocates support people to gain access to information and explore and understand the options available to them.

7. Independent advocacy is provided by specialist organisations that do *not* provide any other services. It is however recognised that some organisations, such as voluntary sector disability rights groups, who may provide (non-independent) advocacy may also provide housing, financial advice and support services. In such cases it is important to establish any potential conflict of interest.

8. For further information about advocacy, contact the Scottish Independent Advocacy Alliance: [www.siaa.org.uk](http://www.siaa.org.uk)

## **Safeguarders**

9. Under Section 41(6) of the Act, the sheriff has discretion to appoint a person to safeguard the interests of the affected adult at risk in any proceedings relating to an application. It may be that the sheriff will instruct the safeguarder to report on the issue of consent.

## **Assessing and managing communication difficulties**

10. The adult should be provided with assistance or material appropriate to their needs to enable them to make their views and wishes known. Reasonable adjustments should be made to support the adult's needs wherever identified. Whenever possible, the adults should be asked which format for communication they prefer. This could be technical aids to support communication or information to be interpreted, translated or adapted.

11. There are various aids and adaptations which can support and enable communication, as well as 'human aids to communication' such as British Sign Language interpreters, lip speakers, Makaton, and deaf-blind communicators. Where possible, materials should also be available in alternative formats such as large print, audio tape, Braille and computer disc. Consideration should also be given to the surrounding environment. This can affect communication due to, for example, noise levels, provision of loop systems or lighting. These are just some examples of areas which should be taken into consideration.

## **Examples of support services that may help an adult**

12. The following is illustrative only and does not comprise a comprehensive list.

### *Victim Support Scotland*

13. This is the lead voluntary organisation in Scotland helping people affected by crime. It provides emotional support, practical help and essential information to victims, witnesses and others affected by crime. The service is free, confidential and is provided by volunteers.

14. Further information from [www.victimsupportsco.demon.co.uk](http://www.victimsupportsco.demon.co.uk)

### *Appropriate adult schemes*

15. The role of the appropriate adult is to facilitate communication between a mentally disordered person and the police and, as far as is possible, ensure understanding by both parties. The use of an appropriate adult is extended to all categories of interview - witness, victim, suspect and accused. Mental disorder is defined in the Mental Health (Care and Treatment) (Scotland) Act 2003 as any mental illness, personality disorder or learning disability however caused or manifested. It is the responsibility of the police to determine if someone is vulnerable and to initiate the appropriate adult scheme.

16. Appropriate adults are selected for their experience in the field of mental health, learning disabilities, dementia and/or acquired brain injuries. It is their role to pick up on clues and indicators that a person has not fully understood what they are

being told or what they are being asked. The presence of the appropriate adult is about trying to ensure equality for the person being interviewed. It is not about advocacy or speaking on behalf of a person with a mental disorder, rather it is about an independent third party checking that effective communication is taking place and that the person being interviewed is not disadvantaged in any way due to their mental disorder.

17. Further information can be obtained from:

<http://www.scotland.gov.uk/Topics/Justice/criminal/18244/Appropriate-Adult>

### **Support for unpaid carers**

18. It may be that adult's carer requires support to enable them to continue to support the adult. The Community Care and Health (Scotland) Act 2002 amends the Social Work (Scotland) Act 1968 to give carers a right to have their carer needs assessed by the council. It would be good practice to bring this assessment right to the notice of any carer providing a substantial amount of care where the carer appears to have unmet caring needs.

### **Vulnerable Witnesses (Scotland) Act 2004**

19. The Act provides support measures to help vulnerable adults participate more fully in court proceedings. A vulnerable witness is a witness in respect of whom there is a significant risk that the quality of their evidence may be diminished by reason of fear or distress in connection with giving evidence at a trial. Special measures are intended to help vulnerable witnesses by providing appropriate support when they give their evidence to reduce any anxiety and pressure. It should be noted however that the final decision on whether to use special measures rests with the sheriff in court.

20. Further information is available at:

<http://www.scotland.gov.uk/Publications/2005/04/04143522/35246>

## **Chapter 4: Inquiries**

1. This chapter covers Section 4 of the Act which places a duty on councils to make inquiries about an adult at risk's well-being, property or financial affairs where the council knows or believes intervention may be necessary to protect the adult.

### **When should a council make inquiries?**

2. Section 4 of the Act places a duty on councils to make inquiries about a person's well-being, property or financial affairs if it knows or believes:

- that the person is an adult at risk; and
- that it might need to intervene (under the Act or otherwise) in order to protect the person's well-being, property or financial affairs.

3. A council may be assisted in its duty to inquire through various sources, for example unpaid carers, independent sector providers and statutory bodies.

### **What might trigger an inquiry?**

4. Any report that an adult may be at risk of harm, including anonymous referrals, should be taken seriously. Cases must be considered with an open mind without assuming that harm has, or has not, occurred. All referrals warrant a carefully considered and measured response. Such referrals should be acted upon as a source of information that may or may not lead to this being used as evidence at a later stage. Information should be passed onto the relevant local authority social work services and/or the police, in line with local arrangements as detailed in the local adult protection guidelines.

5. It would be good practice to ensure that any member of the council's staff who may be a first point of contact with the public is aware of the main provisions of the Act and that they must make appropriate referrals to the social work services.

### **Initial inquiries**

6. Inquiries under Section 4 of the Act will be carried out by the council's social work services and should follow adult protection procedures. The council may consult and/or work in partnership with other agencies and conduct preliminary inquiries to establish where there is genuine cause for concern or intervention. Other professionals, such as the police, the Care Commission or health professionals, may be asked to assist.

7. The system must be both flexible and professional in its approach. Any intervention must be person centred and based on an individual's personal circumstances. Some individuals will be known to services already and in those circumstances it may be helpful for them to have an initial discussion with a familiar person such as a home support worker rather than a professional with whom they may have had no previous contact. With others, it may be enough to have a discussion with the adult. The opportunity for a conversation may give individuals the information they need to enable support to be put in place for themselves or a carer, or

to assist that person in making choices. However there will be cases where some form of intervention is required.

8. If the risk of harm is thought to arise from an unpaid carer, the investigation should also gain as accurate a picture of the carer's situation as possible. It will be important to also acknowledge any strains on the carer and explore what support could be provided.

### **Possible intervention outwith or in conjunction with the Act**

9. The next steps resulting from the duty to inquire could involve a wide range of voluntary or statutory interventions. The "need to intervene" may also be met by using appropriate provisions contained in other legislation or by taking action on a non-statutory basis.

10. Where the person has a mental disorder, action under the Mental Health (Care and Treatment) (Scotland) Act 2003 may be appropriate. Where a person has impaired capacity, an order or the appointment of a proxy under the Adults with Incapacity (Scotland) Act 2000 may be appropriate. It may be that it would be appropriate to provide care and support under the Social Work (Scotland) Act 1968. In some cases, particularly in those where the adult has capacity, assistance may be provided to the adult by, for example, ensuring that they have access to suitable advice and support, should they wish to access it.

11. Where inquiries under Section 4 have indicated that a criminal offence has been committed against the adult known or suspected to be at risk, this should be reported to the police at the earliest opportunity. The role of the police in investigating crime should not be undermined. Particularly important in this respect is ensuring that evidence is not destroyed or contaminated before they arrive at the scene. It would be good practice to seek assistance and co-operation from the police as the police may wish to carry out a criminal investigation. This does not remove the responsibility on the council to take any immediate action to protect the adult at risk in such cases but any proposed action would be taken in consultation with the Police.

12. The adult should be kept fully informed at every stage of the process unless in doing so there is a risk of prejudicing investigations.

### **Where no action is required**

13. The council may decide that nothing further needs to be done. It would be expected that this conclusion would only be arrived at after a range of inquiries have been carried out.

14. Where it is decided that no further action is required, it would be expected that the council would produce a report on the circumstances which gave rise to the initial inquiries, the actions taken and why they believed that no further action was required. The report should then be added to the person's case file. If there is no existing case file, the authority should keep a record in line with their standard procedures for recording referrals.

## **Chapter 5: Visits**

1. This chapter provides guidance on Section 7 of the Act. Under Section 7 council officers have the power to enter a residence or other property to investigate whether any action is required to protect the adult from harm.

### **What is the purpose of a visit?**

2. Section 7 of the Act allows a council officer to visit premises to make the necessary investigations to establish whether or not further action is needed to protect an adult at risk of harm. The purpose of a visit under Section 7 is to:

- assist the council in conducting inquiries under Section 4 to decide whether the adult is an adult at risk of harm; and
- establish whether the council needs to take any action in order to protect the adult at risk from harm.

*(For further information on the definition of an adult at risk, please refer to Chapter 1)*

### **What should be considered prior to a visit?**

3. Any person performing a function under the Act must have regard to the principles. These include whether the action is the least restrictive necessary whilst providing benefit to the adult. The views of the adult's nearest relative, primary carer and others so far as relevant must also be taken into account. *(For further information on the principles of the Act, please refer to Chapter 1)*

4. The council must also have regard to the importance of providing appropriate services to the adult, for example independent advocacy or services to assist an adult, or other person in the household, to communicate. *(For further information please refer to Chapter 3)*

5. Consideration may have to be given to the use of the appropriate provisions contained in other legislation, for example the Adults with Incapacity (Scotland) Act 2000, the Mental Health (Care and Treatment) (Scotland) Act 2003, or other social work, police, health, housing or regulation of care legislation. Consideration should be given to local inter-agency protocols and procedures.

### **Who may undertake the visit?**

6. A council officer, as defined in Section 53 of the Act, may undertake the visit. The council officer may be accompanied by another person. A joint visit with another person could assist the inquiries in a number of ways, for example by:

- allowing the council officer to jointly investigate concerns with, for example, a key worker, a police officer, health professional or representative from the Care Commission or Office of the Public Guardian;
- assisting an assessment of the risk to the adult, such as with a general practitioner, community nurse, key worker or other person already known to the adult and any other members of the household; or



- assisting communication with the adult (or any other member of the household) by being accompanied by an interpreter in British Sign Language, lip speakers, Makaton communicator, deaf-blind communications interpreter or a language interpreter where English is not the visited person's first language.

7. Local multi-agency procedures should specify when it is appropriate for the council officer to be assisted in the investigation by appropriately qualified and trained staff from either within the council or from other identified bodies or agencies.

8. In circumstances where inquiries indicate that the council officer carrying out the visit may encounter resistance from the person believed to be at risk of harm or from others at the premises, including the threat of verbal or physical violence, steps should be taken to ensure that staff are protected and supported in planning and executing the visit. Reference will be made to the council's violence to staff or lone working procedures to assess any potential risks and measures, such as staff visiting in pairs or liaising closely with the police, where necessary.

### **What places may be visited?**

9. Section 7 permits a council officer to enter any place. In many cases this will mean visiting the place where the adult normally resides, for example:

- the adult's rented or owner-occupied accommodation;
- the home of relatives, friends or others with whom the person resides;
- supported or sheltered accommodation staffed by paid carers;
- temporary or homeless accommodation; or
- a care home or other residential accommodation.

10. A place could also include entering premises where the person is residing temporarily or spends part of their time, for example:

- a day centre;
- a place of education, employment or other activity;
- 'respite' residential accommodation; or
- a hospital or other medical facility.

11. The council is allowed access to all parts of the place visited which might have a bearing on inquiries into the welfare, care and safety of the adult at risk. This right also includes access to any adjacent places, such as sheds, garages and outbuildings.

12. In the case of the visited adult's place of residence, this could include all areas used by or on behalf of the adult such as sleeping accommodation, facilities for hygiene, meal preparation areas and general living space.

13. The place visited need not necessarily be the adult's own home. This could be any public, private or commercial premises. For example, the place may be somewhere that the adult stays in temporarily or periodically, such as a day care centre or hospital. The interpretation of "place" is therefore very broad-based.

### **When can a council officer visit?**

14. Section 36 makes supplementary provision for visits carried out under Part 1 of the Act. 36(1) states that a council officer may only visit a place at 'reasonable times'. The Act recognises that a balance needs to be struck between the timeous investigation of allegations of harm and the requirement, where practicable, to fully involve the visited adult and any other individuals in the process of investigation and assessment.

15. It may be that the visit is timed to take into account the likelihood of being able to speak to the adult in private. However good practice would be to give notice of the proposed visit, or to the purpose of the visit, to the individual(s) concerned where this would not be prejudicial to the safety or welfare of the adult at risk. In some cases visiting during the evening, at night or at the weekend may be the only way to make contact with the adult at risk, the primary carer or other individual.

16. Professional judgement will be required as to the level and nature of the suspected risk to the visited adult and whether the adult is at risk of imminent physical harm. It is recognised that there may be times when the concern is such that an immediate visit at a time that might not otherwise be regarded as reasonable may be conducted in order to assess the risk and, if necessary, take action to protect the individual. Whenever possible such action will have been the result of inter-disciplinary discussion and consideration of the likely impact on the adult and any carer.

### **What evidence must a council officer produce?**

17. A council officer must:

- produce evidence of their own identity and that of any person accompanying them;
- state the object of the visit, and
- produce evidence of the officer's authorisation to visit the place.

18. There is an obligation to be clear that the purpose of the visit is to investigate a suspected risk of harm. Wherever possible, other people in the household should also be offered an explanation as to what is happening and why, without breaching the adult's right to confidentiality.

19. Every effort should be made to ensure that any information provided is in an appropriate form that the adult, or other person present, can understand.

## **What if entry is refused?**

20. There may be times where the council officer is refused entry to the premises. Where this happens, the council officer should initially consider how entry may be achieved without resorting to seeking a warrant authorising entry as a first course of action. Provided delay would not increase the risk to the adult, it would be good practice to have a multi-disciplinary discussion and plan to co-ordinate action by those involved before deciding whether to apply for a warrant. Particular regard should be given to minimising distress and risk to the adult. The views of any other persons who may be concerned for the welfare of the adult should be taken into account. Where a warrant authorising entry to premises is sought and provided, this will allow a constable to use reasonable force to fulfil the object of the visit.

## **Who can apply for a warrant?**

21. Section 37 of the Act makes provision for warrants of entry. Only the council can apply for a warrant for entry.

## **Granting of a warrant**

22. The sheriff may only grant a warrant for entry where they are satisfied that:

- a council officer has been, or reasonably expects to be refused entry or otherwise will be unable to enter; or
- any attempt by a council officer to visit the place without such a warrant would defeat the object of the visit.

23. A warrant for entry granted by a sheriff expires 72 hours after it has been granted. Once a warrant has been executed, it cannot be used again.

## **What can be done in cases of urgency?**

24. Section 40 of the Act provides that application for a warrant for entry can be made to a justice of the peace only if it is impracticable to make the application to the sheriff and that an adult at risk is likely to be harmed if there is any delay in granting the warrant. An application must be made to the sheriff wherever possible.

25. A warrant for entry granted by a justice of the peace expires 12 hours after it has been granted. Once a warrant has been executed, it cannot be used again.

## **What does a warrant allow?**

26. A warrant authorises a council officer to visit any place specified in the warrant, accompanied by a constable. The accompanying constable may use reasonable force where necessary to fulfil the object of the visit. This may include the constable opening lock-fast places, therefore it would be expected that the council would take all reasonable steps to ensure the security of the person's premises and belongings if force has been required to enter the premises.

27. Wherever possible, entry to premises should first be attempted without force. It must be borne in mind that the use of force is an absolute last resort, to be used in very exceptional circumstances, and only when all other options have been exhausted.

28. A warrant for entry does not entitle any person to remain in the place entered in pursuance of the warrant after the warrant has expired.

## **Chapter 6: Interviews**

1. This chapter provides guidance on Section 8 of the Act which permits a council officer, and any person accompanying them, to interview any adult present at the place of the visit. It highlights the requirement for the adult to be made aware that they are not required to answer any questions. This interview can be carried out without applying for an assessment order.

### **What is an interview?**

2. Section 8 permits a council officer, and anyone accompanying the officer, to interview an adult in private within the place being visited. *(For further information on visits, please refer to chapter 5)*

3. This power applies regardless of whether a sheriff has granted an assessment order authorising the council officer to take the person to another place to allow an interview to be conducted.

### **What is the purpose of an interview?**

4. The purpose of an interview is to assist with inquiries under Part 1 of the Act, about the source, nature and level of any risk to the adult and also to establish whether action is needed to protect the adult. The aims of such an interview will therefore be to:

- establish if the adult has been subject to harm;
- establish if the adult feels his or her safety is at risk and from whom; and
- discuss what action, if any, the adult wishes or is willing to take to protect him or herself.

### **Where can an adult be interviewed?**

5. An interview may take place within any place being visited. This could be, for example, the adult's home, a day centre, care home or hospital. The decision about where to conduct the interview will be taken by the council officer on the basis of information received. This will involve a judgement based on the wishes of the adult themselves and ensuring that the adult can participate as fully and freely as possible. The council officer may also make available an independent advocate to assist the adult with the interview.

6. The timing of the interview should be guided by a planned process of investigation, taking into account local inter-agency protocols and procedures.

### **What are an adult's rights during an interview?**

7. Section 8(2) provides that the adult is not required to answer any questions, and that the adult must be informed of that fact before the interview commences. The adult can choose to answer any question put to them but the purpose of this section is to ensure that they are not forced to answer any question that they choose not to answer.

8. A similar process should be followed to an assessment of risk, for example seeking the consent of the adult to be interviewed, considering the adult's capacity or promoting the adult's participation in the interview:

- **seeking the consent** of the adult to be interviewed is a more proactive approach than simply advising the adult that they are not obliged to answer questions. The point is to ensure that the adult is given reasonable opportunity and encouragement to answer questions whilst respecting their right not to. Section 35(6) does not permit a council officer or medical practitioner to ignore an adult's refusal to be interviewed or medically examined even after an assessment order has been granted.
- **the adult's capacity** - some of the following factors may be considered where there is doubt about the adult's mental capacity:
  - does the adult understand the nature of what is being asked and why?
  - is the adult capable of expressing his or her wishes/choices?
  - does the adult have an awareness of the risks/benefits involved?
  - can the adult be made aware of his/her right to refuse to answer questions as well as the possible consequences of doing so?

The possible scenarios will include the following:

- the adult has capacity and agrees to be interviewed
  - the adult has capacity and declines to be interviewed
  - the adult lacks capacity and is unable to consent to being interviewed
  - the adult has capacity but is thought to have been influenced by some other person to refuse consent
- **promoting the adult's participation in the interview** - the council also has to promote the adult's participation in the interview by taking account of the adult's needs where these are identified, for example:
    - communication skills or attention span
    - sensory impairment
    - the adult's first language being other than English
    - any other relevant factors

This may require:

- a specialist in sign language or other form of non-verbal communication
- a language interpreter
- an independent advocate
- an appropriate adult where police are interviewing an adult with a mental disorder
- a family member or carer to help communication.

### **Can an adult be interviewed with others present?**

9. Section 8 allows a council officer, and any person accompanying the officer, to interview the adult in private. Whether or not the adult should be interviewed in private will be decided on the basis of whether this would assist in achieving the

objectives of the investigation. The council officer or persons accompanying them may decide to request a private interview with the adult where:

- a person present is thought to have caused harm or poses a risk of harm to the adult;
- the adult indicates that they do not wish the person to be present;
- it is believed that the adult will communicate more freely if interviewed alone;  
or
- there is a concern of undue influence from others.

10. However, where practicable, it would be good practice to ask an adult whether they would wish another person to be present during the interview, for example a family member, paid carer or an independent advocate.

### **Can anyone else be interviewed?**

11. Section 8 allows the interviewing of any adult found in a place being visited under Section 7 of the Act. For example, in some circumstances it may be in the interest of the adult for another person to also be interviewed, for example, someone who shares their home with the adult or, in a regulated care setting, a care worker. Section 8(2) provides that anyone interviewed under this section is not required to answer any questions, and that they are informed of this before the interview commences.

## **Chapter 7: Medical examinations**

1. This chapter provides guidance on Section 9 of the Act which allows a health professional to conduct a medical examination of the adult at risk of harm in private. A medical examination includes any physical, psychological or psychiatric assessment or examination. The examination can take place either at a place being visited under Section 7 of the Act, or at the premises where the adult has been taken under an assessment order granted under Section 11.

### **Who may conduct a medical examination?**

2. A medical examination may only be carried out by a health professional as defined under Section 52(2) as:

- a doctor;
- nurse;
- midwife; or
- any other type of individual described (by reference to skills, qualifications, experience or otherwise) by order made by Scottish Ministers.

*(Scottish Ministers have not made an order prescribing other individuals)*

### **What is the purpose of a medical examination?**

3. A medical examination may be required as part of an investigation for a number of reasons including:

- the adult's need of immediate medical treatment for a physical illness or mental disorder;
- to provide evidence of harm to inform a criminal prosecution under police direction or application for an order to safeguard the adult;
- to assess the adult's physical health needs; or
- to assess the adult's mental capacity.

4. Examples of circumstances where a medical examination should be considered include:

- the adult has a physical injury which he or she states was inflicted by another person;
- the adult has injuries where the explanation (from the adult or other person) is inconsistent with the injuries and an examination may provide a medical opinion as to whether or not harm has been inflicted;
- there is an allegation or disclosure of sexual abuse and the type of assault may have left physical evidence (following local procedures for liaison with the police);



:

- the adult appears to have been subject to neglect or self-neglect; and
- the adult is ill or injured and no treatment has previously been sought.

### **Does an individual have the right to refuse a medical examination?**

5. Section 9(2) of the Act states that the person to be examined must be informed of their right to refuse to be examined before a medical examination is carried out. In an emergency and where consent cannot be obtained doctors can provide medical treatment to anyone who needs it, provided that the treatment is necessary to save life or avoid significant deterioration in a patient's health. However, doctors are advised to respect the terms of any valid advance refusal which they know about, or is drawn to their attention. Doctors are also advised to tell the patient what has been done, and why, as soon as the patient is sufficiently recovered to understand. An example of an emergency situation where consent cannot be obtained is where the person is unconscious.

6. Where it is not possible to obtain the informed consent of the adult because they lack the mental capacity or have difficulty communicating in order to provide consent, the council should contact the Office of the Public Guardian to ascertain whether the person has completed a welfare power of attorney with the relevant powers. Where no guardian or attorney has such powers, consideration may be given to whether it is appropriate to use the provisions in the Adults with Incapacity (Scotland) Act 2000 or the Mental Health (Care and Treatment) (Scotland) Act 2003.

## **Chapter 8: Examination of records**

1. This chapter provides guidance on Section 10 of the Act which permits council officers to obtain copies of health, financial or other records relating to an adult known or believed to be at risk, if this is required to establish whether further action is required to protect that adult from harm. Health records may be inspected only by a health professional (a doctor, nurse, midwife or other type of individual described by order of the Scottish Ministers).

### **Information sharing and confidentiality**

2. Existing law allows information to be disclosed without consent where such disclosure is required by law (either a court order or statute) or where such disclosure is in the public interest. If it is the public interest test that is relied upon, then such disclosure must be proportionate to the harm it is being sought to prevent. Crime detection and prosecution, as well as prevention, may provide legitimate grounds for disclosure. NHS Boards are required to ensure that their staff are aware of and can operate local procedures for sharing of information with the police to promote the prevention and detection of crime, while respecting and safeguarding the interests of patients and the public in the confidentiality of personal health information.

3. Under Section 10 of the Act a council officer may require any person holding health, financial or other records relating to an individual whom the officer knows or believes to be an adult at risk, to give the records, or copies of them to the officer, to enable or assist the council to decide whether it needs to do anything to protect an adult at risk from harm.

4. In accordance with the principles in Sections 1 and 2 of the Act, the adult's consent should be obtained prior to the information being obtained. Where such consent cannot be obtained, the adult should, if possible be informed about the information sharing.

5. There may be some areas of cross-over between child protection and adult protection information, particularly when dealing with families which may have both children and adults at risk. Information which originates as child protection information may ultimately trigger an adult protection investigation and vice versa. Although they may be investigated separately, a link between the two needs to be maintained. A further area of overlap may exist where an individual is aged 16 or 17 and could be classed as both a child and an adult at risk. It is important that transitional arrangements between child and adult protection services are in place, including co-operation between Adult Protection Committees and Child Protection Committees.

6. The Section 2 principles require that any decision or course of action being considered should, as far as possible, take into account the adult's views as well as the views of the adult's nearest relative, primary carer, guardian or attorney of the adult and any other person who has an interest in the adult's well-being or property. This reflects the importance of providing information that may assist such persons to support or care for the adult. However adults who may be being harmed may be anxious about the information being shared with others.

7. When a person is considering the information to be shared, it is important to consider the adult's right to confidentiality in relation to their personal healthcare

information (including medical details, treatment options, and wishes) before information is supplied. In particular, the relevant requirements of the regulatory body must be followed.

8. Whilst confidentiality is important, it is not an absolute right. Co-operation in sharing information is necessary to enable a council to undertake the required inquiries and investigations. Information should only be shared with those who need to know and only if it is relevant to the particular concern identified. The amount of information shared should be proportionate to addressing that concern.

### **What records may be examined?**

9. Section 10 defines records as health, financial or other records relating to an adult at risk. This includes records held in audio, visual or other formats. The purpose of inspecting records should be to enable or assist the council to decide whether it needs to take any further action in order to protect the adult at risk from harm. The type of records to be inspected will therefore depend on the type of harm suspected and will need to be judged on an individual basis. Any information requested must be relevant. *(For further information on adults at risk please refer to Chapter 1)*

10. Health records may only be inspected by a health professional. In some cases it will be sufficient for a health practitioner to inform the investigation by providing a summary of his or her involvement with the adult and of the adult's physical or mental health, along with any relevant documents or reports. It should be noted however that Section 10 refers to existing records held by a professional or organisation rather than information created specifically to meet a request.

11. Where it is suspected that a criminal offence may have been committed, this should be reported to the police at the earliest opportunity.

### **Does the Act provide any safeguards for an adult?**

12. Any person performing a function under the Act must take account of the principles. *(For further information on the principles, please refer to chapter 1)*

13. Records should be accessed and information shared only where disclosure will provide benefit to the adult which could not reasonably be provided without such an intervention.

### **Does an adult have to consent to disclosure?**

14. When a person is considering accessing information, it is important to consider carefully the adult's right to confidentiality about their private medical details, finances or their wishes before such information is requested. Wherever possible, and insofar as practicable the adult's consent should be obtained.

15. However, it may not be possible to obtain consent where:

- the adult lacks the mental capacity to consent;
- the person acting as proxy with the relevant powers for an adult lacking capacity is unavailable or unwilling to give consent; or

- the situation is so urgent that attempting to obtain consent would cause undue delay.

16. In the case of health professionals, the record holder must act in line with professional guidance. For example, guidance by the General Medical Council advises that doctors should inform their patients about such disclosures, wherever that is practicable.

17. Where the adult is incapable of consent, it would be good practice to approach the Office of the Public Guardian to ascertain whether a guardian or attorney may consent on their behalf. Where no guardian or attorney has such powers, consideration may be given to whether it is appropriate to use the provisions in the Adults with Incapacity (Scotland) Act 2000 or the Mental Health (Care and Treatment) (Scotland) Act 2003.

### **Who may access and inspect records?**

18. Section 10(4) allows for records given to the council officer to be inspected by the officer and any other person whom the officer considers appropriate in relation to the content of the records.

19. Section 10(5) provides that only a health professional can inspect health records. Section 10(7) defines health records as records relating to an individual's physical or mental health which have been made by or on behalf of a health professional in connection with the care of the individual.

20. The council officer or any other person whom the officer considers appropriate may determine whether records are health records. In the case of health records only a registered health professional (a doctor, nurse, midwife or other type of individual described by the Scottish Ministers) can be given the authority to inspect records or copies of records.

21. Good practice would be for each council to nominate persons of a suitable seniority to have authority to make decisions regarding accessing records on behalf of the council. This decision should be made in discussion with relevant bodies responsible for keeping records such as general practitioners.

### **How may records be accessed?**

22. A requirement to provide records may be made by the council officer during the time of a visit to the person holding the records or at any other time. The council officer should be able to demonstrate to the record holder that they are authorised to access records. The council should have procedures in place, agreed with relevant bodies which hold records, for obtaining and verifying authorisation.

23. If a request for information is made at a time other than during a visit, it must be made in writing. If the requirement is transmitted electronically it will be treated as having been made in writing if it is received in a legible form and is capable of being used for subsequent reference.

24. Usually only the relevant parts of a record will be copied for access by the council officer. It is essential that copies of records are treated with the same degree

of confidentiality as the original records. Good practice would be to discourage the use of original records.

25. It would be good practice for agreement to be reached with the record holder when records are obtained on how their records are to be treated. For example, whether copies of records should be kept for the minimum length of time necessary and then returned to the original record keeper or whether they should be destroyed.

**Must the record keeper always comply with a request for access?**

26. Section 49 of the Act provides that it is an offence for a person to fail to comply with a requirement to provide information under Section 10, unless that person has a reasonable excuse for failing to do so.

27. Councils should make reasonable efforts to resolve disagreements when record holders refuse to disclose them. Informal or independent conciliation might be considered, depending on the circumstances and reasons given for refusal.

## **Chapter 9: Assessment orders**

1. This chapter provides guidance on Section 11 of the Act which allows a council to apply to a sheriff for an assessment order. This allows a council officer, or any council nominee, to conduct a private interview, or a health professional to conduct a medical examination in private. This order would be necessary only if it were not possible to carry out the interview or examination at the place of the visit. An assessment order will be granted only where there is reasonable cause to suspect that the subject of the order is an adult at risk of serious harm, and that the action specified is necessary to establish this and to identify what further action may be required.

### **What is an assessment order?**

2. The purpose of an assessment order is to determine whether the adult is an adult suspected to be at risk; and whether there is reasonable cause to suspect that the adult at risk is being, or is likely to be, seriously harmed; and whether any action should be taken to protect the adult from serious harm.

3. There is no requirement under the Act for the council to have previously arranged a visit under Section 7, an interview under Section 8, or medical examination under Section 9 prior to applying for an assessment order. Protection orders may be applied for at any time in the process, depending on the individual circumstances of a case. Any proposed action must be judged on a case by case basis, including the use of other legislation, and be of benefit to the individual.

4. The council may make an application to a sheriff for an assessment order to help the council to decide whether the person is an adult at risk and to take an adult at risk of serious harm to a more suitable place in order to allow a council officer or council nominee to conduct a private interview. The order also provides that a health professional may carry out a medical examination in private.

5. When an assessment order is granted, the sheriff must also grant a warrant for entry under Section 37. The warrant for entry to accompany an assessment order will detail a specified place and only that place can be entered using the warrant. The warrant permits a constable to accompany a council officer and to do anything, including the use of reasonable force, where necessary which the constable considers to be required in order to fulfil the object of the visit. Only the constable has a right to use reasonable force.

### **What to consider before applying for an assessment order?**

6. Before the council or any person makes a decision or undertakes any function under the Act, they must have regard to the principles of the Act. *(For further information on the principles of the Act, please refer to Chapter 1)*

7. Consideration must also be given to whether the adult should be referred to an independent advocacy organisation or provided with other services. *(For further information on adult support, please refer to Chapter 3)*

8. The affected adult can be taken to the place specified on the order but whilst there, the adult still retains the right to refuse to answer all or some of the questions when interviewed. The adult may similarly refuse a medical examination. The

affected adult must be informed of these rights before an interview or a medical examination takes place.

9. The protection element of the assessment order allows the council to conduct an assessment in private. This could also be beneficial to the adult where the adult may be under undue pressure to refuse consent.

10. If it is considered that the adult will refuse consent to the granting of the assessment order the council should re-consider the merit of the application. If the council decides to pursue an application where the affected adult has capacity to consent and their refusal to consent is known, then the council must prove that the adult has been “*unduly pressurised*” to refuse to consent to the granting of an order. (for further information, see paragraphs 20 to 25).

11. Where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply. However evidence of lack of capacity will be required by the Sheriff. Where the adult is incapable of consent, it would be good practice to approach the Office of the Public Guardian to ascertain whether a guardian or attorney may consent on their behalf. Where no guardian or attorney has such powers, consideration may be given to whether it is appropriate to use the provisions in the Adults with Incapacity (Scotland) Act 2000 or the Mental Health (Care and Treatment) (Scotland) Act 2003.

12. The information gathered from the assessment order may point to further action being required, for example by providing the adult with support, advice or other services, or by taking further action under this Act or other legislation.

13. Wherever practicable, the adult must be kept fully informed at every stage of the process, for example, whether an order has been granted, what powers it carries, what will happen next, whether they have the right to refuse, what other options are available etc.

14. An assessment order does not have the power to detain the adult in the place they are taken to. The adult may choose to leave at any time.

### **Who can apply for an assessment order?**

15. Application for an assessment order must be made by the council’s legal department. Evidence must be made on oath with both the council’s solicitor and the authorised council officer appearing before the sheriff to present evidence.

### **What are the criteria for granting an assessment order?**

16. Section 12 sets out the circumstances in which a sheriff may grant an assessment order. The sheriff must be satisfied that:

- the council has reasonable cause to suspect the subject of the order is an adult at risk who is being, or is likely to be, seriously harmed;
- the order is required to establish whether the person is an adult at risk who is being, or is likely to be, seriously harmed; and

- the place at which the person is to be interviewed and examined is available and suitable.

17. The council must therefore be able to satisfy the sheriff that a suitable place will be available to take the adult. This may in some circumstances require written confirmation from the person who owns or manages this place that they are willing to receive the adult for assessment purposes. For example, the place could be a friend's or relative's house or a care home. The suitability of the place to conduct a private examination could also be confirmed in writing. This would be desirable but it may not always be practicable in potentially urgent or emergency situations.

18. Under Section 13, an order should only be sought where it is not practicable during a visit under Section 7 (due to a lack of privacy or otherwise) to:

- interview the person under Section 8; or
- conduct a medical examination of the person under Section 9.

19. It may be that the adult needs to be taken from a threatening environment with the prospect the adult may then relax and agree to an interview and/or medical examination. Given that the adult is to be taken to a place where they may be interviewed and medically examined, it would be good practice for the council to provide full details of the actions to be undertaken under the order and the estimated length of time that the assessment and interview may take. This approach would support the application in demonstrating that the council are taking into account the principle of least restriction.

### **Can an order be granted or enforced without an adult's consent?**

20. It must be borne in mind that the principles emphasise the importance of striking a balance between an individual's right to freedom of choice and the risk of harm to that individual, with the principles in sections 1 and 2 of the Act taken into account. Where the adult at risk has refused to consent, section 35 provides that the sheriff in considering making an order, or a person taking action under an order, may ignore the refusal where the sheriff, or that person, reasonably believes:

- that the affected adult at risk has been *unduly pressurised* to refuse consent; and
- that there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the order or action is intended to prevent.

21. There are essentially three stages that require that the issue of consent be considered. Firstly, a council (or other person) must believe that there are no steps which could reasonably be taken with the adult's consent before proceeding to apply for an order. For example, the council may have previously tried an informal approach to move the adult to another place for interview and a medical examination. If the informal approach was unsuccessful, the option to formally apply to the court for an assessment order is available. Secondly, if an application is made and consent to the granting of the order is refused, then the sheriff must consider the test referred to in paragraph 20 above and the onus will be on the applicant for the order to satisfy the sheriff in that regard. Thirdly, if an order is granted, a person must not take action



to carry out or enforce that order without separately considering the test referred to in paragraph 20 above.

22. Section 35(4) gives an example of what may be considered to be undue pressure. This states that an adult at risk may be considered to have been unduly pressurised to refuse to consent if it appears that:

- harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in whom the adult at risk has confidence and trust; and
- that the adult at risk would consent if the adult did not have confidence and trust in that person.

23. In this scenario, the sheriff or the council officer pursuing the application must reasonably believe that there is a relationship of confidence and trust between the affected adult and the person allegedly subjecting the adult to undue pressure, and that the adult would otherwise consent if the adult did not have that confidence and trust. The most obvious relationships to assume confidence and trust would be between parent-child, siblings, partnerships and friendships. The assessment of undue pressure may include the development of the relationship and how the suspected harmful circumstances may have resulted in the affected adult's refusal to consent.

24. However Section 35(5) makes it clear that this is not the only type of behaviour that would constitute undue pressure. Undue pressure can also be applied by an individual who may or may not be the person suspected of harming the adult, such as a neighbour, carer or other person. For example, a relative who is not suspected of causing the harm but does not, for whatever reason, wish the council to apply for an order may place undue pressure on the affected adult to refuse consent. Undue pressure may also be applied by a person that the adult is afraid of or who is threatening them and that the adult does not trust.

25. Where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply. However evidence of lack of capacity will be required by the Sheriff.

## **Notification**

26. Under Section 41(3) and (5), the Act provides that the applicant for an order must notify the affected adult in writing of the application and should advise them of their right to be heard or represented before the sheriff and to be accompanied by a friend, relative or any other representative chosen by the adult.

27. Under Section 41(4), the affected adult may be heard or represented before granting an assessment order. Under section 41(5) the affected adult may be accompanied in court by a friend, a relative or any legal representative instructed by the adult.

28. Section 41(2) provides that the sheriff may disapply the above requirements where the sheriff is satisfied that by doing so this will protect the adult from serious harm or will not prejudice any other person affected by the disapplication.

29. In cases where the council becomes aware that the person suspected of harming the adult may also attend a hearing, for example where the adult wishes to be accompanied by that person, it would be good practice for the council to inform the sheriff prior to the hearing being held. The sheriff will then be able to decide whether to apply the provisions available under the Vulnerable Witnesses (Scotland) Act 2004.

30. Where the adult concerned has indicated that they do not wish to have legal representation, or it appears that they do not understand the process, this should be indicated to the court by the council. The court retains a common law power to appoint a Curator ad Litem where a person is party to a case, but does not have full mental capacity.

31. Under Section 41(6), the sheriff has discretion to appoint a safeguarder before deciding on the order. The role of the safeguarder is to safeguard the interests of the affected adult at risk in any proceedings relating to an application. The sheriff may instruct the safeguarder to report on the issue of consent.

### **Timescales within which an order must be carried out**

32. The date specified in the order may be different from the date the order is granted. The assessment order is valid for 7 days after the date specified in the order. For example, an order dated 13 November would expire at midnight on 20 November.

33. The purpose of the assessment order is to take the adult to a more suitable place to enable the adult to be interviewed or medically examined. The adult must only be taken to the place specified on the order. There may be circumstances where, before the order is executed, the adult consents to being taken to another place. This does not invalidate the original terms of the order.

34. The key focus should be on carrying out an assessment given the suspicion of serious harm. It should be explained to the adult that the application for an assessment order was made due to concern for the adult. The adult has the right to refuse consent to the interview or the medical examination. After the interview or examination has been conducted or where the adult has refused to give their consent, the adult is free to leave.

35. The assessment must be undertaken in the shortest time practicable to minimise any possible distress or confusion to the adult. For example, a medical examination may only require an adult to be removed to the GP's surgery for an hour while an examination is carried out. However it may be that the adult would be happy to consent to remaining in a place overnight.

36. Once the order has been executed, it cannot be used again i.e. it does not provide for the adult to be taken from a place more than once to be interviewed or for a further medical examination.

37. The adult should be informed that an assessment order does not permit detention or allow a refusal to participate in an interview or medical examination to be over-ridden.

38. An assessment order cannot be appealed.

## **Warrant for entry**

39. In granting an assessment order, the sheriff must also grant a warrant for entry that authorises a police constable to use reasonable force. It must be borne in mind that the use of force is an absolute last resort, to be used in very exceptional circumstances, and only when all other options have been exhausted.

40. It is important that a multi-disciplinary plan be prepared in advance on how to carry out the assessment order. In order to minimise distress and risk to the adult, the procedure should be carefully planned and co-ordinated with all those involved in the process. The plan should include contingencies in case the adult does not respond as expected. Where it is anticipated that there may be a risk of violence, a multi-disciplinary assessment of the risk should be undertaken. It may be that the management of the process should be passed on to the police to enable them to address the issue of the safety of all parties concerned. However, all parties involved should bear in mind the principle of "least restrictive alternative" at all times.

41. Once a warrant has been executed, it cannot be used again.

## **What can be done in cases of urgency?**

42. Section 40 makes provision for cases of urgency. An application can be made to a justice of the peace for a warrant to enter premises in cases of urgency where it is not practicable to make application to a sheriff. *(For further information on warrants for entry, please refer to chapter 10)*

43. An application may be made to a justice of the peace where:

- it is not practical to apply to the sheriff; and
- the adult at risk is likely to be harmed if there is a delay in granting the warrant.

## **What happens after the order expires or the adult wishes to leave?**

44. Although the Act does not make explicit what happens after an assessment order expires or the adult chooses to leave, the council continues to have a duty of care to return the adult safely to the place from which they were removed or to a place of their choice, within reason. To this end, the council may consider discussing some form of support plan with the adult at risk or, where appropriate, convene a multi-disciplinary meeting to discuss further care and protection issues.

45. The information gathered may point to further action being required, for example by providing the adult with support, advice or other services, or by taking further action under this Act or other legislation.

## **Chapter 10: Removal orders**

1. This chapter provides guidance on Section 14 of the Act which allows a council to apply to the sheriff for a removal order, which, if granted, allows the council to remove the adult at risk to a specified place. The purpose of a removal order is to assess the adult's situation and to support and protect them. This is a short-term order and, although effective for a maximum of seven days, it is envisaged that it will not be required to last that long in the majority of cases. A removal order will be granted only where the sheriff is satisfied that the adult is likely to be seriously harmed if not moved to another place and that there is a suitable place available to remove the adult to. The council must protect any property owned or controlled by an adult who is removed from a place under a removal order.

### **What is a removal order?**

2. A removal order is primarily for protection and not for a council interview or a medical examination. It permits the person named in the order to be moved from any place to protect them from harm. For example, the place the adult at risk actually lives may however be a contributory factor in the harm and the move may provide "breathing space" for the specified person.

3. There is no requirement under the Act for the council to have previously arranged a visit under Section 7, an interview under Section 8, or medical examination under Section 9 or to have applied for an assessment order. Protection orders may be applied for at any time in the process, depending on the individual case. Any proposed action must be judged on a case by case basis, including the use of other legislation, and be necessary to provide benefit to the individual.

4. Section 14 provides that a council may apply to the sheriff for a removal order which authorises:

- a council officer, or any council nominee, to move a specified person to a specified place within 72 hours of the order being made; and
- the council to take such reasonable steps as it thinks fit for the purpose of protecting the moved person from harm.

5. The adult at risk must however, be removed to a "specified place" which has been assessed as being both available and suitable for the purpose. The council must also protect any property owned or controlled by an adult who is removed from a place under a removal order.

### **Expiry of a removal order**

6. There is a 72 hour period in which to enact the removal order. It expires 7 days (or such shorter period as may be specified in the order) after the day on which the person specified in the order is moved in pursuance of the order.

## **What to consider before applying for a removal order**

7. Action can only be considered where the person is an adult at risk who is likely to be seriously harmed if not moved and suitable accommodation is available to which that person can be moved. *(For further information on what constitutes an adult at risk, please refer to Chapter 1)*

8. Before the council or any person makes a decision or undertakes any function under the Act, they must have regard to the principles of the Act. In particular, any action should be the least restrictive and should be necessary to provide a benefit to the adult. The adult's wishes and needs must always be considered. *(Further information on the principles of the Act are provided in Chapter 1)*

9. The use of other legislation may also be considered, for example, social work, child protection, mental health, civil law or criminal justice legislation.

10. Consideration must also be given as to whether the adult should be referred to an independent advocacy organisation or provided with other services. *(For further information on adult support please refer to Chapter 3)*

11. It is good practice to ensure that wherever practicable the adult is kept fully informed at every stage of the process. For example, they should be made aware of what the order means for them, what powers it carries, what will happen next, whether they have the right to refuse, what other options are available etc. The council may also consider discussing with the adult at risk the need for some form of support plan. Another option would be to convene a multi-disciplinary meeting to discuss further care and protection issues.

12. The information gathered may point to further action being required, for example, by providing the adult with support, advice or other services, or by taking further action under this Act or other legislation.

13. Removal will need careful consideration by all practitioners. If it is considered that the adult will refuse consent to the granting of the removal order, the council should re-consider the merit of the application. This may be in the form of a multi-disciplinary case conference. Protection orders should be only used when all other options have been explored and exhausted.

14. If the council decides to pursue an application where the affected adult has capacity to consent and has made known their refusal to consent, then the council must prove that the adult has been "*unduly pressurised*" to refuse to consent to the granting of an order. *(For further information on undue pressure, please refer to paragraphs 23 to 28)*

15. Where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply. However evidence of lack of capacity will be required by the Sheriff. Where the adult is incapable of consent, it would be good practice to approach the Office of the Public Guardian to ascertain whether a guardian or attorney has powers to consent on their behalf. Where no guardian or attorney has such powers, consideration may be given to whether it is appropriate to use the provisions in the Adults with Incapacity (Scotland) Act 2000 or Mental Health (Care and Treatment) (Scotland) Act 2003.

## **Who can apply for a removal order?**

16. Only the council can apply for a removal order.
17. An application for such an order must be made to a sheriff, or in urgent cases a justice of the peace.
18. Although the application for the order must be made by the council, the council may choose to nominate another person, for example, someone from one of the co-operating bodies to actually move the adult at risk. This may be important if, for example, the nominated person is more familiar to the adult at risk than the council officer. It may be more reassuring for the person being removed if this was done by someone who they already know rather than a stranger. However, only the council officer and police constable have the right to enter the premises where the adult is located to remove the adult.
19. The removal order will specify where the adult is to be removed to. Good practice suggests a protection plan could be submitted by the council with the application.

## **What are the criteria for granting a removal order?**

20. Under Section 15, the sheriff may grant a removal order only if satisfied:
  - that the person in respect of whom the order is sought is an adult at risk who is likely to be seriously harmed if not moved to another place; and
  - as to the availability and suitability of the place to which the adult at risk is to be moved.
21. The place where the adult at risk is removed from may not necessarily be their own home. They could be in public, private or commercial premises. The adult can be removed from any place in pursuance of a removal order. The adult is to be removed to the place specified in the order.
22. Good practice would be that the council provides a suitability report of both the place and the person willing to care for the adult at risk. The council should also obtain a written agreement from the owner of the proposed specified place where it is for example, a private home or independent care provider to confirm the owner's willingness to receive the adult at risk for up to 7 days. The place to which the adult should be taken will be specified in the order.

## **Can an order be granted or enforced without an adult's consent?**

23. The principles emphasise the importance of striking a balance between an individual's right to freedom of choice and the risk of harm to that individual. Any intervention must be reasonable and proportionate, with the principles in sections 1 and 2 of the Act taken into account. Where the adult at risk has refused to consent, section 35 provides that the sheriff in considering making an order, or a person taking action under an order, may ignore the refusal where the sheriff, or that person, reasonably believes:

- that the affected adult at risk has been *unduly pressurised* to refuse consent; and
- that there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the order or action is intended to prevent.

24. There are essentially three stages that require that the issue of consent be considered. Firstly, a council (or other person) must believe that there are no steps which could reasonably be taken with the adult's consent before proceeding to apply for an order. For example, the council may have previously tried an informal approach to move the adult to another place. If the informal approach was unsuccessful, the option to formally apply to the court for a removal order is available. Secondly, if an application is made and consent to the granting of the order is refused, then the sheriff must consider the test referred to in paragraph 23 above and the onus will be on the applicant for the order to satisfy the sheriff in that regard. Thirdly, if an order is granted, a person must not take action to carry out or enforce that order without separately considering the test referred to in paragraph 23 above. Where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply. However evidence of lack of capacity will be required by the Sheriff.

25. Section 35(4) gives an example of what may be considered to be undue pressure. This states that an adult at risk may be considered to have been unduly pressurised to refuse to consent if it appears that:

- harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in whom the adult at risk has confidence and trust; and
- that the adult at risk would consent if the adult did not have confidence and trust in that person.

26. In this scenario, the sheriff or the council officer pursuing the application must reasonably believe that there is a relationship of confidence and trust between the affected adult and the person allegedly subjecting the adult to undue pressure, and that the adult would otherwise consent if the adult did not have that confidence and trust. The most obvious relationships to assume confidence and trust would be between parent-child, siblings, partnerships and friendships. The assessment of undue pressure may include the development of the relationship and how the suspected harmful circumstances may have resulted in the affected adult's refusal to consent.

27. However Section 35(5) makes it clear that this is not the only type of behaviour that would constitute undue pressure. Undue pressure can also be applied by an individual who may or may not be the person suspected of harming the adult, such as, a neighbour, carer or other person. For example, a relative who is not suspected of causing the harm but does not, for whatever reason, wish the council to apply for an order may place undue pressure on the affected adult to refuse consent. Undue pressure may also be applied by a person that the adult is afraid of or a person that the adult does not trust.

## **Notifications and hearing**

28. Under Section 41(3), the applicant for an order should notify the affected adult in writing of the application and advise them of their right to be heard or represented

before the sheriff and to be accompanied by a friend, relative or any other representative of their choice in accordance with section 41(5).

29. Under Section 41(4) and (5), the affected adult may be heard or represented before the granting of a removal order and has the right to be accompanied in court by a friend, a relative or any legal representative instructed by the adult.

30. The council should, if appropriate, advise any other persons who are known to have an interest in the person's well-being or property that the application is to be made. This would enable any such person to enter the proceedings.

31. Under Section 41(2), the sheriff may disapply the requirement (*at paragraphs 28 to 30*) where the sheriff is satisfied that by doing so this will:

- protect the adult from serious harm; or
- not prejudice any other person affected by the disapplication.

32. Section 15(3) provides that the sheriff may require the council to allow a specified person to have contact with the adult at risk subject to specified conditions. Before doing so the sheriff must have regard to:

- representations of the council as to whether persons should be allowed to have contact with the adult at risk; and
- any relevant representations made by:
  - the adult at risk
  - any person who wishes to be able to have contact with the adult at risk; and
  - any other person who has an interest in the adult at risk's well-being or property.

33. There may also be times when a person who is concerned for the adult's welfare would wish to enter the proceedings and be heard by the sheriff, for example, to ask that the adult be taken to a place other than that chosen by the council as the "suitable place".

34. Where the adult concerned has indicated that they do not wish legal representation, or it appears that they do not understand the process, this should be indicated to the court.

35. Under Section 41(6), the sheriff also has discretion to appoint a safeguarder to safeguard the interests of the affected adult at risk before deciding the application. The role of the safeguarder is to safeguard the interests of the affected adult at risk in any proceedings relating to an application. The sheriff may instruct the safeguarder to report on the issue of consent.

36. In cases where the council becomes aware that the person suspected of harming the adult may also attend, for example, where the adult wishes to be accompanied by that person, it would be good practice for the council to inform the sheriff prior to the hearing being held. The sheriff will then be able to decide



whether to apply the provisions available under the Vulnerable Witnesses (Scotland) Act 2004.

37. Where the council considers that it would be prejudicial to the adult's welfare for the adult to attend a hearing, then the council may ask the sheriff to dispense with intimation to the adult who is the subject of the application and other parties (*see also paragraphs 28 to 36*).

38. The council should provide the sheriff with their reasons to assist the sheriff in reaching a decision.

### **Can conditions be attached to a removal order?**

39. Section 15(2) provides that the sheriff may attach conditions to the grant of a removal order. This may require a council to allow any specified person to have contact with the adult at risk to whom the order relates:

- at any specified time during which the order has effect; and
- in accordance with any specified conditions.

40. Whether the sheriff attaches conditions to an order will depend on the circumstances in each application. A purpose of such conditions may be to permit certain persons to have contact with the moved person to help maintain family or social relationships. Such conditions may also stipulate that this conduct takes place under supervision arrangements where there is concern that harm may continue if contact was unsupervised. It should be borne in mind that representations may be made to the sheriff by any of the parties, either orally or in writing, for contact to be granted.

41. It may be inappropriate to have the adult at risk exposed to the alleged harmer during the period of the removal order, but contact with other persons may be beneficial, for example, relatives or friends. This issue could be addressed in advance with the adult.

42. Where conditions for contact have been specified by the sheriff, good practice would be for the council to prepare some form of access plan. This would include dates/times and may, for example, provide that any contact takes place in an alternative location from where the adult has been moved to.

### **Warrant for entry**

43. The sheriff (or justice of the peace) must grant a warrant that authorises a police constable to use reasonable force to achieve the purpose of the visit. Wherever possible, entry to premises should first be attempted without force. The use of force is an absolute last resort, to be used in very exceptional circumstances, and only when all other options have been exhausted.

44. In order to minimise distress and risk to the adult at risk, the procedure should be carefully planned and co-ordinated with all those involved in the process. Ideally, a multi-disciplinary plan would be prepared in advance on how to carry out the entry and removal of the person. The plan should include contingencies in case the adult or a person present does not respond as expected. Where it is anticipated that the use of

force may be necessary to execute the order, a multi-disciplinary assessment of the risk should similarly be undertaken. In such circumstances, management of the process should be passed on to the police to enable them to address the issue of safety of all parties concerned. However, all parties involved should bear in mind the general principles in Sections 1 and 2 of the Act.

45. Once a warrant has been executed, it cannot be used again.

### **Timescales within which an order must be carried out**

46. Given the purpose of the order, the adult must be removed within 72 hours. The order will expire up to seven days after the day the adult is moved, not counting the day the adult is moved, and it expires at midnight on the final day. The order can be specified by the sheriff to expire in a shorter period. The adult at risk cannot be returned home and then removed again within this period.

47. A further application for a removal order must not be made with a view to extending the order. This is to avoid the unintended consequence of an adult being out of their home for longer than is necessary. For example, if someone has been harmed it may be necessary to take them to another place temporarily so that they can be given food and rehydrated. The intention as far as is practically possible would be to return them to their own environment as soon as possible.

48. The council should always consider as short a removal period as possible in line with the general principles of benefit, least restriction and the adult's wishes. This removal period is a very short time interval so may only be used for very specific purposes. It may be that the removal order can be used to resolve any issues between the affected adult and the person suspected of harming the adult. In some cases this could be due to carer stress. However, the removal must be for the purpose of preventing serious harm.

### **What if the adult at risk has moved location before the removal order can be carried out?**

49. It may be that the adult at risk has either left the premises or been moved by another person to avoid the consequences of the removal order.

50. The removal order may not always specify the place from which the adult must be removed, however the warrant for entry always does. This means that if a person is moved to a second place in the period between the removal order and warrant being actioned, and it is anticipated that entry by warrant will be necessary, then a fresh application for a warrant must be made. Where the original removal order specified the place from where the adult must be removed, a fresh application will also be needed for a new removal order.

### **Can a removal order be varied or recalled?**

51. Section 17 provides that an application may be made to the sheriff to recall or vary a removal order. Application may be made by:

- the adult at risk;

- any person who has an interest in the adult at risk's well-being or property; or
- the council.

52. The sheriff may vary or recall the removal order if satisfied that the variation or recall is justified. The sheriff would have to be satisfied that there has been a change in the facts or circumstances in respect of which the order was granted or, as the case may be, last varied.

53. The removal order may not be varied so as to authorise the council to do anything seven days after the day on which the adult at risk is moved in pursuance of the order.

54. Where the sheriff has recalled the removal order, the sheriff may direct the council to:

- return the adult to the place from which the adult was removed; or
- take the adult to any other place which the sheriff, having regard to the adult's wishes, may specify.

55. As with the initial application, the sheriff has the discretion to disapply the notification and other requirements where the sheriff considers that by doing so it will protect the adult at risk from serious harm or will not prejudice any person affected by the disapplication. (*see also paragraphs 29 – 31*)

### **Who has responsibility for caring for the adult's property?**

56. Section 18 deals with protecting the adult at risk's property, whether this is owned or controlled by the adult, from being lost or damaged. The Act provides that the council must take reasonable steps to prevent any property owned or controlled by person moved in pursuance of a removal order to:

- prevent it from being lost or damaged (Section 18(1));
- enter any place to remove the property (Section 18(2));
- take any reasonable steps to safeguard the property (Section 18(4)).

57. Property could include the contents of a house, vehicles, animals, livestock, cash, credit cards and clothing.

58. The council is not entitled to recover any expenses it incurs in relation to property owned or controlled by the adult removed. The council has to return the property to the adult at risk as soon as is reasonably practicable. This could be agreed in advance with the adult at risk in the form of a Protection Plan.

### **What happens after the order expires or the adult wishes to leave?**

59. Although the Act does not make explicit what happens after the order expires or the adult chooses to leave, the council continues to have a duty of care to return the adult safely to the place from which they were removed or to a place of their choice, within reason. To this end, the council may consider agreeing some form of support

plan with the adult, or where appropriate, convene a multi-disciplinary meeting to discuss further care and protection issues.

60. The adult must only be taken to the place specified on the order. There may be circumstances where, before the order is executed, the adult consents to being taken to another place. This does not invalidate the original terms of the order.

### **What can be done in cases of urgency?**

61. Section 40 provides that a council can apply to a justice of the peace of the commission area in which the adult is located, where:

- it is not practicable to make application to the sheriff; and
- an adult at risk is likely to be harmed if there is any delay in granting the order.

62. The justice of the peace must be satisfied that the person is an adult at risk who is likely to be seriously harmed if not moved to another place and that the adult is to be removed to a place that is suitable and available.

63. The adult at risk must be removed within 12 hours of the grant of the removal order and the order expires after 24 hours.

64. Good practice would be that the council should advise any person with an interest in the adult's welfare that the adult has been removed.

## **Chapter 11: Banning and temporary banning orders**

1. This chapter provides guidance on applications for banning orders and temporary banning orders. These orders will only be granted where the adult at risk is in danger of being seriously harmed, and where banning the subject of the order from a specified place is likely to safeguard the adult's well-being and property more effectively than would the removal of the adult at risk. Any decision to grant or refuse to grant a banning or temporary banning order can be appealed to the sheriff principal.

### **What is a banning order or temporary banning order?**

2. A banning or temporary banning order, which bans the subject of the order from a specified place, may have other conditions attached to it, and may last for a period of time not exceeding 6 months. The purpose of these orders is to better safeguard the adult at risk's well-being and property more effectively than would removing the adult from a place where they are at risk of harm from another person.

3. There is no requirement under the Act for the council to have previously arranged a visit under Section 7, an interview under Section 8, or medical examination under Section 9 or to have applied for either an assessment or removal order. Protection orders may be applied for at any time in the process, depending on the individual case. Any proposed action must be judged on a case by case basis, including the use of other legislation, and be necessary to provide benefit to the individual.

4. Section 19 provides for the granting of a banning order, and attachment of conditions to such an order, by the sheriff. A banning order bans the subject of the order ("the subject") from being in a specified place. The subject of the order may be a child. Section 21 allows the sheriff to grant a temporary banning order pending determination of an application for a banning order.

5. A banning or temporary banning order may:

- ban the subject from being in a specified area in the vicinity of the specified place;
- authorise the summary ejection of the subject from the specified place and the specified area;
- prohibit the subject from moving any specified thing from the specified place;
- direct any specified person to take specified measures to preserve any moveable property owned or controlled by the subject which remains in the specified place while the order has effect;
- be made subject to any specified conditions; and
- require or authorise any person to do, or to refrain from doing, anything else which the sheriff thinks necessary for the proper enforcement of the order.

6. A condition specified in an order may authorise the subject of the order to be in a place or area from which they are banned, but only in specified circumstances, for example while being supervised by another person or during specified times.

### **What to consider before applying for a banning order or temporary banning order?**

7. Action can only be considered where an adult is an adult at risk for the purposes of the Act. In terms of the order, the adult in these circumstances becomes the “affected adult”. *(For further information on what constitutes an adult at risk please refer to Chapter 1)*

8. Before the council or any person makes a decision or undertakes any function under the Act, they must have regard to the principles of the Act, in particular that any action will be the least restrictive action and be necessary to provide benefit to the adult. The adult’s wishes and needs must always be considered. *(For further information on the principles of the Act, please refer to Chapter 1)*

9. Where a Council is applying for an order it must consider whether the adult at risk should be referred to an independent advocacy organisation or provided with other services. *(For further information on adult support, please refer to Chapter 3)*

10. The use of other legislation may also be considered, for example, social work, child protection, mental health, civil law or criminal justice legislation.

11. It would be good practice to ensure, wherever practicable, the adult is kept fully informed at every stage of the process e.g. whether an order has been granted, what powers it carries, what will happen next, whether they have the right to refuse, what other options are available etc.

12. If it is considered that the adult will refuse consent to the granting of the order the council should re-consider the merit of the application. This may be in the form of a multi-disciplinary case conference. Protection orders should be only used when all other options have been explored and exhausted.

13. If the council decides to pursue an application where the affected adult has capacity to consent and has made known their refusal to consent, then the council must prove that the adult has been “*unduly pressurised*” to refuse to consent to the granting of an order. *(For further information on undue pressure, please refer to paragraphs 41 to 44)*

14. Where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply. However evidence of lack of capacity will be required by the Sheriff. Where the adult is, or appears to be, incapable of consent, it would be good practice to approach the Office of the Public Guardian to ascertain whether a guardian or attorney has powers to consent on their behalf. Where no guardian or attorney has such powers, consideration may be given to whether it is appropriate to use the provisions in the Adults with Incapacity (Scotland) Act 2000 or Mental Health (Care and Treatment) (Scotland) Act 2003.

15. Where consideration is being given to applying for an order which bans a child, this should include prior consideration of making a referral to the Children’s Reporter where it is believed there would be an effective case to answer. If the

circumstances are such that there is a need to act urgently, then a referral to the Children's Reporter should be made at the same time as the application for an order.

### **Who can apply for an order?**

16. Section 22 provides that an application for a banning order may be made by or on behalf of:

- an adult whose well-being or property would be safeguarded by the order; or
- any other person who is entitled to occupy the place concerned; or
- a Council.

17. Under Section 22 (2) the council is under an obligation to apply for a banning order if it is satisfied that:

- nobody else is likely to apply for a banning order in respect of the circumstances which caused the council to be satisfied as to the matters set out in Section 20; and
- no other proceedings to eject or ban the person concerned from the place concerned are pending before a court.

18. The applicant may also apply for a temporary banning order at the same time as making application for a banning order, or at a later date. This allows an order to be granted pending final determination of a banning order application and may be used in cases where it is deemed inadvisable to wait until a full hearing on the banning order application takes place.

19. If the adult at risk is the applicant, it would be good practice for the council to assist with the application.

### **What are the criteria for granting a banning order or temporary banning order?**

20. Section 20 of the Act provides that a sheriff may grant a banning order or temporary banning order only if they are satisfied that:

- an adult at risk is being, or is likely to be, seriously harmed by another person;
- the adult at risk's well-being or property would be better safeguarded by banning the other person from a place occupied by the adult than it would be by moving the adult from that place; and that either:
  - the adult at risk is entitled, or permitted by a third party, or
  - neither the adult at risk nor the subject is entitled, or permitted by a third party

to occupy the place from which the subject is to be banned.

21. The subject of the banning order may not necessarily be living with the adult at risk. The point of the banning order is to put some distance between them to protect the adult at risk from further serious harm.

22. The order allows a person to be banned from being in a specific place, usually where the adult at risk lives. The main test of the order is whether the person is, or is likely to be, seriously harming an adult at risk. The banning order may ban the subject from contact with the adult at risk for up to a maximum period of six months, and may include other conditions that a sheriff thinks appropriate. For example, this period could provide an opportunity for the adult at risk and the subject to undergo mediation to explore future living arrangements, or to secure the adult at risk's future on a permanent basis.

### **Who can be banned from a property?**

23. Section 23 provides that the granting of a banning or temporary banning order does not affect the adult at risk's rights, as a non-entitled spouse, to occupy a home within the place from where the subject of the order is banned under the Matrimonial Homes (Family Protection)(Scotland) Act 1981. This means that a banning order, despite affecting the subject's right to occupy the property in question, does not affect any rights that the adult at risk has under the 1981 Act.

24. Where the adult at risk is entitled to occupy a place, their occupancy rights are not affected if their husband, wife, partner etc. is banned from the place. Where the adult at risk has no occupancy rights and the proposed subject of the order does have these rights, then the subject cannot be banned from the place.

25. Banning orders may also be applied in respect of public places and may also be used where neither the adult at risk nor the subject has a right to occupy a property.

### **How long can a banning order be granted for?**

26. A banning order can last for any period up to a maximum of six months.

27. The applicant should consider what would be the shortest period possible in line with the general principles of the adult at risk's wishes and what would be beneficial to the adult.

28. The period for a banning order will be specified by the sheriff. A banning order may be recalled or varied. (*see also paragraphs 47 to 50*)

### **How long can a temporary banning order be granted for?**

29. Section 21(4) of the Act provides that a temporary banning order expires on the earliest of the following dates:

- the date the sheriff determines the banning order; or
- is required to determine the banning order within the period specified in Court Rules;
- the date on which it is recalled; or



- any specified expiry date.

30. A temporary banning order may also be recalled or varied. (*see also paragraphs 47 to 50*)

### **What conditions can be attached to an order?**

31. A banning order may specify a number of matters and may have conditions attached. (*see also paragraphs 5 and 6*).

32. Section 19 enables the order to be tailored to allow contact between the subject and the adult at risk under supervised conditions, perhaps as a first step to resolving the issue. This may include supervision of the subject in the area or place they are banned from to allow some form of mediation between the subject and the adult at risk, or to allow the subject access to the adult at risk's children or family. The conditions for this contact could be specified in an Access Plan, showing dates, times and location.

### **Attaching a power of arrest**

33. Section 25 permits the sheriff, at the time of granting the banning or temporary banning order, to attach a power of arrest. The sheriff will make such a decision based on the facts and circumstances of the case presented.

34. The evidence for this would be based on the likelihood of the subject breaching the banning order or any of the conditions attached to the banning order. If any of these conditions were breached the subject may be arrested without warrant if a constable reasonably suspects them to be in breach of the order and that they are likely to breach the order again if not arrested. (*see also paragraphs 59 to 63*)

35. Where a banning or temporary banning order has been granted without an attached power of arrest and the facts and circumstances of the case have changed since the order was granted, then application by way of a motion in the process may subsequently be made to the sheriff to attach a power of arrest. (*see also paragraphs 47 to 50*)

### **Notifications**

36. Under Section 41, the applicant for the banning order or temporary banning order (or application for variation or recall) should give notice in writing of the application to the subject of the order, and to the affected adult (where that person is neither the applicant nor the subject of the application). This notification should advise the subject of the order of their right to be heard or represented before the sheriff. Notification to the affected adult (where that person is neither the applicant nor the subject of the application), should advise of their right to be heard or represented before the sheriff, and to be accompanied by a friend, relative or any other representative chosen by the adult. (*see also paragraphs 40, 45 and 46*)

## **Court hearing**

37. Section 19(4) provides that, where it is proposed to attach a condition authorising the subject of the order to be in the place or area from which they are banned during specified circumstances, the sheriff must have regard to any relevant representations made by:

- the applicant for the order;
- the adult at risk;
- any other person who has an interest in the adult at risk's well-being or property; and
- the subject of the application.

38. Where the adult concerned has indicated that they do not wish legal representation, or it appears that they do not understand the process, this should be indicated to the court.

39. Under Section 41(6), the sheriff also has discretion to appoint a safeguarder before deciding on the order. The role of the safeguarder is to safeguard the interests of the affected adult at risk in any proceedings relating to an application. The sheriff may instruct the safeguarder to report on the issue of consent.

40. In cases where the council becomes aware that the person suspected of harming the adult may also attend e.g. where the adult wishes to be accompanied by that person, the council should inform the sheriff prior to the hearing being held. The sheriff will then be able to decide whether to apply the provisions available under the Vulnerable Witnesses (Scotland) Act 2004.

## **Can an order be granted or enforced without an adult's consent?**

41. The principles in sections 1 and 2 of the Act must always be taken into account. Where the adult at risk has refused to consent, section 35 provides that the sheriff in considering making an order, or a person taking action under an order, may ignore the refusal where the sheriff, or that person, reasonably believes:

- that the affected adult at risk has been *unduly pressurised* to refuse consent; and
- that there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the order or action is intended to prevent.

42. There are essentially three stages that require that the issue of consent be considered. Firstly, a council (or other person) must believe that there are no steps which could reasonably be taken with the adult's consent before proceeding to apply for an order. Secondly, if an application is made and consent to the granting of the order is refused, then the sheriff must consider the test referred to in paragraph 41 above and the onus will be on the applicant for the order to satisfy the sheriff in that regard. Thirdly, if an order is granted, a person must not take action to carry out or enforce that order without separately considering the test referred to in paragraph 41

above. Where the adult does not have capacity to consent, the requirement to prove undue pressure does not apply. However evidence of lack of capacity will be required by the Sheriff.

43. Section 35(4) gives an example of what may be considered to be undue pressure. This states that an adult at risk may be considered to have been unduly pressurised to refuse to consent if it appears that:

- harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in whom the adult at risk has confidence and trust; and
- that the adult at risk would consent if the adult did not have confidence and trust in that person.

44. However Section 35(5) makes it clear that this is not the only type of behaviour that would constitute undue pressure. Undue pressure can also be applied by an individual who may or may not be the person suspected of harming the adult, such as a neighbour, carer or other person in whom the affected adult has confidence and trust. For example, a relative who is not suspected of causing the harm but does not, for whatever reason, wish the council to apply for an order may place undue pressure on the affected adult to refuse consent. Undue pressure may also be applied by a person that the adult is afraid of or a person whom the adult does not trust.

### **Disapplication of notification and intimation**

45. Where the council, or any other person, considers that it would be prejudicial to the person's welfare for the adult to attend a hearing, then the council should ask the sheriff to dispense with intimation to the adult who is the subject of the application and the persons listed at paragraph 37. The council should provide the sheriff with their reasons in coming to this conclusion to enable the sheriff to decide whether it is appropriate to dispense with intimation in the circumstances.

46. Section 41(2) provides that the sheriff may disapply the requirement for notification in those cases where a condition is to be specified in the banning order authorising the subject to be in the place or area from which they have been banned for specified circumstances (under Section 19(3)). The sheriff must be satisfied that:

- by doing so this will protect the adult from serious harm; or
- this will not prejudice any other person affected by the disapplication.

### **Application for variation or recall of an order**

47. Section 24 provides that application may be made to the sheriff to recall or vary an order by:

- the subject of the order;
- the applicant for the order;
- the adult at risk to whom the order relates; or

- any other person who has an interest in the adult at risk's well-being or property.

48. The sheriff may vary or recall an order if satisfied the variation or recall is justified. The sheriff must be satisfied that there has been a change in the facts or circumstances in respect of which the order was granted or, as the case may be, last varied.

49. A variation may not vary the date on which the order expires-

(a) in the case of a banning order, beyond the date which is 6 months after the date on which the order was granted;

(b) in the case of a temporary banning order, beyond the date by which Section 21(3) requires the sheriff to determine the related application for a banning order.

50. A banning or temporary banning order can be varied any number of times within the specified period. If the sheriff recalls the order then the terms of the order cease to have effect. The grounds therefore for recalling the order should show that further harm is not likely to take place.

## **Right of appeal against a decision to grant or a refusal to grant an order**

### *Banning order*

51. Section 51(2) provides for a right of appeal against a decision to grant, or a refusal to grant a banning order. An appeal must be made to the sheriff principal in the first instance. The sheriff principal's decision may be appealed to the Court of Session, but only by those who were party to the appeal to the sheriff principal.

### *Temporary banning order*

52. An appeal against a sheriff's decision to grant, or refuse to grant, a temporary banning order may be made to the sheriff principal. However an appeal is only competent with the leave of the sheriff. An appeal against the sheriff principal's decision to the Court of Session is only competent with the leave of the sheriff principal.

## **How long does an order continue to have effect?**

53. Where a sheriff principal decides to quash a banning order or temporary banning order, the order will continue to have effect until either the end of the period for appeal (if no appeal is made) or, where an appeal is made, when it is abandoned or where the decision is confirmed.

54. Alternatively, the order will continue to have effect until it expires or, in the case of a temporary banning order, the sheriff principal refuses leave to appeal against the decision to quash the order.

### **Who does the applicant have to notify of the granting, variation or recall of an order?**

55. Under Section 26 where the sheriff grants a banning order, temporary banning order, variation or recall, the applicant (where not the adult at risk) must notify the adult at risk and such other person specified by the sheriff, by delivering a copy of the order and any power of arrest attached to the adult and/or other person(s) specified by the sheriff. However, failure to deliver an order does not invalidate it.

56. Where a power of arrest has been attached, Section 27 provides that the police, via the chief constable, must be notified, as soon as possible, by delivering a copy of the order and any power of arrest attached.

### **Who is responsible for preserving the banned person's property during an order?**

57. Section 19(2)(d) of the Act states that a banning order may also direct any specified person to take specified measures to preserve any moveable property owned or controlled by the subject which remains in the specified place while the order has effect.

58. The Act allows for specific measures to be taken to preserve the subject's property. The applicant should obtain an inventory of moveable property belonging to the subject of the banning order that can remain in the adult at risk's home or specified place, where the subject is banned. It would be good practice to obtain a signature from the subject confirming that the inventory is correct. The subject can formally request any of these measures. This may be to protect property such as pets or computers.

### **What happens if an order without an attached power of arrest is breached?**

59. Where the subject of the order breaches the order then this will be dealt with on the basis of a failure to comply with an order of court. As a result of this, if established, the subject of the order can be held in contempt of court. The applicant (and the adult at risk where not the applicant) may raise a normal action for breach of an order. Any proceedings in this regard should be accompanied by confirmation from the procurator fiscal that no criminal proceedings are to be commenced in respect of the facts and circumstances that are to form the subject matter of breach proceedings. An adult at risk is not required to report any breach of an order.

60. Where the person breaching the order has also committed a criminal offence, then this will be dealt with in the usual manner. Proceedings will be instigated by way of a petition by the procurator fiscal, following normal court procedures.

### **What happens if an order with an attached power of arrest is breached?**

61. The power of arrest becomes effective only when served on the subject of the order and will expire at the same time as the order.

62. Under Section 28, where a banning order or temporary banning order has a power of arrest attached, a constable can arrest the subject of an order if the constable:

- reasonably suspects the subject to be breaching, or to have breached, the order; and
- considers that there would, if the subject were not arrested, be a risk of the subject breaching the order again.

63. In other words, the constable cannot simply arrest the subject for having breached the order alone.

### **What must the police do when someone is arrested under Section 28?**

64. Section 28(2) requires that the arresting officer must:

- immediately inform the arrested person of the reason for the arrest; and
- take the arrested person as quickly as is reasonably practicable to a police station.

65. Section 29 requires that the officer in charge must detain the arrested person in custody until the person is-

- accused on petition or charged on complaint with an offence in respect of the facts and circumstances which gave rise to the arrest; or
- brought before the sheriff under Section 32 of the Act.

66. Section 30 requires the officer in charge to ensure that the detained person is informed immediately of:

- their right to have, on request, intimation of detention and the place of detention given, without delay, to-
  - a solicitor, and
  - one other person reasonably named by the person,
- the right to have, on request, intimation given to a solicitor that the solicitor's professional assistance is required;
- the right to have, on request, the solicitor informed, as soon as the information is available, of the court to which the person is to be taken and the date when that is to happen; and
- the right to have, on request, a private interview with the solicitor before any appearance before the sheriff.

67. The police must pass the facts and circumstances to the procurator fiscal. The fiscal will then decide if there is sufficient evidence to take any criminal proceedings (e.g. assault towards the adult at risk) regarding the incident which gave rise to the arrest for breaching the banning order.

## **Breaching of order with an attached power of arrest - child**

68. The subject of the banning order may be a child. Section 30 provides that where the officer in charge knows or believes that an arrested person is a child, then the officer must, where practicable, give intimation without delay of the detention and place of detention to any person known to have parental responsibilities and rights in relation to the child. Such person must be permitted reasonable access to the child. It would be expected that the police would also make a referral to the Children's Reporter.

## **Police duty to keep record of detention**

69. Under Section 31, the officer in charge must ensure that the following matters are recorded in connection with the detention of the subject of the order:

- the time at which the person was arrested;
- the police station to which the person was taken;
- the time when the person arrived at that police station;
- the address of any other place to which the person is, during the detention, taken;
- the time when the person was informed of their rights;
- the time and nature of any request made by the person to exercise any of those rights; and
- the time and nature of any action taken by a police officer under Section 30.

## **Duty to bring detained person before sheriff**

70. Section 32 makes clear that the procedure under the Act would only apply in circumstances where the procurator fiscal has not yet decided to take criminal proceedings against the arrested person as a result of the facts leading to the arrest.

71. The arrested person should be brought to court, in the district in which the person was arrested. This should be on the next court day on which it is practicable to do so but that does not prevent the sheriff dealing with the matter if sitting on a non-court day for the disposal or criminal business.

## **Information to be presented to sheriff**

72. Under Section 33, the fiscal must present a petition to the sheriff setting out various details of the case and requesting the sheriff to consider whether a longer period of detention is justified. The petition should:

- give the detained person's particulars;
- state the facts and circumstances which gave rise to the arrest;

- give any information known to the fiscal:
  - about the circumstances which gave rise to the banning order or temporary banning order concerned, and
  - which is relevant to an assessment of whether the detained person is likely to breach that order: and
- request the sheriff to consider whether a longer period of detention is justified.

### **Authorisation of further detention period by Sheriff**

73. Where the sheriff is satisfied, based on the information provided by the fiscal, that a breach of the banning order or temporary banning order appears to have taken place and that there is a “substantial risk” the subject will breach the order again, the sheriff may authorise the person to be detained for a further 2 days (not counting days which are not court days).

74. Where the sheriff decides not to authorise further detention, then the detained person must be released (unless already in custody in respect of another matter).

75. The sheriff must provide the detained person with an opportunity to make representations prior to making any decision.

76. The banning or temporary banning order, any conditions attached, and power of arrest continue notwithstanding breach proceedings.

### **Expiry of an order prior to any criminal proceedings**

77. If the subject was charged for committing an offence as a result of breaching the order and released on bail, the conditions of the order continue until its expiry, unless varied under Section 24.

78. In cases where an order will expire prior to court proceedings, the applicant for the order, or the council if not the applicant, may wish to consider applying for a new banning order and temporary banning order until such time as the subject is tried. There is nothing in the Act from preventing fresh application being made. The decision to do so would depend on whether there is sufficient evidence to make an application and an order remains justified according to the statutory criteria. In cases where the council intends to act under its adult protection duties, it may wish to liaise with the police or procurator fiscal regarding the application.



## **Chapter 12: Offences**

### **Obstruction**

1. Section 49 provides that it is an offence to prevent or obstruct any person from doing anything they are authorised or entitled to do under the Act. It is also an offence to refuse, without reasonable excuse, to comply with a request to provide information made under Section 10 (examination of records etc). However if the adult at risk prevents or obstructs a person, or refuses to comply with a request to provide access to any records, then the adult will not have committed an offence.

2. A person found guilty of these offences is liable on summary conviction to:

- a fine not exceeding level 3 on the standard scale, and/or
- imprisonment for a term not exceeding 3 months.

### **Offences by corporate bodies etc**

3. Where it is proven that an offence was committed with the consent or connivance of, or was attributable to any neglect on the part of a “relevant person”, or a person purporting to act in that capacity, that person as well as the body corporate, partnership or unincorporated association is also guilty of an offence.

4. A “relevant person” for the purposes of this section means:

- a director, manager, secretary or other similar officer of a body corporate such as a limited company, a plc, or a company established by a charter or by Act of Parliament;
- a member, where the affairs of the body are managed by its members;
- an officer or member of the council;
- a partner in a Scottish partnership; or
- a person who is concerned in the management or control of an unincorporated association other than a Scottish partnership.

5. An unincorporated association is the most common form of organisation within the voluntary sector in Scotland. It is a contractual relationship between the individual members of the organisation, all of whom have agreed or "contracted" to come together for a particular charitable purpose. Unlike an incorporated body the association has no existence or personality separate from its individual members.

## **Chapter 13: Adult Protection Committees**

1. The Act creates an obligation on councils to establish multi-agency adult protection committees (APCs). This chapter covers Sections 42 to 47 of the Act which set out the provisions relating to the establishment, composition and functions of these committees. Section 47 requires APCs and councils to have regard to guidance issued by the Scottish Ministers about their functions under Sections 42 – 46, namely:

- functions;
- membership;
- procedures;
- information sharing; and
- reporting.

2. The Act provides a framework for how APCs should operate. The intention is that each committee will evolve its own procedures to reflect local arrangements and Ministers will monitor effectiveness through the biennial reporting system. Consultation on proposed guidance for APCs will be issued separately.

### **Functions**

3. APC functions will include:

- developing and introducing arrangements and protocols for inter-agency working and auditing and evaluating the effectiveness of these arrangements;
- developing procedures, policies and strategies for protecting adults at risk and reviewing these;
- developing and introducing arrangements to monitor, review, disseminate and report activity in relation to the protection of adults at risk. For example this might include gathering key information relating to:
  - numbers of inquiries and investigations;
  - the number of adult protection referrals by age, client group, gender etc;
  - types of abuse;
  - agency involvement;
  - outcome of referrals and recommendations; and number of initial case conferences convened;
- raising awareness and providing information and advice to the wider community and to professionals;
- training and development activities;
- improving local ways of working in light of knowledge gained through local and national experience, case review and research; and
- undertaking any other functions relating to the safeguarding of individuals as the Scottish Ministers may specify.

### **Membership**

4. Councils will be responsible for appointing a committee convener and committee members with relevant skills and knowledge.

5. The convener must be independent and not be a member or officer of the council.
6. Committee members must be appointed in accordance with the following requirements:
  - The following bodies must nominate a representative with the skills and knowledge relevant to the functions of the APC to be a committee member:
    - the council;
    - the relevant Health Board;
    - the chief constable of the police force maintained in the council's area; and
    - any other public body or office holder specified by the Scottish Ministers (*Scottish Ministers have not specified any other bodies at the time of publication*);
  - The Care Commission may nominate a representative with the relevant skills and knowledge if it wishes to do so; and
  - The council may appoint such other persons as appear to have skills and knowledge relevant to the Committee. For example, this might include a member of a voluntary group, an independent care provider etc.

## **Procedures**

7. Each Committee will establish and regulate its own procedures, which must allow representatives from the following organisations to attend committee meetings:
  - the Mental Welfare Commission for Scotland;
  - the Public Guardian;
  - the Care Commission, where it is not represented on the committee; and
  - any other public body or office-holder specified by the Scottish Ministers.

## **Information sharing**

8. The following bodies must provide the committee with any information that the committee may reasonably require to enable it to carry out its functions:
  - the council;
  - the Care Commission;
  - the relevant Health Board;
  - the chief constable of the police force maintained in the council's area;
  - the Mental Welfare Commission for Scotland;
  - the Public Guardian; and
  - any other public body or office holder specified by the Scottish Ministers. (*Scottish Ministers have not specified any other bodies at the time of publication*).

## **Reporting**

9. The convener must produce a report every two years on the exercise of the committee's functions. Following approval by the committee, the report must be forwarded to:

- to the Scottish Ministers;
- the council;
- the Care Commission;
- the relevant Health Board;
- the chief constable of the police force maintained in the council's area;
- the Mental Welfare Commission for Scotland;
- the Public Guardian; and
- any other public body or office holder specified by the Scottish Ministers.  
*(Scottish Ministers have not specified any other bodies at the time of publication).*

## Links to other guidance

### Scottish Government:

#### **Adult Support and Protection (Scotland) Act 2007**

<http://www.scotland.gov.uk/Topics/Health/care/VAUnit/ProtectingVA>

#### **Adults with Incapacity**

<http://www.scotland.gov.uk/Topics/Justice/Civil/awi>

#### **Adults with Incapacity– communication and assessing capacity**

<http://www.scotland.gov.uk/Publications/2008/02/01151101/0>

#### **Child Protection**

<http://www.scotland.gov.uk/Topics/People/Young-People/Children-Families/17834>

#### **Appropriate Adults Scheme**

<http://www.scotland.gov.uk/Topics/Justice/criminal/18244/Appropriate-Adult>

#### **Mental Health (Care and Treatment) (Scotland) Act 2003**

<http://www.scotland.gov.uk/Topics/Health/health/mental-health/mhlaw>

#### **Survivor Scotland**

<http://www.survivorscotland.org.uk>

### **Counselling, mediation, and victim support:**

[www.victimsupportsco.demon.co.uk](http://www.victimsupportsco.demon.co.uk)

### **Criminal Injuries Compensation Scheme (CICS), 2001:**

[www.cica.gov.uk](http://www.cica.gov.uk)

### **Office of the Information Commissioner’s framework code of practice for sharing information**

[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/pinfo-framework.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/pinfo-framework.pdf)

### **Office of the Public Guardian**

<http://www.publicguardian-scotland.gov.uk/>

### **Public Concern at Work** – provides legal, practical and policy advice on whistle blowing

<http://www.pcaw.co.uk>

### **Scottish Independent Advocacy Alliance**

<http://www.siaa.org.uk/>

### **The Mental Welfare Commission (MWC) for Scotland**

[www.mwscot.org.uk](http://www.mwscot.org.uk)

### **The Princess Royal Trust for Carers**

<http://www.carers.org/>

### **Victims of Crime in Scotland**

[http://www.scottishvictimsofcrime.co.uk/exec\\_ccc/VC\\_FirstPage.jsp?pContentID=275&p\\_aplic=VC\\_CCC&p\\_service=Content.show&](http://www.scottishvictimsofcrime.co.uk/exec_ccc/VC_FirstPage.jsp?pContentID=275&p_aplic=VC_CCC&p_service=Content.show&)

### **Vulnerable Witnesses (Scotland) Act 2004**

<http://www.scotland.gov.uk/Publications/2005/04/04143522/35246>

## Glossary

### Introduction

This glossary is for illustrative purposes only and is not intended to be prescriptive. Full statutory definitions of many of the terms are contained in Section 53 of the Act and it is those that should be used in any process or situation where precise definition is required.

**Adjacent place:** A place near, or next to any place where an adult at risk may be, such as a garage outbuildings etc.

**Adult** (Section 53): An individual aged 16 or over.

**Adult at risk:** *(Please refer to Chapter 1 for further information for an explanation of the full definition)*

**Adult Protection Committee** (Section 42) (APC): A committee established by a council to safeguard adults at risk in its area.

**Advance Statement:** A statement made under the provisions of Section 275 of the Mental Health (Care and Treatment) (Scotland) Act 2003 setting how a person would, or would not, wish to be treated should they subsequently require care and treatment under that Act.

**Assessment order** (Section 11): Order granted by a sheriff to help the council to decide whether the person is an adult at risk and, if so, whether it needs to do anything to protect the person from harm.

**Banning order** (Section 19): Order granted by a sheriff to ban a person from being in a specified place or area. The order may have specified conditions attached. The banned person can be any age, including a child.

**Care Commission** (Section 53): The Scottish Commission for the Regulation of Care.

**Child** (Section 53): A person under the age of 16.

**Conduct** (Section 53): Includes neglect and other failures to act.

**Council** (Section 53): A council constituted under the Local Government (Scotland) Act 1994. References to a council in relation to any person known or believed to be an adult at risk mean the council for the area where the person is currently located.

**Council nominee** (Section 11(1)(a) and 14(1)(a)): An individual who is not a council officer under Section 52 of the Act, nominated by the council to either interview the adult under an assessment order or to move the adult under a removal order.

**Council officer** (Section 53): An individual appointed by a council under Section 64 of the Local Government (Scotland) Act 1973 (c. 65) but the term must, where relevant, also be interpreted in accordance with any order made under Section 52(1).

**Court day** (Section 53): A weekday (Monday to Friday) unless it has been designated a 'court holiday' (usually a bank holiday or a local holiday).

**Curator ad litem:** Person appointed by the sheriff to protect the interests of the person who is the subject of proceedings relating to an application.

**Disapply/Disapplication** (Section 41): To dispense with.

**Harm** (Section 53): Includes all harmful conduct. This includes conduct that causes physical or psychological harm, unlawful conduct that adversely affects property, rights or interests possessions, conduct that causes self-harm.

**Health professional** (Sections 52(2) and 53): The person is a doctor, nurse, midwife or other type of individual prescribed by the Scottish Ministers.

**Inquiry:** An inquiry is any process that has the aim of gathering knowledge and information. This could include inquiries of any relevant party and the co-operation of the public bodies and office holders under Section 5 of the Act. The purpose of making inquiries is to ascertain whether adults are at risk of harm and whether the council may need to intervene or provide any support or assistance to the adult or any carer.

**Investigation:** An investigation follows on from an inquiry. Investigations are carried out for the purpose of supporting or assisting the adult or making necessary interventions, whilst acting in accordance with the principles of the Act.

**Nearest relative:** Section 254 of the Mental Health (Care and Treatment)(Scotland) Act 2003, as applied by Section 53 of the Act, sets out a list of the people who will be considered in identifying a person's nearest relative.

**Parental responsibilities and rights** (Section 53): As provided for in Sections 1 and 2 of the Children (Scotland) Act 1995.

**Primary carer** (Section 53): A primary carer is the individual who provides all or most of the care and support for the person concerned. This could be a relative or friend but does not include any person paid to care for the person. Section 329 of the Mental Health (Care and Treatment) (Scotland) Act 2003, as applied by Section 53 of the Act, defines primary carer.

**Proxy:** A continuing or welfare attorney, or a guardian under the Adults with Incapacity (Scotland) Act 2000. More commonly known as a proxy. Can have a combination of powers – welfare, property and/or finance.

**Power of arrest** (Section 25): Can be attached to a banning order at the time when the order is granted or at the same time as an application is made to vary the order.

**Relevant Health Board** (Section 53): In relation to any council, means any Health Board or Special Health Board constituted by order under Section 2 of the National Health Service (Scotland) Act 1978 (c.29) which exercises functions in relation to the council's area.

**Removal order** (Sections 14): An order granted by a sheriff authorising a council officer or council nominee to move a named person to a specified place within 72 hours of the order being made and the council to take reasonable steps to protect the moved person from harm. The order can be for any specified period for up to 7 days.

**Safeguarder** (Section 41(6)): Person appointed by the sheriff to safeguard the interests of the person who is the subject of proceedings relating to an application.

**Subordinate legislation:** Statutory legislation (usually in the form of regulations) which may be made by Ministers under enabling powers within an Act of the Scottish Parliament to clarify and implement the details of an Act

**Temporary Banning order** (Section 21): An order granted by a sheriff pending determination of an application for a banning order. The order may specify the same conditions as a banning order.

**The Act:** The Adult Support and Protection (Scotland) Act, 2007.

**Visit:** A visit by a council officer under Sections 7, 16 or 18 (including warrant entry) unless the contrary intention appears.

**Warrant for entry** (Section 37): A warrant that authorises a council officer to visit any specified place under Section 7 or 16 together with a constable. The constable may do anything, including the use of force where necessary, that the constable considers to be reasonable towards fulfilling the object of the visit.



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