

# Elder Abuse and the Law in Scotland

1	Introduction .....	1
2	Care of Older People and Assistance .....	4
2.1	The National Assistance Act 1948 .....	4
3	Social Work (Scotland) Act 1968 .....	5
4	Mental Health (Scotland) Act 1984 (referred to as the 1984 Act).....	6
5	Mental Health (Care and Treatment) (Scotland) Act 2003 .....	9
6	The National Health Service and Community Care Act 1990.....	10
7	The Adults With Incapacity (Scotland) Act 2000 and the Minimalist Intervention Principle.....	10
8	Homelessness .....	11
9	The Law and Financial Affairs.....	13
9.1	Adults With Incapacity (Scotland) Act 2000 .....	13
9.2	Joint accounts .....	15
9.3	In hospital .....	15
9.4	Social Security Appointee .....	15
9.5	Management of resident’s funds in authorised establishments	15
9.6	Power of Attorney.....	17
9.7	Trust for administration .....	17
9.8	Continuing Power of Attorney and Welfare Power of Attorney under Adults With Incapacity (Scotland) Act 2000.....	18
9.9	Curator Bonis .....	19
9.10	Negotiorum Gestio.....	20
10	Civil Law Remedies .....	20
11	Criminal Law Remedies .....	21
12	Abuse by Mentally Disordered Persons.....	24
12.1	Changes to the criminal court system .....	24
13	Contacts.....	25

## I Introduction

**This information sheet gives an overview of current law on elder abuse, as it relates to Scotland only. It should be appreciated that when considering issues surrounding elder abuse, there is overlap between various pieces of legislation and the protection of adults with mental disorders and/or incapacity, which can make the whole subject complex. It is intended to provide informal guidance only for professional health or care workers and students. It should not be used as an alternative to legal advice.**

## Elder Abuse and the Law in Scotland

Elder abuse is a real social problem in Scotland but it has only been recognised in recent years. The law has not yet adequately addressed the issue. However, there was a landmark civil action reported on 14 October 2003 in which 50 disabled adults were successful in claiming to have suffered physical or sexual abuse in the Stoke Place and Stoke Green Residential Homes during the 1980s and 1990s. They were awarded more than £1 million, despite the authorities lack of admission of liability.

There appears to be no precise legal definition of 'elder abuse' in Scots law, but 'abuse' has been recently defined in the *Protection from Abuse (Scotland) Act 2001* as including violence, harassment, threatening conduct, and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm, or distress. As the Scottish Law Commission pointed out in its 1993 Discussion Paper on Mentally Disordered and Vulnerable Adults: Public Authority Powers (No 96, Report 158), abuse can denote both positive actions, such as violence, physical restraint or misappropriation of state benefits and other property, and omissions. Action on Elder Abuse also provide some assistance and that organization has defined it as "a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person."

If Scots law has dealt with elder abuse in any manner, it has done so to protect money and property. Protection of the elderly person from physical harm and of his/her general welfare has not been similarly addressed. Section 45 of the *Health Services and Public Health Act 1968* allowed local authorities to make arrangements to promote the welfare of older people but this section was repealed many years ago. Most recently, the *Adults With Incapacity (Scotland) Act 2000* and the *Mental Health (Care and Treatment) (Scotland) Act 2003* (the latter not yet in force) has begun to address this gap in the law by putting protections in place for adults with incapacity and mentally disordered persons.

When compared with the law on children, the gap is even more noticeable. Child abuse is well documented. There are many named offences against the child. There is more legislation in place to protect children, such as the *Criminal Law (Consolidation) (Scotland) Act 1995*. Even as early as 1937, the abuse of children was being minimally addressed with the implementation of the *Children and Young Persons (Scotland) Act*. This deals with the

## Elder Abuse and the Law in Scotland

prevention of cruelty and exposure to moral and physical danger. There were no equivalents to prevent elder abuse until very recently and the law is still changing. When elder abuse takes place and legal action is required against the abuser, general common law principles, or civil or criminal legislation broadly applicable to all adults can be used.

In Scots law, persons over 16 are presumed to have legal capacity (section 1 of the *Age of Legal Capacity (Scotland) Act 1991*) unless the opposite can be shown. However, legal capacity is not defined in the Act. It is accepted that capacity is a matter of fact to be determined by the Court. The onus of proof lies with the person who wants to show incapacity. Where capacity is questioned, a full assessment of an individual's mental state must be undertaken. This may include a medical report. Medical evidence is relevant to the assessment as the doctor may have significant knowledge of his patient's condition.

The *Adults With Incapacity (Scotland) Act 2000* perhaps provides some assistance, although its definition of incapacity is only for purposes connected with that Act. An "incapable" adult according to section 1(6) of that Act is someone who is incapable of –

- (a) acting; or
- (b) making decisions; or
- (c) communicating decisions; or
- (d) understanding decisions; or
- (e) retaining the memory of decisions by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise).

Mental disorder in the *Adults With Incapacity (Scotland) Act 2000* is defined as a mental illness (including personality disorder) or mental handicap however caused or manifested; but an adult shall not be treated as suffering from mental disorder by reason only of promiscuity or other immoral conduct, sexual deviancy, dependence on alcohol or drugs, or acting as no prudent person would act. This is slightly different from the definition in the *Mental Health (Scotland) Act 1984* (see paragraph 4 below).

## Elder Abuse and the Law in Scotland

Where an adult does not have mental capacity, it is important that there is intervention by others who are authorised to act on his or her behalf.

Where an adult does have mental capacity, it is important to realise that even where there is a legal remedy an older person may be reluctant to use it. Older people cannot be forced to pursue an action in court. However, helping them to realize what options are available to them, and letting them know they can seek independent legal advice, will help them make their own decisions about what they want to do.

In order to understand elder abuse, it is useful to look at the following:

- legislation which exists to protect and hopefully prevent elder abuse
- an overview of the duties and powers of local authorities and others towards the elderly
- the offences which can be perpetrated against the elderly
- what can be done if a case of abuse is discovered.

## 2 Care of Older People and Assistance

This section provides the basis for intervention by health and social work departments. (Workers should also refer to their own agency's guidelines and consult their agency's solicitor in matters of law.)

### 2.1 The National Assistance Act 1948

Section 47 gives local authorities the power to seek an order from a court to authorise the removal of people from their homes, if they are at severe risk, and to place them compulsorily in hospital or another suitable place, such as a care home. In order for this procedure to be used they must be;

- (1) suffering from grave chronic disease, *or* being aged, infirm or physically incapacitated
- (2) living in unsanitary conditions, *and*
- (3) unable to devote to themselves, and are not receiving from anyone else, proper care and attention.

The designated medical officer certifies that it is necessary in the interests of the person, or to prevent injury to health or serious nuisance to others. The order can last for three months and can be

renewed. There is an expedited procedure under the *National Assistance (Amendment) Act 1951*, which can be used in an emergency situation. In this case the order lasts for three weeks and can be renewed.

Section 48 states that local authorities have a duty to take reasonable steps to protect the moveable property of those who are admitted to hospital or care, or are unable for whatever reason to make arrangements to deal with their property. Local authorities may take such steps as securing premises or removing property and placing the property in storage.

Section 55 makes it an offence to obstruct persons carrying out their duties under this Act.

### 3 Social Work (Scotland) Act 1968

Under this Act social work authorities must provide advice, guidance and assistance to “persons in need”. This includes, among others, persons who are in need of care and attention because of infirmity or age and those suffering from illness or mental disorder. Section 94(1) defines “persons in need”. A mental disorder has the same meaning as in section 1(2) of the *Mental Health (Scotland) Act 1984*. (See paragraph 4 below.)

Section 12 is very important. It sets out the duties of local authorities in providing general social welfare services, as appropriate in any given area. It details those to whom they owe the duty and how the duty should be met. Community care should be provided for older people, people who have a disability, a mental health problem, learning difficulties, and those with long-term health problems. The duty is broadly defined as providing advice, guidance and assistance on such a scale as appropriate, making arrangements, and providing or securing the provision of facilities that are considered suitable and adequate. This includes residential and other establishments. Assistance is in cash or kind, and either unconditionally or with conditions attached.

There is a two-stage process for community care assessments. First, local authorities have a duty under section 12A to carry out assessments of needs for those to whom they have a duty. This section deals with the matters to be taken into account in assessing the needs of adults for community care services, and include the care

being provided and the views of the cared-for adult and the carer. Section 12A was amended by the *Carers (Recognition and Services) Act 1995* to enable local authorities to assess the needs of carers as well as individuals thought to be in need of community care services but it was recently further amended by the *Community Care and Health (Scotland) Act 2002* to allow carers to ask for an assessment of their ability to provide care, even if the cared-for adult is not being assessed for services.

At the same time as carrying out the assessment, local authorities should be considering whether a person may have a right to a disabled person's assessment under section 4 of the *Disabled Persons (Services, Consultation and Representation) Act 1986*. After finishing the assessment stage, local authorities must decide whether the person's needs require the provision of a service – this is often referred to as the care plan.

#### **4 Mental Health (Scotland) Act 1984 (referred to as the 1984 Act)**

This Act is a consolidating piece of legislation. It makes major changes to mental health law as originally laid down by the *Mental Health (Scotland) Act 1960* and the *Mental Health (Scotland) Act 1983*. It has been amended several times since by the *Mental Health (Detention) Act 1991*, *Mental Health (Patients in the Community) Act 1995*, *Mental Health (Public Safety and Appeals) (Scotland) Act 1999*, *Adults With Incapacity (Scotland) Act 2000* and various pieces of criminal legislation.

This Act is concerned with the provision of treatment to persons with a mental disorder. This includes mental illness, a learning disability, dementia or a mental disorder caused by brain injury. It does not cover people who abuse alcohol or drugs. Mental disorder is defined as mental illness (including personality disorder) or mental handicap, however caused or manifested. However, mental illness or mental handicap are not further defined in the Act. This Act may assist if the older person is mentally ill and believed to be ill treated or neglected.

The 1984 Act deals with detention in hospital, transfer to hospital from criminal courts and compulsory supervision in the community through guardianships and community care orders. The *Adults*

## Elder Abuse and the Law in Scotland

*With Incapacity (Scotland) Act 2000* abolished guardianships in April 2002.

Sections 7-11 (Part III) impose duties on local authorities to provide care.

Section 7 lists the functions of local authorities. They are given discretion to provide the services listed but have a duty to provide a service if directed to do so by Scottish Ministers. The services include provision, equipment and maintenance of residential accommodation, ancillary or supplementary services, and supervision of 'certain persons with a handicap'.

Section 8 gives local authorities a duty to provide after-care services whether or not the people concerned have been in hospital, however, it appears this duty has been widely ignored.

Section 9 states that local authorities must appoint Mental Health Officers who can competently deal with people with a mental disorder. MHOs are social workers with special training and experience in dealing with people with mental disorders.

Section 10 is about the duty of local authorities for the welfare of certain hospital patients. Local authorities must arrange visits and take "such other steps in relation to the patient while in the hospital or nursing home as would be expected of a parent".

Section 11 gives a clear duty to provide "training and occupation" for people with learning disabilities who are over school age and living in the community and not in hospital. There is a duty to provide day care for people with learning disabilities. There is discretion only in determining the suitable amount or type of training. Local authorities may provide services themselves or assist other organisations in providing training and day care.

Sections 19 to 25 (Part V) contain the provisions regarding compulsory admission of patients to hospital and detention.

Sections 35A to 35J (Part V) deal with a new "community care order" introduced with the *Mental Health (Patients in the Community) Act 1995*. This order is for those who can live outside hospital provided they receive adequate care and supervision, without which they would pose a risk to their own health and possibly others. They should have a care plan, a special medical

officer in the community and an after-care officer, who is to be an MHO from the local authority responsible for co-ordinating the patient's social care.

Sections 36 to 52 (Part V) contained the provisions for guardianship but these sections were repealed once the provisions of guardianship and intervention orders in Part 6 of the *Adults With Incapacity (Scotland) Act 2000* came into force in April 2002. The new form of guardianship under the *Adults With Incapacity (Scotland) Act 2000* is more flexible, allowing for a guardian to be given powers in the financial, welfare and medical fields. Procedurally, this is not hugely different from the curatory system. The differences lie in the principles of the Act and the need now to be proactive in dealing with those who require such assistance. There is a Code of Practice for persons authorised under intervention orders and for guardians effective from 1 April 2002.

Section 92 (Part IX) places a duty on local authorities to protect the property of patients going into hospital when it appears that their property is at risk. Reference is made to section 48 of the *National Assistance Act 1948* (see paragraph 2.1 above). Local authorities must take reasonable steps to prevent or mitigate any damage to the property if no one else is looking after the property, but they can recover reasonable expenses incurred in so doing. Here, both moveables and heritable property are covered.

Section 117 (Part XI) gives emergency powers to a MHO or medical commissioner of the Mental Welfare Commission (under warrant if necessary) if mentally disordered persons are thought to be at risk. They can intervene where they have a reasonable cause to believe that a person suffering from mental disorder has been or is being ill-treated, neglected, not being kept under control or is living alone and being unable to care for himself or herself. If necessary, the person concerned can be removed and detained in a place of safety for up to 72 hours. A place of safety means a hospital in terms of the Act. The Scottish Law Commission has recommended the replacement of the powers in section 117 to protect people at risk of abuse and neglect by a new legal code for vulnerable adults.

Section 118 (Part XI) gives the police similar powers as the MHOs have in section 117 to remove any person who appears to be suffering from mental disorder and requires care and control to a place of safety from any public place for up to 72 hours.

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

The 1984 Act will be wholly replaced by the *Mental Health (Care and Treatment) (Scotland) Act 2003* in the future, although it is anticipated that this new Act will not become law until at least October 2004. This new Act has 333 sections. It will repeal the *Mental Health (Detention) Act 1991*, *Mental Health (Public Safety and Appeals) (Scotland) Act 1999*, and the *Mental Health (Amendment) (Scotland) Act 1999*.

This new Act provides a new definition for mental disorder in section 328. It is defined as any mental illness; personality disorder; or learning disability, however caused or manifested. The section then excludes persons as being mentally disordered by reason only of sexual orientation; sexual deviancy; transsexualism; transvestism; dependence on, or use of, alcohol or drugs; behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; acting as no prudent person would act.

This new Act places duties on local authorities to provide, or secure, for people who have or have had a mental disorder services designed to promote their well-being and social development (section 26). Such services would include social, cultural and recreational activities, training and assistance in obtaining and undertaking employment. The local authorities must also provide, or secure, services which provide care and support, such as residential accommodation, personal care and personal support, but not nursing care (section 25). The services are designed to minimized effect of mental disorder on such persons and give them opportunities to lead lives as normal as possible. The local authorities must provide assistance with travel facilities as considered necessary to attend or participate in the services in sections 25 and 26 (section 27). The Act further requires local authorities to co-operate with health boards, National Health Services, or voluntary organizations. These duties are without prejudice to other duties in the *Social Work (Scotland) Act 1968* in sections 12(1)(advice, guidance and assistance on an appropriate scale), 13A (residential accommodation with nursing), 13B (care and after-care) and 14 (domiciliary and laundry services).

There is a duty on the local authorities under section 33 to inquire in certain circumstances, which includes when a person may be, or may have been, exposed, at some other place other than a hospital,

to ill-treatment, neglect or some other deficiency in care or treatment, when a person is living alone or without care or unable to look after himself or his property or financial affairs, or a person's property may be suffering, or be at a risk of, loss or damage because of the mental disorder, and the safety of someone else may be at risk because of another's mental disorder and that other person is not in hospital.

This new Act will give people with a mental disorder the right to access independent advocacy services and will place a duty on health and local authorities to secure availability of these services. The Act also proposes a tribunal system instead of using sheriff courts giving details of its organizational structure and procedures in section 21 and Schedule 2.

In discharging functions under the Act, there shall be regard to many factors (listed in section 1), such as the present and past wishes and feelings of the patient, the views of the carer, guardian, welfare attorney, the importance of the patient participating as fully as possible, the importance of providing information and support as necessary to enable the patient to participate, options for the patient, maximum benefit to the patient, the patient is not treated less favourably, and the patient's abilities, background and characteristics.

For the time being the law concerning mental health is mainly found in the 1984 Act as amended (see paragraph 4 above), but this Act can't be looked at in isolation because of the impact of other legislation such as the *Adults With Incapacity (Scotland) Act 2000*.

### **6 The National Health Service and Community Care Act 1990**

The local authorities are required under Part IV of this Act to carry out an assessment of need where a person appears to be in need of community care services.

### **7 The Adults With Incapacity (Scotland) Act 2000 and the Minimalist Intervention Principle**

The *Adults With Incapacity (Scotland) Act 2000* changes the system for protecting the rights and interests of adults who are incapable of managing their own affairs. It deals with the management of their

property, financial affairs and personal welfare, including medical treatment. It allows other persons to make decisions on behalf of them subject to safeguards. The general principles are outlined in Part 1. The Scottish Executive's leaflet *Adults With Incapacity (Scotland) Act 2000* states that all decisions made on behalf of an adult with impaired capacity must:

- benefit the adult;
- take account of the adult's wishes and feelings, the views of the nearest relative or primary carer and of any guardian or attorney as far as it is reasonable and practicable to do so;
- restrict the adult's freedom as little as possible while still achieving the desired benefit; and
- encourage the adult to use existing skills or develop new skills.

This means that no intervention in the affairs of an adult is allowed unless there is incapacity and need, and the need (benefit) cannot be achieved without intervention. The principle of minimum intervention applies so that the adult's freedom is least restricted.

Many regulations have been made, as well as codes of practice to deal with various matters. You can get information from the Office of the Public Guardian or from their website. (See Sect. 13, below.)

## 8 Homelessness

The *Housing (Scotland) Act 1987* placed duties on local authorities for dealing with homelessness. In order for a homeless person to gain a right to accommodation in a local authority that person had to pass the 'priority need' test, could not be intentionally homeless and had to have a local connection. The law in that Act and in the *Housing (Scotland) Act 2001* has been recently amended by the *Homelessness etc. (Scotland) Act 2003*. The Act has not yet come into force but the Scottish Ministers can set different dates to commence different provisions of the Act. The Explanatory Notes to the 2003 Act may assist in understanding the changes to the law.

The 1987 Act requires housing departments of local authorities to consider someone who cannot secure entry to accommodation or would be at risk of violence if they remained with a person with

whom it would otherwise be reasonable to live with as being homeless or threatened with homelessness under section 24. Section 25 of the 1987 Act requires these departments to consider those vulnerable as a result of old age, mental illness or handicap as having a priority need. The 2003 Act widens the definition to include, among others, those with a personality disorder, learning or physical disability, chronic ill health, having been discharged from a hospital, or other special reason. By 31 December 2012 the 'priority test' will be abolished so that the right to permanent accommodation will be extended to all people who find themselves homeless, not just those in priority need.

Section 26 of the 1987 Act defines when a person becomes homeless or threatened with homelessness intentionally. Under section 28 of the 1987 Act the local authorities have a duty to investigate intentionality. The 2003 Act contains a new section 28 which gives local authorities a discretion as to whether to investigate intentionality in place of that duty.

Section 27 defines local connection, which is generally established by living or working within a local authority area for a specified period of time, by family associations or other special circumstances. It is intended under the 2003 Act that this provision can be suspended and re-instated at a later date.

For asylum seekers, changes to local connection provisions will mean that local authorities cannot decide that living in accommodation provided by the National Asylum and Support Services was the asylum seeker's own choice, thus enabling such a person to live anywhere in Scotland.

Duties relating to homeless people are found in section 31 and duties relating to those who are threatened with homelessness are found in section 32. Sections 31 and 32 are amended by the 2003 Act.

The 2003 Act also amends section 29 of the 1987 Act so that local authorities have an interim duty to provide accommodation in case of apparent priority need while making the necessary enquires and, if satisfied that the person has a priority need and has not made himself intentionally homeless, the person would be entitled to have permanent accommodation.

It might be useful to consult the current *1998 Code of Guidance on Homelessness* if an issue about an older person becoming homeless arises.

### 9 The Law and Financial Affairs

#### 9.1 Adults With Incapacity (Scotland) Act 2000

The law makes provision for a person's financial affairs to be handled by another. The most recent legislation dealing with the protection of the rights and interests of adults who are incapable of managing their own affairs is the *Adults With Incapacity (Scotland) Act 2000*. Part 3 of this Act came into force on 2 April 2001.

Part 3 sets up a new scheme under which the Public Guardian can allow access to accounts and funds of an adult with incapacity. Authority could be given to family members and carers but not social work departments or other statutory bodies. The funds are likely to be bank and building society accounts and funds in accounts where the adults with incapacity are sole holders. Authority to access would be only given to one person at any one time. The cost of processing of any application for authorisation to intromit (under section 26) and issue of certificate of authority is £35.

The Public Guardian supervises those exercising financial powers under the Act and investigates complaints relating to their financial functions. He keeps a register of those having powers of attorney, those who have access to an adult's funds and use of the funds, and registers of both guardianship and intervention orders.

Those acting for adults with incapacity owe a duty of care to them. They must exercise skill and care in carrying out their functions. Their relationship is based on this duty and as such they must not enter into engagements in which they have personal interests which conflict with the interests of the adult, or place themselves in a position where their duty to one beneficiary conflicts with a duty owed to another.

This duty of trust also means they must use confidential information only for the benefit of the adult and not for their own advantage or to benefit others. Those with functions under the Act

## Elder Abuse and the Law in Scotland

cannot misuse the adult's funds, but if they do they would have to refund them, with interest. It is a criminal offence for someone who is acting on behalf of an adult with incapacity to ill treat or wilfully neglect that person.

The practice has been to freeze accounts when adults lose capacity to operate them but the Act allows a person, usually family member or carer, to access and use the funds if their application is successful. The Public Guardian must inform the adult with incapacity and others with an interest that an application has been made since they have a right to make comments and the Public Guardian must take account of these views.

If the application has been successful, the Public Guardian issues a statutory certificate and allows the adult's account to be accessed or a new separate account to be opened and the approved amount transferred to it. The Act sets out the types of expenditure that may be authorised and include such things as taxes, day to day household expenses, care costs, and other debts.

The Guardian also has discretion to allow other payments such as gifts and exceptional payments. The authority for regular payments from the account should normally last for three years but this can vary. It is possible to re-apply for the authority on the expiry of the time limit. There is an appeal to the sheriff if the Public Guardian denies access to the funds.

Those with access must keep records of their transactions. The Public Guardian can check these records to monitor the use of the funds. There is protection afforded to the incapax since the Public Guardian has discretion to suspend or terminate an authority to have access to funds but an appeal to the sheriff can be made against such decisions. Authority ceases where a guardian is appointed or an intervention order is granted or an attorney acquires authority to act.

The Office of the Public Guardian has published Access to Funds Guidance and the Scottish Executive has published a Code of Practice for persons authorised under Part 3 to access fund of an

adult effective from 2 April 2001. Both are available on the Office of the Public Guardian's website. (See Sect. 13, below.)

### 9.2 Joint accounts

Part 3 of the *Adults With Incapacity (Scotland) Act 2000* does not apply to accounts which are "either/or survivor" accounts, i.e. where one adult with capacity can operate the account without the signature of the adult with incapacity, unless the account holders have agreed to opt out on the incapacity of one of them or a court order prevents the adult with capacity to operate the account. The adult who still has the capacity to operate the account can continue to do so and this prevents the account from being frozen.

### 9.3 In hospital

If long-term care in hospital is required, authorised establishments can take over the management of the incapax as provided for in Part 4 of the *Adults With Incapacity (Scotland) Act 2000*. These establishments will not require the consent of the Mental Welfare Commission in order to do so. (see paragraph 10.5 below)

Carers may continue to manage the affairs of the incapax.

### 9.4 Social Security Appointee

Where a person has a claim to a pension or other benefits but is unable to act (temporary or permanently) for any reason, and has no one with authorised power to manage his estate, the Secretary of State may appoint any other person to exercise the claimant's rights in relation to benefits and to receive and deal with any sums payable. (Regulation 33 of the Social Security (Claims and Payments) Regulations 1987.)

### 9.5 Management of resident's funds in authorised establishments

Part 4 of the *Adults With Incapacity (Scotland) 2000* came into force on 1 October 2003. It provides that managers of certain residential and care establishments may manage finances of adults who reside there who in the opinion of a medical practitioner are incapable of managing them. They can only intervene where no other arrangements are in place and where it is suitable and appropriate that managers intervene.

The matters which these managers can manage are listed in section 39 and in so doing they must act for the benefit of the resident.

## Elder Abuse and the Law in Scotland

They will be able to claim, receive and hold and spend any pensions, benefit, allowances or other payment to which the resident is entitled other than those under the *Social Security Contributions and Benefits Act 1992*. (A person can be appointed to deal with these benefits – see section 10.4 above). They can claim, receive, hold and spend money to which the resident is entitled, hold any other moveable property (personal effects and possessions) to which the resident is entitled and dispose of the resident's moveable property.

Section 39 also prevents the managers of an authorised establishment from managing any matter if its value exceeds the prescribed amounts without the consent of the supervisory body. For disposals of moveable property other than money, £100 is the prescribed amount and £10,000 for any other matter. The duties and functions of the managers are set out in section 41 which include, among others, keeping records and ensuring that funds (including cash) held over £500 (the current prescribed amount) are placed in an account which earns interest. These establishments will be registered with supervisory bodies who have substantial powers in connection with the role of establishments in management of residents' financial affairs. After a resident ceases to be a resident or ceases to be incapable, the managers can continue to manage the resident's affairs but not for longer than 3 months while any necessary arrangements are made.

Some protection is built into the management of residents' money. There is a duty on the managers to make provision for indemnifying residents against any loss attributable to any act or omission of the managers in the exercise of their powers or for any breach of duty, misuse of funds or failure to act reasonable and in good faith on the part of the managers (section 41(i)). Supervisory bodies also have a duty to make inquiry from time to time about how managers are carrying out the management and investigate any complaint received as to how matters are being managed (section 40 (2) and (3)) and these bodies have the power to revoke an establishment's power to manage any resident's money (section 45).

It is important to note that this Part of the *Adults With Incapacity (Scotland) Act 2000* does not apply to any matters in section 39 if there is a guardian, continuing attorney, or such other person with powers relating to that matter, or where an intervention order has

been granted. There is no liability if anyone acted in good faith in ignorance of the existence of such a person or order.

There is a Code of Practice for managers of authorised establishments and a Code of Practice for supervisory bodies (both effective from 1 October 2003) which are available from the Scottish Executive by link from the Office of the Public Guardian's website. (See Sect. 13, below.)

### 9.6 Power of Attorney

Persons may find it useful, at some time during their lives, to have someone else formally authorised to deal with their financial affairs on their behalf, especially where finances are complex. This can be done by a document called a power of attorney. This document may be used by one or more persons to act on the behalf of the person granting the power while that person has not lost his capacity to manage his affairs, but where they cannot or do not want to act for some reason (eg because of illness or absence abroad for a long period). It must be signed when the granter does not have any incapacity. Once signed, it should be registered in the Books of Council and Session for preservation.

The power of attorney document sets out what the attorney is authorised to do. It may give wide-ranging powers or be limited to specific acts such as selling a house. If it is a limited power, the person who gave the power can still act on his own behalf in other matters. The usual types of powers include:

- operating bank and building society accounts;
- paying bills;
- completing tax returns;
- buying and selling investments and/or other property such as a house; and
- signing documents,

all on behalf of the person granting the power.

### 9.7 Trust for administration

This is an alternative of the power of attorney route but is similar in many respects. Persons hand over their property to trustees who manage it. The trust is for the benefit of those persons who may end the arrangement at any time. There are more checks and balances in this arrangement than with a power of attorney.

### 9.8 Continuing Power of Attorney and Welfare Power of Attorney under Adults With Incapacity (Scotland) Act 2000

Under section 71 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*, any ‘enduring or continuing power of attorney’ granted after 1 January 1991 could continue in force even after granters became mentally incapable of managing their property and affairs but this section has been repealed by the *Adults With Incapacity (Scotland) Act 2000*. Now in order to ensure that a power of attorney is continuing there must be an express statement of the granter’s intention.

Note on pre-Adults With Incapacity (Scotland) Act power of attorney: The extent of the application of the *Adults With Incapacity (Scotland) Act 2000* to pre-Act powers of attorney is given in paragraph 4 of Schedule 4 of that Act, which states the provisions which do not apply. This is complicated and requires careful consideration.

Any power of attorney granted before January 1991 is normally only valid while the persons who made it were capable of giving instructions. If they become mentally ill and no longer able personally to supervise or direct the attorney then that power may become invalid. In these circumstances it may be possible for the attorney to carry on acting if you go to Court or on the basis of *negotiorum gestio* (see below). The person making the power can terminate an attorney's appointment at any time. This is best done in writing.

On 2 April 2001, Part 2 of the *Adults With Incapacity (Scotland) Act 2000* came into force, which contains provisions concerning the appointment of a ‘continuing attorney’ or a ‘welfare attorney’. Both of these require to be made by the granter when the granter does not have any incapacity. This Part of the Act also provides for the registration, monitoring and supervision of these attorneys. The Office of the Public Guardian publishes Guidance Notes for Registration of Powers of Attorney.

A ‘continuing power of attorney’ given by the granter that relates to his property or financial affairs commences or continues to have effect when the granter loses the capacity to deal with decision about the matters to which the power of attorney only relates.

Those which do not continue on incapacity are not registered with the Public Guardian, only 'continuing power of attorneys' are.

A 'welfare attorney' is a power of attorney relating to the personal welfare (including health and research) of an adult with incapacity which commences on the granter's incapacity. It can only be used to make decisions after the granter loses capacity to deal with such matters. A person is acting wrongly and without authority if he intervenes when the adults could still take a decision on the particular matter in question. It can only be given to individuals, not to local authorities and the like. It is a restricted power since welfare attorneys are not able to place granters in hospital for treatment of mental disorder against their will and cannot consent to any form of treatment as specified in the Act. The current legal status of attorneys with such powers is unclear. The Act does not authorise intervention in respect of certain decisions, such as consent to marriage and making a will.

All continuing and welfare powers of attorney granted on or after 2 April 2001 must be registered with the Public Guardian in order to be effective. In order to apply for registration a power of attorney, the appropriate Certificate and a fee of £35 is required. There are also fees involved at later stages when, for example, accounts are submitted for auditing purposes (currently £75).

The attorneys must keep records of their actions.

The attorneys can resign after giving proper notification to the Public Guardian.

If a granter and an attorney are married, the power of attorney shall come to an end under separation, divorce or declaration of nullity of marriage, or on appointment of a guardian.

Four bodies are involved in the regulation of both types of attorneys – Public Guardian, courts, local authority, and Mental Welfare Commission for Scotland.

The Office of the Public Guardian has published *Guidance for Solicitors and Advisers on Continuing Powers of Attorney and Welfare Powers of Attorney*. The Scottish Executive has published a *Code of Practice for Continuing and Welfare Attorneys*. Both are available on the Public Guardian's website. (See Sect. 13, below.)

### 9.9 Curator Bonis

When persons became mentally incapable of managing their affairs or appointing someone else to do it for them, it was often necessary

to apply to the courts for a person to be appointed as a curator bonis. However, as from April 2002 it is no longer competent to appoint a curator bonis, tutor-dative or tutor-at-law to a person who has attained the age of 16, as a result of the *Adults With Incapacity (Scotland) Act 2000*. Guardians will be appointed instead. A curator bonis created before April 2002 is supervised by the Public Guardian.

There are general guidance notes for curator bonis available on the Office of the Public Guardian's website. (See Sect. 13, below.)

### 9.10 Negotiorum Gestio

If persons become incapable of managing their own affairs, it may be possible for others to act on their behalf without written authorisation because it can be assumed that those persons would have given authorisation had they been capable of doing so. This is an informal arrangement that could be useful in an emergency situation or when absolutely necessary. For example, when someone cannot act for himself or herself because of incapacity, sickness, absence abroad or some other cause. The "gestor" must have reasonable regard to the interests of that other person. However, there is no legal requirement to accept the signature of others in these circumstances and not all organisations will necessarily be happy with this arrangement.

## 10 Civil Law Remedies

A person who is abused can bring a civil case against the abuser. This may be in relation to either personal violence or financial wrongdoing.

A person who has suffered harm or fears that he may be harmed can seek certain remedies in the civil courts, such as a court order declaring void a transaction which he was improperly induced to enter (reduction); a court order forbidding the abuser from acting improperly (interdict); or a court order ordering the person at fault in an action of negligence or delict to pay damages or compensation.

If the person is suffering abuse from a spouse causing injury to physical or mental health, a court order under section 4 of the *Matrimonial Homes (Family Protection) Scotland Act 1981* excludes the spouse from the home. This order is known as an exclusion

order. The court may also grant an interdict prohibiting the other spouse from entering or remaining in a specified area in the vicinity of the matrimonial home. The court must be satisfied that it is necessary to protect the applicant or any child of the family from actual or threatened conduct of the other spouse which would be detrimental to their physical or mental health and that it is not unjustified or unreasonable to do so.

In terms of the *Adults With Incapacity (Scotland) Act 2000*, common law fiduciary duties and duties of care will apply to appointees under the Act. They are required to repay any funds if in breach of their fiduciary duty or outwith their authority or power to intervene but their personal liability is limited where acts or omissions which are reasonable, in good faith and in accordance with principles of section 1 of the Act.

If there is racist abuse the *Race Relations Act 1976* and the Commission for Racial Equality may assist.

If discrimination is alleged, then the *Sex Discrimination Act 1975*, or the *Disability Discrimination Act 1995*, or the Disability Rights Commission may assist.

## II Criminal Law Remedies

Abuse may constitute a crime (e.g. murder, assault, drugging, cruel and unnatural treatment, theft, rape, sexual assault, incest, shameless indecency, dishonesty). It should be noted that existing criminal law has not changed where anyone was to unlawfully cause injury or death; that person would be guilty of a criminal offence. Action can be taken against those who abuse using existing criminal legislation.

These include such legislation as the *Offences against the Persons Act 1861*, the *Sexual Offences Act 1976*, and section 50A of the *Criminal Law (Consolidation) (Scotland) Act 1995*.

Some of the legislation contain specific legal measures for the protection of mentally disordered persons or incapax persons, such as the *Mental Health (Scotland) Act 1984*, the *Adults With Incapacity (Scotland) Act 2000*, and the *Mental Health (Care and Treatment) (Scotland) Act 2003*.

## Elder Abuse and the Law in Scotland

The following offences are contained within the 1984 Act:

Section 104 – Making false statement in any Mental Health report or other document if the person knew the statement was false and intended to deceive others.

Section 105 - Ill treatment and willful neglect of patients in hospital and in the community (introduced by the *Mental Health (Patients in the Community) Act 1995*). This section might also cover heterosexual abuse of male patients. It should be noted that part of this section was prospectively repealed by *Adults With Incapacity (Scotland) Act 2000*.

Section 106 – A man having unlawful sexual intercourse with a mentally handicapped woman or for any person to procure or encourage unlawful sexual intercourse with women who are protected by these provision or owners/occupiers of premises to induce such conduct with women protected by these provisions. The male equivalent of this section is found in the *Criminal Law (Consolidation) (Scotland) Act 1995*, where *section 13* states that homosexual abuse of a man with learning disabilities which prevent him from living an independent life or protecting himself against exploitation is an offence.

Section 107 - Sexual intercourse between care staff and mentally disordered persons. This applies to both men and women with mental disorders and protects them against homosexual abuse. It should be noted that the *Adults With Incapacity (Scotland) Act 2000* prospectively repealed part of this section.

Section 108 – Assisting patients to escape from detention at a hospital or from custody, or helping to detain them from the hospital when they are absent without permission. It should be noted that the *Adults With Incapacity (Scotland) Act 2000* prospectively repealed part of this section.

Section 109 – Obstructing anyone carrying out their duties under the Act.

Section 83 of the *Adults With Incapacity (Scotland) Act 2000* introduces a new offence in relation to protection of incapable adults. This offence is the ill treatment and willful neglect of an adult with incapacity. The *Mental Health (Care and Treatment)*

## Elder Abuse and the Law in Scotland

*(Scotland) Act 2003* has a similar provision in section 315 but this is not yet in force.

The *Mental Health (Care and Treatment) (Scotland) Act 2003* will create other offences, which are found in Part 21 of that Act. These include non-consensual sexual offences with or towards a mentally disordered person (section 311), sexual offences by persons providing care services (section 313), inducing and assisting absconding (section 316), and obstructs access or persons carrying out duties (section 317), and offences about false statements (section 318). However, these sections are not yet in force.

In terms of procedure in getting a case involving abuse to the courts and in the courts, there have also been some improvements. The *Protection from Abuse (Scotland) Act 2001* enables a power of arrest to be attached to interdicts granted to protect individuals from abuse. In 2003, the *Criminal Justice (Scotland) Act* was passed which amends the law in relation to serious and sexual offences. This piece of legislation also gives the victim a right to submit written victim statement to the Court and there are many prescribed offences for which this is relevant. Offences for which such a statement could be given include sexual crimes (one sexual offence involves abuse of position of trust), racially motivated crimes and non-sexual crimes of violence, among others. The provision relating to victims rights in sections 14, 15 and 18 come into effect on 25 November 2003.

One of the difficulties is getting the abused elderly person to come forward. For a whole host of reasons, including fear, confusion, hurt, shame, embarrassment and vulnerability, this may be extremely difficult. If it is considered a crime has been committed and the older person wishes to pursue a case against the perpetrator, the police will need to be involved promptly and evidence collected. Even if it is not clear that a case can be brought against an abuser, the police will often be prepared to talk through a situation and give guidance to those involved. Liaising with the appropriate agencies and providing the elderly person with the appropriate support are important first steps.

It may also be useful to bear in mind the following pieces of legislation which could be applied to older people:

The *Police Act 1997 (Enhanced Criminal Record Certificates)*  
*(Protection of Vulnerable Adults) (Scotland) Regulations 2002* provides

for enhanced criminal records where someone is applying for a position in which during the course of his or her duties he or she will have regular contact with a 'vulnerable adult'. The Regulations define what a 'vulnerable adult' is for the purposes of that legislation but it is worth thinking about the definition. A 'vulnerable person' is defined as a person aged 18 or over who in consequence of certain conditions (a learning or physical disability; a physical or mental illness, including an addiction to alcohol or drugs; or a reduction in physical or mental capacity) has a certain type of disability (a dependency upon others in the performance of basic physical functions; severe impairment in the ability to communicate with others; or impairment in the ability of a person to protect themselves from assault, abuse or neglect) and receiving certain services (care home services, personal care or nursing or support to live independently at home; any services provided by an independent hospital, clinic, medical agency or health body; social care services; any services provided in an establishment catering for a person with learning difficulties.)

The *Public Interest Disclosure Act 1998* protects employees disclosing a public concern providing they are acting reasonably.

The *Human Rights Act 1998* may have applicability in civil or criminal cases.

*Criminal Injuries Compensation* is available to anyone who has been the victim of a serious violent crime (including sexual abuse). It can be applied for by filling in a form to the criminal injuries compensation authority. If the person is incapax or in receipt of income support or housing benefit, any large award should probably be placed in trust for their benefit.

## 12 Abuse by Mentally Disordered Persons

### 12.1 Changes to the criminal court system

There have been changes in the powers of the criminal courts to deal with mentally disordered persons coming before them, notably in the *Criminal Procedure (Scotland) Act 1995* and the *Crime and Punishment (Scotland) Act 1997*.

Part 8 of the *Mental Health (Care and Treatment) (Scotland) 2003* also deals with criminal proceedings for mentally disordered persons

including pre-sentence orders, disposals on conviction and acquittal, treatment and compulsion orders but this part of the Act is not yet in force.

### 13 Contacts

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Web: [www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk)

#### **Scottish Executive website - Adults with Incapacity section**

[www.scotland.gov.uk/justice/incapacity](http://www.scotland.gov.uk/justice/incapacity)

CS/Age Concern Scotland

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