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ADULT SUPPORT AND PROTECTION (SCOTLAND) BILL: PART 1 – PROTECTION OF ADULTS AT RISK OF ABUSE

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The Adult Support and Protection (Scotland) Bill was introduced in the Scottish Parliament on 30 March 2006 by Andy Kerr MSP.

This briefing deals with Part 1 of the Bill, which contains provisions for the protection of adults at risk, often referred to in the past as "vulnerable adults", in particular people with learning disabilities, older people and some young people.

The briefing provides background information on the policy intention behind the proposals in the Bill, then outlines the main provisions in Part 1 of the Bill, discussing them with relevant policy documents and consultation responses where possible.

The Scottish Parliament

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BACKGROUND (p 8-12)

- The Adult Support and Protection (Scotland) Bill was introduced in the Scottish Parliament on 30 March 2006 by Andy Kerr MSP. This briefing deals with Part 1 of the Bill, which contains provisions for the protection of adults at risk, often referred to in the past as "vulnerable adults", in particular people with learning disabilities, older people and some young people.

- The policy intention behind the Bill has been developed over a number of years, particularly since the Scottish Law Commission (the SLC) published its position paper and draft Vulnerable Adults Bill in 1997. This was followed by a Scottish Executive (the Executive) consultation in 2001. Since that point the Adults with Incapacity (Scotland) Act 2000 (the 2000 Act) and the Mental Health (Care and Treatment) Act 2003 (the 2003 Act) have come into force. In addition, policy has been affected by the high profile Borders Inquiry into the long term abuse of a woman with learning disabilities by her primary carer and others, which found significant gaps in the protection offered by a variety of agencies. This was followed by a second Scottish Executive consultation in 2005.

- There is currently no definition of a "vulnerable adult" or "adult at risk" in current legislation. Traditionally vulnerability has been associated with mental disorder in statute, and there are a number of protection measures available for those with a mental disorder, primarily through the 2003 Act. However, there is a large body of opinion, including the Scottish Law Commission and many of the respondents to the various Scottish Executive consultations, which believe that such legislation does not cover everyone that could be described as vulnerable or at risk, such as older people.

- It has been suggested that more stock should be taken of the 2000 Act and 2003 Act and whether or not they should be used as a vehicle for offering more protection to the groups identified by the Executive. It has also been argued that there is no need for legislation in this area, rather improved procedures and guidance. The Executive contends that the Borders Inquiry, in particular, has illustrated that there are significant gaps in legislation, eg in ensuring that all the groups identified by the Executive are covered by any legislative framework, in placing duties on various bodies to investigate abuse and in giving them proper powers to deal with situations involving abuse. It believes that the Bill will complement both the 2000 Act and the 2003 Act to provide an overall framework of support and protection for adults at risk.

GENERAL PRINCIPLE ON INTERVENTION (p 13-14)

- Section 1 of the Bill sets out the general principle of the Bill that a person may intervene or authorise an intervention in an adult's affairs, only where they are satisfied that the intervention will provide benefit to the adult and that it is the least restrictive option of those that are available. Section 2 includes proposals to ensure that relevant bodies (local authorities, the Mental Welfare Commission for Scotland, the Care Commission, the Public Guardian and the relevant NHS Board) provide as much information and support an adult at risk requires to fully participate in any proceedings under this Part of the Bill.

- These sections illustrate an issue that permeates much of the Bill, which is that the provisions would enable significant interventions into the life of an adult. Some have argued that this may contravene Article 8 of the European Convention on Human Rights. However, the SLC contends that the public interest in protecting adults at risk of abuse or harm

outweighs any temporary disruption to an individual's autonomy and privacy. It also argued that no intervention should take place without the consent of the vulnerable adult, unless the adult had a mental disorder or was subject to undue pressure.

- Most of the respondents to the Executive's 2001 consultation agreed with the SLC as long as there were appropriate safeguards and that "undue pressure" was further clarified. The Executive has proposed in section 32 that that where the adult at risk refuses to consent to the granting of the order a sheriff must not make a protection order (ie an assessment order, removal order, banning order or temporary banning order). However, it is also proposed that the sheriff or the person carrying out the order can ignore the refusal to consent if they reasonably believe that the adult at risk appears to be under undue pressure to refuse consent. What constitutes undue pressure is clarified in section 32.

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- Section 3 of the Bill proposes that adults at risk are those aged 16 or over, "who because they are affected by disability, mental disorder, illness infirmity or ageing are unable to protect themselves from abuse, or, are more vulnerable to being abused than persons who are not so affected". (See also Issues Arising from the Proposals, below, regarding issues that have been raised concerning the age of adulthood).

- The definition can be seen as a culmination of opinions gathered through the work of the SLC and the two Executive consultations. However, as this definition was never itself consulted on it is difficult to make an assessment as to how popular or otherwise it may be with stakeholders. The briefing discusses some of the different definitions put forward and illustrates the difficulties of attempting to come up with a definition when there are disparate views.

DEFINITION OF ABUSE (p 16-17)

- Section 50 of the Bill defines the term "abuse" for the purpose of this Part of the Bill. It is defined to include "any conduct which harms or exploits an individual, and in particular includes physical abuse; psychological abuse; theft, fraud, embezzlement and extortion; self abuse; and, any other conduct which causes fear, alarm or distress or which dishonestly appropriates property".

- Similar to the definition of "adults at risk", this definition is the culmination of views gathered through the work of the SLC and the Executive's consultations in 2001 and 2005. It is different to those previously consulted on. Therefore, the briefing discusses some of the issues identified through responses to the definition presented in the 2005 consultation, some of which is pertinent to the definition proposed in the Bill.

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- Section 4 of the Bill proposes a duty on councils to make inquiries about an adult's well-being, property or financial affairs, where the person falls within the definition of an adult at risk, and the council knows or believes it may have to intervene in order to protect the adult from abuse. Section 5 requires the relevant public bodies to cooperate with one another where abuse is known or suspected

- The proposals in the Bill follow largely what was recommended by the SLC in 1997, though it should be remembered that neither the Care Commission nor the Public Guardian existed at that time. 52% of respondents to the Executive's 2001 consultation agreed that local authorities should be the lead agency.

INVESTIGATIONS (p 19-20)

- The Bill proposes to give local authority officers powers of investigation in cases involving adults at risk (sections 6-9 and 33). This includes giving them powers of entry to investigate premises, powers to conduct private interviews and the power to inspect records. It also allows a health professional to conduct a medical examination. The Bill also proposes that in cases where an officer cannot gain entry a sheriff would be able to grant a warrant for entry. However, the Bill also does not allow interviews or medical examinations to take place without the consent of the adult at risk.

- The proposals in this regard largely follow those recommended by the SLC. 61% of respondents to the Executive's 2001 consultation were in favour of local authority officers being able to demand admission to premises, and if necessary apply for a warrant for forcible entry.

ASSESSMENT ORDERS (p 20)

- The Bill (sections 10 to 12) proposes that a local authority should be able to make an application to a sheriff for an assessment order, which would allow a council officer to conduct a private interview or a health professional to conduct a private medical examination. This would only be for cases where it was not possible to carry these out within the place being visited. A 'safeguarder' could also be appointed by the sheriff to represent the interest of the adults during the process.

- The Bill largely adopts the recommendations of the SLC in this regard. Most respondents to the Executive's 2001 consultation agreed that it would be appropriate for such an intervention in the situation described.

REMOVAL ORDERS (p 21-22)

- The Bill (sections 13 to 17) proposes that a sheriff would be able to grant a removal order, which would allow the removal of an adult at risk to a specified place whilst investigations take place. To grant the order a sheriff would need to be satisfied that the adult concerned is at risk and that they are likely to be seriously abused if they are not removed. Such an order could be made for up to seven days to allow the local authority officer to take steps to support the adult in the period immediately following the removal. However, the sheriff would have the power to make various requirements on the order (eg allowing a named person to have contact with the person), to vary the order or recall it. A 'safeguarder' could also be appointed by the sheriff to represent the interest of the adults during the process.

- The proposal in the Bill follows the recommendations of the SLC. As discussed above it concluded that such an intervention should not take place without the consent of the adult, unless the adult is mentally disordered or is being unduly influenced by others. Only 41% of respondents to the Executive's consultation agreed with such a proposal, with some being concerned at the use of the phrase "undue pressure" and what it actually meant.

BANNING ORDERS (p 22- 24)

- The Bill (sections 18 to 31) proposes that a local authority would be able to apply to a sheriff for a banning order on the person or persons abusing the adult at risk. The Executive considers that a banning order would be a last resort. The Bill proposes that a banning order would specify the place from which the person is banned and the length of time (up to six months) for which a person is banned. An application would be made by the adult at risk (or someone acting on their behalf), any other person occupying the property from which the individual concerned would be banned or the council (under certain circumstances).

- The Bill proposes to allow the sheriff flexibility in being able to place certain conditions on the order, and also vary the order or recall it. In addition a sheriff could grant a temporary banning order whilst they consider the application for a full order. A 'safeguarder' could also be appointed by the sheriff to represent the interest of the adults during the process.

- The proposal is based largely on the recommendations of the SLC. 64% of respondents to the Executive's 2001 consultation supported the power to exclude a person living with a vulnerable adult, if it was necessary for the protection of the adult at risk. However, some respondents were concerned about what would happen if the abuser was themselves a vulnerable person. Others were concerned about unintended consequences of a banning order on the victim, eg if the abuser was the primary care, and as a result of the order the victim had to move into a form of accommodation that was not in line with their wishes.

ADULT PROTECTION COMMITTEES (p 24-26)

- The Executive proposes in the Bill that each local authority must establish an Adult Protection Committee (APC) to "take a strategic overview in jointly managing adult protection policies, systems and procedures at a local level".

- In carrying out their functions APCs would be required to cooperate with a range of public bodies (the relevant local authority, the Care Commission, the relevant NHS Board , the chief constable of the relevant police force and any other public body specified by Scottish Ministers) in order to safeguard adults at risk. The Bill proposes that each council would be responsible for appointing an independent convenor of the APC and the other members. Each of the public bodies listed above would be required to nominate a person, though the Care Commisison is only required to appoint such a person if it wishes.

- In its 2005 consultation the Executive proposed that APCs should have the functions proposed in the Bill but also that they should take the lead in investigations. Respndents, whist in favour of APCs themselves were less sure about them taking the lead in investigations as it was felt such a role would overlap with those of existing agencies. The Executive also asked whether the provisions relating to APCs should be in statute. 66% of all respondents were in favour of APCs being defined in legislation.

OTHER PROVISIONS (p 26)

- The Bill (section 45) proposes that Scottish Ministers should prepare and publish a code of practice, which would contain guidance on the operation of the various protection measures. However, there is little information as to what would be contained in such a code. Local authorities, their officials and health professionals would be required to have regard to the code. The Bill would also make it an offence to prevent or obstruct any authorised person from carrying out their duties under this Part of the Bill.

ISSUES ARISING FROM THE PROPOSALS (p 26-28)

- The Executive believes that the measures outlined in the Bill should be complemented by other interventions for which statue is not required, such as mediation. The Executive considers it would be useful in cases where the abused and perpetrator live together and want to remain so.

- The Executive has made a financial assessment of the costs associated with the measures proposed in Part 1 of the Bill, the detail of which is contained in the Financial Memorandum (Explanatory notes, 2006, para 137-166). Local authorities will bare the greatest burden, with the Executive estimating the measures will costs £13m across all councils. The

Executive has said that it expects to provide some funding to meet the additional costs identified.

- The Bill proposes that an adult is someone aged 16 or over, and that some groups of young people may be covered by the Bill. However, some have pointed out that the Protection of Children (Scotland) Act 2003 (POCSA) stipulates that a child is aged under 18, and felt it was important that any legislation for adults at risk dovetailed with this legislaiton. The Executive points out that the definition of an adult in the Bill mirrors that in the 2000 Act.

- The Executive originally consulted on a list for those working with vulnerable adults, similar to that for those working with children under POCSA. This has not been covered in the Bill, but instead is being consulted on as part of the Executive's response to the recommendations of the Bichard report. This will be dealt with in seperate legislation.

INTRODUCTION

The Adult Support and Protection (Scotland) Bill was introduced in the Scottish Parliament on 30 March 2006 by Andy Kerr MSP. It is accompanied by a Policy Memorandum (2006) and Explanatory Notes (2006). The Scottish Executive (the Executive) (2006a) has advised that the Deputy Minister for Health, Lewis MacDonald MSP, will be the Minister in charge of the Bill.

The principle aim of the Bill is to "protect and benefit adults at risk of being abused" (Policy Memorandum, 2006, para 2). Part 1 of the Bill contains provisions for the protection of adults at risk. It defines an 'adult at risk' and contains provisions that would introduce investigative rights and duties on a number of public bodies, as well as a number of post-investigative interventions including assessment orders, removal orders and banning orders. Part 1 of the Bill also contains proposals to set up multi-agency Adult Protection Committees in each local authority area. It is envisaged that these will oversee and coordinate the work of the various agencies involved in abuse investigations, as well as develop prevention strategies.

The remaining Parts of the Bill contain proposals for a number of amendments to existing legislation. The Bill proposes to amend the Adults with Incapacity (Scotland) Act 2000 (asp 4) to address issues arising from the early days of implementation and so ensure that the legislation is better able to meet its objectives by simplifying and streamlining the protections for adults with incapacity and improving access to them. The Bill also seeks to make several amendments to the Social Work (Scotland) Act 1968 (c 39), and the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) to ensure that Mental Health Tribunal reviews take place every two years. These are discussed in the SPICe briefing 'Adult Support and Protection (Scotland) Bill: Adults with Incapacity and Other Measures' (Payne, 2006).

This briefing concentrates on Part 1 of the Bill regarding the protection of adults at risk of abuse and harm. It provides background information on relevant policy developments, including the current legislative framework where appropriate, and will then discuss the main proposals in the Bill, in conjunction with relevant policy documents and consultation responses where available.

BACKGROUND

TERMINOLOGY

Part 1 of the Bill relates to the protection of adults who are at risk of abuse or harm. In the past, such as in the consultations undertaken by the Executive and the work of the Scottish Law Commission (see below), such adults have been described as being "vulnerable". As will be discussed below there has been a debate on the suitability of the word "vulnerable" to describe the particular groups of people being referred to for the purpose of the Bill. In this briefing both the word "vulnerable" and the phrase "adults at risk" will be used in the context they were used in the various documents that will be referred to.

POLICY BACKGROUND

Scottish Law Commission

Policy development in this area can be traced back to 1997 when the Scottish Law Commission (SLC) published its 'Report on Vulnerable Adults'. This report, which itself followed on from a SLC discussion paper from 1993, considered the existing law and recommended a new legal framework. This included defining "vulnerable", investigative powers for relevant bodies as well as assessment, removal and other orders.

Adults with Incapacity (Scotland) Act 2000

The next development came in 2000 when the Scottish Parliament passed the Adults with Incapacity (Scotland) Act (asp 4) (the 2000 Act).

The purpose of the 2000 Act is to provide for decisions to be made on behalf of adults who lack legal capacity to do so themselves because of mental disorder or inability to communicate. Such decisions could be about the adult's property or financial affairs, or about their personal welfare, including medical treatment. The Act also enables anyone to make arrangements for another person or persons to make decisions and manage affairs on their behalf, in the event of losing capacity in the future. Thus the Act makes provisions for powers of attorney, intromission with funds, intervention orders and guardianship orders.

Vulnerability and mental disorder

As will be discussed below, traditionally "vulnerability" has been associated with mental disorder, and thus it has been included in reviews on mental health policy. In 2001 the Scottish Executive (the Executive) published 'New Directions: Report on the Review of the Mental Health (Scotland) Act 1984' (the Millan Report) (Scottish Executive, 2001a). The Report recommended that the SLC's 1997 report proposals relating to vulnerable adults should be accepted in respect of adults with mental disorder (2001a, p 237). In October 2001 the Executive published 'Renewing Mental Health Law - Policy Statement' (Scottish Executive, 2001b), which accepted this recommendation and stated that it would introduce a new statutory framework based on the recommendations of the Scottish Law Commission for vulnerable adults with a mental disorder. This was taken forward in the Mental Health (Care and Treatment) Act 2003 (asp 13) (2003 Act).

However, a key criticism identified in the framework, even taking into account the Millan Report, the Executive's response and the legislative changes brought forward through the 2003 Act, was that is that it did not cover all adults that could be described as vulnerable.

Scottish Executive 2001 consultation

In December 2001, the Executive published 'Vulnerable Adults: Consultation Paper' (2001 consultation) (Scottish Executive, 2001c). This sought views on the extension of the vulnerable adult's provisions to groups other than persons with mental disorder and the possible introduction of provisions to exclude persons living with a vulnerable adult, where the adult's health is at risk. In December 2002 the 'Consultation on Vulnerable Adults: Analysis of the Responses' (Scottish Executive, 2002) was published. This analysis found there was a high level of agreement with the proposals that the vulnerable adults provisions should be extended to groups other than persons with mental disorder and the possible introduction of provisions to exclude persons living with vulnerable adults, where the adult's health is at risk. However, a number of questions were raised on various issues, including definitions of vulnerability, local authority responsibility and collaboration, exclusion provisions, the appointment of safeguarders and resource implications. Some of the issues raised in this consultation will be discussed in the section, below, which concentrates on the proposals in the Bill.

Borders Inquiry

Further developments took place following the case, in March 2002, of a woman with learning disabilities who was admitted to Borders General Hospital having suffered extreme levels of physical and sexual abuse within her household over an extended period. Three men were subsequently imprisoned for the abuse, with one of those convicted being the carer of the woman. It then transpired that there were other similar cases of abuse and neglect involving other adults with learning disabilities, physical disabilities and mental health problems in the

Borders area spanning three decades. In all of these cases health and social work records contained numerous statements of concern about their care, including allegations of serious abuse and exploitation that were not acted upon. (Scottish Executive, 2004).

In June 2003 the Minister for Education and Young People, Peter Peacock MSP, asked the Social Work Services Inspectorate (SWSI) to carry out an inspection of the social work services provided to people with learning disabilities by Scottish Borders Council. At the same time, the Mental Welfare Commission for Scotland (MWC) also undertook an inquiry into the involvement of health services, though worked closely with SWSI during its inquiry. The two bodies produced separate reports, but also published a joint statement (MWC and SWSI, 2004), which summarised their findings and stated their recommendations. The findings included:

- a failure to investigate appropriately very serious allegations of abuse
- a lack of information-sharing and co-ordination within and between key agencies (social work, health, education, housing, police)
- a lack of risk assessment and failure to consider allegations of sexual abuse
- a lack of understanding of the legislative framework for intervention and its capacity to provide protection
- a failure to consider statutory intervention at appropriate stages

These findings illustrate that it was not so much the lack of available statutory powers that led to the failure to act on the allegations rather there was a lack of understanding of those powers and how to implement them. Indeed many of the recommendations related to the practice of professionals and the systems in place in the local authority and health board. Nevertheless, gaps were identified in the legislation, particularly as regards there being no formal duty to investigate allegations of abuse, and it was recommended that the Executive introduce a Vulnerable Adults Bill to complement the protective measures in the 2000 Act and the 2003 Act.

Scottish Executive 2005 consultation

The Executive considered the MWC and SWSI reports, together with the responses to the 2001 vulnerable adults consultation and the legislative changes that had took place through the 2000 Act and 2003 Act. In July 2005 it published 'Consultation on Protecting Vulnerable Adults - Securing Their Safety' (the 2005 consultation) (Scottish Executive, 2005a), which sought views on a number of issues including new definitions of "vulnerable" and "abuse" and on the developemnt of Adult Protection Committees in each local authority area. The 'Analysis of Responses to the 3rd Consultation Paper on Protecting Vulnerable Adults – Securing Their Safety' (Scottish Executive, 2005b) was published in November 2005. These papers together with individual consultation responses will be used to provide background information to the proposals in the Bill regarding the protection of adults who are at risk from abuse.

CURRENT LEGISLATIVE FRAMEWORK

Definition of 'vulnerable'

As discussed above, 'vulnerability' has been traditionally associated with mental health, but there is currently no legal definition of a vulnerable adult or adult at risk. As will be discussed below there are protection measures for those with a "mental disorder". However, whilst it could be said that vulnerability is associated with mental disorder it has also been argued by the Scottish Law Commission and others that there are groups whose vulnerability extends beyond that associated with mental disorder, for example through age and infirmity. Thus, mental health legislation does not offer protection for everyone that could be described as vulnerable.

Currently, section 328 of the 2003 Act describes a mental disorder as a mental illness, personality disorder or learning disability. It also specifically excludes certain behaviours from the definition of mental disorder, namely:

- 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

The definition of mental disorder in the 2003 Act is similar, though more extensive, to that in the previous legislation that governed this area, namely the Mental Health (Scotland) Act 1984 (c 36).

Existing statutory powers available to public authorities

As vulnerability has been associated with mental disorder, existing statutory protection provisions available to public authorities exist mainly through mental health legislation, now contained in the 2003 Act:

- a power to demand admission to premises where a mentally disordered person is
- a power of forcible entry to premises where a mentally disordered person is and removal of that person to a place of safety
- a power to take mentally disordered people found in a public place and in need of care to a place of safety
- a power to enter premises in order to take a person over 16 who has, or appears to have, a mental disorder to any place authorised under the 2003 Act
- a power to enter premises to remove to a place of safety a person over 16 with a mental disorder who is at risk and is likely to suffer significant harm if not removed to a place of safety
- a power to remove a person reasonably suspected to have a mental disorder from a public place to a place of safety

In addition, section 47 of the National Assistance Act 1948 (c 29) (as amended) provides for a power to remove a person suffering from chronic disease or living in unsanitary conditions who lacks proper care and attention from home to a hospital or other place. Finally, section 6 of the Social Work (Scotland) Act 1968 provides for a power of entry and inspection of residential and other accommodation provided by a local authority, voluntary organisation or other person.

The Policy Memorandum (2006, para 9) accompanying the Bill also discusses how there are "limited common law powers of entry without warrant available to the police, although these are primarily limited to dealing with serious disturbances or when actively in pursuit of persons who have committed serious crimes".

Limitations of current legislation

The Executive (Policy Memorandum, 2006, para 9), notes the advances that have taken place in both the 2000 Act and 2003 Act. However, it argues that the position of adults at risk, as discussed in the 1997 SLC paper remain largely the same. Protection exists for those with a mental disorder but not for all who could be described as being vulnerable or at risk from harm, and local authorities currently have no power to intervene to help them. The Executive (Policy Memorandum, 2006, para 12) states that these groups include older people, people with a

learning disability and young people who move into adult services having previously been supported in care environments, but whose lifestyle is unsettled and thus makes them more likely to be at risk. As regards elder abuse, Age Concern Scotland (Online) estimates that between 7% and 9% of older people in Scotland are victims of at least one form of abuse, with over 40% of victims suffering more than one kind of abuse.

The Executive (Policy Memorandum, 2006, para 12) identified other limitations in the current framework from the findings of the Borders inquiry, including the failure to investigate serious allegations of abuse appropriately, because of a lack of understanding of the legislative framework for intervention and its capacity to provide protection.

Need for additional legislation

Given current framework and recent developments, the Executive has taken the view that there is a legislative gap concerning adults at risk. The work of SLC and the responses to the Executive's 2001 consultation showed a high level of agreement with this view (Scottish Executive, 2002, p 1).

There was support too following the Executive's 2005 consultation (2005a), particularly from those campaigning for older people, for example Action on Elder Abuse (Scottish Executive, 2005c). However, there were more questions about the need for new legislation compared to the 2001 consultation, because by this stage the 2000 Act had come into force and the 2003 Act was due to come into force in October 2005. The British Association of Social Work spoke for some respondents believing that "there is sufficient legislation already in place for those vulnerable adults who are deemed to be incapable" (Scottish Executive, 2005d, p 1). Some of this may be due to the fact that, as discussed above, the 2003 Act contains protection measures for those with a mental disorder, the definition of which includes those with learning disabilities. Enable (Scottish Executive, 2005e, p 1), questioned the need for more legislation given the current powers of local authorities, the MWC, the police and the Care Commission to investigate abuse, following the 2000 Act, the 2003 Act and the Regulation of Care (Scotland) Act 2001:

> *"If the system that currently exists doesn't work or give the right powers then it makes sense to look at the reasons why. Consideration could then be given to whether amendments could be made to existing laws before deciding to establish an entirely new framework."*

In response to such arguments the Executive explains that it did consider the options of improving guidance about protection issues and ensuring there was better knowledge of the existing framework (Policy Memorandum, 2006, para 25-27). However, it made clear its view that this would not cover all those that could be at risk. It made particular mention of the protection measures in the 2003 Act, but noted that even in those cases where someone has a mental disorder only a small number require compulsion under the 2003 Act. It also notes that the 2003 Act does not contain certain provisions included in the Bill, such as the ability to exclude the perpetrator of abuse. It contends that the Bill will complement existing legislation. (Policy Memorandum, 2006, para 8).

PROPOSALS IN THE BILL

Part 1 of the Bill deals with the protection of adults at risk. The following sections outline the key areas of this part of the Bill and the actual proposals in the Bill. This is followed by a discussion of the background to each of the main areas.

General principle on intervention

Proposal

The Executive has stated that whilst the emphasis of the Bill is on intervening to protect an adult at risk, any intervention must be proportionate (Policy Memorandum, 2006, para 21). To ensure this the Bill, in section 1, sets out the general principle of this Part of the Bill, which is that a person may intervene or authorise an intervention in an adult's affairs, only where they are satisfied that the intervention will provide benefit to the adult and that it is the least restrictive option of those that are available. (Explanatory Notes, 2006, para 5).

In addition, section 2 describes what principles any public body or official carrying out their functions should follow if performing any of the functions under this Part of the Bill - that consideration should be given to the general principle in section 1, the feelings of the adult at risk (as far as they can be ascertained) and the views of other significant individuals with an interest, such as relatives or guardians.

The Bill expects that all relevant bodies and officials will involve the adult themselves as far as possible in all processes, by ensuring they are provided with appropriate information and support. As part of this they would be charged with observing equal opportunities requirements, being mindful of the adult's age, sex, ethnic background and so on, and, in particular, ensuring that the adult is not treated any less favourably than any other adult in a comparable situation. (Explanatory Notes, 2006, para 7).

Finally, in section 32 of the Bill, it is proposed that where the adult at risk refuses to consent to the granting of a protection order (ie an assessment order, removal order, banning order or temporary banning order, all of which are discussed below) a sheriff must not make the order. However, it is also proposed that the sheriff or the person carrying out the order can ignore the refusal to consent if they reasonably believe that the adult at risk appears to be under undue pressure to refuse consent. Section 32 goes on to describe a particular set of circumstances which are to be treated as amounting to undue pressure:

> *"An adult at risk may be considered to have been unduly pressurised in the situation where abuse is being inflicted on the adult by a person in which the adult has confidence and trust and that the adult would consent to interventions to prevent the abuse if he or she did not have confidence and trust in that person."* (Explanatory Notes, 2006, para 52).

Discussion

As will be seen in the following sections, the Bill contains a number of provisions that would enable interventions of varying degrees to be made into the life of an adult who would be deemed to be at risk of abuse or harm. The Executive (2001c, para 25) notes that there are concerns from some parties about compulsory measures, such as assessment or removal from their homes, for those who are not mentally disordered. Those wary of such interventions point to Article 8 of the European Convention on Human Rights, which states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

SLC (1997, para 2.20) considered this issue and concluded that the public interest in protecting adults at risk of abuse or harm outweighed temporary disruption to an individual's autonomy and privacy. It considered that entry to premises by relevant bodies under a statutory procedure could be justified on the grounds of "the protection of health" (the vulnerable adult's own health or the health of others) or "the prevention of disorder or crime" in relation to physical abuse or financial exploitation. However, it accepted there would require to be a number of checks and balances, including ensuring the consent of the individual and having recourse to the Sheriff Court. The overall conclusion was:

> *"No intervention in relation to an adult should be authorised or carried out if the adult objects unless those authorising or carrying out the intervention reasonably believe that the adult is vulnerable and is either mentally disordered or subject to undue pressure."* (SLC, 1997, para 2.26).

The debate continued into the Executive's 2001 consultation. However, the consultation report (Scottish Executive, 2002, p 20-27) concluded that most of the respondents agreed with SLC, as long as:

- there was clear evidence for the intervention and other less intrusive measures had been tried and failed
- there were clear guidelines in place detailing what was permitted
- safeguards for the vulnerable adult were put in place
- undue pressure as grounds for intervention to be further defined

As discussed above the Executive has made provision for undue pressure in the Bill, though it will be discussed in connection with particular orders, below.

Adults at risk

Proposal

Section 3 defines an adult at risk for this Part of the Bill as:

3	**Adults at risk**
(1)	For the purposes of this Part, "adults at risk" are adults who, because they are affected by disability, mental disorder, illness, infirmity or ageing, are—
	(a) unable to protect themselves from abuse, or
	(b) more vulnerable to being abused than persons who are not so affected.
(2)	The Scottish Ministers may by order modify subsection (1) so as to amend the definition of "adults at risk" as they think appropriate.

Section 3 also proposes to allow Scottish Ministers powers to bring forward regulations to modify the definition.

Discussion

The definition of adults at risk proposed in the Bill could be viewed as a culmination of opinions, gathered through the work of the SLC (1997) and the two Executive consultations. Even a cursory look at the consultation reports and responses makes clear that there were a range views as to the content of such a definition.

The Policy Memorandum (2006) does not explain the Executive's reasons for choosing the definition it has. Indeed, it is difficult to make an assessment on how popular or otherwise it may be with those that have an interest in the Bill, as it is not the wording that was proposed by the SLC (1997, para 2.17), which in turn was consulted on by the Executive in 2001, nor the revised definition consulted on by the Executive in 2005. In addition to these definitions some including MWC (Scottish Executive, 2005f), have also pointed to the Lord Chancellor Department's definition contained in 'Who Decides? Making decisions on behalf of mentally incapacitated adults' (1997, para 8.7). These definitions of vulnerability are shown below in Figure 1.

The report of the Executive's 2001 consultation noted that discussions over defining vulnerability dominated many of the responses. However, only 44% of all respondents agreed with the SLCs definition, with 14% disagreeing and a third making no comment. The Executive's revised definition in 2005 was more popular, gaining 52% agreement across all respondents.

Figure 1: Various definitions of vulnerable

SLC (1997)

An adult who is unable to safeguard his or her personal welfare, property or financial affairs, and is:

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

'Who decides?' (1997)

Someone of 16 years or over who:

- is or may be in need of community care services by reason of mental or other disability, age or illness; and
- who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation

Executive (2005)

Any adult aged 16 or over who:

- are unable to safeguard their personal welfare, property, or financial affairs
- may be in need of community care services by reason of mental disorder or disability, age or illness
- are unable to care for themselves, or unable to protect themselves against significant harm or exploitation

In the 2005 consultation, there were respondents that criticised the use of the word "vulnerable". South Lanarkshire Council (Scottish Executive, 2005g) was one of these. It believed that it focussed on people's disabilities rather than their abilities and sought the use of different terminology. The Executive appears to have accepted this concern and has therefore changed "vulnerable" to "adults at risk".

In many of the responses to both the 2001 and 2005 consultations, there were queries made about the inclusion or not of certain phrases, which illustrates the difficulties in constructing such a definition. For example, it will be noticed from Figure 1 that the definitions used in 'Who Decides?' and by the Executive (2005a) make reference to the use of community care services. SLC did not, and it was one of the points identified by the 2001 consultation report (Scottish Executive, 2002, p 16). Various organisations, including Age Concern, were quoted as being in favour of a link between vulnerability and the use of community care services being made. The Executive then revised its definition for the 2005 consultation to include the phrase, but this met with objections from other bodies. The National Autistic Society (Scottish Executive, 2005h, p 2) was against the link as it believed it may not include many vulnerable people who do not use such services. Action on Elder Abuse (Scottish Executive, 2005c, p 2) was also concerned that making such a link "places the emphasis on the perceived vulnerability of the adult rather than the circumstances that give rise to that vulnerability". Orkney Islands Council (Scottish Executive, 2005j) shared that concern stating that any such link must also include that the person is unable to protect themselves. It will be noted that the definition in the Bill makes no reference to community care services.

Another example is using the word “age” or “ageing” in any definition. Figure 1 illustrates that age tends to be a feature of definitions, and as discussed above older people are one of the main groups that the Executive is trying to support. Both the consultation reports (Scottish Executive 2002, p 18 and 2005b, p 6) discuss that there were concerns regarding using age. In response to the 2005 consultation Counsel and Care (Scottish Executive, 2005k) stated it was against the use of the word “age”. It believed it was not chronological age itself that was a predictor of vulnerability, rather the health-related illnesses that accompany it. The Royal College of General Practitioners (RCGP) Scotland (Scottish Executive, 2005l) noted that most older people are alert, fit and able to manage their own affairs. It considered that age should, at most, be a secondary factor for consideration alongside more pertinent issues.

These debates highlight the difficulty in attempting to devise a definition which captures all the people that the Executive wishes to, without infringing the rights of large sections of the community. The definition in the 2005 consultation was welcomed by Parkinson’s disease Society of the United Kingdom (Scottish Executive, 2005m) because it believed it was wider than that proposed by the SLC and would mean more people with Parkinson’s disease would be covered. However, both the British Medical Association (BMA) Scotland (Scottish Executive, 2005n) and Enable (Scottish Executive, 2005e, p 2) were amongst those concerned that the 2005 definition may have been too wide, with the latter arguing that “defining large numbers of people as “vulnerable” will [not] prevent abuse or assist investigations”

Definition of abuse

Proposal

The protection of adults at risk from abuse is the key aim of the Bill. Thus, the definition of “abuse” will be crucial in determining whether public bodies or officials will intervene in a particular situation. Section 50 of the Bill defines “abuse” for the purposes of Part 1 of the Bill as:

> (1) In this Part—
>
> “abuse” includes any conduct which harms or exploits an individual, and in particular includes—
>
> (a) physical abuse,
>
> (b) psychological abuse,
>
> (c) theft, fraud, embezzlement and extortion,
>
> (d) self-abuse, and
>
> (e) any other conduct which causes fear, alarm or distress or which dishonestly appropriates property.

Discussion

As with the definition of adults at risk, how the Executive has chosen to define “abuse” for the purposes of the Bill is different from what was previously proposed. A different definition was consulted on in the 2005 consultation, and thus it is possible to gain some understanding of why the Executive has chosen the definition it has.

The Executive’s 2005 consultation (2005a, para 2.6) stated the Executive’s original intention to define “abuse” as:

> *"…a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes the adult distress."*

The Executive's consultation report (2005b, p 7-8) discusses how only 26% of respondents were content with this definition, with 54% disagreeing. The report states that the overwhelming reason given for rejecting the definition was the inclusion of the word "distress". BMA Scotland (Scottish Executive, 2005n, p 2), whilst generally in agreement with the definition, spoke for many respondents with its concern that anything causing distress could be interpreted as abuse, and could thus lead to inappropriate interventions. The Office of the Public Guardian (Scottish Executive, 2005o, p 4) looked at the issue from a different angle arguing that a person can be harmed but unless they are aware of the circumstances they may not necessarily be distressed by it, leaving adults at further risk.

There was also some concern connecting abuse with "any relationship where there is an expectation of trust". Enable (Scottish Executive, 2005e, p 2) felt the phrase required clarification asking whether it would cover professional advice, such as from a financial advisor, as well as family members. Fairbridge Scotland (Scottish Executive, 2005p, p 3) was concerned that some vulnerable adults could be at risk from arbitrary attacks from other adults resident in a care home or another place of refuge, but would not be protected under such a definition. Indeed the Executive's consultation report (2005b, p 8) notes that many respondents were concerned that abuse did not always take place in relationships of trust.

The Executive's consultation report (2005b, p 7) noted that many respondents wanted "distress" replaced by the word "harm" or "significant harm". Orkney Islands Council (Scottish Executive, 2005j, p 2) was one of these, also arguing that the definition should also refer to the source of the vulnerability. On this point a number of consultees felt it was important to specify as much as possible as to the types of behaviour that constituted abuse. The City of Edinburgh Council (Scottish Executive, 2005q), NHS Education for Scotland (Scottish Executive, 2005r), Quarriers (Scottish Executive, 2005s) and Scottish Borders Vulnerable Adult Protection Committee (2005t) were examples of a number of organisations that provided examples of what such a list could look like.

Both City of Edinburgh Council (Scottish Executive, 2005q, p 1) and Scottish Borders Vulnerable Adult Protection Committee (Scottish Executive, 2005t, p 2) wanted more expression given to the fact that abuse is about the misuse of power by someone in a dominant position.

As can be seen from the definition in the Bill, many of the concerns discussed above have been taken into account by the Executive, though reaction to the Bill itself will be required to ascertain whether the new definition will obtain more support than was achieved with the 2005 definition.

Inquiries

Proposal

The Policy Memorandum (2006, para 18) states the Executive's belief that the current situation requires "a strengthening of expectation that when there are allegations of abuse these will be taken seriously and pursued stringently". Therefore, section 4 of the Bill proposes a duty on local authorities to make inquiries about an adult's well-being, property or financial affairs, where the person falls within the definition of an adult at risk, and the authority knows or believes it may have to intervene in order to protect the adult from abuse.

In addition section 5 would require the MWC, the Care Commission, the Public Guardian and the relevant NHS Board to cooperate with the local authority and each other where abuse is known or suspected. Section 5 also states that should one of these bodies know or believe an adult is at risk and believe action is required then it must report that to the local authority.

Discussion

The proposal to impose a duty on local authorities to inquire into actual or possible abuse is related to the discussion on the general principles of the legislation (see above).

In its report, SLC (1997, p 19) recommended that local authorities "should be under a duty to enquire as to whether steps need to be taken to protect the welfare or property of adults who are, or whom it believes, to be vulnerable". This led from another recommendation, which was that local authorities "should have the primary role in dealing with vulnerable adults…" (1997, p 15). However, whilst it also saw the need to place local authorities and the MWC under a duty to collaborate, it did not believe any other bodies, such as the police, should have such a statutory duty, believing that this would be best dealt with under a code of practice. However, as regards the Bill's proposals, it should be remembered that the Care Commission and the Public Guardian were not in existence at the time of the SLC report.

By the time of the Executive's consultation (2001c) the Office of the Public Guardian did exist, and the Executive proposed that it and the MWC should have a duty to consult local authorities in cases of vulnerable adults being at risk of abuse. The Executive did not seek views on this nor the SLC's recommendation that local authorities should have a duty of investigation. However, it did seek views on whether local authorities should be the lead agency and whether a code of practice would be a suitable vehicle for ensuring collaboration between local authorities and other agencies such as NHS bodies and the police.

The Executive's 2001 consultation report (2002, p 19 & 28) found that 52% of respondents across all sectors agreed that the local authority should be the lead agency. As regards those that didn't, views included that the police would be a more suitable agency when a criminal offence had taken place. Another felt that whilst a local authority might be appropriate in being the lead for issues of welfare they would not necessarily be so for the areas of property and finances.

In terms of a code of practice for collaboration, only 41% of people agreed with the Executive's proposition, with 22% against, though 37% had no comment. The Executive's consultation report (2002, p 28-29) found that those in favour were mainly from the statutory sector. It was considered that collaboration could be most effectively dealt with using a code of practice, although many of these bodies felt such a code of practice should be supported by legislation and a review system should be in place so that it could be ensured that multi-disciplinary working was taking place. The report also found that several respondents in favour of such a code felt that legislation may be too complex. For those disagreeing with the consultation proposal, there was a concern that a code of practice would not encourage collaboration, and thus roles and responsibilities would need to be detailed in the legislation. One respondent was quoted as paying particular attention to the fact that as many vulnerable adults have health needs the involvement of health care professionals should be detailed in the legislation rather than a code of practice.

As will be noted below, the Executive has made provision in the Bill for a code of practice, though does not provide any detail as to what it might contain.

Investigations

Proposal

The Policy Memorandum (2006, para 17) accepted that, in the past, when allegations of abuse were made, in most cases, social work staff would make efforts to establish the facts. However, often having no right of entry adversely affected their ability to intervene. The Bill seeks to address this in section 6 to 9 and 33, by giving local authority officers powers of investigation in cases involving adults at risk. The Explanatory Notes (2006, para 14-17 and 54-55) explain its proposals in more detail.

In summary, if a council officer is making inquiries under section 4 (see Inquiries, above) the Bill would enable relevant local authority officers to enter premises to make necessary investigations with the aim of establishing whether further action is needed to protect an adult at risk from abuse. Visits would only be carried out at reasonable times and officers must have written evidence of their authority to visit. In addition, an officer would be permitted, while visiting, to examine the place and to bring with them any other person or equipment that they require in order to successfully complete the visit. The officer and anyone accompanying them would also be enabled to interview an adult in private within the place being visited. However, it should be noted that section 32 states that there is nothing in the Bill that allows a council official or a nominee to carry out an interview where the adult at risk has refused consent. If it is not practicable to carry out a private interview in the place of the visit and the council officer requires to take the person to other premises, an assessment order must be obtained from a sheriff (see Assessment Orders, below)

The Bill also provides for a relevant health professional (a doctor, nurse or midwife) to conduct a private medical examination of the adult at risk in the place where investigations are being made, or in another place subject to an assessment order. However, section 32 states that there is nothing in the Bill that would allow a health professional to carry out a medical examination where the adult at risk has refused consent. In addition the Bill will allow local authority officers the right to require those holding health, financial or any other records to produce them for inspection should this be required to establish whether further action is required to protect an adult at risk from abuse. Health records would also be able to be inspected but only by health professionals.

Should a local authority officer have difficulty in gaining access, or anticipate such a difficulty section 35 would allow a sheriff to grant a warrant if they are satisfied that the officer reasonably expects to be refused entry, would otherwise be unable to enter or if the objective of the visit was unlikely to be met without a warrant. In urgent cases, section 37 would allow an application to be heard by a justice of the peace. Provisions for warrants are contained in sections 34-37 of the Bill and are discussed in the Explanatory Notes (2006, para 56-63).

Discussion

Again, this area is closely related to issues discussed above regarding the principles behind the Bill. The proposals in the Bill are largely based on those of the SLC (1997, para 3.23). This recommended that a mental health officer or other prescribed officer of the local authority should be entitled to demand admission to premises if they reasonably believe that entry to the premises would assist them with their enquiries. It also considered that a commissioner or officer of the MWC should be similarly entitled but only in relation to adults who are, or who are reasonably believed to be, mentally disordered. This was taken forward through the 2003 Act. SLC (1997, para 3.35, 3.39 and 4.15) also made recommendations regarding warrants and the purposes of gaining entry, and the obtaining of relevant records and accounts, all of which are similar to those proposed in the Bill itself.

The Executive's 2001 consultation (2001c, p 8) asked respondents whether local authorities should be entitled to demand admission, and if necessary, obtain a warrant for forcible entry in cases where a vulnerable adult or suspected vulnerable adult is present. The Executive's consultation report (2002, p 10, 23 and 27) found that 61% of respondents agreed with this proposition, 3% disagreed and 36% had no comment. Agreement was highest amongst local authority respondents compared to other groups.

The Executive's 2001 consultation (2001c, p 11) also discussed the SLCs recommendation regarding the use of local authority officials and MWC commissioners. It asked which classes of officers of a local authority should be authorised under provisions relating to non-mentally disordered vulnerable adults. For those answering the question it appears social workers of one grade or another were the preferred officers identified. Other possible candidates included Mental Health Officers, occupational therapists, doctors and nurses. However, the most important issue identified regarding this question appears to have been the provision of training for those that would be authorised under the legislation. (Scottish Executive, 2002, p 31).

Assessment Orders

Proposal

Assessment orders are dealt with in section 10 to 12 of the Bill and discussed in the Explanatory Notes (2006, para 18-20).

The Bill enables a council to make an application to a sheriff for an assessment order, which would allow a local authority officer to conduct a private interview or a health professional to conduct a private medical examination. As discussed in 'Investigations' above, this would only be for cases where it was not possible to carry these out within the place being visited. Applications would only be made in cases where officials were trying to establish whether the person is an adult at risk, and if so, whether further action is required to protect them from the abusive behaviour. To grant an order the sheriff would have to be satisfied that the local authority has reasonable cause to suspect that the adult is at risk of being, or is likely to be, seriously abused. An order would be valid for up to seven days, and would be accompanied by a warrant for entry for a visit. It should be noted that section 48 of the Bill would prohibit an appeal against the granting of an assessment order.

Section 38 of the Bill would allow a sheriff to appoint a safeguarder to represent the interests of the adult at risk in any proceedings relating to the application for an assessment order. As discussed above, section 32 does not allow a sheriff to grant an assessment order if the sheriff knows that the adult at risk has refused consent to the granting of the order, unless there is evidence of undue pressure.

Discussion

As with other areas in this Part of the Bill the Executive has chosen to largely adopt the recommendations of SLC (1997, para 4.84), regarding the principle of assessing an individual in private and carrying out any necessary medical assessments, and the process for obtaining an assessment order.

The Executive's 2001 consultation (2001c) did ask whether it was appropriate to assess an individual who objects and who has sufficient understanding of what is involved, even if those wishing the intervention believe that the adult may be in a vulnerable position and may be being placed under undue pressure. The 2001 consultation report (Scottish Executive, 2002, p 27) found that most respondents felt it would be appropriate to intervene in such circumstances.

Removal orders

Proposal

Removal orders would allow the removal of an adult at risk to a specified place while investigations take place. Removal orders are provided for in sections 13 to 17 of the Bill, and described in the Explanatory Notes (2006, para 21-27).

The Bill proposes that a local authority would be able to apply to a sheriff for a removal order, who would grant it only if satisfied that the person for whom the application is made is an adult at risk and that person is likely to be seriously abused if they are not moved (section 14(1)). The order, which would be accompanied by a warrant for entry, would specify the place where the adult is to be removed to, and the time period, which would be for up to seven days, to allow the local authority officer to take steps to support the adult in the period immediately following the removal. The local authority may undertake the removal themselves or may choose a nominee to do so on its behalf. The Explanatory Notes (2006, para 21) states that the nominee would be from one of the cooperating public bodies (ie MWC, Care Commission, Public Guardian, or NHS Board). The Bill itself does not stipulate this but the Executive (2006b) expects that, in practice, the local authority would nominate a person from one of the co-operating bodies. The policy intention being that if a person was already familiar with, and used to dealing with a representative from another body (most likely to be one of the co-operating bodies in practice e.g. a district nurse, health visitor or mental health officer) then it may be more reassuring for the person being removed if this was done by someone who they already know rather than a stranger.

The sheriff would have the flexibility to include various requirements on the order, such as allowing a named person to have the contact with an adult at risk during the period albeit subject to a number of conditions. In doing so the sheriff would have to have to take account of representations from the local authority, the adult at risk, anyone who wishes to contact the adult at risk or any other person who has an interest in the adult at risk's well-being or property. However, section 38 of the Bill would allow them to dispense with the requirement for such representations if they are satisfied that by doing so they will protect an adult at risk from serious abuse.

The Bill would also allow the sheriff to vary or recall a removal order. Variation allows the Sheriff to change the conditions of the order though they would not be able to extend the period of removal past the seven days of the original order. If a sheriff chooses to recall the order they would be able to direct the local authority to return the person to the place they were removed from or to any other place which the sheriff, having considered the adult's wishes, may decide. In addition, as regards the enforcement of a removal order, the Bill will require the local authority to take reasonable steps to prevent any property owned or controlled by the removed person being lost or damaged for the duration of the order. In addition, the local authority will not be able to recover any expenses incurred.

It should be noted that section 37 allows a justice of the peace to grant a removal order in urgent cases, and, as with assessment orders, section 48 of the Bill would prohibit an appeal against a removal order. In addition, as with assessment orders, Section 38 of the Bill would allow a sheriff to appoint a safeguarder to represent the interests of the adult at risk in any proceedings relating to the application for a removal order. As discussed above, section 32 does not allow a sheriff to grant a removal order if the sheriff knows that the adult at risk has refused consent to the granting of the order, unless there is evidence of undue pressure.

Discussion

These sections of the Bill again relate closely to the recommendations of the SLC (1997, para 4.16-4.35). As with many elements of its proposals the SLC (1997, para 4.37) was concerned to ensure that its recommendations were compliant with ECHR. It noted that it was important in using any such order that the "interference is proportionate to the legitimate aims being pursued". It considered that its recommendations, largely adopted in the Bill, met this condition. As with other orders, SLC (1997, para 4.23) also argued that a vulnerable adult should only be removed with their consent, unless they are mentally disordered or being unduly influenced by others.

The Executive's 2001 consultation (2001c, para 29-31) did assess such issues. At this point it noted there would be a need for guidance for local authorities on how to judge whether a vulnerable adult was subject to undue pressure. However, it asked respondents whether they agreed that there should be no removal of an adult who objects and who has sufficient understanding of what is involved, unless those authorising or carrying out the intervention reasonably believes that the adult is vulnerable and is subject to undue pressure.

The Executive's consultation report (2002, p 10 and para 6.19 – 6.25) analysed responses to this and found that whilst 47% agreed with the proposition, 5 % disagreed and 47% made no comment. However, despite this the consultation report found, amongst all sectors, uneasiness with the term "undue pressure", with many asking for this to be clarified. In the report, Alzheimer Scotland were quoted as recommending the inclusion of both "subject to undue pressure" and "unduly susceptible to undue pressure", noting that many people may not have an underlying disorder, but are vulnerable due to the power base of the abusive relationship. For others, including the Royal College of Psychiatrists, it was important to ensure that the legislation also ensured that vulnerable adults were not put under pressure by local authority officials keen to impose an order.

As discussed, the Executive has taken forward the recommendation of the SLC (1997, para 4.35) that a sheriff should have to consider whether to appoint a safeguarder to an otherwise unrepresented adult.

Banning Orders

Proposal

The Bill also proposes that applications could be made to a sheriff for a banning order on the person or persons abusing the adult at risk. The Policy Memorandum (2006, para 19) states that the use of such a banning order should be applied for as a last resort. Banning orders are dealt with in sections 18 to 31, and discussed in detail in the Explanatory Notes (2006, para 28-49).

The Bill proposes that applications for a banning order would be made to a sheriff, specifying the place from which the person is banned (eg the adult at risk's home) and the length of time (up to six months) for which a person is banned. An application would be made by the adult at risk (or someone acting on their behalf), any other person occupying the property from which the individual concerned would be banned or the local authority (under certain circumstances).

The sheriff would only be able to grant an order if:

(a) an adult at risk is being, or is likely to be, seriously abused by another person, and

(b) the adult at risk's well-being or property would be better safeguarded by banning that other person from a place occupied by the adult than it would be by moving the adult from that place

However, in granting an order it is proposed that the sheriff would have significant flexibility in what conditions to place on it eg they could ban the individual from the vicinity of the specified place or prohibit them from moving anything out of the premises concerned. They could also allow the subject of the order to visit the place specified in the order under certain conditions eg under supervision. However, before granting such conditions the sheriff must take account of the views of the applicant for the order, the adult at risk and the individual themselves. As with removal orders section 38 of the Bill would allow the Sheriff to dispense with the requirements for such representations if they are satisfied that in doing so they are protecting an adult at risk from serious abuse.

The Bill contains provisions for a sheriff to grant temporary orders whilst they consider an application for a full order. As with removal orders, the sheriff would also be able to vary or recall a banning order or temporary banning order if they are satisfied that there has been a change in the facts or circumstances on which the banning order was made.

The remaining sections of the Bill in the area of banning orders (sections 23 to 31) concern such issues as the powers of arrest in the event of someone breaching a banning order, the duties of the police in this regard and the entitlements of the arrested person. Unlike with assessment and removal orders section 48 of the Bill would allow appeals against the granting of a banning order to either the sheriff principal or the Court of Session. As regards a temporary banning order it is proposed that this could only be appealed with the leave of the sheriff principal.

As with assessment and removal orders, section 38 of the Bill would allow a sheriff to appoint a safeguarder to represent the interests of the adult at risk in any proceedings relating to the application for a banning order. Section 32 also does not allow a sheriff to grant a banning order or temporary banning order if the sheriff knows that the adult at risk has refused consent to the granting of the order, unless there is evidence of undue pressure.

Discussion

The SLC (1997, para 4.36 to 4.61) discussed banning orders, or as it termed them exclusion orders at length. Again, the Executive has elected to largely adopt the recommendations of SLC.

The Executive's 2001 consultation (2001c) asked a variety of questions regarding the SLC's proposals and recommendations. The Executive's consultation report (2002, para 8.1) noted that there was broad agreement with the exclusion or banning provisions that were based on the SLC's recommendations. As regards support for the power to exclude a person living with a vulnerable adult if necessary for the protection of the adult, the report (2002, p 11) found that 64% supported it, with no respondents disagreeing and 36% making no comment. Several respondents arguing that exclusion should be considered as a last resort after other interventions had failed, which, as noted above has been accepted by the Executive.

There was some discussion on the implications for the excluded adult. The Executive's consultation report (2002, para 8.15 to 8.18) found a number of questions being asked by respondents, including:

- what happens if the excluded person is themselves a vulnerable person?

- what evidence base is required for banning order to be granted eg what if the allegations turned out to be malicious?

Some respondents also tackled the consequences of exclusion to the vulnerable person themselves. The Executive's consultation report (2002, para 8.19-8.22) noted several concerns from bodies such as Age Concern as to what would happen if the excluded person was the primary carer for the vulnerable person. It felt the vulnerable person could be placed in residential care, which may not be in line with their wishes. Another respondent believed that in granting a banning order the court should be satisfied that a proper support package has been put in place for the vulnerable adult.

There was some comment regarding the SLC's recommendation that a sheriff should not grant an exclusion order if the vulnerable adult objects, unless the Sheriff believes the objections should be disregarded because of mental disorder or undue pressure. The Executive's consultation report (2002, p 11) found that 54% of all respondents agreed with the proposition, with only 5% disagreeing and 41% making no comment. However, the report (2002, para 8.27) also made reference to the discussion on the use of the phrase "undue pressure", which has been discussed above.

In terms of appointing safeguarders, the consultation report (2002, para 9.1-9.8) found that 63% of respondents agreed that they should be appointed, with only 1% disagreeing and 36% making no comment. Some thought that safeguarders should be appointed in all circumstances, others thought that independent advocates should be explicitly mentioned in this regard. However, there were respondents that thought more clarification was required as to the role of the safeguarder and the types of people that would be appointed to such a position.

The 2001 consultation asked specific questions about how banning orders would work in practice, again based on the recommendations of the SLC. In the vast majority of cases at least a simple majority of respondents agreed with each proposal.

Adult Protection Committees

Proposal

The Executive proposes in the Bill that each local authority must establish an Adult Protection Committee (APC). The Policy Memorandum (2006, para 22-23) states that APCs will "take a strategic overview in jointly managing adult protection policies, systems and procedures at a local level". The Executive accepts that some areas do have APCs but notes that their roles and responsibilities vary. Sections 39 to 44 of the Bill make provision for APCs, and these are detailed in the Explanatory Notes (2006, para 67-72).

The Policy Memorandum (2006, para 22) describes how APCs would coordinate protection procedures across their areas. In addition they would promote inter-disciplinary practice and would have responsibilities to monitor and review policies and procedures. It is also proposed that they take a lead in developing and delivering training.

In carrying out their functions APCs would be required to cooperate with a range of public bodies (the relevant local authority, the Care Commission, the relevant NHS Board , the chief constable of the relevant police force and any other public body specified by Scottish Ministers) in order to safeguard adults at risk. As regards membership, the Bill proposes that each local authority would be respondible for appointing an independent convenor of the APC and the other members. Each of the public bodies listed above, apart form the Care Commission, would be required to nominate a person with relevant knowledge and skills to be a Committee

member. The Care Commission would be able nominate such a person if it wishes. In response to a question regarding why this approach with the Care Commission has been taken, the Executive (2006b) considered that the way in which the Care Commission is structured (compared to the other bodies listed in Section 39) means that is not practical, or possible, for them to send a representative to every APC and thus it did not want to place an onerous burden on the Commission by requiring it to do so. It noted that section 41 also ensures that even where the Care Commission does not have a designated representative on the APC that they are entitled to attend APC meetings.

The local authority would also be able to appoint other persons with relevant skils and knowledge.

The remaining sections propose procedures of the Committee, state that the public bodies stipulated in the Bill must provide the APC with any information useful to it when carrying out its functions, that the convenor of the Committee prepare a general report on the Committee's work every two years and that APCs take account of any guidance issued by Scottish Ministers.

Discussion

APCs were first proposed in the Execuitive's 2005 consultation (2005a). In it the Executive stated that APCs would ensure that there were appropriate structures and proceedures in place across Scotland. Whilst many of the functions of APCs were very similar to those proposed in the Bill it did seek views on whether APCs should lead investigations into abuse in all settings.

The Executive's 2005 consultation report (2005b, p 8) found that 48% of respondents agreed with this proposition, with 21% disagreeing, 14% unsure and 17% not answering. The biggest issue appeared to be the investigative role being proposed. There was a particular concern that such a role would overlap with existing agencies who already work in the are and have a statutory obligation to investigate allegations of abuse. Action on Elder Abuse (Scottish Executive, 2005c) was not convinced APCs were the most approriate organisations to lead investigations given the role of police in investigating criminal actions and the regulatory and investigatory functions of the Care Commission. BMA Scotland (Scottish Executive, 2005n), which was in favour of APCs taking the lead, nevertheless felt there needed to be clear lines of responsibility and accountabiltiy between APCs and other agencies. For many respondents, including South Lanarkshire Council (Scottish Executive, 2005d) and Enable (Scottish Executive, 2005e) the role of APCs should very much surround the coordination of various agencies, ensuring the sharing of information, facilitating training and promoting good practice.

As regards membership, Counsel and Care (Scottish Executive, 2005k) was concerned at ensuring APCs had at least one member that was independent of statutory authorities, whilst a number of other organisations believed that that service users, carers and voluntary sector organisations should also be members.

A much clearer response came to the question of whether APCs should be defined in legislation or not. The 2005 consultation report (2005b, p 10) found that 66% of all respondents were in favour of the APCs being defined in legislation, with only 4% against and 7% unsure. 23% of respondents did not give an answer. The British Association of Social Work spoke for a number of organisations when it stated that

> *"We believe that it would be essential for APCs to be defined in statute. This would ensure that there was a consistent approach across Scotland and a level of standardisation would be achieved. It would avoid the possible erratic introduction of adult protection across Scotland if it were left up to each*

individual authority to determine whether adult protection processes were necessary." (Scottish Executive, 2005d, p 3).

Other provisions

Code of Practice

Section 45 of the Bill requires Scottish Ministers to prepare and publish a code of practice, which will contain guidance on the operation of the various adult protection measures. However, there is no information about what exactly will be part of such a code.

Local authorities, their officials and health professionals who have a role in performing the functions in this Part of the Bill are to have due regard to the code of practice. Section 45 also stipulates that Ministers must periodically review the code and if necessary revise it. It does not stipulate a time period for each review to take place but does state that any changes to the code must first be consulted upon with local authority officers, health professionals and other bodies deemed appropriate by Ministers.

Obstruction

This states that it would be an offence to prevent or obstruct any authorised person from carrying out their duties under this Part of the Bill. Any person found guilty of such an offence would be liable on summary conviction to a fine not exceeding level 3 of the standard scale, which is currently £1,000, to imprisonment for a term not exceeding three months, or both.

However, nothing done by the adult at risk themselves will constitute an offence under this section.

ISSUES ARISING FROM THE PROPOSALS

There are a number of issues that have been raised by respondents throughout the lengthy consultation process.

Use of mediation

In the Policy Memorandum (2006, para 19) the Executive states that the measures proposed in the Bill will be complemented by other interventions for which statute is not required. The Executive considered it would be useful in cases where the abused and perpetrator live together and want to remain so.

The Executive (2005a) consulted on whether mediation should be offered to all those subjected to abuse. The consultation report (Scottish Executive, 2005b, p 11-13) found that this only received 22% support from all respondents. Overall, respondents felt that the judgement as to whether mediation should be considered had to be made on a case by case basis. It was pointed out by some respondents that mediation would only be useful when the vulnerable adult had sufficient capacity to engage in the process and had consented to taking part. In general, it was considered that mediation may be more useful in situations where the adult being abused wished to maintain a relationship with the perpetrator eg where the pressure of caring had contributed towards the abuse.

Respondents then considered the implications of offering such services, citing the resources, skills and training necessary. For some respondents local authorities should have a role in providing mediation services, for others established voluntary providers may be more appropriate. A number of respondents suggested that APCs should take the lead in raising

awareness about such services and determining the cases that would most benefit from such intervention.

Resource implications

The Executive has published a Financial Memorandum in the Explanatory Notes (2006, para 137-166) for the adult protection measures. The assessment of additional costs arising from the adult protection measures is summarised in Figure 2:

Figure 2: Summary of additional costs arising from the adult protection measures

Scottish Executive	Local Authorities	Other Bodies
Publicity & awareness raising: £80,000 –one-off cost to be met from existing resources	Adult Protection Committees: £96,000 pa Adult Protection Units: £7.5m pa Investigation, assessment, protection & care management: £5,111,250 pa Training & awareness raising (including one–off material costs): £394,500 pa Staff training: Between £100 and £300 per Person depending on level of training	***Courts*** Negligible ***Police*** Increased staffing - £644,000 annually; and in rural areas possibly additional transport requirements equating to an additional car at an approximate cost of £10,500 together with additional running costs ***Private Business and Voluntary Sector*** Minimal additional costs

Source: Explanatory Notes (2006, p 37)

The Financial Memorandum provides significant detail as to how the Executive has reached this assessment. The Adult Protection Committee and Unit costs are based on similar bodies set up by Scottish Borders Council, whilst the Police costs are based on estimates by Dumfries and Galloway Constabulary. The Executive (2006b) has stated that it expects it will provide some funding to meet the additional costs identified.

Age of an adult at risk

As discussed above, for the purposes of the Bill an adult is deemed to be someone aged 16 years or over. In addition, it was discussed above how the Executive expects that some young people will be covered by the Bill. Some respondents to the Executive's 2005 consultation (2005a) noted how the age of 16 proposed in the Bill contrasts with the age stipulated in other legislation. Youthlink Scotland (Scottish Executive, 2005w, p 2) noted that the Protection of Children (Scotland) Act 2003 (asp 5) states that a 'child', in the context of an individual harming, or placing a child at risk of harm, is "a person under the age of 18". Youthlink Scotland, alongside other organisations, including Fairbridge Scotland (Scottish Executive, 2005p) and the Scottish Council for Voluntary Organisations (SCVO) (Scottish Executive, 2005x), felt it was important to ensure that any legislation for vulnerable adults at 16 dovetailed with POCSA.

In response, the Executive (2006b) notes that the age definition in the Bill mirrors that in the 2000 Act.

List of persons disqualified from working with adults at risk

The Protection of Children (Scotland) Act 2003 established a list of people disqualified from working with children. The Executive had originally consulted on such a list for those working with vulnerable adults, proposing that it be established in legislation for the protection of adults at risk. As can be seen from the Bill the Executive has elected not to pursue the list at this time. In February 2006 the Executive (2006a) announced a consultation to take forward recommendations of the Bichard report, which followed the Soham tragedy. The key proposals include introducing a list of those unsuitable to work with adults at risk, to run alongside an extended Disqualified from Working with Children List. The consultation finishes on 2 May 2006. Legislation is expected at some point before the end of the Parliamentary session.

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