



SCOTTISH EXECUTIVE

The Adults with Incapacity (Scotland) Act 2000: Learning from Experience

Legal Studies



**THE ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000:
LEARNING FROM EXPERIENCE**

**The Consultancy on Implementation,
Monitoring and Research**

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DEDICATION

This report is dedicated to the memory of Tom Thomson, Scotland's first Public Guardian, who died in 2003. Tom was pivotal to the implementation of the 2000 Act and was committed to ensuring that it would deliver benefits for adults with incapacity, their carers and families.

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ABBREVIATIONS

AWI	Adults with Incapacity (Scotland) Act 2000
ADSW	Association of Directors of Social Work
CPN	Community Psychiatric Nurse
IwF	Intromission with Funds
MHO	Mental Health Officer
MWC	Mental Welfare Commission
OPG	Office of the Public Guardian
POA	Power of Attorney
RMO	Responsible Medical Officer
SLAB	Scottish Legal Aid Board
SWSI	Social Work Services Inspectorate

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EXECUTIVE SUMMARY

INTRODUCTION AND BACKGROUND (Chapter 1)

Chapter One provides an introduction to the report which details findings from the consultancy, which was publicised under the title ‘the Learning from Experience Project’. The Adults with Incapacity (Scotland) Act 2000 (the Act) has enhanced existing safeguards and introduced new mechanisms for protecting the interests of adults who are unable to make all or some decisions, or to communicate decisions, relating to their welfare or finances. Five Parts of the Act are the responsibility of the Scottish Executive Justice Department:

- Part 1 – the General Principles behind the legislation
- Part 2 – Power of Attorney (POA)
- Part 3 – Intromission with Funds (IwF)
- Part 6 – Guardianship and Intervention Orders
- Part 7 – Miscellaneous Provisions

In 2002, following a competitive tendering exercise, the Scottish Executive contracted a partnership of Alzheimer Scotland – Action on Dementia and the Scottish Development Centre for Mental Health to undertake the programme of work summarised here in relation to Parts 2, 3 and 6 of the Act. The consultancy had three main aims:

- to explore issues arising from the implementation of the Act;
- to monitor usage;
- to undertake research into the operation of the legislation.

The project was designed to be dynamic, offering ongoing feedback to the Executive on emerging issues and trends, as well as providing both quantitative and qualitative data describing the usage, experience and impact of the Act.

MONITORING THE USE OF THE ACT (Chapter 2)

The Office of the Public Guardian (OPG) provided data on usage, for the first three years of the operation of Parts 2 and 3 of the Act (2001-04), and for the first two years of Part 6, (2002-04). The main findings from the data analysis are summarised in the report.

- Over 2001-04, more than 30,000 powers of attorney (POA) were registered under Part 2;¹ 433 people were granted authority to intromit with funds (IwF) under Part 3. Scotland-

¹ Once registered, a continuing POA can come into effect at any time, and a welfare POA can only come into effect when the granter no longer has relevant capacity. The numbers of POA registered will, therefore, always be higher than the number in operation.

wide, the rate of POA registered per 100,000 of adults (16 years and older),² increased over the three years of operation from 135 to 348. There were, however, substantial variations between local authority areas. In 2003-04, registrations per 100,000 adults, by local authority area, ranged from 108 to 649.

- In 2003-04, the number of Part 6 guardianship orders granted had doubled on the previous, first year's figure to just under 600. The number and types of guardianship orders per 100,000 adults varied widely between local authority area. Against a Scotland-wide rate of 14 orders in 2003-04, local authority area rates ranged from four to 28 orders.
- Over the two years of operation, the number of intervention orders granted increased but remained low - fewer than 170 in 2003-04. Although few in number, the data suggest variations between local authority areas.
- Relatives comprised over 80% of nominated attorneys in all three years, and the vast majority of applicants for IwF.
- In 2002-03, local authorities comprised almost 60% of applicants for all guardianship types, and relatives around 30%, with professionals largely the remainder. In 2003-04, 45% of applicants were relatives and 43% local authorities. In 2003-04, the proportion of local authorities as sole guardians declined from around two thirds in the previous year to about one third, and the proportion of relatives as sole guardians increased from just under 25% to 37%. In both years, relatives were much more active as joint guardians than local authorities or professionals, across all types of order.
- In both years over one half of applications for intervention orders were made by relatives and between one third and 40% by local authorities. The proportion of relatives appointed as interveners decreased from 90% to just under two thirds, with an increase in the proportion of local authority interveners from just under 7% to nearly 23%.

Monitoring data for the first three years of the Act suggest a dynamic picture, with patterns of usage changing over time. IwF and intervention orders are not yet used extensively. There were wide variations across the country in the use of the different procedures. Relatives clearly play a key role across all procedures and the profile of both granters and adults with incapacity is of a predominantly female (two thirds of users), elderly (70-80% are over 60 years old) and white (less than half of one per cent of POA granters was not white) population. Dissemination routes for future data on usage were suggested: the Adults with Incapacity (Scotland) Act website, the website of the Office of the Public Guardian and the Scottish Executive MHO Newsletter.

² Rates per 100,000 population throughout this summary are based on adults defined as being 16 years old and over and GROS mid-year estimates of population.

IMPLEMENTATION OF THE ACT (Chapter 3)

The implementation element of the consultancy involved a number of complementary activities in relation to the operation of the Act:

- to identify the experiences and views of users and potential users;
- to review information and support for those interacting with the Act, including the relevant Codes of Practice and the website for the Act;
- and to provide a source of assistance to resolve difficult queries.

Three key stakeholder groups provided feedback on the operation of the Act:

- potential beneficiaries (service users and carers) and organisations representing their interests;
- agencies with operational responsibilities under the Act (such as financial institutions, solicitors and medical practitioners);
- and agencies with duties under the Act, including the MWC, the OPG and local authorities.

These groups formed a network of contacts which provided feedback in a variety of ways, including meetings, working groups, training sessions and case material. In addition, the consultancy was contacted by 110 individuals from across the networks, one fifth of whom were carers seeking help with complex problems or wishing to report difficulties they were experiencing, particularly in relation to financial and welfare guardianship applications. Key issues for those involved – service users and carers, and organisations, agencies and professionals with operational responsibilities under the Act – that related to implementation were identified.

Key issues emerging from implementation

- Lack of publicity about the Act and how it might benefit adults and carers was perceived as one of the main barriers to access.
- Gaps in the information produced for adults about their rights if they are subject to an application under the Act.
- Lack of clarity about who should support the adult to have a voice in the process, that is, confusion over the role of non-legal or independent advocates, safeguarders, and curators ad litem, and about funding for legal representation for the adult.
- Barriers to accessing IwF because of unintended consequences of certain requirements of the Act and regulations.

- Inadequate information and support, and instances of the wrong advice being given by solicitors with costly consequences. A common problem was that the lay guardian had not been fully informed of his or her duties in advance of being appointed.
- Considerable accumulative costs involved in the process of making a guardianship application.
- Lack of automatic entitlement to legal aid, especially in respect of applications for welfare guardianship - widely regarded as a substantial rights issue.
- Lack of co-operation from professionals experienced by some carers when making a private application for guardianship. Social workers and doctors did not appear to be accustomed to responding to requests from lay people.
- The need for training on 'good practice' issues and ongoing informal support for legally appointed proxies in carrying out their duties (European models could be considered).
- The perceived inappropriateness of the sheriff court environment for processing Part 6 cases, due to the view of it as formal, intimidating and associated with criminality.
- Mental Health Officers (MHOs), the Mental Welfare Commission (MWC) and Law Society reflected the concerns of carers about the appropriateness of the sheriff courts for dealing with applications under AWI. They considered that consideration should be given, in the long term, to extending the function of tribunals under the Mental Health (Care and Treatment) (Scotland) Act 2003, to hearings under the Adults with Incapacity (Scotland) Act 2000.
- A lack of understanding by some financial institutions, refusing to recognise the authority of certificates issued by the OPG. This was partly a training issue for branch staff, but also due to interfaces between banking laws, the Act and other legislation. Adults were denied access to their funds and their proxies considerably inconvenienced.
- Lack of clarity amongst local authorities on when to invoke the Act, creating concerns about equity of access to the potential benefits of the Act and transparency in decision-making about its use.
- Restrictions on, and difficulties in finding, appropriate people, who can act on behalf of an adult with moderate means, either as an intromitter or as a financial guardian. Where there is no one to act as an intromitter, but the local authority funds or part-funds a solicitor to act as a financial guardian this may represent a more restrictive option than necessary. This may mean some loss of income to the adult, and a cost to the public purse. However, if no individual is able to intromit and the local authority is unable to fund a solicitor, there is a decision-making vacuum. Several potential legislative and non-legislative solutions have been suggested to address such problems.

- The need for a comprehensive training strategy, to include local multi-agency training programmes for health and social care staff with different levels of responsibility under the Act.
- The need for good practice guidance for health and social care staff and solicitors on key areas: communicating with adults with severe communication difficulties; understanding the impact of different neurological conditions on ability to reason and make decisions; assessing capacity in relation to a specific decision or levels of decision-making; intimating or notifying an adult about an intervention to which they are to be subject under the Act. MHOs sought further guidance in the codes of practice on how to deal with a range of conflicts of interest.
- The lack of emergency powers under the Act, for example, to intervene in cases of suspected abuse or unauthorised, covert removal from home or care setting.
- The current period of 30 days, required for the preparation and co-ordination of an application, including the MHO and medical reports, can on occasion be insufficient. It was suggested that consideration should be given to the need for and implications of extending the current statutory time scales, and/or allowing some flexibility for the sheriff to receive a report which is outside the time scale in specific circumstances.
- The need to simplify some specific processes and procedures - for example, the recall procedures for guardianship are more complex and time consuming than under previous legislation, which may lead busy staff to allow an order to run its course, against the best interests of the adult, and the legal requirement for local authorities to visit welfare guardians and adults four times a year is viewed as excessive. The Scottish Executive is consulting on a proposal to reduce the number of visits to a minimum of two per annum, giving the local authority discretion to carry out more visits if necessary.
- The OPG and others raised issues regarding the sale of heritable property, and have suggested that: the requirement on guardians to register heritable property in the General Register of Sasines or the Land Register of Scotland should be reviewed as it is costly, time consuming and offers the adult no additional safeguard; clarity is needed on circumstances in which the guardian is required to seek the consent of the OPG for the sale and price of an adult's property. The current wording in Schedule 2 6 (1) is ambiguous and potentially leaves the adult without a safeguard.
- Concerns raised by social workers and doctors about the need to address the complex interface issues between AWI and the new Mental Health (Care and Treatment) (Scotland) Act 2003. Social workers raised the implications for training and concerns about the adequacy of resources for advocacy for adults with incapacity.

- The Act was viewed as having been a catalyst for the improvement of inter-disciplinary working particularly in relation to Single Shared Assessments. The Part 1 principles³ received an overwhelming endorsement from those professionals who had become familiar with the Act. They valued the principles as a tool for the facilitation of a ‘person-centred’ approach to reviews and care planning.
- Lack of clarity amongst local authorities on when to invoke the Act, giving rise to concerns about: equity of access to the potential benefits of the legislation; and the transparency in decision-making about use of the Act.
- Considerable evidence from the MWC that welfare guardianship powers applied for and granted are often much greater than reports have suggested are required to benefit the adult. This suggests a need for people to have a better appreciation of the needs of the adult and greater awareness of the implications of the principles.

RESEARCH ON PARTS 2 AND 3 (Chapter 4)

Research on Parts 2 and 3 aimed to explore awareness, perceptions and experiences of using these two parts of the Act. The research comprised a postal questionnaire survey of advice agencies and telephone interviews with granters of POA and applicants for IwF.

Twenty-three advice agencies (law centres, Citizens Advice Bureaux and voluntary organisations) responded to the postal survey. The majority thought they were familiar with the aims of the legislation, most felt familiar with the purpose and processes of Part 2, but fewer felt the same about Part 3. A majority had experience of people coming to them with queries regarding POA; half had experienced people seeking advice on the role of a withdrawer.

To obtain the views of POA ‘granters’ and IwF ‘withdrawers’, a telephone survey was undertaken. Although 100 people who had registered POA or applied to be a withdrawer were selected at random and invited to participate in the research, a sample of just eight suitable interviewees was obtained. This reflects difficulties with the complex sampling process required to conform with ethical and data protection demands. Nevertheless, the interviews offer some general insights into the use of Part 2 and 3.

From both the surveys, a number of themes emerged:

- Opinions were divided about the available information for these Parts of the Act: some thought it was difficult to obtain and complex, others thought it ample and clear.

³ The AWI Part 1 principles state that all decisions made on behalf of an adult with impaired capacity must: benefit the adult; be the least restrictive intervention to achieve that benefit; take into account the past and present wishes and feelings of the adult in so far as they can be ascertained by any means of communication whether human or by mechanical aid as appropriate to the adult; take into account the views of the relative or primary carer of the adult, and others with an interest, in so far as it is practical and reasonable to do so; encourage the adult to use existing skills or develop new ones.

- Parts 2 and 3 were seen to provide safeguards and protections for vulnerable people. POA, particularly, was seen as empowering, while IwF provided an easier way to manage finances, allowing access to accounts that would otherwise be frozen.
- There was a general view that there needed to be greater awareness of the legislation.
- Perceived limitations to the value of Part 2 stemmed partly from the complexity of the procedure.
- Use of Part 3 was felt to have been limited due to low awareness, restrictions on who could be a ‘withdrawer’, the number and types of bank account that could be accessed, procedural complexity, and the responsibilities placed on withdrawers.
- The impetus for registering POA was being able to plan for the future: it meant peace of mind for granters and families. Advice on how to grant and register POA came from lawyers.
- Prompts to consider IwF included the need to manage the affairs of a relative who was becoming confused or to avoid having accounts frozen. Respondents found out about becoming a withdrawer from lawyers, CABx, relatives, or ‘through the grapevine’, and spoke to the OPG and their lawyers about how to make an IwF application.
- There was some confusion about whether (and, if so, which) fees incurred in the application process could be recouped by the withdrawer.
- While the need for an intimation period before an application could be granted was appreciated, the freezing of accounts in the interim had financial implications for the person applying to be a withdrawer.
- Experiences of having the bank repeatedly check their authority and fears about committing inadvertent accounting errors were less positive outcomes.
- Generally, however, being granted the authority to access their relative’s funds had been positive for the withdrawers, and all would have gone through the process again.

QUALITATIVE RESEARCH ON PART 6 (Chapter 5)

This qualitative research exercise involved in-depth analysis of thirteen cases where the use of Part 6 had been considered, and an application made or alternatives pursued. Amongst the 58 people interviewed were adults, their nearest relatives or attorneys, MHOs, GPs, consultant psychiatrists, lawyers, and care staff – a range of the individuals involved in each case. The case-study approach allowed rich exploration of the perspectives of those involved through the use of semi-structured interviews. Engaging the adults themselves and achieving an interview sample entailed grappling with considerable methodological and ethical challenges. Some of the topics explored in the interviews were informed by themes emerging from the project activity to

support implementation of the legislation and by the patterns of usage revealed through the monitoring exercise. The case study data, therefore, threw light on and added depth to what was being revealed or suggested by the other elements of the consultancy. Importantly, it also revealed significant fresh themes, particularly in relation to processes.

- The data suggest two *overlapping* triggers to consider the use of Part 6: to minimise risk or to establish legitimate decision-making authority.
- Beyond MHOs and consultant psychiatrists, professionals' awareness of the Act and the processes involved varied. Lay people, particularly private applicants, were on an even steeper 'learning curve'.
- In local authority applications, multi-disciplinary assessment and the case conference system facilitated joint and collaborative working, which did not feature in private applications.
- In their contact with the adult, assessors would seek to ascertain their present and past wishes and the extent to which these were based on informed judgement. This duality could generate various scenarios along the two dimensions of capacity to express or communicate a view and the perceived extent to which the view is based on an impaired judgement.
- The principle that a person may be legally capable of making some decisions and actions but not others was generally welcomed by respondents. The sample cases fell into three assessed levels: global incapacity, partial incapacity and capacity.
- MHOs have a core role in drawing attention to, and putting into effect, alternatives to an application under Part 6, but contingent factors also play a part.
- Recognition that incapacity is not all or nothing did not systematically influence consideration of the powers being sought, which could be formulated outwith the discussions informing decisions to apply under Part 6 or the assessment of incapacity.
- The data suggest that Part 6 is being invoked in relation to two distinct populations: one able to communicate and act, but with impaired decision-making judgement over aspects of their lives, exposing them to financial and/or welfare risks; another population who may have "global incapacities", for whom the concern is to endow an identified body or person with legitimate decision-making authority. These sometimes overlapping populations generate two different but overlapping decision-making models: one focusing on risk and its minimisation, where the emphasis is on seeking *powers over*; and one focused on decision-making and forward planning, which seeks to obtain *powers to*.
- Cases where obtaining decision-making authority was the aim were initiated by private individuals (the applicant may be a local authority). Others were initiated by local authorities, who would act as guardian if no-one else was able or willing to do so.

- Local authority applications were largely co-ordinated by MHOs. Private applicants worked very much on their own, possibly with the support of a solicitor or concerned professional. Co-ordination included ensuring the different reports were written within the appropriate timeframe, although sometimes difficult to achieve.
- Court hearings could be experienced by non-professionals and adults as perplexing, inhibiting and stressful.
- In local authority welfare applications, MHOs would attend court, informing and supporting those unfamiliar with the process. They did not, however, attend court for private welfare applications.
- The study suggested practice differences relating to the appointment of safeguarders or curators; the role of independent advocates; and orders for caution.
- The data highlighted interface issues both within the Act, for example between Part 6 and Part 5, and between the Act and other pieces of legislation, particularly the current Mental Health (Scotland) Act 1984.
- Immediate outcomes could be direct ‘substantive’ changes in aspects of the adult’s life, and ‘procedural’ or ‘due process’ outcomes, providing a formal legal basis for decision-making.
- There appeared to be differences in practice in relation to the nature, regularity and frequency of local authority supervision of guardians and guardianship orders. The study highlighted the difficult balance to be struck between meeting the needs of financial guardians (and attorneys) for information, support and advice and the requirement to ensure financial probity.
- In all thirteen cases, the principles of the legislation had been an important feature of the decision-making processes initiated under the Act. Interpretation and balancing the principles against each other could, however, be complex.
- There was less evidence of consideration of the principles once an order had been granted. For example, some care managers supervising guardianships or acting as guardians seemed to have limited knowledge of the principles of the Act.
- Although the legislation is ‘accessible’ in the sense that private individuals are not precluded from applying for an intervention order, the infrastructure and processes may not facilitate this access. Similarly, although not excluding adults, the complexity of the procedure may not enhance inclusion. There was insufficient material to indicate the extent to which the Act was accessible to, and used by, different equalities groups, for example, people from black and minority ethnic communities.

Five key themes emerged from the Part 6 case studies:

- The need to extend knowledge and awareness of Part 6, including embedding an understanding of the principles beyond the assessment and application process.
- The two overlapping objectives of seeking '*powers over*' and '*powers to*' raise two far-reaching questions. First, who initiates an action when the adult has incapacity but there is no immediate risk, and no-one is seeking decision-making powers on their behalf, but where decisions may be being made? Second, to what extent does the authority to have *power over* include a reciprocal responsibility to provide appropriate resources?
- The procedural disadvantage and isolation experienced by private individuals.
- The complexity and formality of the process may act as barriers to inclusion on the part of the adult and non-professionals. The associated costs may also act as a deterrent to nearest relatives seeking to be involved in the process.
- Outcomes for the adult may be both concrete changes in circumstances and a more abstract but fundamental protection achieved through transparency in decision-making authority.

CONCLUSIONS FROM THE CONSULTANCY (Chapter 6)

The rich and varied evidence achieved from the different project activities suggests that the Act has been largely working as intended and yielding benefits for adults with incapacity and for those who care for and about them. But it also revealed possible legislative, procedural and practice issues which may inhibit the full realisation of the objectives behind the legislation. Some of the issues are already being addressed by the Scottish Executive in response to the findings from the consultancy and through parallel initiatives, such as the research into Part 5 and recently issued guidance in relation to Part 6. Suggestions for further research have also been presented.

CHAPTER ONE INTRODUCTION AND BACKGROUND

INTRODUCTION

1.1 The Adults with Incapacity (Scotland) Act 2000 (AWI/the Act) is intended to modernise and improve the law to safeguard the interests of adults who are not able to take some or all decisions for themselves. The legislation has far-reaching implications for people subject to the provisions of the Act, their families and carers, estimated at potentially around 100,000 people (Scottish Executive 1999).⁴ It applies to individuals who are assessed as incapable of acting, making, communicating or understanding decisions because of mental disorder or an inability to communicate caused by a physical or other disorder. The main groups to benefit from the provisions of the Act are: people with dementia, adults with a learning disability, with severe mental illness, or who have suffered a head injury, and people with severe communication difficulties caused by physical disability.

1.2 In 2002, the Scottish Executive commissioned a partnership of Alzheimer Scotland – Action on Dementia and the Scottish Development Centre for Mental Health to undertake a two-year consultancy contract to explore issues arising from the implementation of Parts 2, 3 and 6 of the Act, to monitor usage and to undertake research relating to the operation of the legislation. The project adopted the title ‘Learning from Experience’. A Consultancy Steering Group was established to advise and oversee the project (see Appendix 1 for membership). This report summarises the work undertaken in the course of the consultancy, and highlights key issues and lessons to be learned from the first three years of the Act.

THE ACT

Background to the legislation

1.3 In 1991, the Scottish Law Commission (SLC) published *Mentally Disabled Adults – Legal Arrangements for Managing their Welfare and Finances* (Discussion Paper No 94) in which the laws governing decisions about the finances and welfare of mentally incapable adults were examined and changes proposed. The discussion paper also included a draft bill, and a wide range of individuals and organisations responded to the Paper. The reforms proposed were radical, and formed a basis for wide-ranging debate. Taken together, the proposals, for the redefinition of incapacity, a hierarchy of provisions, a system for registration, supervision and investigation, and principles to underpin the legislation, aimed to provide a balance between empowering and protecting adults with incapacity and enabling their carers to manage their day to day welfare and financial affairs when the adult is no longer able to do so themselves. The Commission also recommended measures to provide a legal framework to authorise medical decision-making. The reforms were founded on the principles of autonomy and equity, that adults who are unable to make decisions for themselves should not be disadvantaged. At the time of the Commission’s report, legislation to support decision-making for this group was

⁴ The documents referred to in this chapter are available on the website of the SLC (www.scotlawcom.gov.uk) or the Scottish Executive AWI webpages (www.scotland.gov.uk/Topics/Justice/Civil/16360/4927).

fragmented, archaic and left adults with incapacity open to abuse and neglect. A subsequent SLC document, *The Report on Incapable Adults* (Report 151) (SLC 1995), made 152 recommendations to government to establish comprehensive legislative reforms.

1.4 Early in 1997, the then Scottish Office produced its own consultation paper, *Managing the Finances and Welfare of Incapable Adults*, which adopted most of the SLC's 1995 recommendations. It was not, however, until the establishment of the Scottish Parliament that the need for legislation was reconsidered. Drawing on the earlier work by the SLC and subsequent consultations, the Adults with Incapacity (Scotland) Act 2000 became the first major piece of legislation to be passed by the Scottish Parliament. It introduced a comprehensive hierarchy of provisions for making financial and welfare decisions on behalf of an adult, tailored to the level of intervention needed by the individual.

1.5 For the purposes of the Act an 'adult' means a person who has attained the age of 16 years.

Capacity

1.6 In Scots law there is a legal presumption that adults have the capacity to make decisions about their own lives unless proven otherwise. This presumption may be called into question, especially where a person has an impairment of cognition and affect. However, the legislation does not consider this sufficient evidence to intervene. The title of the Act recognises that incapacity is not an 'all or nothing' concept and that many adults with incapacity can still manage some aspects of their life. An assessment of incapacity must therefore be 'decision-specific' in relation to the ability to make decisions about health, welfare or financial matters, taking into account the complexity of the decision-making involved.

1.7 The legislation defines a person as being without capacity if, at the material time, he or she is unable, by reason of mental disability, to make a decision on the matter in question. That is, if the disability is such that, at the time that the decision needs to be made, he or she is unable to understand information relevant to the decision; make a decision based on the information given; act on the decision; communicate the decision; or retain the memory of the decision.

1.8 The Act recognises that incapacity may be a temporary or permanent state; may vary over time; and that the ability to make a decision depends not only on the adult, but on the complexity of the decision to be made and the way information is presented. A mandatory Part 1 principle of the Act recognises that the way in which information is presented will impact on the ability of the individual to make decisions and requires that every effort be made to aid communication with the adult.

1.9 The supporting Codes of Practice provide broad guidelines on communication with the adult and the assessment of capacity.

Principles

1.10 The Part 1 principles state that all decisions made on behalf of an adult with impaired capacity must:

- Benefit the adult.
- Be the least restrictive intervention to achieve that benefit.
- Take into account the past and present wishes and feelings of the adult in so far as they can be ascertained by any means of communication whether human or by mechanical aid as appropriate to the adult.
- Take into account the views of the nearest relative or primary carer of the adult, and others with an interest, in so far as it is practical and reasonable to do so.
- Encourage the adult to use existing skills or develop new ones.

1.11 The principles underpinning the legislation were designed to support the autonomy of the adult as far as possible. Their application is relevant in three key areas:

- assessing whether or not an intervention under the Act is necessary;
- assessing which intervention or interventions under the Act will be appropriate;
- implementing an intervention made under the Act.

1.12 The Act establishes checks and balances to reduce the potential for abuse. All interventions must be registered with the Office of the Public Guardian (OPG). The OPG was established by the Act and provides for the Accountant of Court, a senior official in the Scottish Court Service, to assume the role of Public Guardian. Amongst its key functions, the OPG also provides supervision, support, advice and information to financial guardians or other authorised persons in managing the property and financial affairs of the adult; receives and investigates complaints in relation to those appointed as financial proxies; and consults with the Mental Welfare Commission (MWC) and local authorities on interests of mutual concern. The MWC and local authorities have a similar range of functions in relation to welfare interventions.

Provisions

1.13 The Act consists of seven parts. The Scottish Executive Justice Department has overall responsibility for the implementation of the Act and specific responsibility for Parts 1, 2, 3, 6 and 7 which relate respectively to:

- General matters (for example, the principles of the Act, functions of statutory authorities)
- Continuing and welfare powers of attorney
- Access to accounts and funds
- Intervention orders and guardianship orders
- Miscellaneous provisions

The Health Department of the Scottish Executive has overall responsibility for Parts 4 and 5 of the Act. These parts are concerned with:

- Management of care home residents' finances
- Medical treatment and research

1.14 The Act introduces a hierarchy of provisions designed to allow decision-making in relation to the financial affairs of an adult with incapacity and/or their health and welfare. The consultancy was focussed on the operation of Parts 2, 3 and 6. The Scottish Executive Health Department commissioned a separate review of the implementation and early operation of Part 5 of the Act (Davidson et al 2004) and undertook a consultation on the Code of Practice for Part 5 (Drinkwater et al 2004). To set in context the discussions in the following chapters, the provisions, procedures and processes, as they relate specifically to Parts 2, 3 and 6, are summarised below.

Part 2: Power of attorney

1.15 Under Part 2 of the legislation people with capacity can authorise someone to have *power of attorney* (POA). These powers can relate to financial matters and would be referred to as financial or continuing power of attorney. The Act also introduces a new type of attorney with powers over welfare matters. It is possible to grant both continuing and welfare powers of attorney. Continuing POA can come into effect at any time, but can be continued on incapacity if the granter specifically states this. Someone granted welfare power of attorney can only act in this capacity if the granter subsequently becomes unable to manage some aspect of their welfare.

1.16 The person appointing someone with POA is referred to as a '*granter*'. The person or people to whom they grant POA can be a friend, a relative, a neighbour or a professional person such as a solicitor or doctor. The '*granter*' can identify one person as their *sole attorney*, or appoint a number of people who would act as *joint attorneys*.

1.17 To be able to come into effect, the POA has to be registered with the Office of the Public Guardian.

Part 3: Authority to intromit with funds

1.18 Part 3 of the legislation introduces *intromission with funds* (IwF), a procedure to enable a private individual to access funds on behalf of an adult with incapacity. The funds must be held solely in the adult's own name. Authority to intromit with funds is granted by the OPG to whom applications have to be submitted. The application must indicate the purpose for which the funds will be used, for example, care home charges or utility bills. Any private individual can apply for the authority to access the adult's funds, to become a '*withdrawer*'. The application has to be countersigned by someone from a specified group, a councillor, teacher or minister of religion, for example. The counter-signatory has to have known the applicant for at least two years, and

must also know the adult. The application must be accompanied by a medical certificate stating that the adult is incapable of managing the funds.

1.19 Once authority has been granted by the OPG the withdrawer is required to open a ‘designated’ account into which funds for the specified purposes will be transferred from the adult’s account.

Part 6: Intervention and guardianship orders

1.20 Under Part 6 of the legislation, an application can be made to the sheriff for a *guardianship* or *intervention* order. Intervention orders are usually concerned with a one-off or time-limited action or decision to be made on behalf of an adult who is not capable of taking the action or making the decision. Intervention orders can relate to the adult’s financial affairs, property and/or personal welfare. A person or office holder authorised to act under an intervention order is known as an ‘*intervener*’. Guardianship orders are intended for longer-term help or ‘continuous management’. Again guardianship orders can cover financial, property and/or welfare matters. The Act allows for both sole and joint guardians to be appointed.

1.21 Guardianship and intervention orders are granted by a sheriff following a court hearing and must be registered with the OPG.

1.22 Private individuals and professionals, such as solicitors, can apply for and be nominated as guardians or interveners but, under Part 6, local authorities also have statutory roles and responsibilities. First, local authorities must apply for a guardianship or intervention order where it is felt to be necessary and there is no one else doing so. Second, specifically in relation to welfare guardianship, the Chief Social Work Officer must be notified that an application is being made. Third, the application to the sheriff for welfare guardianship or a welfare intervention order has to be accompanied by a Mental Health Officer’s (MHO’s) report. These reports are concerned with the appropriateness of the order being sought and the suitability of the person named to act as *guardian* or *intervener*. Fourth, the local authority can be nominated as the welfare guardian or welfare or financial intervener. The local authority cannot, though, exercise powers of guardianship in respect of property or financial affairs.

1.23 Applications for guardianship or intervention orders have to be accompanied by two medical reports of incapacity. Applications for orders covering financial or property matters must also include a report from someone with sufficient knowledge to establish the appropriateness of the order and of the person nominated to carry out the order. All reports need to be completed within 30 days prior to the application being lodged with the court. The applications include the powers sought.

1.24 Once an application is submitted to the court, the Act enables a sheriff to appoint someone to safeguard the interests of the adult, including conveying the adult’s views to the sheriff, where these are ascertainable.⁵

⁵ Section 3(4) makes provision for the appointment of a ‘safeguarder’ by the sheriff. In all applications and proceedings under the Act, the sheriff is required to consider whether it is necessary to appoint a safeguarder. The

1.25 Once granted by the court guardianship orders can be for three years, or for any other period, including indefinitely, as determined by the sheriff. In cases of financial guardianship the sheriff can require the guardians to find *caution*. This is a form of insurance to safeguard the adult with incapacity from loss due to the actions of someone acting on his or her behalf.

1.26 Part 6 is, therefore, designed to make it possible for interventions to be tailored to the needs of the individual, both in terms of powers granted and the period of time that the intervention may be required.

1.27 Table 1.1 summarises the different procedures available under Parts 2, 3 and 6 and the roles and responsibilities of the different participants

Table 1.1 Parts 2, 3 and 6 of the AWI: provisions, roles and responsibilities

Financial	Welfare	Who can act	Supervisory/ investigative powers
Joint bank account (either or survivor specified)		Private individual	
Continuing powers of attorney	Welfare powers of attorney	A continuing power may be granted to a 'person' (a private individual or legal persona. A welfare power can only go to a named individual. Appointments may be joint or separate (with option of appointing substitutes)	OPG (continuing POA); local authority and MWC (welfare POA)
Intromission with funds		Private individual	OPG
Financial intervention order	Welfare intervention order	Private individual or local authority	OPG (finance); local authority and MWC (welfare)
Financial guardianship order	Welfare guardianship order	Private individual (joint or separate); local authority (welfare guardianship only)	OPG (finance) local authority and MWC (welfare)

appointment of a safeguarder is in addition to, and does not replace, any existing powers to appoint someone to represent the interests of the adult, such as a curator *ad litem*. The purpose of the safeguarder is to convey the views of the adult to the sheriff.

National Implementation Steering Group

1.28 In May 2000, the Scottish Executive Justice Department convened the National Implementation Steering Group, comprising representatives from relevant professional associations, public and voluntary agencies. The remit of the group was to provide feedback on issues of concern relating to implementation and training in the various professional fields. Early in 2003, the future of the group was considered in the light of the work established through the consultancy. It was agreed to discontinue the group, but where specific aspects needed in-depth or detailed consideration, the Justice Department would set up meetings or small working groups, with appropriate experts, and, if there was sufficient interest, would consider holding an annual conference to discuss issues arising from implementation of the Act.

THE CONSULTANCY

Aims of the consultancy

1.29 The specific aims of the consultancy were four-fold.

- To assist the process of implementation of the Act by reviewing the information (including the relevant Codes of Practice) and support available and acting as a sounding board for individuals and agencies.
- To analyse the process of implementation of the Act by describing the pattern and process of implementation through monitoring and research.
- To analyse the operation of specific provisions of the Act through monitoring and research to examine the usage of those provisions.
- To describe the impact of the Act from feedback from a range of stakeholders and from research findings.

Consultancy elements

1.30 To meet these aims the consultancy consisted of three interlinked elements: implementation, monitoring and research.

1.31 The implementation element comprised:

- A review of information and support available to those interacting with the legislation, including the development of a network of stakeholders to provide a focal point for views and comments, from small procedural points to more substantive strategic issues.
- A review of the codes of practice for Parts 2, 3, and 6 and the code for local authorities operating under the Act.

- Engaging in the resolution of difficulties or queries relating to the operation of the legislation.
- Updating the Scottish Executive Adults with Incapacity Act website.

1.32 The monitoring component of the consultancy included:

- Liaison with the Scottish Court Service and the OPG with a view to obtaining data on usage.
- Early liaison with local authorities and the MWC to map monitoring at a local level.
- Consideration of mechanisms for disseminating information on the use of the legislation.
- Identifying information that was not being routinely collected.
- Producing a monitoring report summarising usage in the first three years of the Act.

1.33 In broad terms, the research element of the consultancy included consideration of:

- The impact of the legislation on adults with incapacity, their families and associated professionals.
- The operation of the Act in relation to specific interventions.
- An evaluation of the Act in relation to equality considerations.

The research component comprised two projects: a study of the awareness, perceptions and experiences of Parts 2 and 3 of the Act; and in-depth analysis, through case studies, of processes and outcomes following consideration of an application under Part 6. The design of both studies, which were largely qualitative, were informed by, and elaborated upon, early insights secured through the implementation and monitoring elements of the consultancy.

Structure of the report

1.34 The consultancy was dynamic in purpose: the aim was to feed back to the Scottish Executive issues and trends, as they emerged from the different elements, to assist on-going policy making and practice developments. This report is a summary of that process and the key findings. Other activities, including, for example recommendations in relation to the codes of practice and website development, and issues around the availability and scope of data on use of the Act, are not described in detail.

1.35 Chapter 2, drawing on the data provided by the OPG, summarises the patterns of usage of Parts 2, 3, and 6 of the Act. This is followed, in Chapter 3, by an account of the implementation element of the consultancy and a discussion of the emerging findings. The research studies

undertaken into the operation of Parts 2, 3, and 6 of the Act are described in Chapters 4 and 5. The concluding chapter draws out key themes from across the three areas of consultancy activity.

CHAPTER TWO MONITORING PARTS 2, 3 AND 6 OF THE ACT

INTRODUCTION

2.1 A key component of the Consultancy was the regular monitoring of usage of Parts 2, 3 and 6 of the legislation. To undertake this monitoring, the consultancy required access to summary reports generated from data that are routinely collected by the Office of the Public Guardian (OPG). However, the OPG's system is designed for workflow and case management in the daily functions of that agency and for its own organisational monitoring, and was not set up with a specific intention to generate additional statistics. By its nature, the OPG's data system is, therefore, not static: changes relating to individual cases, as they progress over time, can cause adjustments to figures that had been generated for a previous period because the system overwrites the older information with new details. Nevertheless, this only occurs with a tiny number of cases, so the monitoring data do provide a reliable illustration of patterns and trends over time, rather than the final picture for any one period.

2.2 This chapter presents a summary analysis covering the first three years of operation of the legislation. This includes Part 2, Power of Attorney (POA) and Part 3, Intromission with Funds (IwF), which came into effect in April 2001. It also covers Part 6, implemented a year later in April 2002, which makes provision for Guardianship and Intervention Orders.

SUMMARY OF USAGE

Power of attorney

2.3 Table 2.1 summarises the numbers and types of POA registered by financial year. This reveals that, over the three years since implementation, well over 30,000 POAs have been registered with the OPG. Under the legislation, once registered, a continuing POA can come into effect at any time, but a registered welfare POA can only come into effect when the granter no longer has capacity to manage some aspect of their welfare. The numbers of POA registered will, therefore, be higher than the numbers that are operational at any time.

2.4 Over this period there has been a noticeable change in the pattern of types of POA registered. In the first year of operation, continuing or financial POA comprised 70% of registrations, in the third year of operation this had dropped to fewer than 60%. Over this same time there was an increase in the number of combined continuing and welfare powers of attorney registered, from just over one-quarter to 40%. The number of registrations of welfare-only POA was small but gradually rising. The patterns suggest that people are becoming increasingly aware of the broadened range of options now available.

Table 2.1 Number and types of power of attorney registered by financial year

Type of power of attorney	Financial Year (%)			Total
	2001–2002	2002–2003	2003–2004	
Continuing and welfare	1448 (26)	3508 (34)	5820 (40)	10776 (35)
Continuing	3947 (71)	6382 (62)	7576 (52)	17905 (59)
Welfare	197 (4)	468 (5)	1097 (8)	1762 (6)
Total	5592	10358	14493	30443

Percentages may not total 100 due to rounding.

Intromission with funds

2.5 Over the three years of operation, the number of applications for IwF that have been granted has increased but remains under 200 per year (Table 2.2).

Table 2.2 Number of applications for intromission with funds granted by financial year

Financial year	Number granted
2001-2002	105
2002-2003	157
2003-2004	171
Total	433

Guardianship and intervention orders

2.6 In the two-year period since Part 6 came into effect, the number of guardianship orders granted doubled from under 300 to just under 600 per annum (Table 2.3). The pattern of types of order also changed. In the first year, just under three quarters of guardianship orders were for welfare provisions only, under 20% were for financial guardianship, and less than 10% were combined welfare and financial powers. In the following year, welfare guardianships reduced substantially, with an increase in both financial-only and combined orders being granted. To an extent, the initially high proportion of welfare guardianships may reflect the transitional period during which guardians who had been appointed under the Mental Health (Scotland) Act 1984 applied for appointment under the new legislation when their previous appointments ended. Nonetheless, as with power of attorney, the pattern suggests people are beginning to make fuller use of the range of provisions.

2.7 Over the same period, the number of intervention orders that were granted increased (Table 2.3), but the total numbers remain low. In both years financial orders predominated.

Table 2.3 Number and types of guardianship and intervention orders registered by financial year

Type of order	Type of order by financial year (%)			
	Guardianship Orders		Intervention Orders	
	April 2002– March 2003	April 2003– March 2004	April 2002– March 2003	April 2003– March 2004
Financial and welfare	28 (10)	120 (20)	1 (2)	15 (9)
Financial only	50 (17)	200 (34)	49 (88)	135 (81)
Welfare only	210 (73)	273 (46)	6 (11)	17 (10)
Total	288	593	56	167

Percentages may not total 100 due to rounding.

PATTERNS OF USAGE BY LOCAL AUTHORITY AREA

2.8 To compare usage of Parts 2, 3 and 6 of the legislation in different parts of the country rates per 100,000 population aged 16 years and over ('per 100,000 adults')⁶ in each local authority area were calculated. This revealed substantial variations across Scotland.

Power of attorney and intromission with funds

2.9 Scotland-wide the number of registered POA per 100,000 adults has increased over the three-year period from 135 to 348. There are though consistent and substantial variations between local authority areas. Omitting Orkney, nan Eilean Siar, and Shetland, where the low absolute numbers may distort the overall pattern, people in Argyll and Bute, Perth and Kinross, Angus and East Renfrewshire have been consistently high users of POA across the three years. At the other end of the scale, people in North Lanarkshire, West Dunbartonshire, West Lothian and Falkirk are amongst the lowest users. In 2003–2004, for example, the rate of powers of attorney registered per 100,000 adults was 649 in the East Renfrewshire local authority area, compared with a rate of only 108 in the North Lanarkshire area. Factors such as the use of power of attorney prior to the new legislation, the demographic structure and levels of deprivation or wealth may be among the explanations for the degree of variation.

⁶ In the Act, an adult is defined as someone aged sixteen year old or over, which is the basis for this comparison of usage rates with 100,000 of the population in a local authority area per GROS mid-year estimates.

2.10 The small absolute numbers for intromission with funds granted make the geographic distribution much less consistent or clear cut, within and across the years.

Guardianship and intervention orders

Guardianship orders granted

2.11 Comparison of the rate of guardianship orders, of all types, per 100,000 adults also revealed wide variation in usage between local authority areas. In the second year of operation, for example, as indicated in Table 2.4, against a Scotland-wide rate of 14 orders per 100,000 adults, the rates between local authority areas ranged from four to 28 orders. Areas with comparatively high rates of usage included Argyll and Bute, Angus, Highland and West Lothian. 'Low' usage rates were found in the Stirling, Glasgow City and East Ayrshire local authority areas.

2.12 In addition to transitional issues a number of other factors may be at work to account for such wide disparities, for instance, local authority policies relating to when to use the legislation, and other local factors such as the demographic profile for the area, or a hospital re-settlement programme.

2.13 The data also begin to suggest variations in the patterns of 'types' of guardianship orders between different local authority areas. The small absolute number of cases in some local authority areas, together with transitional issues may distort the pattern to some extent, but focusing on the second year of operation illustrates possible trends. For example, in 2003–2004 the greatest users of combined welfare and financial guardianship orders were in Renfrewshire local authority area, where just under 60% of orders were combined. At the other end of the scale, no combined orders were granted in eight local authority areas. Welfare-only orders show a similarly wide variation in usage: ranging from under one-quarter of all orders granted in nine local authority areas (including five areas where there were no welfare orders granted), to over 70% of orders in West Lothian and Scottish Borders. Financial-only orders were granted in the majority of local authority areas, but again the range extended from less than 10% of all orders in three areas, to over one half in seven.

Table 2.4 Number of guardianship orders per 100,000 population aged 16 years and over by local authority area of adult and by financial year

	Number of guardianship orders, by local authority area of adult per 100,000 population aged 16 years and over	
	2002 - 2003	2003 - 2004
Aberdeen City	12	16
Aberdeenshire	5	15
Angus	8	23
Argyll & Bute	15	28
Clackmannanshire	3	10
Dumfries & Galloway	10	17
Dundee	6	14
E. Ayrshire	7	9
E. Dunbartonshire	2	13
E. Lothian	7	10
E. Renfrewshire	1	10
Edinburgh	6	14
Eilean Siar	9	14
Falkirk	8	10
Fife	5	18
Glasgow C	5	8
Highland	21	26
Inverclyde	6	10
Midlothian	2	11
Moray	13	11
N. Ayrshire	7	19
N. Lanarkshire	3	7
Orkney	6	6
Perth & Kinross	18	18
Renfrewshire	2	10
Scottish Borders	7	16
Shetland	6	0
S. Ayrshire	9	21
S. Lanarkshire	5	14
Stirling	10	4
W. Dunbartonshire	7	17
W. Lothian	24	24
Scotland Total	8	14

Intervention orders granted

2.14 The small number of intervention orders makes comparison between areas difficult. The data do though suggest that there has been fairly wide variation in usage. In 2003–2004, for example, against a Scotland-wide total of 4 per 100,000 adults, the rate ranged from either zero to one in five local authority areas (excluding Orkney), to 28 in one area. Fife and Stirling local authority areas generated the highest proportions of intervention orders (of all types) (only in Shetland was the rate higher, a figure which may be distorted by the small numbers involved). The local authority areas where less frequent use was made of intervention orders include East Renfrewshire, Aberdeen City and Dundee.

STATUS OF APPLICANTS AND PROXIES

2.15 Focusing on the status of the applicant, that is, their relationship to the granter or adult, and whether acting on their own or jointly, the data revealed the roles played by private individuals and local authorities.

Power of attorney and intromission with funds

2.16 Whether acting alone or jointly, with financial and/or welfare powers, relatives comprised over 80% of nominated attorneys in all three years since the legislation became operational. Over the same period, friends comprised around 5% of sole attorneys and a slightly lower proportion of joint attorneys. Friends tended to be appointed as welfare POA. Professionals may be marginally more active as joint attorneys than as sole proxies, and to be more active in financial than welfare matters.

2.17 Relatives consistently comprised the vast majority of people applying for IwF.

Guardianship orders

Applicants

2.18 Over the two years since the implementation of Part 6, there was a shift in the pattern of applicants for guardianship. By total number of applications, in the first year local authorities comprised just under 60% of applicants, and relatives around 30%, with professionals largely comprising the remainder. In the second year, relatives overtook local authorities: 45% of applications came from relatives and 43% from local authorities.

2.19 Table 2.5 indicates the status of the applicant in percentages by type of guardianship order for each of the two years of the operation of Part 6. Relatives were most active as applicants for financial guardianship and joint financial and welfare orders in both years. The pattern for local authorities appeared to change with increases over these two years in local authority applications for combined financial and welfare and financial-only orders.

2.20 Professionals appear to have been involved in about 10% of guardianship applications, predominantly, but not exclusively, for financial guardianship. Friends rarely make an application for guardianship.

Table 2.5 Status of applicant by type of guardianship order by financial year

Status of applicant (Total number)	Status of applicant as % by type of guardianship and financial year							
	2002 - 2003				2003 - 2004			
	Fin & Welfare (48)	Fin only (69)	Welfare only (224)	Total (341)	Fin & Welfare (150)	Fin (226)	Welfare (294)	Total (670)
Friend	0	1	0	0.3	2	1	1	1
Relative (inc. spouse)	77	67	8	30	72	66	15	45
Local authority	17	9	84	59	21	14	76	43
Professional	6	22	9	11	5.0	18	7	11
N/a	0	1	0	0.3	0	0.4	1	3.0

Percentages may not total 100 due to rounding.

Sole guardians

2.21 The status of people appointed as sole guardians seems to be changing over time – reflecting the changing pattern of orders granted. In the first year, local authorities comprised just under two thirds of sole guardians, compared with just under 25% of relatives and just over 10% of professionals. As the proportion of welfare guardianship orders has declined, so too has the proportion of cases where the local authority is sole guardian. In the financial year 2003–2004, there were marginally more relatives acting as sole guardians (37%) than local authorities (35%). Professionals too were playing an increasing role as sole guardians, comprising over one quarter of the total.

2.22 By type of order, relatives were predominantly the sole guardians in cases of joint financial and welfare guardianship orders and in half of the cases where a financial-only order was granted. Local authorities were predominantly the sole welfare guardian, though this appeared to be decreasing. Professionals were most active as sole financial guardians.

Joint guardians

2.23 Joint guardianship presents a different profile to sole guardianship. Relatives are much more active as joint guardians than either local authorities or professionals, across all types of order. This though may be shifting over time. The data for the second year since

implementation of Part 6 indicate a drop in the proportion of relatives as joint guardians and an increase in the proportion of local authority and professionals as joint guardians.

2.24 There may also be change over time in relation to particular types of order. In the first year, relatives comprised 70% of joint guardians for combined financial and welfare orders. In the second year this had dropped to under half. Over the same period there was an increase in the proportion of local authorities nominated as joint guardians in cases of combined financial and welfare orders. The proportion of professionals as joint guardians also increased in relation to combined orders. For welfare-only guardianship orders the majority of joint guardians were relatives: local authorities are rarely joint welfare guardians.

2.25 Table 2.6 compares the pattern of sole and joint guardians appointed, by type of order over the period 2003–2004.

Table 2.6 Status of sole and joint guardians appointed by type of guardianship order for the financial year 2003 - 2004

Status of guardian	Number of sole and joint guardians by type of guardianship order							
	2003 - 2004 (%)							
	Sole guardians				Joint guardians			
	Fin & Welfare	Fin only	Welfare only	Total	Fin & Welfare	Fin	Welfare	Total
Friend	1 (1.5)	1 (0.5)	0	2 (0.4)	2 (2)	1 (4.55)	4 (9)	7 (4)
Relative (inc. spouse)	58 (89)	106 (51)	35 (13)	199 (37)	54 (45)	20 (91)	37 (86)	111 (60)
Local authority	0	0	188 (72)	188 (35)	28 (23)	0	1 (2)	29 (16)
Professional	6 (9)	100 (48)	39 (15)	145 (27)	34 (29)	1 (4.5)	1 (2)	36 (20)
N/a	0	0	1 (0.4)	1 (0.2)	1 (1)	0	0	1 (0.5)
Total	65	207	263	535	119	22	43	184

Percentages may not total 100 due to rounding.

Intervention orders

Applicants and interveners

2.26 In both financial years, over one-half of applications for intervention orders were made by relatives and between one third and 40% by local authorities.

2.27 The proportion of relatives appointed as interveners decreased from 90% to just under two thirds, with an increase in the proportion of local authority interveners from just under 7% to nearly 23%, and that of professionals also increasing. Given the small numbers involved, particularly in the first year of operation, the patterns may be particularly fluid.

2.28 On the basis of the higher numbers of intervention orders granted in 2003–2004, it seems that relatives were particularly active in relation to financial intervention orders; local authorities comprised a higher proportion of interveners in relation to combined financial and welfare orders and welfare-only orders.

CHARACTERISTICS OF USERS OF THE ACT

2.29 A sense of who has been using the different sections of the legislation can be gauged from an analysis of the age, sex and, where available, the ethnic group of the adult. The age and minority ethnic groupings are based on the categories used by the OPG.

Age of granter or adult with incapacity

2.30 The age profiles of granters of POA and adults for whom IwF has been registered tend to be older: over 80% of both granters and adults subject to the legislation were aged over 60 years. In the first two years of operation of Part 3, this age group in fact comprised over 90% of adults. This compares with around 70% of adults for whom a guardianship or intervention order had been granted.

Sex of granter or adult with incapacity

2.31 Across all years and all procedures, women represented approximately two thirds of all granters and adults with incapacity, except in relation to IwF, where women comprise around three quarters of people who have a withdrawer.

Minority ethnic group of granter or adult with incapacity

2.32 Information on minority ethnic group was only available in relation to POA and IwF, and because obtained voluntarily the data are incomplete. The available data suggested that, over the three years these parts of the Act have been operational, non-white users comprised less than half a percent of granters of POA and only one adult from a non-white background had a withdrawer. In part, this may reflect the age profiles of the minority ethnic population: although minority ethnic groups comprise 2% of the Scottish population, they have a younger age distribution than white groups. Nonetheless, the data do suggest an under-representation of non-white groups.

THE EMERGING PICTURE

2.33 A number of trends emerge from this analysis of usage of Parts 2, 3 and 6 of the legislation.

2.34 First, the picture is dynamic: even over this comparatively short period changes were becoming evident. As people become more aware of the extended range of options available, and perhaps also more familiar or confident with the procedures involved, so the patterns of usage are changing.

2.35 Second, some procedures were not being used extensively, especially IwF and intervention orders. Yet these procedures would seem to offer less restrictive options, either for someone who may lose capacity in the future, or for an adult who has already lost some capacity.

2.36 Third, what also comes across from the data are the wide variations across the country in the use of the different procedures. This has related as much to POA and IwF, which reflect the private decision-making of individuals, as to guardianship and intervention orders, where the role of local authorities especially may influence usage levels. On-going monitoring may identify whether this degree of variation has been a product of a learning curve or reflects more substantial issues of population structure, socio-economic status or local authority policies relating to usage of the Act. Over time it may become possible to develop area profiles based on the relationships between the use of guardianship and intervention orders and also with the use locally of power of attorney and intromission with funds.

2.37 Looking at who has been involved as applicant or ‘proxy’, the fourth finding is the key role played by relatives across all of the procedures. This may suggest a target group for future awareness-raising initiatives. But it raises further questions concerning the levels of support available, both to assist relatives initiating these processes and once they are active as a proxy.

2.38 What also is apparent from the data is the profile of the granters and adults with incapacity: this has been a predominantly female, elderly and white population. In some respects this is not surprising. The data do, however, suggest the scope for raising awareness of provisions, such as POA among younger people and of all these procedures among people from black and minority ethnic communities.

ON-GOING MONITORING

2.39 The Consultancy had a role to consider and agree with the Justice Department, the Scottish Courts Service and the OPG future dissemination of monitoring data, with particular reference to the level of detail, frequency and format of this information. A small group of people, with experience of monitoring and disseminating numerical information drawn from complex data-sets, was convened to assist the development of a monitoring strategy.

2.40 Any such strategy has to take into account, first, that different groups, affected by or with obligations under the legislation, will potentially have an interest in the way the Act is working.

Second, the routes through which people find out about this will differ. Third, any approach has to be accessible, in terms of language, format and clarity, practicable and cost-effective.

2.41 Following exploration of a number of different options, it was suggested that, in the short to medium term, to achieve the widest circulation in the most effective way, established and existing routes should be used to disseminate information on usage of the Act.

- Regular downloadable updates could be provided on the Scottish Executive's Adults with Incapacity (Scotland) Act website and through links on the OPG's website, at, for example, six-monthly intervals. For those without web access, hard copies of reports could be available on request from the Justice Department.
- The regular MHO Newsletter, published by the Scottish Executive, which has an extensive circulation, would provide another good route to disseminate information to a target group.

SUMMARY: KEY POINTS

An analysis of data routinely collected by the OPG, for the first three years of operation of Parts 2 and 3, and the first two years of operation of Part 6 of the Act, reveals the following points.

- This is a dynamic picture: even over this comparatively short time period changes were evident.
- Some of the newer procedures, particularly intromission with funds and intervention orders were not being used extensively.
- There were the wide variations across the country in the use of the different procedures. This relates as much to power of attorney and intromission with funds, which reflect the private decision-making of individuals, as to guardianship and intervention orders, where the role of local authorities in particular may influence usage rates.
- Relatives clearly play a key role as applicants and proxies across all of the procedures.
- The profile of the granters and adults with incapacity has been of a predominantly female, elderly and white population.

CHAPTER THREE IMPLEMENTING THE ACT

INTRODUCTION

3.1 This chapter sets out the objectives of the implementation element of the project, describes the processes used to gather information, identifies policy and practice issues emerging for stakeholder groups, and includes their suggestions for making improvements. The dynamic nature of the context within which the consultancy operated is again emphasised here. Some issues raised early in the life of the project have proved to be transitory, an inevitable product of any new legislation. However, experience suggests that further consideration should be given to a range of issues affecting both access to the legislation and its operation. Regular reporting by the project has enabled the Scottish Executive to respond at an early stage to those issues where improvements could be made through non-legislative means.

3.2 Six key objectives were originally identified for the ‘implementation’ element of the consultancy. These objectives were not mutually exclusive and informed one another:

- to review the information and support available to those interacting with the Act;
- to identify issues arising from the experiences and views of users and potential users;
- to inform improvements in practice and the law;
- to provide a source of assistance and help to resolve difficulties or queries related to the operation of the Act;
- to review the codes of practice for Parts 2, 3 and 6 of the Act and the code for local authorities in the light of insights into the early implementation phase of the Act, making detailed proposals for revision;
- to contribute to the National Implementation Steering Group (see 1.28).

PROCESS

3.3 The intention of the first phase of the consultancy was to gather feedback from the experiences of key stakeholders. A comprehensive database of organisations and services that interact with the Act, or have the potential to do so, was established. The following three categories of interest formed the basis of an extensive network of contacts (see Appendix 2), which served as a channel for identifying emerging issues:

- potential beneficiaries of the Act (service users and carers) and organisations representing their interests;
- agencies and individuals with operational responsibilities under the Act, for example, financial institutions, solicitors, medical practitioners;
- agencies with duties under the Act, for example, local authorities, the Mental Welfare Commission, the Office of the Public Guardian.

Working with the network

3.4 A number of different ways were used to seek feedback from stakeholders. A news bulletin and posters were sent out to user and carer organisations, asking them to disseminate information about the project and to encourage individuals to get in touch to discuss their experiences of using or attempting to use the Act. The bulletin included an invitation from the project leader to meet with groups of service users and carers or their representatives. This approach produced a positive response and the project leader (who was responsible for the implementation phase) attended a number of meetings with groups of carers as well as with independent advocacy staff.

3.5 Similarly the project was invited to meetings with professional bodies such as the Law Society of Scotland, the MWG, OPG and Sheriffs Association. Meetings were held with individuals in relevant positions working for financial and legal bodies. Opportunities were also taken to encourage feedback from participants in conference workshops and training sessions led by the project leader.

3.6 In addition to the formal meetings and training sessions held, over 110 individuals from across the networks contacted the project either by letter, e-mail or telephone. Twenty per cent of these contacts were from carers seeking help with complex situations or wanting to report difficulties they were experiencing, particularly in relation to financial or welfare guardianship applications.

3.7 The purpose of the evidence gathering in the implementation activity of the consultancy was not to systematically collect quantitative data that would provide the basis for any statistical analysis. It was, instead, exploratory: engagement, in different contexts and at different levels, with stakeholders facilitated ongoing discussion and offered channels for the sharing of people's reactions to, experiences of, and thoughts about the way the legislation was operating.

3.8 The issues for implementation that are discussed in this chapter are also informed by the review of information, support and training available to stakeholder groups and by the review of the codes of practice. This information, in turn, informed the research programme.

REVIEW OF INFORMATION AND SUPPORT

3.9 The review assessed the range, availability and accessibility of information in all its formats (written, audio/visual, websites, etc) and other information and support mechanisms available to different groups of users or potential users. Issues arising from the review are outlined at the end of this section.

3.10 It is recognised that the effective implementation of the Act requires large numbers (indeed thousands) of professionals to have a general awareness of the Act and to understand the responsibilities of their agency and their own roles. This includes social workers, health professionals, lawyers, sheriffs, officers of the court, police, bankers and financial advisers. In addition, a large number of statutory and voluntary bodies provide information and advice

services, with staff and volunteers who need to have an awareness of the Act and its implications for those seeking help. Identifying and meeting the different levels of knowledge and specialist skill required has proved to be a difficult and complex task to accomplish and presents an ongoing challenge.

Published information

3.11 Published information on the Act comes in the following forms.

Official documentation:

- the Act, Regulations and Codes of Practice;
- general information leaflets about the Act, summaries of different parts of the Act including one for doctors and another for service users, and other publicity materials;
- guidelines and accompanying application forms published by the Office of the Public Guardian and a 'DIY' application pack on Part 6 produced by the Scottish Executive Justice Department;
- the AWI website, which includes all the forms.

Professional practice guidelines:

- for specific groups, such as lawyers (for example, the Current Law Statutes asp4, Adults with Incapacity (Scotland) Act 2000 and Ward 2003);
- guidance produced by local authorities and NHS boards for staff.

Information for lay people:

- guidance and information produced by specialist voluntary organisations.

Articles:

- bulletins produced for professionals (for example, *Mental Health Officers' Bulletin* and the *Journal of the Law Society of Scotland*).

Websites

3.12 The Scottish Executive's website is the main source of information about the Act. A major reconstruction was carried out in February 2003 by a member of the consultancy team, based on an analysis of the needs of users and potential users of the site. A key objective has been to ensure that the site is 'user friendly' for the non-professional. New sections were added to the website on 'How to plan your own future' and 'How to help a friend or relative who is mentally incapacitated', along with updated links and other guidance. The review of the Codes of Practice identified the need for guidance on specific topics, which would be placed on the web and cross-referenced in the codes.

Review of training opportunities

3.13 The consultancy carried out an overview of training activities, which took place during the first two years of the legislation (up to May 2003) and attempted to note training opportunities available since then.

3.14 To address training needs, the Executive supported several strands of activity:

- providing additional funding for local authorities to implement the Act. Most local authorities have now appointed a lead officer with responsibility for training;
- commissioning four regional, multi-disciplinary seminars based on a 'cascade' model of training and a training resource pack produced for participants and available on the web;
- organising a one-day training event for medical practitioners and deans of faculties;
- organising a one-day training seminar for nurses;
- producing a video aimed at medical practitioners;
- producing a series of training modules targeted to local authority staff. Some of this was designed for use in shared training between health and social care professionals and training modules are available on the Scottish Executive website and on CD ROM.

Specialist training provided by other institutes and agencies

3.15 The OPG regularly runs training open days on the financial provisions of the Act for lay people, lawyers, health and social care professionals, and provides training to a wide variety of organisations, including carers groups. The Judicial Studies Programme for sheriffs covers the Act and includes input from the Chief Medical Officer's representative on medical and ethical issues arising from Part 6. The Law Society of Scotland, Central Law Training, and individual firms have provided training for the legal profession internally. A range of training opportunities has been provided, by the BMA and other bodies, for general practitioners, hospital-based acute teams, dentists, dental students, and nurses in care homes.

3.16 Generic one-day courses have been provided for advice and helpline staff by the Legal Services Agency. A number of voluntary organisations organise training days for their own staff and volunteers.

3.17 The consultancy explored the availability of information and training within the banking and finance sector and was only able to identify one initiative. It lacked the capacity to find out about the availability of information and training on the Act for the police or within the prison service, although these would be relevant areas to explore, given that adults with incapacity may become involved in these.

3.18 The consultancy also could not review input on the Act within undergraduate or specialist training for social workers, doctors, nurses and lawyers. Input on mental health legislation as well as on AWI will be an important component for all professionals who intend to work with vulnerable people in the community. A number of voluntary agencies organise awareness-raising and training days for adults and carers who may be potential users of the Act.

3.19 It should be noted that contact by the consultancy with various agencies heightened their awareness of the need to know more about the Act and resulted in the direct provision of training by the project leader. This experience enriched the insight of the project into the specific training needs of staff providing specialist services for groups of adults with rare conditions, such as Huntington's disease, as well as for medical practitioners more generally involved in assessing capacity.

Support and advice services

Services for the public

3.20 The OPG provides advice and support to those enquiring about or applying for financial powers. (A small pilot was also run to offer support to guardians and interveners in their duties.) The Mental Welfare Commission provides advice on the use of welfare provisions under the Act as do social work departments within local authorities.

3.21 The Scottish Executive receives queries, some dealt with directly, others fielded. One remit of the consultancy was to address complex enquiries, taking referrals from the Executive.

3.22 A number of specialist voluntary organisations provide direct support and advice to non-professionals, including Citizens Advice Scotland, ENABLE, Capability, and Alzheimer Scotland's 24-hour free-phone Helpline. Solicitors are also a key source of advice for families, especially when a family member is no longer able to manage their financial affairs.

Support for professionals

3.23 The main source of information and support within local authorities is the AWI implementation officer; MHOs and the legal departments of local authorities are further sources. Most local authorities have produced their own guidelines and procedures as have NHS Boards.

REVIEW OF CODES OF PRACTICE

3.24 The function of codes of practice are to:

- explain what is in the legislation in non-legalistic language;
- set out what that means for those who have duties under legislation;
- provide guidance on how these duties are to be carried out;
- provide forms/model letters/case studies.

The Codes of Practice provide the main tool for informing users of the Act about how the provisions of the legislation are to be put into operation. A key component of the implementation element of the consultancy was to review the codes of practice for local authorities and for Parts 2, 3 and 6, in light of insights gained during the early implementation of

the Act, and to make detailed proposals for revisions as appropriate. Priority was given to reviewing the local authorities' and Part 6 codes of practice.

3.25 A review group was convened and met five times (membership at Appendix 3). The expertise brought to the project by members of the group provided a valuable source of information about how the Act was working. The review identified general issues in relation to all the codes, and specific issues in relation to each of the codes.

Presentation

- layout and language - to make the codes more 'user friendly'
- headings that identify guidance as for specific professionals or lay persons
- the provision of simple summary booklets (with information produced in a range of formats)

Content

- further good practice guidance needed on specific topics
- the rationalisation of complex procedures through changes to regulations
- interface issues with other parts of the Act, in particular for Parts 4 and 5
- interface issues with the Mental Health (Care and Treatment) Scotland Act 2003
- areas for policy clarification and/or changes to the Act

3.26 A report setting out detailed suggestions for improvements to the codes of practice was presented to the Justice Department for consideration. Local authority representatives on the Review Group brought to the exercise their rich experiences of where difficulties had arisen for practice, either because of lack of clarity in the codes, or because of the unintended consequences of regulations and the legislation. Some of the key issues identified from practice are outlined later in this chapter. Where there is clear evidence of the need for change, and where these could be achieved relatively quickly (because of their non-legislative nature), consultations on proposals have already been taken forward by the Scottish Executive.

3.27 Local authorities have produced their own protocols and guidelines to support the use of the codes and a number of these documents were included in the review process. This helped to highlight differences in the operation of various aspects of the Act between authorities.

ISSUES EMERGING FROM THE SERVICE USER AND CARER NETWORK

Accessibility

Lack of publicity

3.28 In 1999 it had been estimated that there were 100,000 adults with incapacity, and their carers (Scottish Executive, 1999), who might benefit from the provisions established under the legislation. However, initial and subsequent publicity has been limited and this factor will, inevitably, have an impact on uptake. One significant indicator is the uptake of intromission with funds, a provision designed to benefit many thousands of adults with modest means, which has

been unexpectedly low. Although a number of factors will affect uptake, an awareness that the Act exists and how it can help, will always be key to its use. Currently, it is not at all clear how an ordinary member of the public would begin to find out about how the Act might help them and their family. More public ‘sign-posts’ are needed.

3.29 It was suggested to the project that a public information video or DVD could be produced about the Act and made widely available with an accompanying booklet (as for the Incapacity Act in New Zealand). Comments received from across the networks suggest that a rolling programme of public information could help to ensure that those who may benefit from the Act know about it. The local authority code of practice suggests that councils, in partnership with health and other agencies, have a key role in publicising the Act.

Legislative issues limiting take-up: Intromission with funds

3.30 Factors affecting uptake

- a major problem preventing uptake is that an adult has to have a pre-existing bank account. This excludes very large groups of people including adults with learning disability as they come of age and many older people who have chosen not to open an account.
- only private individuals are able to intromit with funds. This has the impact of excluding adults who have no family member or friend willing or able to apply.
- regulations require the counter-signatory to the application to know both the applicant and the adult. This is not always possible for practical reasons, such as location.
- regulations require signatories to be from a limited class of people. This presents a problem for applicants who may have no occasion for knowing anyone in the categories listed or may not have known them for the required period of at least two years. (The Scottish Executive was consulting on widening the scope of those who can be counter-signatories to the application at the time of writing.)
- a limitation of the scheme is that funds can only be accessed from one bank account, although many people hold more than one account.
- intromission can only be for a sole named person. Where there is a joint account and the second signatory becomes incapable, then the intromitter is unable to act for both.

Costs

3.31 Under Parts 2, 3 and 6 of the Act, costs are incurred at each stage. For Part 2, these can be solicitors' fees and fees to the OPG for registration. Intromission with funds requires fees for a medical certificate of incapacity and for registration. In private applications under Part 6, costs can include solicitors' fees, medical certificate costs, and the OPG registration fee. In cases of financial guardianship they may also be required to apply for caution (a form of insurance which has to be paid annually), and to pay the OPG an annual fee for reviewing the management accounts (although this may be waived in certain circumstances). The total costs incurred in making an application under Part 6 have caused considerable dismay to private individuals and professionals alike. If orders under Part 6 are granted for a limited period (for example, three years) and a new application made thereafter, all these costs will be incurred again.

3.32 The OPG estimated that the cost of making a guardianship application was on average between £1,700 and £2,000, of which 70% generally represented fees paid to solicitors, which can vary considerably. There was a similarly wide variation in the fees charged by medical practitioners for certificates of incapacity. There was no guidance as to what GPs can charge, fees varying from nothing to £300. Any additional independent reports sought by a private individual to support an application or appeal will have to have been paid for by the individual unless they are eligible for legal aid. These figures provided a snapshot at a specific point in time and may not be reflective of costs over the longer term.

3.33 In relation to actions under Part 6, it was not possible to estimate the numbers of cases where private individuals, because of the costs that they feared might be involved, have not pursued guardianship. However, anecdotal information has suggested that the costs involved, particularly solicitors' fees may have been a barrier to private applications under the Act. The Scottish Executive produced a "DIY pack" to aid those who wish to become an intervener or guardian. (However, the experience of two carers who had taken this route was that the process was time-consuming and not easy to co-ordinate because they felt that the professionals involved did not respond well to them as lay people. A third carer reported her experience of finding the process 'straightforward'.)

Bond of caution

3.34 Several private individuals and professionals informed the consultancy that they felt that caution had not been justified in their circumstances; or that it had been disproportionate to the value of the assets it was intended to protect. The consultancy was made aware of differences in the requirement for caution, but the basis for decision-making was unclear. One problem was that there were only two insurance companies that provided caution and they had set a high threshold. Another problem appeared to be a lack of clarity in the Act about the discretion given to sheriffs to dispense with caution.

Legal aid

3.35 Means-tested legal aid is available for intervention and guardianship orders under the Act. There are two stages at which applications for legal aid may be appropriate. The first is at the pre-application stage when Advice and Assistance may be applied for by the person wishing to make an application on behalf of the adult. Eligibility for Advice and Assistance is based on the resources of the person who is making the application and not the adult. Civil legal aid can be available for representation in proceedings under the Act, and financial eligibility is assessed on the resources of the adult and not the applicant.

3.36 Prior to AWI, Assistance by Way of Representation (ABWOR) had been available, without a means test, for guardianship proceedings under Part V of the Mental Health (Scotland) Act 1984. The impact of this change in the eligibility rules for guardianship applications was strongly regarded by all stakeholder groups as representing a substantial issue for the following reasons.

3.37 First, the cost involved might prevent advice being sought about an intervention under the Act. For example, the threshold for Advice and Assistance was low and could deter those whose incomes were modest: for instance, a lone, working parent, who was on income support and with no savings, but in receipt of DLA, whose 18 year old son may be incapable of managing his finances or welfare due to a brain injury, might not be entitled to legal aid.

3.38 Secondly, it has been regarded as unjust that the burden of the costs of a legal intervention to remove decision-making powers from an adult (especially in the sphere of welfare decision-making) should fall on that adult.

3.39 A specific set of circumstances has affected patients who are detained in hospital under the Mental Health (Scotland) Act 1984 and for whom welfare guardianship has been applied for under AWI. This has affected a substantial group who were being transferred from hospital into supported accommodation. Some of these patients have wanted to appeal against the application for guardianship. Under the Mental Health Act they would have been entitled to non-means tested legal aid, but under AWI that right was removed. Some had been in hospital for a considerable length of time and had accumulated savings. They were concerned that, if they appealed, they might not be eligible for legal aid and would find themselves having to meet costs of several hundred pounds. These patients were already suffering a high level of anxiety, and the financial implications of making an appeal were causing them to 'give in' against their will.

3.40 In response to all of the above issues the Scottish Executive initiated further discussions with SLAB and the Law Society of Scotland.

Infrastructure issues

Information, training and support for private individuals as proxies

3.41 Carers seeking information about interventions under the Act said that they found the printed information produced by the OPG to be clear and helpful. Few of these carers had seen the Codes of Practice, and had difficulties in obtaining information about welfare interventions. The codes encourage lay people to seek advice from their local authority, but this information, like other information for lay applicants in the codes, is not easy to find; nor is this source of support well publicised elsewhere.

3.42 Feedback from carers suggests that the quality of information and support received from statutory services and solicitors was very variable, whilst reports about specialist voluntary sector providers, such as Citizens Advice Bureaux, were consistently positive.

3.43 The majority of individual carers who contacted the project did so because they were dissatisfied with the quality of information and support they received from professional sources and wanted to inform the project. A common difficulty, reported by carers appointed as financial guardians and by the OPG, was that guardians, in many instances, had not been fully informed of their duties in advance of being appointed. Some guardians had received no briefing with regard to completing an inventory, management plan or accounts, which came as an unpleasant surprise on being informed by the OPG. The level of support often required by lay guardians from OPG staff was considerable. Some mistakes were expensive and paid for by the lay person. In one such example the parent of a child with learning disabilities wanted to make preparations for when he came of age. The solicitor recommended financial and welfare guardianship and made applications on the instructions of the parent. However, financial guardianship was inappropriate given the modest income of their son and IwF would have been adequate. The parent was dismayed to discover what was required by the OPG in terms of an annual fee for guardianship accounts, and had not been informed that this could be waived in certain circumstances.

3.44 In contrast to professionals who are appointed as interveners or guardians under the Act, there is little training and ongoing support for lay people who have been appointed as proxies. Although local authorities and the OPG have a duty to provide supervision and advice, carers have asked for informal support through a peer group or network, but none exists at present. This issue has been addressed in countries such as Germany and Austria by resourcing voluntary agencies to provide training and support for lay guardians. In some US states short courses on 'good practice' are provided for lay guardians.

Gaps in information, independent support and legal representation for the adult

3.45 Independent advocacy agencies have exposed a serious gap in the provision of information for adults about their rights under the Act and particularly in relation to applications under Part 6. In one situation, a hospital based advocate described her search for information on behalf of several patients who wished to appeal against applications for welfare guardianship by

the local authority. The advocate could find nothing in a suitable format to explain the rights of the adult and what they could do if they wished to make an appeal.

3.46 A number of different practice issues have also emerged in relation to how far adults are enabled to have a voice throughout the process, especially in relation to applications being made under Part 6. An issue raised by independent advocacy services and carers groups was the confusion that seems to exist around who is to help the adult have a voice or understand what is going on in court and who is to be the adult's representative. There appeared to be a lack of clarity around the roles of independent advocates, safeguarders and curators *ad litem* as well as around how these different forms of support might be accessed to support the adult.

Processes and procedures

The court system for hearing applications

3.47 There is nothing in the Act that stipulates whether hearings should be held in open court or in private, but there is a widely held expectation that such sensitive matters should be heard in closed court. Carers, other family members and adults have been distressed to find that this has not always been the case. Applicants can request that the hearing is in private, but few will know this. A note on this issue has been circulated to sheriffs.

3.48 The consultancy was contacted by over twenty carers who had been involved with guardianship applications. Each carer volunteered their views on the court process, describing it as being extremely stressful and in many instances 'a nightmare'. The majority of these carers were pleased with the outcome, and complimented the sheriff and other professionals involved, but objected strongly to the court environment with its associations with criminality. In several instances, it was also reported that the adult felt they were being taken to court because they had 'done something wrong' and it was hard to explain why they had to go there. (It is interesting to note that in Belfast, to reduce the stresses induced by the environment, hearings take place in a less formal setting within the court structure. In England, hearings before the Court of Protection take place in a normal meeting room.)

3.49 In the long term, consideration could perhaps be given to extending the function of tribunals under the Mental Health (Care and Treatment) (Scotland) Act 2003 to hearings under AWI. Several voluntary organisations have proposed the use of tribunals for hearings under both pieces of legislation. Orders under both may be necessary for some adults: to go through two separate processes would be stressful for the adult and their family, and a poor use of resources.

Interface with financial institutions

3.50 Experiences of poor co-operation from some financial institutions were reported. Some banks, both north and south of the border, were refusing to accept the authorisation of certificates that give powers for the attorney, withdrawers and financial guardians, to manage adults' bank accounts. Carers were having to 'shop around' to find a bank willing to accept the certificate.

Often this has reflected a lack of awareness amongst staff at branch level and the OPG has intervened to support individuals confronted by such difficulties. The OPG also issues a leaflet to IWF clients along with their certificate entitled, 'Intromit with Funds Scheme – A guide for fundholders', which users can take to the bank when setting up accounts. However, at a strategic level, there appear to be interface issues between banking law, the Act and other legislation, resulting in adults being prevented from having access to their own funds. The Scottish Executive has been discussing these issues with the banking representatives.

3.51 The OPG has also found that there are complex cross-jurisdictional issues that impact on banking.

3.52 In determining the appropriate level of financial intervention required for managing the funds of an adult, it is necessary to have some knowledge of their income and assets. However, the banks' duty of confidentiality means that they cannot issue such information without a court order or the account holder's written consent, which the adult may be incapable of providing. The OPG has found that a number of guardians have been appointed where IwF would have been more appropriate, and the court has not been informed of the adult's means in advance of an order. The prospective guardian would have difficulty in obtaining this information from the banks, unless there is a change in the legislation to facilitate this. It is only once an inventory of the estate is established that this situation becomes apparent. By that time, an adult, sometimes of modest means, has had to bear the costs of the court proceedings and related guardianship fees.

ISSUES FOR AGENCIES AND STAFF WITH OPERATIONAL RESPONSIBILITIES AND DUTIES UNDER THE ACT

Policy issues

3.53 The circumstances in which it is necessary to invoke the Act was by far the most complex issue reported by local authorities, through ADSW and the Social Work Legal Group, as well as by implementation officers within local authorities and by the MWC. The issue is one of legal interpretation: was it originally intended that the Act should be used every time a major intervention is required for the benefit of the adult who is unable to give informed consent, or only, for example, when there is a dispute or conflict of interests? It is the stated policy of some local authorities always to invoke the Act in order to move an adult from hospital to another care setting. Other councils will only do so where the adult or family is resisting such a move. Disagreement on this fundamental point has been the most controversial aspect of the Act.

3.54 A focus of dissent has been around the primacy of the principles that underpin the Act. One body of legal opinion has regarded the principles, in the first instance, as a tool in the care review process to help determine whether the Act is the only means by which benefit to the adult can be achieved; whilst another body of legal opinion has regarded the principles as applying only to formal interventions under the legislation.

3.55 The Scottish Executive has sought to clarify the position in collaboration with the Mental Welfare Commission, who, at the time of writing, were preparing a discussion paper on

‘Authorising Significant Interventions for Adults who Lack Capacity’. Following legal advice, the Executive has written to authorities on this matter (SWSI 2004).

Examples of the impact of lack of clarity about when to invoke the Act

- Delayed discharges of several months have been caused whilst some local authorities have made applications for welfare guardianship in order to move adults to a more appropriate care setting in the community. This procedure has even been made in cases where there has been full agreement on the benefit of the move and where there is compliance. Such delays have proved to be to the serious detriment of the adult.
- Further examples of a lack of clarification about whether to use the Act concern the signing and termination of tenancy agreements. Some housing associations are applying for a welfare or financial intervention order so that a tenancy agreement can be signed. Other housing associations do not consider it necessary to intervene under the Act. Some have concluded that tenancy agreements need to be simplified and it may be a matter of communicating with the adult in terms they can understand. The view of the OPG has been that, generally, virtually all tenancy agreements have both a financial and welfare elements and, in most cases, because these are ongoing, an application for financial guardianship may be more appropriate.
- Another issue identified by the Social Work Legal Group is around the termination of a council tenancy. Some local authorities have taken the decision that an intervention order would be too cumbersome, expensive and time consuming, so have resorted to using ‘abandonment’ legislation to terminate a tenancy agreement in situations where it is clear that the person is unfit to return home from hospital. However understandable, the use of abandonment legislation is inappropriate and the recent Scottish Executive guidance may help to resolve this issue.

Gaps in the provision of emergency measures

3.56 The lack of emergency measures within the legislation to protect adults with incapacity, who may be in imminent danger of abuse or of neglect has been raised by the local authorities social work legal advisers group, by the MWC, the Codes of Practice Review Group and ADSW. Whilst the legislation has provision for an interim guardianship order, this cannot be achieved without a full summary application and supportive report being made to the sheriff court. Even this can take several days to be processed and a decision reached. Local authorities and health boards have been using emergency provisions under the Mental Health (Scotland) Act 1984 and may continue to do so under the Mental Health (Care and Treatment) (Scotland) Act 2003. It was suggested by a range of voluntary and statutory stakeholders that one solution could be through vulnerable adults legislation.

3.57 ADSW has suggested that the legislation be amended to allow for the provision of short-term interim guardianship orders (for example, for 14 days) before a formal application for guardianship is made.

Unauthorised and covert removal

3.58 The project was made aware of three cases where the unauthorised and covert removal of an adult had taken place. Whilst such cases are rare, they are inevitably complex and involve intense family conflict, and collectively expose a series of issues, relating to the legislation, processes and procedures, as well as to practice. In each case the adult was suffering from severe mental impairment but had not received an assessment of incapacity under AWI. The primary carer experienced considerable distress in each case, which was exacerbated by the length of time it took to resolve matters, and the financial costs involved.⁷ The cases are examples of when the Act has not been used, but should have been.

3.59 The agencies involved in these cases have analysed the circumstances and outcomes very closely in order to learn lessons for practice and to inform improvements to the process and legislation. The MWC refers to 'lessons learnt' in its Annual Report 2003-2004 (forthcoming). Lessons relate to the need for emergency provisions to intervene at a very early stage; practice guidelines for dealing with conflicts of interest where there are two competing applications for guardianship and two different local authorities involved; guidelines for interagency working with the police; and advice for sheriffs with regard to interim orders and timescale issues.

Gap in the system for the provision of a guardian or intromitter of 'last resort'

3.60 Local authorities reported that there was a significant number of individuals who lacked the capacity to manage their own affairs, but either had no family member or friend to manage their finances for them or anyone willing and able to do so. Local authorities have a duty under the Act to put in place appropriate measures when these are necessary and no one else is doing so, but they are disallowed from becoming financial guardians. This is problematic, particularly where the adult has only moderate assets or may be in debt as a direct result of their incapacity. Some authorities have tried to make an application for a financial intervention order (for which local authorities can apply), but the courts have sometimes rejected these as inappropriate because the powers sought were not of a 'one-off' nature. In many situations the only solution open to local authorities has been to nominate an independent solicitor as financial guardian, and whilst expenses can be claimed back from the adult's estate, in many instances this will be too small and the local authority will have to subsidise costs. ADSW have reported that this has caused a significant resource difficulty for local authorities and led to patchy provision across the country.

3.61 The number of adults affected is hard to determine but a survey of local authorities suggests that in larger authorities there may be between 50-75 cases a year, and in smaller authorities up to 25 cases a year. The consultancy reported on this issue in May 2003 and put forward three possible solutions, two of which would require legislative changes:

- local authorities to be given the power to act as financial guardians;

⁷ As these cases were rare and complex, no further reference is made to details which may identify persons affected.

- the OPG to be appointed guardian of last resort (a solution proposed by the Scottish Law Commission in its original 1991 proposals).

A third, non-legislative solution could be for the provision of a low cost service by the voluntary sector. Because it is adults with low to moderate means that need the support of a ‘guardian of last resort’, it is unlikely that any of these options would be fully self-financing so public subsidy would be required. This issue is under consideration by the Scottish Executive.

Sale of property

3.62 The OPG highlighted two issues in relation to the duties of financial guardians under the Act.

- Section 61 states the requirement on guardians to register heritable property with the General Register of Sasines or in the Land Registry of Scotland. This is costly, time-consuming and offers no safeguard to the adult, as the Keeper’s office does not have a remit to check that the guardian has consent in principle and to price.
- Schedule 2 6(1). The consent of the Public Guardian is required, in principle for the sale of a property and following that, consent on the price. Clarity is required on the phrase ‘use for the time being as a dwelling house for the adult’ as many guardians have chosen not to seek consent to principle and price on the basis of this phrase. They argue that the requirement does not apply because the adult is no longer living in their house having been moved to a care home. This interpretation removes a safeguard from the adult.

Practice issues

Training

3.63 Training and good practice guidance underpin the effective operation of the Act. The Scottish Executive’s early approach to information dissemination and cascade training, with four multi-disciplinary regional seminars in 2001, proved to be partially successful. It worked very well for staff with specific social work responsibilities under the Act, such as Mental Health Officers; and it worked well in some areas where a strategic approach was developed to the provision of multi-disciplinary training. However, such action was limited in many areas.

3.64 It was recognised, especially by MHOs and CPNs, that the introduction of single shared assessment and multi-disciplinary working under the Joint Futures agenda should provide a strong incentive for inter-disciplinary training on AWI. A rolling programme of training could help to ensure all health and social care staff, who are likely to be supporting adults with incapacity and their carers, have the knowledge and skills they need.

3.65 The project led a number of training sessions and workshops over a period of 18 months for health and social care professionals delivering front line services. Those sessions revealed

that the majority of participants had only a limited awareness of the Act and were unfamiliar with the Part 1 principles. Those who had received some training, typically a day or half day, found it to be too broad to help them to know what to do in specific cases. A number of social workers were not aware that there was an Implementation Officer within their department from whom they could seek advice.

3.66 Medical practitioners have responsibility to carry out an assessment of incapacity that is decision-specific and to sign certificates of incapacity under Parts 3, 4, 5 and 6 of the Act. The codes of practice advise that the assessment process should be inter-disciplinary and involve the adult, the adult's advocate (if there is one) and their carer as far as possible. Medical practitioners, and GPs in particular, have expressed a lack of confidence in their skills and abilities to assess incapacity. Those who had seen the GPs' leaflet and video considered that they provided a good overview, but did not help to inform their practice. A number of GPs who responded to a letter from the consultancy asked for more about the Act because they said they had not heard of it, even although every surgery had been sent an information leaflet. This finding is supported by recently published research on Part 5 (Drinkwater et al 2004). GPs have consistently requested a flowchart for quick reference (though one is provided inside the s47 certificates pad) and guidance on how to make an assessment of incapacity that is decision-specific. The need for the latter has also been identified by the Codes of Practice Review Group and the addition of a professional guidance page to the AWI website, which would include issues such as assessing capacity and communication, was suggested.

3.67 Concern was expressed that attention to the Act may be superseded by the Mental Health (Care and Treatment) (Scotland) Act 2003 which is to be fully operational by 2005. There are important areas of overlap, which will cause confusion if staff are unfamiliar with AWI provisions.

Good practice issues

- Assessing capacity and supporting communication

3.68 The need for further guidance on the assessment of incapacity and communicating with the adult emerged from at least three different sources: the review of information and training; the review of the codes of practice; and feedback from stakeholder groups, especially the medical profession. The Codes of Practice Review Group was concerned that the revised codes should make explicit the connection between optimising communication with the adult and the assessment of capacity.

3.69 These communication and assessment issues were of particular concern to providers of services for people affected by less common neurological conditions. They felt that many of the professionals involved with assessing capacity failed to understand how the condition affected an adult's decision-making powers. For example, the Huntington's Association for Scotland felt that the decision-making capacities of those with Huntington's disease were frequently over-estimated, leading to inappropriate decision-making; similar comments were made by PAMIS, a voluntary body supporting adults with severe and complex learning disabilities. Alzheimer

Scotland reported that in some instances the decision-making abilities of people with dementia were under-estimated because professionals involved with assessment lacked the necessary communication skills. These issues have strong implications for guidance and training.

3.70 Good practice issues with regard to communication and assessment of capacity are viewed as fundamental to advancing Single Shared Assessment and the Joint Future agenda for the most vulnerable community care users. The application of the Part 1 principles is entirely consistent with the ‘person-centred’ focus of NHS and Joint Future policies. Good practice guidance and training should help practitioners in health and social work to make these crucial cross-policy links.

3.71 The MWC expressed its concern that the Act does not require any formal assessment of the adult’s capacity before a welfare POA can be activated. The granter has the choice of building in the safeguard of a ‘springing power’, a clause stipulating the events which must occur before the power is authorised (for example, that a doctor known to the granter must assess their capacity). If there is no springing power then it is left to the attorney to decide when the adult lacks capacity and, therefore, when to take over decision-making within the powers granted. It is the view of the MWC that such provision places too great a responsibility for the assessment of incapacity on a lay person. The Commission has suggested that the Act should be changed to require a certificate of incapacity before a welfare power can become operable. Others have argued that it should be enough to encourage granters always to include the safeguard of a springing clause. The Act does provide a retrospective safeguard in that anyone with an interest, who suspects abuse, can instigate an investigation by contacting the local authority or MWC with regard to a welfare attorney or the OPG with regard to a continuing attorney.

- Intimating /notifying the adult

3.72 Every adult subject to an application for an intervention under AWI must be ‘intimated’, that is notified, and have their rights under the legislation explained to them. Only in rare circumstances would this not be appropriate because of possible serious risk to the health of the adult. However, there is an absence of guidance about how this should be carried out in different settings, for example, good practice for nurses on NHS wards, or what should happen when the adult lives alone.

- Operation of the principles

3.73 The extent to which agencies and individuals operating under the Act have regard for the principles and their application is a major test of whether the legislation has been working as intended. One view that emerged from MHOs was that the Act and its principles had influenced a marked improvement in multi-disciplinary assessment and care planning for adults with incapacity. It was felt that the principles were beginning to be applied as a matter of good practice, in advance of any decision to use the Act.

3.74 Sheriffs have a duty to ensure that powers applied for are appropriate to the needs of the individual. The MWC has a duty to review all summary applications and accompanying certificates for welfare guardianship and provide comment as appropriate to the sheriff. The

MWC and some MHO reports have observed that it is not unusual for applications to request powers that are in excess of what the evidence presented has suggested would be needed to benefit the individual. There may be a number of reasons for this. For example, solicitors may not have the necessary background information to help them make an appropriate application (for instance, case conference notes); or they may feel it is in the best financial interests of their client so they do not have to return again to request more powers in the future, especially where the adult may have a degenerative condition. However, it may also be indicative of a lack of appreciation of the Part 1 principles and an understanding of the rights of the adult under the Act.

3.75 The Mental Welfare Commission, as part of their monitoring processes, has recorded concerns expressed by MHOs that, in some instances where they had made a strong recommendation against a guardianship application or the extent of the powers applied for, the sheriff had granted the application without hearing further evidence from the Mental Health Officer. The MHOs had expected to be called as a matter of course in such circumstances. The MWC has advised that MHOs should make an advance request to be heard by the sheriff; and that such advice should be disseminated through the MHOs' bulletin and in the revised code of practice.

3.76 The MWC has also noted that it has been common for interlocutors not to state the length of the guardianship order. Section 58 (4) of the Act states that 'an order appointing an individual or office holder nominated in the application to be guardian for 3 years or such other period (including an indefinite period) as, on cause shown, may be determined.' If cause is not shown, the Act specifies a three-year period of appointment. However, the absence of any specified time could be confusing for the adult and guardian. If the decision had been for the guardianship order to be ongoing then this should be stated with reasons given.

- Habitual residence and cross-boundary issues

3.77 Under section 76 of the Act, responsibility for the guardianship of an adult passes from one local authority to another when the adult's place of habitual residence changes to another local authority area. This only applies when the guardian is the Chief Social Work Officer. The Act does not define 'habitual residence' and the code of practice for local authorities restates the legislation without shedding further light. In addition, there is no definition of the length of time that the adult has to be resident in an area for them to 'habitually' resident. Community care legislation includes the concept of 'ordinary residence' for funding purposes, but it cannot be assumed that habitual residence is the same. ADSW has suggested that a local authority protocol be established for where habitual residence is an issue, and a draft has been produced for consultation with local authorities.

- Dealing with conflicts of interest

3.78 Whilst sections 5.51-5.22 and 6.69-6.70 in the local authorities code of practice refer to considerations to progress action where there is a conflict between different persons with an interest, there remains a degree of confusion around how best to progress in circumstances where, for example, an application is being made by more than one family member; there is a dispute between family members regarding an application; independent legal advice is

contradictory to the advice of the local authority; or there is a disagreement between relatives and the local authority about the need for guardianship where a private application is being made. Clarification is needed in the code of practice about the course of action an MHO should take in such circumstances. Further clarity is also needed on what should happen in those circumstances where a private individual is making an application for guardianship at the same time as the local authority (for example, in relation to who is to be the MHO for the private applicant).

- Responsibility of the local authority to act

3.79 The Code of Practice Review Group identified the need for advice to be provided to local authorities on when to act where there are delays and a reluctance to act by relatives where the adult is in need of protection.

Processes and procedures

Recall procedures for guardianship

3.80 Local authorities and the MWC identified two key difficulties, reflecting a change from the relatively simple recall procedure under the Mental Health (Scotland) Act 1984: that the process of recall is too complex and may deter local authorities from applying; the intimations go out too widely and are in conflict with the adult's right to privacy.

3.81 The Codes of Practice Review Group suggested that the process should be simplified through changes to the regulations and code of practice. The MWC has expressed the view that there should be a procedure for local authorities to discharge their own guardianship and that the MWC should be informed about, and have the power to object to, a proposal.

Timescales

3.82 A number of issues have arisen in relation to the timeframes for processing applications under the Act. Problems have arisen from the pre-submission phase in which the Act requires that three assessments have to be carried out and certificates submitted within the 30 day period prior to lodging the application. Two of these are medical assessments and the third is a social assessment carried out by the MHO. All three may include the views of relevant others as part of their assessment and this may take time. Feedback from some solicitors and private individuals is that they have experienced problems in receiving responses to requests for reports and co-ordinating these within the timeframe. The consequence, in respect of medical certificates, is that assessments have to be repeated and new certificates presented. One or two of the private individuals in touch with the project, who took applications forward themselves, found it particularly difficult to get professionals to respond within timeframes. In one case a carer followed the procedures in the Scottish Executive 'DIY' guardianship application pack and felt badly let down when the social work department failed to allocate a MHO to produce a report in time.

3.83 ADSW suggested that the implementation might be improved by inserting a proviso in section 57 allowing the sheriff discretion to accept reports more than 30 days old in specific circumstances.

Supervision for private guardians

3.84 Regulations require that welfare guardians and adults be visited every three months. Some carers with guardianship powers have said that they feel that such frequent visits are unhelpful and can be disruptive to the adults' education or attendance at day care. Mental Health Officers also feel hard pressed to carry out visits, especially as the numbers of private appointments is growing.

3.85 The Codes of Practice Review Group and ADSW have recommended that the supervisory period should involve a visit every six months, and more frequent visits could be carried out at the discretion of the local authority in relation to a specific case.⁸

Intimation and non-compliance

3.86 Local authorities and the MWC have raised issues in relation to the intimation of applications for non-compliance orders (section 70). It has been considered that the 21 days notice required for intimation of these applications may leave an adult at serious risk. The minimum period this could be shortened to would be 48 hours. It may also be impossible to serve the intimation on an adult who has disappeared or who has been moving around from one address to another.

Use of interim guardianship

3.87 The Codes of Practice Review Group identified the need for further clarity on the use of interim guardianship orders. Multiple use during a single application had not been anticipated. The reasons for this happening are unclear and further investigation has been suggested before this element of the Part 6 code can be improved.

SUMMARY: KEY POINTS

3.88 What is evident from looking at the outcomes from the various implementation activities, and the research, is the consistency of issues emerging from within and across stakeholder groups. There are of course a number of separate 'technical' issues which have been highlighted by staff in agencies with operational responsibilities and duties under the Act. Ultimately, all the issues have an impact on the quality of service provided to adults with incapacity for whom the Act was designed to benefit.

⁸ The Scottish Executive was conducting a consultation on this issue at the time of writing.

Legislative and policy issues

- Clarification on when to invoke the Act (currently being addressed by the Scottish Executive).
- Lack of automatic entitlement to legal aid for welfare guardianship applications under the Act is widely regarded as a major injustice.
- Changes to the Act and regulations to make intromission with funds more accessible.
- Many individuals with modest means have no family member or friend to intromit with funds. The Act does not allow local authorities to do so or to become financial guardians. There is a gap in the system and alternatives suggested by the project are being considered by the Scottish Executive.
- Interface issues to be addressed between banking practice and law, the AWI and other legislations as these barriers are depriving adults of access to their own funds.
- Regulations could be altered to reduce the minimum requirement for supervision visits to welfare guardians by local authorities from four to two per annum.
- Timescales for processing applications can be problematic when co-ordinating the three reports required. If one falls outside the timeframe the other two must be repeated.
- The perceived inappropriateness of the sheriff court environment points to the need for a short term solution, and longer term consideration to extend the remit of the tribunals for the Mental Health (Care and Treatment) (Scotland) Act 2003 to include AWI hearings.
- Recall procedures are more complicated and time consuming than under the old mental-health legislation. This means adults may remain on an order for longer than necessary.
- Issues arising from regulations around intimation and non-compliance.
- Issues arising from the definition of 'habitual' residence.
- Clarity required on circumstances in which the guardian must seek the consent of the OPG for the sale of an adult's property and on the price.

Information, support and training issues

- The need for a public awareness-raising strategy, incorporating action to be taken at a national and a local level so as to improve access to the Act by all those who may benefit.
- Changes to the presentation and language in the Codes of Practice to make them more 'user friendly'.
- Provision of information, support and independent advocacy for adults subject to the application for an intervention.
- The need for the provision of informal support and training for lay proxies.
- The need to include the AWI within undergraduate and postgraduate training for specific professional groups; joint training at a local level between health, social work and provider organisations within the Single Shared Assessment and Joint Future framework to ensure that the essential links are made.

Practice issues

- Difficulties for the medical profession and others in communicating with, and assessing capacity of, adults with severe communications difficulties. To be addressed by the Scottish Executive in collaboration with others through the provision of good practice guidance and training.
- Uncertainty in how to progress where there are conflicts of interest - MHOs identified a number of circumstances in which there was confusion about how best to progress matters. Further good practice guidance needed.
- The operation of the Part 1 principles have led to improvements in multi-disciplinary assessment and care planning, however the MWC, in monitoring of Part 6 applications, revealed that the principles were not always observed, in that powers applied for and granted are often in excess of what has been assessed as needed by the adult. The involvement of solicitors, in review meetings or having access to care plans, may improve practice.
- Clarity needed on when a local authority should act under Part 6 in circumstances where the adult is in need of protection, but relatives are reluctant to do so or are delaying action.

CHAPTER FOUR RESEARCH ON PARTS 2 AND 3 OF THE ACT

INTRODUCTION

4.1 Part 2 of the Act, Power of Attorney (POA), and Part 3, Intromission with Funds (IwF), were intended to provide more accessible and less restrictive means for managing the finances, property and welfare of an adult with incapacity. In particular, it was anticipated that intromission with funds would help carers to access funds that might otherwise be frozen by banks or building societies.

4.2 In the course of the implementation element of the consultancy, attention was drawn to the value of these two procedures - and to some of the difficulties arising from the processes involved. To explore these issues in more depth, and to get an early picture of people's awareness, perceptions and experiences of using Parts 2 and 3 of the legislation, a research project was undertaken with three aims:

- to identify factors informing awareness and usage of these two procedures;
- to describe the perceptions of the process of application and registration;
- to describe perceptions of the outcomes of registration for the adult and non-professional applicant.

4.3 To meet these aims the research took a two-pronged approach:

- a postal survey of a sample of advice agencies including law centres, Citizens Advice Bureaux (CABx) and voluntary agencies;
- a telephone survey of a small number of withdrawers and granters of powers of attorney.

4.4 The sample sizes for both the postal survey and the telephone survey were very small, and the data partly qualitative. The findings corroborate issues identified as important in the course of the implementation stage. Although far from being a definitive account, the picture emerging from these surveys raises a number of questions for further consideration.

POSTAL SURVEY OF ADVICE AGENCIES

Method and sampling

4.5 Advice-giving agencies have an important role for people who want to plan for the future, or who may already be experiencing difficulties because either they, or someone they care for, are having difficulty making or communicating decisions. To get a sense of how familiar these organisations feel they are with Parts 2 and 3 of the Act, and the extent of their activities in these areas, a postal survey was conducted across a small number of agencies.

4.6 The postal survey questionnaire was distributed to a sample of ten voluntary organisations, all ten general law centres, and twelve CABx,⁹ chosen to ensure coverage of the Highlands and Islands and other rural areas, as well as the Central Belt. The selection of organisations aimed to cover the range of different client groups affected by the legislation. Of the 32 questionnaires distributed, 23 were completed and returned, a response rate of nearly 72%. Eight were returned by law centres, five by CABx and ten by voluntary organisations.

Postal survey findings

Familiarity with the Adults with Incapacity (Scotland) Act 2000

4.7 Of the 23 respondent agencies, a majority regarded their organisation as familiar with the aims of the legislation. Of the agencies feeling less familiar, two were law centres, two were voluntary organisations and one a CAB. One agency, for example, remarked on the questionnaire,

“As we don’t deal with it [the Act] regularly it is difficult to get our heads round it and need to read it thoroughly every time someone makes an enquiry!”

4.8 Training on the Act had been available in two thirds of the organisations. This ranged from an introduction to the general principles, to training covering “all aspects of the Act”. One law centre was a trainer on aspects of the Act. Detailed data were not, however, collected on the kind or level of training provided, or who within each agency had undertaken this training.

4.9 Fourteen agencies had had people coming to them for advice on how to plan for the future in case of incapacity, and three quarters had been asked for advice on how to manage the financial affairs of someone who was becoming unable to do so due to incapacity.

Familiarity with Parts 2 and 3 of the legislation

4.10 Of the 23 agencies, most felt familiar with the purpose of Part 2 of the Act and with the process of granting and registering POA. There was slightly less familiarity with Part 3 – only two thirds agencies felt they were aware of the purpose and the process involved in applying to become a withdrawer. Commenting generally on Parts 2 and 3, one quarter specifically noted that these were not areas with which they had a great deal of experience.

Dealing with queries in relation to Parts 2 and 3 of the legislation

4.11 Seventeen respondents, across the range of agency types, had handled queries regarding POA. The volume of queries over the previous twelve months had ranged from one to 216 (in one law centre). Just half had dealt with queries about intromission with funds and the number of queries in a year ranged from two to eleven.

⁹ This represents one in six Citizens Advice Bureaux across Scotland.

4.12 Organisations had a number of ways of responding to queries regarding POA. Two thirds would provide advice themselves, and around half would refer to a professional outwith the organisation or another agency, including the OPG, solicitors or the Legal Services Agency (LSA). Only seven agencies would pass on printed information.

4.13 For IwF queries, under half anticipated providing advice or information themselves, and a third would refer on to another agency. These figures may reflect the fact that fewer agencies had experienced queries regarding Part 3. If referring someone on, the OPG would be the main source of advice (more so than in relation to POA), followed by solicitors and the LSA. Only about one third would offer printed information.

Queries raised about POA

4.14 Nearly three quarters of agencies had experience of people seeking advice on how to grant or register a POA. The two second largest categories of query, experienced by almost half of the agencies, were about the purpose of a POA and questions from people about some aspect of their role as an attorney. Queries relating to advice on what powers to grant an attorney, issues about the fees and costs involved in registering a POA, or concerns about the way an attorney was undertaking their role were each reported by two fifths of organisations. People experiencing difficulties finding someone appropriate to take on the role of attorney had contacted just over one quarter of the agencies.

4.15 In terms of others' roles, only two agencies had experienced people with concerns about the solicitor's role in the process. None had handled concerns about the way that the OPG handled the registration. Other queries concerned capacity-related issues (for example, people could be confused about the purpose of POA, believing that someone already with incapacity was able to grant this) or financial institutions' insufficient understanding of POA.

Queries raised about IwF

4.16 Over half the organisations had been approached by people seeking advice on the role of a withdrawer. The second largest category of queries concerned the process of becoming a withdrawer. Process issues relating to obtaining a certificate of incapacity or about the costs or fees involved had been raised with one third of the organisations.

4.17 Withdrawers with questions concerning their own role and queries about how to find someone who could confirm the suitability of the withdrawer had been experienced by just three agencies. Neither the OPG nor solicitors was the subject of queries, and few organisations were aware of questions about the way a withdrawer was undertaking their role. Queries about how to identify someone who would be able to act as a withdrawer were similarly rare.

4.18 Other queries concerned issues of capacity and financial institutions not fully understanding the role and authority of withdrawers. One agency thought that people were unaware the scheme existed and assumed that they needed to become a financial guardian. It felt

that professionals were frustrated that they could not use this scheme for those for whom they care.

Information on Parts 2 and 3

4.19 The main information sources agencies themselves would draw upon were the Adults with Incapacity website, printed leaflets or information booklets and direct contact with the OPG. Just over two thirds of the organisations were aware of the information available to help people thinking about using these two procedures and to help people undertake the role of either attorney or withdrawer. The third that were unaware extended across the agency types.

4.20 Of the majority who commented on the availability of information, most felt it was difficult to obtain, and seven felt there was a lack of information available, a third felt there was ample information.

4.21 Amongst those that perceived there to be a lack of readily available and timely information, it was suggested that Parts 2 and 3 were not widely publicised, and outwith an unspecified website information was not easy to obtain, so people found out “too late”. The comment was made that solicitors were unlikely to advise people on these procedures because there was no financial interest for them. One agency referred to the potential to receive incorrect information, describing the “confusion caused by profs [sic] giving misleading or conflicting information (verbally)”. Of fifteen agencies commenting on the nature of the information available, six felt it was too complex. For example, one respondent felt,

“information is mainly in the form of codes of practice, which are too long and detailed for many people. There is a need for more concise, accessible information.”

More positively, others felt that the information was adequate – referring, for example, to the OPG leaflets as “clear” and the CD-ROM as “useful for advisors”.

How Parts 2 and 3 have helped people

4.22 Both Parts 2 and 3 were seen as providing safeguards and protections for vulnerable people. For example, the systems for registration of POA, supervision and for complaint were felt to be beneficial for granters. POA was described as a “very simple tool for dealing particularly with welfare issues, but also financial”. Importantly, POA was seen as empowering, enabling people to nominate an attorney to come into effect should they lose capacity, including people with dementia who are diagnosed early. It also helped to avoid the use of more restrictive procedures, “prevent[ing] situations deteriorating until more drastic measures are necessary”.

4.23 In addition to the protections IwF provided, the procedure allowed access to funds that would otherwise have been frozen, and “should provide an easier way of managing finances”. It

was also a practical tool: “a straightforward process for solving a common problem”. Just under a third of agencies, however, felt they had insufficient experience to comment on its value.

Limits to Parts 2 and 3

4.24 Two agencies, reflecting on the ways in which they thought POA had been less successful, referred to the complexity or “cumbersome” nature of the procedure. One felt it was,

“formal, solicitor based. Sometimes people just need something very simple to assist them with their affairs at this time.”

Another referred to “increased” costs of legal, medical and OPG fees. One commented that, although Part 2 “has been welcomed”, some people had found solicitors’ fees to be very high.

4.25 One organisation thought the Act caused confusion regarding the extent of the responsibilities of the relevant people. A second believed that there was no ability for a welfare attorney to enforce the powers granted, particularly place of residence.¹⁰

4.26 Because of the comparatively low take-up of Part 3 (see Chapter 2), in addition to a question on the ways in which this provision had been less successful, the postal survey also sought views on why use had been low and what could be done to encourage greater usage. Combining the responses to these two questions suggests that there are five main perceived obstacles to greater uptake.

- Lack of awareness: it was suggested that the “message had not got across”.
- Too many real or perceived restrictions, including the following:
 - difficulties identifying someone prepared to act as a withdrawer;
 - difficulties arising because Part 3 cannot be used by professional care organisations not covered by Part 4 of the Act, limiting its potential use by people living in the community, supported 24-hours per day, but without family or friends able to assume this task;
 - that it can only be used for ‘simple’ financial accounts and only allows access to one bank account when many people have more than one;
 - it cannot be used to open an account – and people with learning disabilities, for example, moving into the community will not necessarily have a bank account.
- Too complicated: respondents suggested it was a “very, very complex procedure”. Having to anticipate financial requirements over three years and what was described as the “bureaucracy involved in report back and the fear of inadvertent error” were felt to deter use. Several referred to a “reluctance” on the part of people to use the Act by people who dislike form filling, or “who have problems getting legal advice”, for instance.

¹⁰ Under Section 3 (3) of the AWI legislation, the attorney can, however, apply to the sheriff for directions.

- Too costly: one respondent thought that there were “significant costs involved, particularly from GPs for certification of incapacity”.
- Too onerous: people might be put off by the responsibilities required of them as withdrawers.

Increasing the take-up of Part 3

4.27 Reflecting the perceived obstacles to greater take-up of Part 3, respondents suggested the following actions:

- improve awareness and understanding among the public, professionals including frontline staff, carers and medical professionals, and banking staff;
- expand the scope of Part 3 by, for example, permitting organisations or their representatives to act as withdrawers, expanding the list of countersignatories,¹¹ allowing more than one bank account to be accessed and making certificates more open-ended and amendable;
- simplify the process;
- address issues around costs and fees by, for instance, fixing fees for GPs.

TELEPHONE SURVEY OF ‘GRANTERS’ AND ‘WITHDRAWERS’

Method and sampling

4.28 To obtain the views of ‘granters’, ‘withdrawers’ and, where possible, adults with incapacity, a semi-structured interview schedule was developed to be administered over the telephone. This covered: reasons for pursuing particular procedures; finding out about the process; applying or registering; advice and support, including the codes of practice; and outcomes for themselves or the person for whom they are a ‘withdrawer’.

4.29 To recruit the sample, the names of 100 people, who had either registered POA or applied to be a withdrawer, were selected at random from the OPG’s database. Forty were applicants for authority to withdraw funds and 60 were people granting POA. Letters were sent inviting them to take part in the research. To abide by data protection requirements and ensure confidentiality, this initial letter was sent by the OPG on behalf of the researchers.

4.30 Enclosed with the letter were an information sheet about the project and a consent form to be completed by the granter or withdrawer. To provide an opportunity for adults with incapacity to participate too, the letter for withdrawers also included an information sheet, letter and consent form for the adult, together with a letter, information sheet and consent form for the

¹¹ At the time the consultancy was being completed the Scottish Executive was seeking views on the possible extension of the classes of countersignatories.

and consent form for the adult, together with a letter, information sheet and consent form for the person's welfare guardian or nearest relative, if the adult was unable to give informed consent to participate in research. Although intended to reflect the requirements of Part 5 of the legislation as it relates to consent to research, this did mean that the procedure was very complex and confusing for recipients which almost certainly had an impact on the size of the sample recruited by possibly discouraging people from responding.

4.31 In total 23 consent forms were returned, including three non-consents and six forms indicating consent but with no contact information. In six cases, consent was obtained, but upon further investigation they were not appropriate for inclusion. As a result, only eight interviews could be undertaken: three with granters and five with applicants for intromission with funds. The interviews lasted up to 45 minutes.

4.32 Although the complexity of the consent procedures and the reliance on a telephone interview may have limited the final sample size, the interviews nevertheless do reveal key issues, some of which could be considered for further exploration as part of a strategy for future research (see Appendix 4).

Findings from the telephone survey 1: using Part 2 to grant POA

4.33 Two granters had registered continuing and welfare powers of attorney; the third had granted welfare POA only. Each had registered their POA roughly a year before the interview. A respondent who had granted both continuing and welfare POA had an attorney exercising powers on their behalf at the time of interview. Two interviewees had granted POA to their spouse and nominated their children as substitutes; one had granted financial POA to their lawyer and welfare POA to their daughter.

4.34 Interviewees had spoken only to their lawyers about how to grant and register someone with POA. Lawyers also helped them to decide what powers they wanted their attorney to exercise and were responsible for arranging for the appropriate papers to be completed and for the POA to be registered.

What prompted people to consider applying for POA

4.35 Respondents were asked what made them think that it would be useful to grant someone with POA:

- to avoid disagreement between their children by placing their financial affairs in someone else's hands;
- previous experience of relatives 'leaving it too late' and not being able to access funds;
- preferring to sort out their financial affairs while they had the capacity to do so;
- experience of serious physical illness increasing their risk of becoming incapacitated.

Experiences and perceptions of the process

4.36 Interviewees felt that registering a POA was generally no problem, but one suggested that the OPG could reduce the time taken to handle applications. In this person's case the application took three months, of which the OPG stage was believed to take six weeks. Details of this case were not available to the research, although the OPG aims to register a correctly submitted POA within five working days, and delays may have occurred at other stages of the process. Experience of delays in the process had already been emerging as important from the work to support and explore implementation, and require further investigation and explanation.

Outcomes

4.37 For respondents being able to grant someone POA meant:

- peace of mind for the individual and their family;
- being able to relax because, as a pre-emptive process, it means that if the person became incapacitated the family could contact the lawyer who would trigger the process;
- being able to give someone the ability to make decisions about their welfare if they became unable to do so themselves;
- taking the burden off others who might be a recipient of funds and avoiding arguments.

Other issues

4.38 None of the respondents expressed concerns about fees they had paid for legal advice relating to registering POA. Nor did any know about the principles behind the legislation before making their application, and just one had since seen them.

4.39 Several comments suggested a need for greater awareness of the Act. One respondent remarked that not everyone would have the resources, or know about the process (where to start or how to go about it), especially those on lower incomes and older people. It was suggested that organisations like Age Concern could publicise the Act, and that people have to 'seek out' information although the Act applies to everyone, including the young.

Findings from the telephone survey 2: using Part 3 to apply for IwF authority

What prompted people to consider applying for IwF

4.40 The following reasons were given for considering that applying to be a withdrawer would be useful:

- to regulate the affairs of a relative who was becoming confused;
- fears that the government would seize the frozen monies and dormant accounts held by a confused relative;

- having to complete forms for the social work department, but having the bank refuse or be unable to tell the respondent what was in their relative's account;
- to take care of the affairs of a family member with dementia living in a home;
- concerns that a relative could be taking money from the adult's account for themselves;
- lawyer suggested it would assist with the expenses of a relative in a care home;
- the declining health of the adult and his or her increasing inability to manage their affairs.

4.41 Interviewees needed to access funds to pay bills, deal with the adult's bank accounts, make transfers to pay for care fees, purchase toiletries and clothes for their relative, or pay for services such as hairdressing. Two had been a withdrawer for two years, two for about a year.

4.42 A fifth person who took part in the research had applied for IwF. In the course of the interview, they spoke of applying for POA, but because of the adult's deteriorating condition had subsequently been advised to make an application to be a welfare guardian. Because of this individual's evident distress during the interview it was not appropriate to seek a detailed account of their experiences.

Experiences and perceptions of the process

4.43 Respondents found out about becoming a withdrawer from lawyers, CABx, family members, the OPG, the newspapers when the legislation was launched and "through the grapevine". Interviewees spoke to the OPG and their lawyers about how to make the application.

4.44 Working out the financial information required for the application did not present difficulties. One had sought help from the OPG with this and others consulted their lawyers. Obtaining a medical certificate presented problems for one, who found the process of working out which medical staff to approach and taking a letter to medical and nursing staff for signing "a lot of hassle". All found it easy to get an independent person to sign Part B of the form. All knew that they needed to keep a record of their expenditure and had booklets from the OPG to help them with this. Only one knew about the Code of Practice for withdrawers (although the OPG booklet details how to obtain a copy), and they had found it very helpful.

4.45 Based on the experiences and perceptions that were relayed, a number of issues emerged relating to the process of applying for IwF.

- One respondent had to complete a second application form because the original was lost in the post, pointing to the importance of simply retaining a copy of the completed application form, a point that could be included in information for applicants.
- Another felt that the process could be simpler.
- Difficulties were experienced when the person for whom they were the withdrawer had more than one account: having to make a separate application for other accounts was felt to be frustrating and inconvenient.

- One person was concerned that the social worker and community psychiatric nurse caring for their relative did not identify sooner that their relative was becoming incapacitated so that POA could have been applied for at an earlier stage.

Fees and timescales

4.46 In addition to the fee to the OPG, two respondents had to pay for medical fees and one had to pay lawyer's fees. All accepted that they had to pay these: two recouped their costs, another did not know that they could but did not mind, a fourth recouped some costs.

4.47 The respondent who had had to switch their application to one for guardianship could not recoup their costs. They were billed £130 by their lawyer and, when they asked the OPG about recouping this, were told they could have gone through the process of applying for IwF for just £30 (sic). They were frustrated at not having known of whom to ask questions and when.

4.48 Respondents reported that from putting an application to the OPG to getting a certificate took from between four weeks to a few months. One said that they understood that the process involved others being asked if they had objections, which would take some time. The legislation requires an intimation period before an application can be granted, during which time the adult's account may be frozen, and in one case this meant that the interviewee had to pay nursing home care charges in the meantime from their own money.

4.49 There were experiences of frustration and difficulty when they needed to access more than one bank account or transfer funds between accounts because of only having access to one. Interviewees had problems dealing with the banks and risked incurring charges when money in the accessible account ran out. Respondents were unsure of whether they had to go through the whole application process again to access funds in their relative's other accounts, and the process was described as restrictive and illogical.

Outcomes

4.50 Respondents said that being able to access their relative's funds had been positive, especially as it meant their relative could access their own money. They had varied experiences from having the responsibility of being a withdrawer: feeling more empowered; frustrations with the banks checking their authority every time they wanted to transfer money; worrying about forgetting receipts and being unhappy with the feeling that they were being checked up on.

4.51 With the benefit of hindsight, all respondents said that they would go through the process again, but had some advice: open a joint bank account in the first place and, "Be patient, there's a lot of things to do and phone calls to make but in the end it's worth it."

ISSUES EMERGING FROM ACROSS THE POSTAL AND TELEPHONE SURVEYS

4.52 From the postal survey of advice organisations and telephone interviews with granters and withdrawers eight key topics emerged. Although based on only a small sample of agencies and an even smaller sample of granters and withdrawers, a number of these issues mirror those raised in the course of the implementation element of the consultancy (see Chapter 3). The data also allow suggestions to be made for where further research could be valuable, focusing in depth on the roles of proxies, particularly attorneys, and the outcomes for granters, proxies and adults, as part of any forward AWI research strategy (see Appendix 4).

The merits of using Parts 2 and 3 of the Act

4.53 Organisations familiar with Parts 2 and 3 and people who had been through the process of applying acknowledged the value of being able to grant POA or have the authority for IwF. Advantages of POA included being able to avoid difficulties or future disagreements. It was empowering, enabling an individual to plan for their future and avoid the potential future use of more restrictive options. The registration and complaints procedures meant there were protective mechanisms built-in for the granter. IwF enabled an individual to manage the affairs of an adult, often a relative, who was no longer able to manage their own finances, which included access to funds that might otherwise be frozen. This procedure was seen as protective of the adult.

The need for greater awareness of these parts of the legislation

4.54 Given the value of these parts of the Act, a strong theme to emerge from both surveys and from the implementation work was the need to improve awareness, both of the opportunities provided and of the criteria that apply. Awareness-raising would need to target not only the general public but also advice agencies and lawyers. Comments by advice-giving agencies suggested information has not always been perceived to be easily available, nor necessarily accessible.

4.55 To encourage early consideration of POA or IwF, increased awareness among health, social care and voluntary and independent sector professionals, working with people who may become or are incapable of managing their affairs, is particularly needed. This could reduce the risk of people being misinformed or informed too late to pursue a less restrictive option, and might overcome some of the perceived difficulties encountered by withdrawers attempting to obtain a medical certificate. The perceived difficulties experienced by withdrawers, once authorised, suggested there is also a need for further awareness-raising or training within banks and finance houses.

The complexity of the processes

4.56 A common theme, which arose through the implementation activity too, was the (perceived) complexity of the processes involved. However, the impact of 'complexity' may

differ in relation to the different parts. The two procedures are distinct: the process of applying and registering POA is largely lawyer-driven, that of IwF is led by relatives or carers of the adult.

4.57 Although none of the small sample of granters interviewed referred to the complexity of the procedure, which was handled by their lawyers, several advice agencies referred to the “cumbersome” nature of the procedure, suggesting that this meant that people had to use lawyers (and incur lawyers’ fees) when “sometimes people just need something simple”.

4.58 In relation to applying for authority to intromit with funds, the “complexity” of completing the application, obtaining a certificate of incapacity and a countersignature, setting up a designated account and giving details of how the transferred funds would be used over three years, fall largely on the shoulders of the lay applicants, with some advice from the OPG or lawyers. Difficulties this raised were reflected in withdrawers’ comments and in agencies’ criticisms of the procedure, implying that the “bureaucracy” could deter people from applying.

Responsibility and accountability

4.59 The complexity of the role of withdrawer extends beyond the process of applying and obtaining authority to the on-going requirement to keep a record of expenditure. Although they had information from the OPG to assist them, the need to be accountable and fear of making errors did create anxieties amongst withdrawers, concerns echoed in the comments of the advice agencies with experience of dealing with Part 3-related queries.

4.60 This reflects a tension between the need to protect an adult with incapacity from potential financial exploitation and to ensure that the ways of guaranteeing accountability are not so off-putting or complex that they deter people from taking on the role of withdrawer.

Support in the role

4.61 The research did not include interviews with people granted POA or acting as attorneys, so it is not possible to assess how supported they feel in the task, although the number of agencies dealing with queries from attorneys suggests there may be a demand for assistance. Withdrawers were aware of supervisory mechanisms and of the extent of their responsibilities, but appeared to be unsupported in the task. This may be significant in the light of the fairly limited take-up of Part 3 provisions overall.

4.62 Although only one withdrawer could recall having seen the code of practice and found it helpful, this may be one avenue for supporting potential and actual withdrawers through the process, although in its current form the code may be perceived to be too complex. Reviewing the code with people who have experience of using it to ensure it is more user-friendly may help to overcome some of the deterrents apparently at work. There may also be a greater role for advice agencies in enhancing their own awareness and, therefore, their ability to support withdrawers.

Limitations

4.63 Several limitations identified in relation to Part 3 echo those raised in the course of the implementation element of the consultancy. Telephone and postal survey respondents drew attention to the limitations of only being able to access one of the adult's accounts.

4.64 Furthermore, Part 3 does not make provision for people to open an account for someone who does not already have one, raising the possibility of an application being instead made for an intervention or guardianship order under Part 6, contrary perhaps to the principle of the less restrictive alternative.

4.65 Limiting withdrawers to people acting in a personal not professional capacity may curtail the usefulness of Part 3 for those moving from hospital to the community. It was suggested that organisations or their representatives should be able to act as withdrawers.

4.66 Limitations relating to finding a suitable proxy were difficult to gauge from the data, although one third of the organisations, which had experienced people with queries about aspects of POA, had specifically dealt with concerns about how to identify someone to be their attorney.

Timescales and costs

4.67 Generally, neither the timescales nor the legal fees involved raised concerns for the small number of POA granters interviewed. Agencies, however, drew attention to the high legal fees experienced by some, and had experience of people approaching them with queries about the costs involved in registration. Medical and legal fees did not appear to be a significant barrier for most withdrawers. The postal survey, however, revealed concerns that the Part 3 procedure may be felt to be too costly, including the fees for medical certificates. For withdrawers, the time taken to process applications, including the required intimation period, had significant implications as during that period the adult's account was frozen.

The principles of the Act

4.68 The five principles underpinning the legislation apply as much to Parts 2 and 3 as they do to Parts 5 and 6, yet none of the telephone survey respondents was aware of the principles at the time they were going through the process. This may be a matter of recall or more immediate concerns with the practicalities of their duties. Arguably, however, the apparent lack of awareness raises two questions about how the principles are being applied in these two non-professional led procedures, and how to ensure that they are observed by withdrawers or attorneys. While perhaps awareness of the principles is less immediately relevant to *granters* of POA, these questions may take on greater salience as more people become withdrawers or act as attorney for someone who has ceased to be able to manage their own affairs.

SUMMARY: KEY POINTS

On the basis of the responses to a postal survey by 23 advice agencies and telephone interviews with three granters of power of attorney and five applicants for intromission with funds, key points emerged in relation to the following.

- The perceived value of these procedures to enable and empower granters and withdrawers.
- The need for greater awareness of these options, among the general public, advice agencies, lawyers, health, social care and voluntary and independent sector professionals. Banks and financial institutions also need to make staff better aware of the authority granted to withdrawers.
- The perceived complexity of the processes involved in registering power of attorney or applying for authority to intromit with funds.
- The importance of support for people taking on the responsibility of withdrawer, particularly in the context of the need for clear mechanisms for ensuring financial accountability.
- Limitations of Part 3 in terms of: being able to access just one account; not being able to open an account for someone who does not already have one; only private individuals, not people acting in a professional capacity, being able to function as withdrawers. The time required for intimation may also pose practical difficulties for applicants for intromission with funds since during this period the adult's account will remain frozen.
- The unfamiliarity of withdrawers and granters with the five principles of the legislation.

CHAPTER FIVE

RESEARCH ON PART 6 OF THE ACT

INTRODUCTION

5.1 Issues raised in the course of the implementation stage of the consultancy relating to the operation of Part 6 of the Act informed some the aims, objectives and study design of the research into guardianship and intervention orders. Based on thirteen in-depth case studies, the research provided an opportunity both to reflect upon a number of issues and to explore in greater detail, from the different perspectives of those involved, aspects of the process, such as assessment and decision-making, and the immediate outcomes for the adult with incapacity.

5.2 The three aims of the research were to:

- identify the factors informing usage, processes and outcomes relating to the implementation of Part 6;
- describe the perspectives and experiences of all those involved in considering an application, making an application and putting an order into effect;
- draw from these accounts generalisable statements relating to policy and practice.

5.3 To meet these aims the research on Part 6 had the following objectives:

- to identify the determinants which inform usage;
- to describe the infrastructure issues informing usage;
- to explore how assessment and decision-making processes inform particular courses of action;
- to analyse the ways in which the legal procedures and processes meet the objectives of the Act;
- to examine the immediate outcomes resulting from the process;
- to outline possible issues arising from the interface between the Act and other relevant legislation.

SCOPE AND DESIGN OF THE RESEARCH

5.4 The focus of the research was on the processes and outcomes in relation to the consideration of an application for guardianship or for an intervention order – including welfare, financial, and combined financial and welfare provisions. To obtain the perspectives of the range of people involved in these processes a qualitative, case study approach was used. A small sample of cases, in three local authority areas, was identified for intensive study. In each case, the aim was to obtain the views and experiences of the adult, their nearest relative or people significant to the adult, the welfare or financial guardian/intervener, the Mental Health Officer (MHO) undertaking the assessment under the legislation, the medical assessors (general practitioners and consultant psychiatrists), legal advisors, and appropriate others involved in the process.

5.5 Semi-structured interview schedules were designed around a core set of questions covering the different stages of the process, from initial consideration of an application, to assessment and decision-making, submission of an application, court processes and immediate outcomes. A briefer version of the schedule was developed to enable, where possible, the adult with incapacity to participate. The design of the schedules allowed core themes to be explored, but enabled each person to express their own views in their own terms and according to their particular role in the process. The interview responses were analysed using a qualitative data analysis package, which assisted with the identification of key themes.

Sampling

5.6 Cases were selected from three local authority areas, which had been chosen on the basis of two criteria: broad patterns of usage of Part 6 of the Act; geographic spread across Scotland and type of area (rural, mixed/suburban and urban areas).

5.7 The initial aim was to recruit a sample of 20 people, including 15 people for whom an application for a guardianship or intervention order had been made and a further five people where an application under Part 6 was seriously considered (for example a case conference held) but an application was not pursued.

5.8 A two-step process of case identification was developed.

- Step 1: the lead AWI officer in each of the three local authority areas was asked to provide brief details of twelve anonymised cases on a standardised ‘case list’. The cases were randomly selected from all completed cases where action under Part 6 had been considered or pursued over the period April 2002–March 2003.
- Step 2: on the basis of the ‘case lists’, the researchers aimed to select a sample which included a range of different types of actions and different causes of incapacity.

Obtaining consent to participate

5.9 Formal written consent or, as appropriate, the agreement of a nearest relative or welfare guardian with the relevant authority, was sought in each case. A covering letter, information sheets and consent forms were designed for the adult and for appropriate proxies. To ensure the confidentiality of those who subsequently chose not to take part the first approach was made either by the Mental Health Officer involved in the case or a care manager. Consent forms were then sent directly to the researchers. Meetings were held in each area with the lead officer and/or the relevant MHOs or care managers to discuss the purpose and design of the research and to explain consent procedures.

The final sample of cases

The sample of cases

5.10 The final sample of cases related to thirteen adults and generated a total of 58 interviews. In ten of these cases a guardianship or intervention order was granted and in two cases alternative avenues were pursued. In the remaining case, the initial discussions concluded in consideration of power of attorney, rather than an action under Part 6, although subsequently a financial guardianship order was pursued. Of the 13 cases, two local authorities accounted for six cases each. Only one case was recruited from the third local authority.

5.11 The sample included adults with learning disabilities, dementia, acquired brain injury, mental health problems and those with a combination of physical and other disabilities. It included six women and seven men whose ages ranged from 16 years to 93 years. A summary of each case is outlined in Appendix 5. Nearest relatives were the applicants in three cases where an order under Part 6 had been pursued. In the remaining nine cases the local authority was the applicant.

5.12 The range and number of people interviewed reflected the characteristics of each case. In several cases, the adult or their nearest relative indicated that they did not want the researchers making contact with particular professionals or individuals. In one case a professional refused to take part. Table 5.1 summarises the range of people interviewed.

Table 5.1 Range of people interviewed

Role in the process	Numbers interviewed
Adult	6
Nearest relative/significant other	7
Financial attorney	1
MHO	13
Consultant psychiatrist	6
GP	7
Private solicitor	4
Safeguarder/Curator ad litem	2
Social worker/care manager	7
Care home staff/managers	3
Supervising MHO	1
Other professional	1
Total	58

Issues arising from the sampling

5.13 The size of the sample is clearly smaller than the 20 it was hoped to recruit. This was due largely to practical difficulties arising through the use of ‘gatekeepers’. In one local authority, competing demands on the MHO’s time made it difficult for them to approach people on behalf of the research. In the other areas, time demands on MHOs and care managers meant there was a

delay before they could approach the adults or families concerned with the consent papers. A number of people when approached declined to take part. The time taken to identify and approach substitutes further delayed the process. As a result, the recruitment of even this smaller number of cases took much longer than had been anticipated.

5.14 The research raised a number of ethical issues, specifically, for instance, establishing that an adult is making an informed decision to consent to research, that they understand the purpose and implications and retain this information. The relative nature of incapacity suggests that although an adult is unable to make informed decisions relating to their financial affairs or some aspect of their welfare, it cannot be supposed that they are unable to make an informed decision about their participation in research. Difficulties, however, may arise if there are doubts as to the adult's capacity to consent and no-one else has the legal authority to agree on their behalf. Guardians, for example, may not have specifically sought this power.

5.15 In the majority of study cases a nearest relative was able to agree on behalf of the adult. Additionally, the adults interviewed for the study indicated both prior to, and at the beginning of, the interview that they were prepared to be interviewed. Several also indicated that they did not want certain people to be contacted as part of the research, suggesting that they did have an understanding of the implications.

TRIGGERS TO CONSIDERING USING THE ACT

5.16 Across the sample, reasons for pursuing an intervention under Part 6 fall into two broad, and *overlapping* groups: to protect the adult from immediate risk; and to establish legitimate decision-making authority over the adult's current and future financial and/or welfare affairs.

Protecting the adult/risk minimisation

5.17 Clearly, the interests of the adult with incapacity run throughout all actions under the legislation, or where alternatives are sought. However, in some cases the trigger to an action under the Act was the immediate risks to which the adult was exposed. In these cases, legal authority was sought to make decisions to minimise the assessed risks. Examples include: authorising the adult's move to a new home; to give formal carers (for instance, nursing home managers) the legal authority to prevent someone leaving accommodation inappropriately or convey someone back if they abscond; to obtain legal backing to ensure that an adult, otherwise reluctant to engage with services, accepts support to enable them to stay in their own home; or to ensure the appropriate management of an adult's finances, either because they have substantial resources or for debt management.

Establishing decision-making authority

5.18 In other cases the impetus came less from immediate risks to which an adult might be exposed than from the need to formalise the decision-making authority of nearest relatives

through their appointment as guardians. In the broadest sense, the trigger in these cases was to empower relatives. But empowerment has both a positive and negative dimension. As a positive step, nearest relatives sought to acquire the legal authority to make decisions on behalf of an adult with incapacity – both in terms of day-to-day decision-making (including being consulted on health care or treatment decisions) and planning for the future.

5.19 However, this authority was also sought by some nearest relatives as a way of redressing the perceived power imbalance between themselves and agencies and professionals involved in the adult's care. In three cases, where nearest relatives had applied to be welfare guardians, the spur came from their perceived negative experiences of previous medical or social work decision-making in relation to the adult, and a desire to have some authority over future decisions.

5.20 Another 'negative' trigger was the need to invoke the law in the face of the apparent intransigence on the part of other bodies. In one case, a financial intervention order was obtained to try to obtain access to a bank account held by a bank in England that refused to acknowledge the authority of the adult's financial attorney.

STARTING THE PROCESS

Knowledge base

5.21 To start a process presupposes knowing about it in the first place. A number of the cases in the research project were among the first undertaken in a particular geographic area, or the first experienced by, for example, a GP or a lawyer. As a result, a lack of familiarity with, and understanding of, the process of applying for an intervention or guardianship order, is likely to reflect the comparative newness of the legislation at that time. To get a sense of how much people understood about the process it is also necessary to distinguish between the different parties involved.

Professionals

5.22 Among the professionals, MHOs were perhaps the most knowledgeable about the Act and the processes to be followed. Others, including solicitors and GPs, would look to the MHO for advice. However, at this early stage, several of the MHOs reported feeling unfamiliar with the process, or only marginally ahead of the game:

“People always tend to look to the MHO for guidance. It was only a two-day training course that made me more expert than them – and I had read it [the Act].”

5.23 Consultant psychiatrists appeared familiar with their role under the legislation. GPs, however, were less clear and less comfortable when approached to provide a second medical opinion. One GP, for example, had been “surprised” to find they actually had a role, and several reported having to read up on the Act when approached to make an assessment. A number

queried whether as GPs they were even necessarily the best people for the job, either because they felt it required specialist skills to assess *mental* capacity, or because they did not feel they would necessarily know the adult well enough to make a judgement. Private lawyers interviewed were also aware of being on a learning curve with regard to the requirements of the legislation. Both lawyers and GPs felt that the infrequency with which they were referred or handled cases (at that time) made it difficult to build up expertise.

5.24 The comments of two MHOs from one area suggested that a combination of limited training and a perceived ambiguity in the local authority's own position as to when and when not to use the Act could lead to someone being referred too rapidly by social workers or care managers for an assessment under Part 6.

5.25 Particular training issues may arise in relation to young adults. A lack of awareness of the legislation among children's and young people's services may mean that when someone reaches 16 years old the processes are not in place to ensure that someone has been authorised to make decisions for them.

Non-professionals

5.26 In cases where the local authority was the applicant, nearest relatives, including those who would subsequently be guardians, largely learned about the Act and the process of applying from the MHO. For 'untrained' non-professionals, particularly private applicants, the 'learning curve' could be even steeper than that for professionals. Lay people were largely reliant on their own research skills and/or the expertise and, in the absence of expertise, the willingness to learn among professionals, for example, with a supportive community psychiatric nurse. While potentially 'empowering', the comments from interviewees suggest how isolated and under pressure people could feel. One nearest relative, applying to be welfare and financial guardian, commented:

"I've had no support or help from anybody. I had to investigate it all myself, and I still think I know more about it than anyone in [local authority], apart perhaps from the MHO involved.... Afterwards I realised the social work service would have done the whole thing for you. I did it totally alone.... [T]here should have been resources given to local authorities or voluntary agencies to give proper training to users."

REFERRAL MECHANISMS

Local authority-led and private-led processes

5.27 In the majority of cases where the local authority took responsibility for steering the process, the starting point tended to be a referral from a social worker or care manager to an MHO service manager or District MHO. The senior MHO either retained the case or allocated it to another MHO. In one case, for example, the adult's nearest relatives were discussing the

possibility of obtaining guardianship with the adult's social worker, who raised this with the District MHO for the area, who then progressed the application.

5.28 MHOs take responsibility for obtaining medical reports and co-ordinating case conferences. In one case, however, 'referral' to the GP was via the adult and their paid carer who presented the papers to him in the course of a surgery appointment. As the GP commented,

"I don't think that turning up for a normal appointment with the form is really the right way to go about it. I don't think they really knew how to approach it."

The GP concerned took the papers away for consideration before completing the forms.

5.29 In private applications it is the nearest relative (as applicant), their solicitor, or, in one case, a health care practitioner assisting the nearest relative, who made the 'referral' to the social work and medical assessors. One private applicant described their experience:

"I had to source all the specialists. I saw the GP, he'd never done one before, I contacted the psychiatrist, the MHO. I had to write to them all. The psychiatrist only did it as a favour really."

5.30 Difficulties could be experienced identifying relevant people, either because it was not clear whom should be contacted, or because people were not available. In one instance the professional assisting the nearest relative described writing letters to "four or five" different people in the social work department before an MHO was identified. In another case, an initial approach to the general psychiatric hospital for a consultant's report resulted in "no take-up there".

5.31 As indicated above, private applicants were working very much on their own, their comparative isolation almost intrinsic to the application pathway. Local authority applications start from a case conference at which the appropriateness of guardianship or an intervention order is part of a multi-disciplinary discussion. Private applications start from a referral to an MHO and forms being sent to medical assessors "sourced" by the applicant. As discussed in the following section on assessment, the joint working that the case conference process builds in is not extended to private applications.

Issues of geography

5.32 In two cases, for different reasons, more than one local authority was involved in the process. In one, the MHO, attached to a specialist health care unit where the adult was a patient, facilitated the application for guardianship. The health care unit provided a Scotland-wide service. Prior to the order being granted, the adult had been placed in a nursing home under Section 18 Leave of Absence of the Mental Health (Scotland) Act 1984. The nursing home placement was funded by the local authority for the area where the adult had lived prior to admission to the unit. Responsibility for supervising the guardianship order was transferred to an MHO in a third local authority covering the area in which, nursing home was located.

5.33 In the other case, one local authority drafted in an MHO from another area to undertake assessments in relation to a number of people moving from a hospital to homes in the community. The hospital was located in a third local authority area, and hearings had to be held in the sheriff court covering that area.

5.34 Although very specific, these cases draw attention to important issues that may arise in other contexts. In the first case described above, the rationale behind the local authority in which the specialist unit was based making the application was one of efficiency. This avoided MHOs from across Scotland having to come to the unit to undertake assessments and initiate applications in relation to people with whom they may have been unfamiliar. It did, however, raise legal and organisational ‘jurisdictional’ issues.

- A safeguarder appointed in the first case queried the appropriateness of the hearing being held in the sheriff court for the area in which the specialist unit was based, given that the adult was no longer resident within this area.
- If someone moves from their home, to a national unit in a second area, and subsequently moves to long term care in a third area, this may raise the question for local authorities of where the adult is “habitually resident”. This has implications for identifying responsibility for supervising the order.

5.35 More practically, the involvement of different local authorities at different stages may raise issues of communication between agencies. For instance one supervising MHO had not received background information on the individual for whom they had on-going responsibility.

5.36 On the other hand, if a case is not transferred, then supervising an order in relation to someone at some distance may raise practical difficulties. This relates not just to local authority applications but also private applications where the local authority is required to provide an MHO report, and subsequently to supervise and review the case. This may involve adults across Scotland or other parts of the UK.¹³

Prior knowledge of the adult

5.37 The extent to which the MHO and medical assessors knew, or were familiar with, the adult was highly variable, from cases where the MHO had in-depth knowledge from having worked with the adult personally for some time, to ones where the adults was completely new to the MHO. Consultant psychiatrists and GPs also varied in terms of their familiarity with the

¹³ The complexities of cross-border working between Scotland and England and Wales were referred to in the context of applications. Although it was not a case in the research sample, an instance was described of an action in relation to someone who had been living in England but had returned to Scotland. This had required the involvement of both the Office of the Public Guardian in Scotland and the Court of Protection for England and Wales.

adult. The majority of GPs interviewed had had some prior knowledge of the adult, in several cases extending over many years. In one case, however, the GP had never met the adult before. Similarly, consultants could either have been aware of, or been treating, the person for some time, or might not have met them before. There were, therefore, cases where there had been significant engagement with an adult by key players prior to the application process, and others, where, as in one private application, “the MHO and the doctors were three strangers to [the adult]”.

5.38 Of the professional groups interviewed, GPs placed the most importance on having some prior knowledge. This, however, may reflect a lack of confidence in their ability to assess the “mental competence” of someone with whom they are unfamiliar.

5.39 It was not possible to indicate from the data what, if any, impact the degree of prior knowledge of the adult had on the process or the outcomes. Prior knowledge facilitates a cumulative picture to be built up of an adult’s capacities and areas of incapacity. If few or none of those involved in the assessment have known the person over a long period, “at the end of the day there is not a lot to go on to determine what powers to apply for”. On the other hand, it may be that new people may bring in a fresh assessment.

ASSESSMENT AND DECISION-MAKING

Assessment processes

5.40 There are, in effect, four overlapping assessment processes: the MHO assessment, the assessment by the consultant psychiatrist, the GP assessment and, where appointed, the safeguarder’s or curator’s assessment.

What are the assessors looking for?

5.41 From their accounts of the assessment process, MHOs look for four things: the appropriateness of guardianship; the potential for alternatives; the ‘capacity’ of the adult to make a judgement; and the appropriateness of the person nominated as guardian.

5.42 Clearly, the first three elements are linked: the potential for alternatives to guardianship, such as the appointment of an attorney or someone being enabled to move to a nursing home voluntarily, will hinge on an assessment of an adult’s capacity to make an *informed* judgement. While the assessment of incapacity is the formal responsibility of the medical assessors, the MHOs were, nonetheless, weighing up in their own minds the adult’s level of understanding, and communicating this to the medical assessors. In one case the MHO felt that the adult may have the ability to grant welfare and financial power of attorney. The MHO and Responsible Medical Officer subsequently undertook a joint visit to assess whether the adult fully understood the implications of granting POA.

5.43 Consultants and GPs were looking for similar things: “comprehension”, “capacity”, “competency to make decisions”. In several cases, where the adult had limited communication ability, the clinicians specifically looked at these skills. One consultant observed that people may have intellectual capacity but this may not be picked up if an inappropriate means of communication is used.

5.44 Safeguarders or curators ad litem, appointed by the courts, appeared to have a similar agenda to that of the MHOs, looking to establish through their assessment the reasons why guardianship was being considered; whether it was in the adult’s best interest; whether or not the adult met the criteria; and the appropriateness of the nominated guardians. The assessment included both direct contact with key players in the process and commissioning independent psychiatric and social work reports.

The assessment process

Collecting evidence

5.45 MHOs described a fairly extensive evidence-gathering process, involving the adult, their nearest relative, paid carers, social worker or care manager, clinicians and other professionals who might be involved or services the adult might use. They might also look at past files or reports. Consultants’ and GPs’ contacts varied, with a focus on those with more immediate contact with the adult, such as paid carers and nearest relatives, as well as with the adult and with each other. Either through direct communication, or via the independent psychiatric and social work reports, safeguarders or curators would collect evidence from the adult, their nearest relative, paid carers, social worker and MHO, as well as evidence from the adult’s past history.

Talking to each other

5.46 In local authority applications, the key forum for joint discussion is the case conference. In addition to the MHO, consultant psychiatrist, social worker or care manager, the nearest relative and the GP, those invited to attend could include relevant care staff or community support workers, a community psychiatric nurse and nursing home or residential care managers. Housing department and police representatives were also invited in one case.

5.47 In several cases, GPs were integral to the collaborative process, sometimes through informal or on-going discussions rather than attending formal case conferences, for which they were unable to find the time. In other cases, however, the GPs appear to have been almost on the periphery of the process, undertaking a discrete task independently. Perhaps the most extreme example was the case described above where the GP was approached with the forms by the adult and their carer in the course of a surgery appointment, without any prior discussion. Nor was there further discussion with any of the other professionals involved and the GP had also not been informed of the outcome.

5.48 In one area representatives from the local authority legal department were also included in the case conferences for several adults. In a second, the relevant reports were forwarded to the local authority solicitor (as applicant). Respondents did not include the lawyers among those they described as attending the case conferences, although it is possible that this may have been an issue of recall on the part of those interviewed.

5.49 Given the role of local authority solicitors in drawing up the summary application, including the powers sought, and in cross-examining witnesses in court, the role of the legal department was clearly more than administrative. There were insufficient data from the study to indicate how collaborative the process is with this group of key players. The potential was, though, illustrated by the comments of one MHO, who described how important and valuable their on-going discussions with the legal department were in determining the best way forward.

5.50 Case conferences provided a framework for group or joint decision-making, allowing for a range of different perspectives to be highlighted and discussed. In addition to the formality of case conferences, examples were also cited of additional informal meetings, “long conversations” between different professionals, and of joint visits. In one case, the nature and degree of joint working between the NHS, social work and a nursing home were felt to have been fundamental for achieving a good outcome for the adult, without recourse to the legislation.

5.51 In private applications, where there would be no case conference, there was far less opportunity for collaborative and joint discussion between the different professionals involved. While there might be “conversations” between the MHO and medical assessors this was largely about information gathering, not collectively discussing or reaching a joint decision: each party was largely working independently of the other. The advantages of joint working that the system of case conferences encourages, therefore, do not feature in such applications.

Involving adults

5.52 Specifically in the context of assessment, the data indicate the dual nature of assessors’ contacts with the adult. The aims of practitioners were, as per the principles, to ascertain the present and past wishes and feelings of the adult, and, where expressed, to identify the extent to which those wishes and feelings are based on an informed judgement. This duality gives rise to a number of scenarios.

- In several cases, MHOs, consultants and GPs were unable to communicate directly with an adult with limited communication skills, relying on observation of the adult in their normal environment and drawing on the knowledge of those more familiar with the adult, for example, a paid carer or nearest relative.
- In at least two cases the adults concerned had impaired judgement but at the time of the assessment were felt to be able to understand sufficiently what was proposed and to express an informed view or choice.

- A further scenario, suggested above, arose when people were able to indicate what they wanted, but this was assessed as being based on impaired judgement. For instance, an elderly woman with dementia was most adamant about wishing to remain in her home. However, she was felt to be at risk and unaware of the dangers to which she was exposed.
- In at least one case, an adult was able to articulate, but felt not to be able to comprehend what was being said, or indicate their own wishes.

ASSESSING CAPACITY

5.53 As already indicated, although determining incapacity is formally a medical responsibility, others too may be making ‘informal’ assessments which subsequently contribute to the formal assessment. What assessors were looking for was evidence of someone’s ability to understand and/or take actions to minimise risk – now and in the future - and a consistency in this understanding. In one example, where an order was not pursued, the adult was felt to be able to indicate that they understood that they were no longer able to look after themselves, and that they were in positive agreement about a move to a particular nursing home – not just acquiescing. In cases where an order was pursued, the adult was either unable to understand the risks to which they may be exposed (or to which they may expose others) and/or to take actions to minimise the risk.

5.54 In the majority of the sample cases there was agreement between professionals on the nature of the adult’s incapacity. Through the additional perspective brought by an MHO, in some cases the initial view of the adult’s incapacity to make an informed judgement was modified. In two cases where POA was proposed in place of a guardianship order, the clinicians agreed with the MHOs that, although the adults lacked capacity in many areas, they nonetheless understood the implications of what they were agreeing to and were clear about who they wanted to take on these powers. In a case where eventually no action was taken under the Act, the MHO was able to present evidence of the adult’s capacity to agree to move to a nursing home sufficient to convince a psychiatrist already questioning the adult’s degree of incapacity.

5.55 The cases where alternatives were pursued begin to demonstrate a more sophisticated understanding of incapacity: that it is not all or nothing. Across the professional groups, the basic premise of AWI, that a person may be legally capable of some decisions and actions and not capable of others, was generally welcomed. From the cases in the sample, however, people may fall into three groups determined by extent of assessed incapacity:

Level 1: global incapacity

- In some cases incapacity was described as total or global. These were people who, it was assessed, lacked capacity in all five areas defined in the legislation. Due to the nature of the cause of incapacity none were likely to regain capacity.

Level 2: partial incapacity

- Other adults were judged to have capacity in some areas, but not others, exemplifying most clearly the relative model of incapacity built into the legislation. Commonly this group of people were considered able to make day-to-day decisions about what to wear, what to eat, and what to do during the day, but unable to anticipate risks, make informed decisions about their own future, or fully understand the implications of, for example, signing a tenancy agreement. For example, one adult was deemed to be capable of instructing a lawyer, but to be unaware of the difficulties she had maintaining her living circumstances. Despite impaired decision-making capacity, several adults were assessed as able to express a coherent and consistent judgement about who could make these decisions on their behalf. In one case the MHO described the need to balance the risks arising from the areas in which the adult lacked capacity and their rights in those areas where they still had the ability to make informed judgements. Where the balance is struck may depend on other options for risk minimisation, including the adult's capacity to authorise someone to make decisions for them, but also the availability of additional services and/or medication.

Level 3: capacity

- Adults may be assessed as having the capacity to communicate and make informed judgements about both day-to-day and future decisions. Only one adult within the sample fell into this category, and here the assessment hinged on his apparent willingness to make the 'right' decision to minimise risk, that is to move into a nursing home without the need for a guardianship order.

5.56 Although not directly evident from the sample cases, several practitioners underlined the difficulties of assessing incapacity where this changes, fluctuates or is intermittent, or where a combination of physical and mental health problems makes it difficult to assess whether the person has capacity or not.

DETERMINING ACTION

Considering alternatives

5.57 In addition to the central issue of capacity, three other factors emerged as significant in the decision to consider alternative courses of action. First, the important role of the MHO in raising questions, including those relating to the adult's capacity, and proposing alternative solutions. In each of the three cases where alternatives were seriously considered the MHO was a prime mover. Second, contingent factors may influence consideration of alternatives, specifically the availability of an individual the adult knows and trusts to appoint as their welfare and/or financial attorney. Third, in two cases where welfare guardianship was pursued, the point was made that the less restrictive option had, in effect, already been attempted, possibly even beyond the point when action should have been taken. From the applicants' point of view in

both cases what was significant was not just the immediate context but what had been happening over a number of years.

Type of order

5.58 Whether the action is aimed at addressing welfare and/or financial affairs is obviously contingent on the particular circumstances of the case: the areas over which the adult is unable to manage their affairs and the decisions someone requires the authority to make on their behalf. In most cases where the local authority was the applicant the adult had too little income or was reliant on benefits so it was unnecessary to obtain a financial order. In a case where a local authority applied for financial guardianship the adult had inherited a large sum of money which they were not thought to have the capacity to manage. A solicitor was nominated as the adult's financial guardian.

5.59 In another case the nearest relative applied for both financial and welfare powers. In this instance it was suggested that the application for financial guardianship, in relation to an adult with no source of income other than benefits, was possibly based on erroneous advice, reflecting the inexperience of all those involved. The process, including the need to complete a management plan, and an initial requirement to pay caution (subsequently overturned by a second sheriff), were described by the applicant as a "disaster", something not to be "touched with a bargepole". It was only subsequently that the applicant found out that management of the adult's finances could have been achieved by a Department of Work and Pensions appointeeship.

5.60 In two cases a financial intervention order was considered. In one an application was made by the local authority (together with an application for welfare guardianship) as a means for attempting to release monies held by the adult in an offshore account, and the bank managing the account would not recognise the powers of the Scottish financial attorney. It was hoped that a financial intervention order would be the least restrictive option for the adult, while also giving some legal authority to allow the money to be released.

5.61 In the other, a financial intervention order was sought by a local authority as a way of circumventing the prohibition on local authorities acting as financial guardians. It was recognised that what was required was a longer-term mechanism to assist the adult to manage her financial affairs, including preventing the accumulation of debt. The local authority policy at that time discouraged the appointment of a solicitor, funded by the council, to act as financial guardian. The sheriff, however, refused to grant the financial intervention order. The adult's continuing financial difficulties, together with a loosening of the local authority policy on meeting the fees of solicitors acting as financial guardians had since opened up the possibility of applying for financial guardianship in this case.

5.62 In only one welfare guardianship cases did the possibility of an intervention order as a less restrictive means to meet welfare needs appear to have been considered in depth. In the majority of cases discussion appears to have centred on the appropriateness, or otherwise, of using guardianship to achieve objectives. This could be a reflection of the on-going needs of the adults concerned, or there could have been an element of erring on the side of caution.

5.63 For the one exception, an adult moving from hospital to a new home in the community, there was a discussion around whether what was required was a short term intervention order to effect the move, including making it possible for a tenancy agreement to be signed, or whether long term powers were needed. The uncertainty of those involved in the discussions, together with a belief that if the application were thrown out they would have to recommence the lengthy application process, resulted in the local authority applicants “hedging their bets” and submitting an application for both an intervention and guardianship order. The sheriff granted the guardianship order on the basis that the adult needed longer-term protection.¹⁴

DETERMINING POWERS

5.64 Assessment of incapacity is fundamental to establishing whether the adult comes within the purview of the legislation. But the relative nature of incapacity takes on additional significance in the context of determining what powers to seek. As incapacity is not all or nothing, the powers sought should relate to need. The extent to which they do is contingent on who draws up the powers, who sees them and at what stage. On the basis of the research data, from the sample cases there seem to be three approaches.

- Powers drawn up as part of joint discussions: in several cases powers were drawn up in the context of case conferences or joint discussions. In one, this involved several meetings over a number of months and the MHO was clear these were not just about whether to pursue an order or not, but also a forum for a joint discussion on the powers sought.
- Powers drawn up by local authority or private solicitors, largely separate from the assessment process and then presented for ratification. Rather than emerging from multi-disciplinary discussion the list of powers is presented from ‘outside’. In private applications solicitors discuss the powers with the applicant, but there may not be any discussion with the other professionals involved, although they may have sight of the powers before the application is submitted.
- Powers drawn up by solicitors but not seen at the time the application is submitted. Three practitioners, from two areas, described how applications, including the powers sought, were prepared by local authority or private solicitors *after* they had undertaken their own assessments. One MHO, for example, commented,

“You need to see the application before you write the report. I have still never seen the application in this case, and still don’t know what powers she has got.”

¹⁴ Section 58(3) the Act does make provision for a sheriff to treat an application for guardianship as an application for an intervention order if he or she is satisfied that an intervention order is sufficient.

All three practitioners made the point that they had learned from experience and would now ask to see the application before preparing their report.¹⁵

5.65 The research did not have access to the applications made or orders obtained: information on the powers is therefore based on respondents' recall. From this, it appears that while in some cases the links were clearly made between the powers and need, other applications included a "list" of powers almost as standard. Discussion of the origin of these "lists" suggested that they were "borrowed" from various external sources: the list of suggested powers in the Part 6 code of practice, for example, the powers previously granted to a tutor dative, or a copy of "the style of setting out the welfare powers". One MHO suggested that applications may include extensive lists of powers to preclude having to return to court later for further powers. Commenting on this, the respondent added,

"powers should relate to a specific capacity at a specific time – not to give people the authority to ride roughshod over people at will."

5.66 The interviews with adults were not able to uncover to what extent, if at all, people were aware of, or were affected by the powers others had in relation to their lives. In one case, however, the adult was unhappy about their place of residence because of the locked doors, describing how moving to this accommodation, "Doesn't feel like a step forward, feels more like a step back." Practitioners working with one adult described how they had "rankled" at the powers the order gave social work over where they stayed and the authority to access their home.

5.67 The interview data, therefore, illustrate the duality of the powers: they give power *to* people to support and protect, but, by the same token they also give power *over* an adult.

DECISION-MAKING: RISKS, CAPACITY AND POWERS

5.68 Summarising the ways in which risks, capacities and powers work together, it is useful to refer to the earlier discussion of the determinants for action under the legislation (see above). Here it was suggested that in some cases interventions were aimed at risk management, while in other cases the focus was on establishing decision-making authority. These two stimuli are reflected in the decision-making processes.

5.69 What the data suggest are two orientations informing decision-making: a risk orientation, especially in relation to adults who have impaired judgement but are able to articulate and act; and a decision-making orientation aimed to identify someone with legitimate authority to make day-to-day and future decisions on behalf of an adult with 'global incapacity'. These orientations are not mutually exclusive – but a way of teasing out the relationships between risks, capacities, powers and immediate outcomes. (Appendix 6 presents these models diagrammatically.)

¹⁵ Part D of the Mental Health Officer's Report to Accompany Application for Guardianship (Regulation 4(a), Schedule 2), concerned with the appropriateness of the order applied for, does require the MHO to indicate that they have "read the application, have taken note of the powers sought and the period of guardianship being applied for".

Model 1: Risk orientation

5.70 In Model 1, the trigger to action is the actual or potential risk to the adult and/or to others, and the extent to which the adult understands the risk to which they are, or could be, exposed. Where the adult is able to comprehend or judge risks, including their inability to live on their own, no further action would be taken under the legislation. Where an adult has impaired judgement but has the capacity to minimise risk by appointing someone to assist with their financial or welfare affairs, then Part 2, rather than Part 6, of the Act may be invoked. Where, however, an individual is assessed as lacking capacity to assess financial or welfare risks, make decisions for their future, or appoint someone to act on their behalf, then Part 6 would be invoked. In this instance, powers sought may be thought of as powers *over* the adult.

Model 2: Decision-making orientation

5.71 In Model 2, the focus is on the actual or potential vacuum in decision-making authority in relation to an adult with no or very limited capacity in terms of the five dimensions described in the Act. The focus is less on minimising immediate actual or potential risk, than to give legitimate authority to someone to make future social, healthcare and financial decisions on behalf of the adult. The emphasis is, therefore, on giving powers *to*.

5.72 Within the sample, risk-oriented cases were largely initiated by local authorities. Cases where the impetus was to obtain decision-making authority were initiated by private individuals (although the applicant may be the local authority).

MAKING AN APPLICATION

Applicants and interveners

Choice of applicant

5.73 Three applications were made by nearest relatives, all of whom subsequently became guardians. These included applications for financial-only, welfare-only and financial and welfare guardianship orders. The local authority was the applicant in the remaining cases, in two of which the nearest relative was proposed as guardian. In another two cases, seeking financial powers, the local authority made the application and solicitors were proposed as financial guardian and financial intervener respectively.

5.74 In one case pragmatics appeared to inform the decision about who would be applicant: the nearest relative, subsequently appointed guardian, lived some distance away. In another, the relative was unaware that the local authority could have applied on their behalf. The potential costs involved apparently discouraged one nearest relative from making an application. In other cases, however, it is not clear from the data why it was the local authority rather than the nearest relatives, or vice-versa, who took on the responsibility of making the application.

Choice of guardian or intervener

5.75 Four welfare guardianships were held by nearest relatives, two jointly by parents of the adult. In three of these cases an application for guardianship had been initiated specifically to give the nearest relatives the authority to make decisions on behalf of the adult.

5.76 In the other Part 6 welfare guardianship cases, the local authority was appointed guardian, either because there was nobody else able to perform the role, or, for three adults, because relatives or friends, who might have taken on the role, stated a preference for the local authority to act as guardian. Since a local authority is not able to act as a financial guardian, two of the three financial guardians appointed were nearest relatives, the third a solicitor. A solicitor was also appointed to act as a financial intervener in one case.

5.77 In the one case where welfare and financial POA were granted to a private individual, in response to the MHO's advice, the roles were shared with the solicitor involved in drawing up the papers. This was seen as a way to support the attorney in undertaking these roles, particularly if difficult welfare-related decisions needed to be made in the future.

Co-ordination of the application process

5.78 Local authority applications were largely co-ordinated by an MHO, whose role included, in addition to preparing the MHO report, liaison with the clinicians providing medical reports and with the council solicitor preparing the summary application. Many MHOs were familiar with taking a very active part in Section 18 applications under the Mental Health (Scotland) Act 1984 and assumed a similar role for AWI applications. However, several pointed out that although they often felt as though they had the major responsibility for the application, under AWI the application is made by the local authority, not the MHO. At the time of these applications the legislation was new to MHOs who were still adjusting to this different role.

5.79 Two private applications were largely co-ordinated by nearest relatives with assistance and advice from their solicitors, and, in one case, a nurse. Both relatives were also caring for the adults concerned and found the co-ordination role stressful and demanding of their time.

5.80 MHOs, solicitors, and, in private applications, nearest relatives had an important role in facilitating communication and, where necessary, keeping the application process moving. This included discussions with GPs initially reluctant to complete a report, and a request to one GP to make necessary amendments to the report.

5.81 Another element to co-ordination was to ensure that the different reports were written within the required timeframes. In five cases the requirement to lodge an application within 30 days of the medical reports appeared to create difficulties. In three of these medical assessments had to be completed a second time because they did not meet the required timescales. As one private applicant commented,

“It’s very difficult getting three people from different places with different funding to all do the assessments in 30 days.”

Two MHOs suggested that the 30-day limit was particularly tight when the MHO and none of the other practitioners were familiar with the adult and needed to undertake a full assessment and determine the powers. Given the risk of error, one MHO described how she had felt she had to go through the application “with a fine tooth comb” to make sure it was correct.

Reports

5.82 The process of completing the standard report forms raised a number of recurrent comments. For MHOs the structure of the report form was felt to be quite straightforward, although completing it time-consuming. One MHO thought that the prescribed layout of the form helped her ensure that the application related to the principles of the Act.

5.83 Several doctors had some problems with the prescribed format of medical reports, in relation to their being insufficient space to summarise their assessment of the adult or difficulties with some of the choices they were asked to make on the form, leading to them adding extra information to clarify their responses.

5.84 The extent to which the reports, once written, were shared varied. Some MHOs and Responsible Medical Officers had shared the content of their reports with nearest relatives and carers. In the two private applications the report was prepared for the applicant to lodge with the court, so that nearest relatives as applicants received copies. In both cases, however, the MHO did not have sight of the medical reports.

LEGAL PROCESSES

Court procedures

5.85 In only one case was it reported that the intimation to an adult had been dispensed with. Arrangements were made in several cases to ensure that intimation was carried out with the support of a relative or member of residential care staff. However, several interviewees commented that the adult would have been completely unable to comprehend the intimation.

5.86 A safeguarder or curator ad litem was appointed by the court in three cases, all applications for welfare guardianship. Factors that appeared to influence the appointment of a safeguarder or curator included the following.

- An assessment, usually by an MHO or social worker, about the need for a safeguarder. In several cases the adult’s interests were thought to be already safeguarded in some other way, for example by the nearest relative or solicitor; in one case the adult was considered capable of instructing a solicitor.

- The existence of local authority guidelines. In one of the sample local authorities, social work procedures included consideration of the adult's ability to instruct a solicitor, or their possible need for a safeguarder/curator, and for this recommendation to be passed on to the clinicians assessing the adult's incapacity.
- The decisions of individual sheriffs. A request to the sheriff to dispense with intimation to the adult was thought to make it more likely that the sheriff would wish to appoint a safeguarder. If this request was not made the data suggest individual sheriffs may take different approaches in terms of whether or not to appoint a safeguarder/curator. The research was not able to systematically explore this, but it may be an area for further monitoring.

5.87 In the context of 'representation', none of the adults in the sample had an independent advocate. One social worker had unsuccessfully attempted to access advocacy for an adult; another had offered the assistance of an advocate but the adult had declined; and one MHO had difficulty obtaining carer advocacy for a nearest relative appointed as a financial and welfare guardian.

5.88 Court procedures seemed to vary between and within different geographical areas. For example, hearings could be held in the sheriff's chambers or in court, but all the hearings in relation to the sample appeared to have been held in closed court. In most of the unopposed cases respondents perceived the hearings to be very short. Some respondents, including a nearest relative who had not been called by the sheriff, felt that the application had been 'rubber stamped'. However, in two cases, including an opposed application, the sheriffs were felt to be taking time to weigh up the issues involved.

5.89 In some cases there was a considerable time delay between lodging the application and a final decision, for a variety of reasons, including deferment to allow a safeguarder or second medical opinion to report, the time taken to obtain legal aid, and reported difficulty in securing court time. An interim guardianship order was requested, for one case, in anticipation of a planned move for the adult being delayed.

Court attendance

5.90 Only one adult within the sample had attended court, in their case to oppose the guardianship application. Other adults had not wished to attend or, it was felt by relatives or professionals that, they would not have understood the proceedings or found them upsetting or confusing.

5.91 In four cases, the nearest relative(s) had elected to attend one or more court hearings, and in another the hearing was attended by the adult's financial attorney. Several relatives felt it was important for them to attend, even where, as for one, they had to travel a considerable distance.

5.92 Hearings were also attended by private solicitors and, where appointed, a safeguarder or curator ad litem. The local authority solicitor and an MHO or social worker would attend where

the application was made by the authority. In fact, several MHOs emphasised the importance of attending the hearing and, in several cases, appeared to have an important role in keeping others informed and supporting individuals unfamiliar with court procedures. MHOs did not attend court where financial-only powers were being sought. Nor were MHOs present when private applications were made by nearest relatives, so they did not play the same supporting role they would have in local authority welfare applications. Apart from the one contested case in the sample, RMOs and other medical practitioners did not attend the court hearings.

5.93 Several of the relatives who attended court found the formality perplexing and inhibiting. One private applicant remarked:

“I had no idea that the judge would sit up on this great big flipping platform like God. I certainly didn’t open my mouth unless I was told to.”

5.94 Professionals involved in the case where the adult chose to attend court to oppose the application felt that the experience had been confusing and stressful for the adult.

“[X] gave evidence... in court – probably helped the application. [X] was also not well served because of the two adjournments, and...was struggling to grasp the process.... [X] took the stand against lawyer’s advice. [X] basically collapsed: it was a rant, tears, and then [X] got lost....The sheriff was sympathetic towards [X], but.. listening to [X] in court was very sad. But most saddening moment was during the sheriff’s summing up. Addressing [X’s] lawyers the sheriff said he was throwing out their argument. [X] thought this meant they had won. But then the sheriff said the order was granted, and everybody stood up and walked out. [X] was perplexed, and it was left to the social worker and MHO to explain to [X] that the order had been granted.”

5.95 Examples such as these perhaps emphasise the need for greater consideration of the role of legal safeguarders able to represent the adult’s views and the potential role of independent advocates to support the adult.

Costs and fees

5.96 Issues relating to both fees and legal aid were raised in the context of the implementation element of the consultancy and are discussed in Chapter 3. Among the cases included in the qualitative research, the need to pay legal fees did appear to affect some applications. On the one hand, the expense of making a private application was a concern for one nearest relative, and was reported to deter individuals making applications in other cases, particularly where legal aid was not granted. On the other hand, where applications for legal aid were made it was perceived to take some time before approval was obtained, and in three cases this was felt to have contributed to delays in the application and court processes.

5.97 The requirement to find caution where financial guardianship was granted appeared to vary between, and even within, cases. In one instance, where financial guardianship had been applied for (possibly mistakenly) and granted in relation to an adult in receipt of welfare benefits

caution was applied by one sheriff, only to be dispensed with by another at a second hearing. In another case, where the adult did have funds, caution was dispensed with.

INTERFACE ISSUES

5.98 A number of issues were raised reflecting the interface between the Act and other legislation and within AWI itself.

Part 2: Financial and welfare powers of attorney

5.99 Prior to the Act coming into force, two adults had granted friends or relatives with financial POA prior to losing capacity, making a later application for financial guardianship unnecessary. As described earlier, this did not however, preclude having to make an application for a financial intervention order when a bank in England refused to recognise the attorney's authority. In a third case, an action under Part 6 was avoided because of the adult's capacity to grant financial and welfare power of attorney under Part 2 of the legislation.

5.100 Several interviewees suggested that there could be a move towards MHOs, solicitors and others encouraging individuals to consider granting POA specifically to avoid the possibility of having to consider more restrictive measures at a later stage.

Part 5 Consent to medical treatment¹⁶

5.101 Some GPs had reservations about signing Part 5 Section 47 certificates. Issues included pressure of time, uncertainty about when these were required, difficulties in assessing capacity and the perceived cost to the health service.

5.102 The need to obtain Section 47 certificates to cover medical and dental treatment was an issue for two relatives acting as welfare guardians. Concerns included: perceived delays to treatment while obtaining a certificate; others' apparent confusion about the guardian's role in relation to consent to treatment; and a perception that Part 5 gives doctors the final say over treatment.

Between AWI and the Mental Health (Scotland) Act 1984

5.103 Comments on the relationship between AWI and the Mental Health (Scotland) Act 1984 had two dimensions. On the one hand several MHOs and RMOs contrasted AWI favourably

¹⁶ On 2 July 2004 the Minister announced changes to Part 5 of the Act to allow healthcare professionals, other than registered medical practitioners, to issue certificates of incapacity under section 47, provided they have the necessary skills and expertise to assess capacity. The maximum duration for a certificate will be increased from one to three years in certain circumstances. These changes will be brought about when a suitable legislative vehicle becomes available.

with guardianship under the 1984 Act since it allowed the development of ‘a tailor-made order’ to fit the individual’s requirements. However, more anecdotal evidence has suggested that the timescales involved for an application and the perceived cumbersome nature of the process may lead to the use of Section 18 leave of absence as an alternative to welfare guardianship for adults who have a mental disorder.

Between AWI and Mental Health (Care and Treatment) (Scotland) Act 2003

5.104 Several professionals interviewed reflected on whether the tribunal system, being introduced under the new mental health legislation, would be a better forum than the sheriff court to hear Part 6 applications. The perceived advantages included a less intimidating venue and more consistent decision-making. At the same time there were concerns that the tribunal might provide insufficient judicial scrutiny. The importance of involving children’s services in the implementation of both AWI and the new Mental Health Act was emphasised by one MHO.

Between AWI and policies relating to vulnerable adults

5.105 Reference was made by one solicitor and one clinician to the lack of current legislation for vulnerable adults (apart from AWI for those with incapacity). The comment was made that although there are local policies in place “they have no powers attached”.

OUTCOMES OF THE APPLICATION

Processes and timescales

5.106 Although recognising the protections Part 6 of the Act provides for the adult, the processes involved to achieve this goal were generally viewed in negative terms. Professionals and non-professionals variously described the application process as “cumbersome”, “a kerfuffle”, a “nightmare”, “putting the nearest relative through a ‘shredder’”, “onerous” and an “enormous waste of time”.

5.107 Data were not collected on timescales for each stage, so comments on the length of the process from referral to immediate outcomes were largely impressionistic. And the impression generally was that the process was lengthy.

5.108 Pre-court delays could occur due to:

- the availability of an MHO. Several respondents in one area described recent delays of months in obtaining an MHO to act under the Act. In another, in that area, an MHO from outwith the district was brought in to do an assessment.
- the need for further discussion. In one case consideration of the powers sought took place over a number meetings.

5.109 Post-submission of the application, delays could occur through:

- the time taken to obtain legal aid, causing the hearing to be postponed. In one private application the delay was estimated to be about two months.
- the postponement of a hearing following appointment of a safeguarder or curator ad litem.

5.110 To be able to move things forward, an application may be made for an interim order. But the perceived length of time required to obtain an order under Part 6 sets in context the concerns of several consultants psychiatrists that there are no emergency provisions under the legislation. As described above, an unintended consequence may be use of Section 18 of the Mental Health (Scotland) Act 1984 to move people with a mental disorder out of hospital, and only using AWI legislation if the person does not settle in their new home.

Immediate outcomes

5.111 Table 5.2 summarises the immediate outcomes for the cases of the thirteen adults in the sample. Where guardianship orders were granted the majority were for either three years or an indefinite period.

Table 5.2 Immediate outcomes

Type of order granted/action taken	Number of cases
Welfare Guardianship	7
Welfare Guardianship and Financial intervention	1
Welfare Guardianship and Financial Guardianship	1
Financial guardianship	2 ¹⁷
Welfare and financial power of attorney granted	1
No action under AWI	1
Total	13

5.112 Although changes were described in a number of different areas of the lives or circumstances of the adults in the sample, it in fact proves difficult in some cases to determine whether these related directly to the use of the Act or to other changes occurring independently of the application. Some adults, for example, had already moved to new accommodation, perhaps under Section 18, or for respite. What an intervention under the Act established, however, were the legal arrangements that made possible the management of an adult's welfare and/or financial affairs, including where they stayed. Short term 'outcomes', actions taking place coterminous with, or following, an order being granted, a power of attorney coming into effect, or an alternative to legal processes being pursued, fall into two overlapping groups: substantive and procedural.

¹⁷ In one case the immediate outcome of the MHO's intervention was a decision to pursue financial POA. Possibly because of a delay in preparing the papers the adult was felt to no longer have capacity to grant POA so a financial guardianship order was applied for and obtained.

Substantive outcomes

5.113 Substantive outcomes with a direct impact on the adult fall into six categories.

1. Accommodation

Seven individuals were either already in, or moved to, supported accommodation or nursing homes around the time an order was granted. Five of these were under welfare guardianship, although four had already moved into their current accommodation by the time the order was granted. In one case the local authority used the welfare guardianship order to sign a tenancy agreement on behalf of the adult, allowing her to move to new accommodation.

Four adults remained in the community after a welfare guardianship order with powers over residence had been granted. For one the order gave the local authority some control over the adult's place of residence. Although from the point of view of the professionals the order was seen as successful in achieving this aim, the adult was known to be unhappy with the powers this gave the local authority. In three other cases, where the nearest relative was welfare guardian, the power to make decisions over current and future accommodation was considered by the guardian to be an important outcome of the guardianship order. A fifth adult's wish to remain in her own home was achieved because she was able to grant welfare and financial POA.

2. Safety

In six cases where welfare guardianship orders were granted, the adult's safety had been an important consideration in making the application. This was said to have been supported in a number of ways, through encouraging the adult's engagement with workers in a community setting, providing some control over those with whom the adult could associate, and allowing the adult's physical and mental health to be monitored and care provided. In one case, continuing safety concerns resulted in the adult's subsequent admission to long-term in-patient care.

3. Quality of life

Of the six service users interviewed, four had moved to new accommodation. Three were positive about the moves. Changes identified by themselves and their carers included better physical health, more opportunities for social activities and the development of daily living skills. One user, however, described himself as frustrated and bored. His nearest relative (not his guardian) also felt he was lacking opportunities to develop daily living and social skills. One adult appreciated being able to stay in her own home, but would have liked more "company".

Other evidence of quality of life outcomes came more indirectly from friends, family and practitioners. One relative commented that he thought the adult liked her residential care home because, "she had a room which faced on to the gardens and she had been a keen gardener".

4. Medical treatment

Medical treatment was a particular issue in three cases, all welfare guardianship orders held by nearest relatives. In each the guardians felt that the order had enabled them to inform and influence some control over decision-making in relation to the adult's medical and dental treatment. As noted earlier, however, the guardians also expressed continued concerns about some aspects of the ways in which Part 5 of the Act was being interpreted and implemented.

5. Management of finances

The management of the adult's financial affairs was a desired outcome in six cases. This was achieved in three through financial guardianship and in one through financial POA. Outcomes included the sale of property and the management of the adult's day-to-day living expenses.

In one case, despite obtaining a financial intervention order to access funds in an account in England the order had to be registered in a local court before it was recognised, entailing additional time and expense to resolve. In another (discussed earlier) where an application for a financial intervention order was rejected by the court the adult continued to experience financial management difficulties.

A less positive outcome for private individuals in particular who take on responsibility for managing an adult's financial affairs, was the associated administration and scrutiny which respondents experienced as onerous, time-consuming and stressful.¹⁸ There are also ongoing costs where private individuals assume the role of financial guardian or attorney, which may include both administrative costs and legal fees. There was also some uncertainty about the costs that could be reclaimed by guardians and attorneys.

6. Access to information and services

One welfare guardian had been able to access medical information related to the adult; a financial attorney had obtained information about the adult's bank accounts; and the order had assisted one welfare guardian to apply for direct payments so that carers could be employed to look after the adult at home. However, some guardians and professional staff described difficulties in accessing and co-ordinating resources for the adult. Perceived gaps included opportunities for holidays and other activities outside the home and insufficient staffing in residential care.

¹⁸ Based on their own experience, the view of the OPG is that guardians do not seem to have been briefed or prepared in advance of being appointed with regard to their duties, particularly the requirements to complete an inventory, management plan and accounts.

Procedural outcomes

5.114 Procedural outcomes refer to the impact of an order in providing a formal legal basis for arrangements that may already exist. It is the abstract legal nature of the ‘outcome’ that perhaps informs the tension, evident in the comments of respondents, between those who felt that Part 6 measures added nothing to the protection or care of the adult, and those who believed adults had the right to the legal protection of AWI if they could not consent to major changes in their lives.

Longer term outcomes

5.115 There was an expectation in five welfare guardianship cases that adults might need to move on to alternative accommodation. Reasons for this included the adult’s wish to be more independent, concerns that the adult needed more support and a young person’s move into adult services.

5.116 Some parents had concerns about the long-term future of their son or daughter, and, in two cases, as welfare guardians, wanted a greater emphasis on longer term planning.

SUPPORT AND SUPERVISION

Support needs identified by relatives and carers

Before an order is granted: information and advice, communication and emotional support

5.117 When measures under AWI were being considered relatives and carers valued both verbal and written information about the legislation, which many found complex and difficult to understand. MHOs seemed to be most likely to provide this information, but solicitors were also described as very helpful in three cases, and in another a community psychiatric nurse was involved in giving information. In one private application, the nearest relative experienced considerable problems accessing information and advice about use of the legislation.

5.118 Information about financial issues, including direct payments and free personal care, was also considered important. Two relatives/carers had problems accessing this. Several relatives and carers had contacted the OPG for information in relation to financial powers. One relative had found this advice useful, but two other individuals perceived the advice to be inconsistent. Another described difficulties obtaining accurate information on legal aid.

5.119 Ongoing communication from professionals about the progress of their applications, some of which spanned several months, was thought to be important by two relatives/carers, one of whom lived in England. In both cases MHOs assumed this role as a channel for information.

5.120 Some relatives and carers found their involvement in use of the legislation a stressful experience. In four cases, contact with social workers or MHOs was perceived as reassuring and supportive during the application process.

After an order is granted: support in exercising financial powers and on-going support

5.121 The role of financial guardian appeared to create particular support needs for individual carers and relatives, who found the role complex and confusing. The solicitors involved in two such cases were found to be supportive and informative, although there were financial implications in obtaining such assistance. The OPG was seen as less supportive, and bank staff sometimes lacked understanding of the powers of both financial attorneys and guardians.

5.122 Ongoing requirements for support varied and also intersected with supervision requirements (see below). Support came from a variety of sources including community psychiatric nurses, care managers, solicitors, and family members. In two cases MHOs provided ongoing support on an informal basis in the absence of other help.

Supervision and implementation of guardianship orders

5.123 Under Section 10 of the Act the local authority has a duty to supervise welfare guardians. Regulations currently require that the adult is visited at intervals of no more than three months where the guardianship is for one year or more.¹⁸ In the four cases where a nearest relative was appointed as welfare guardian the extent to which supervision was provided appeared to vary. In two cases there was regular contact between the nearest relative or welfare guardian and the local authority supervisor, but two other guardians were not aware of receiving regular supervision.

5.124 Five welfare guardianship orders were held by local authorities, with both care managers and MHOs acting on behalf of the authority to supervise the order. Again, the arrangements described by social workers and MHOs exercising guardianship powers varied, from regular three-monthly reviews in one case to none to date in another.

5.125 Factors influencing local authority supervision of guardianship orders included:

- knowledge of the Act and understanding of review procedures, for example, the degree to which non-MHO social workers understood their supervisory role;
- lack of clarity about the respective roles of care management and supervision of the order when responsibility lay with two different practitioners or different local authorities;
- differing practices in local authority areas about who should supervise a guardianship order or when a review should be convened;
- resource issues, for example, the availability of an MHO to undertake supervision.

5.126 Visits from, and contact with, the MWC, acting in its statutory capacity under Section 9 of the legislation, were described in five of the nine cases where a welfare guardianship order was granted. In one case the visit was believed to have helped one adult to find out about how to seek a revocation of the order. In another the guardian had found the visit by the MWC representative to be helpful and informative. For two, however, it was perceived as intrusive.

¹⁸ Shortly before the end of the consultancy the Scottish Executive issued a consultation document seeking comments on a proposal to extend the intervals between visits to six months.

One explained, “when the Mental Welfare Commission came I thought, ‘I don’t want another intruder in my life’”; they already felt ‘over-scrutinised’ by the OPG and the Benefits Agency.

5.127 A financial guardianship order had been granted in three cases studied. In two of these cases the financial guardians raised issues relating to the amount of “paperwork” required by the OPG, perceived inconsistencies in the information with which they were provided and a feeling of being “over-scrutinised”.

5.128 Clearly, the comments on contacts with both the MWC and the OPG were based on the personal perceptions of a small sample of people. A balance does need to be struck between the support needs of private individuals in taking on a substantial responsibility and ensuring that the adult is adequately protected.²⁰ What the data again, however, illustrate is the comparative and perceived isolation of private individuals.

PRINCIPLES INTO PRACTICE

5.129 The Act and its associated codes of practice reinforce the importance of taking into account the five underpinning principles in any intervention under the legislation. The in-depth case studies provided an opportunity to explore the ways in which these principles are being interpreted in practice and the dilemmas they may pose.

Benefit to the adult

5.130 The Act states that there should be no intervention in the affairs of an adult unless it results in a benefit to the adult, and that this benefit cannot be achieved without the intervention. The benefits that practitioners, relatives and carers sought and the adults themselves experienced were both direct and indirect. Direct ones included, for instance, managing risks by determining where the adult should live, determining the level of care she or he should receive, monitoring physical and mental health, promoting social interaction and relationship building and facilitating access to, or management of, funds. Less directly, an intervention under the Act was seen as providing a formal legal basis for decision-making on the adult’s behalf.

5.131 At the same time, several respondents described what, for them, were the difficulties inherent in defining and assessing benefit to the adult. Considerations included the following.

- Balancing the benefits to the adult of different courses of action. Concerns about an adult’s physical safety at home, for example, had to be set against their evident distress at the prospect of moving into a residential home.
- Questions about *who* derived benefit from guardianship. For example, if the legislation was primarily being used to provide the legal basis for decision-making about the adult’s affairs, could this be described as having any direct benefit to the adult?

²⁰ The OPG does risk assess individual cases and will reduce the level of monitoring where it is appropriate.

- In several cases the process of applying for an intervention under the Act, and the mechanisms of financial scrutiny once an order was in place, were felt to have the potential to produce disbenefits to the adult. For example, the inaccessibility of the legal process to adults, or the potential for an adult to remain in inappropriate accommodation because of the sometimes lengthy application process. In one financial guardianship, the amount of work required to ensure accountability and the anxiety experienced by a non-professional guardian were perceived to have brought disbenefits without conveying any advantages to the adult.

Least restrictive option

5.132 Any intervention under AWI should be the least restrictive option in relation to the freedom of the adult. Practitioners were generally aware of drawing on this principle to inform their decision making, for example, trying all available options before contemplating use of the legislation, including consideration of less restrictive measures such as power of attorney.

5.133 Practice issues, however, that arose in relation to this principle included:

- interpreting ‘least restrictive’ when weighing up alternatives (for example, use of AWI or Section 18 of the Mental Health (Scotland) Act 1984);
- the degree to which, in practice, powers sought reflected the minimum intervention required to meet an adult’s needs - in some cases the powers took the form of a comprehensive ‘list’ that did not appear tailored to these;
- the perceived absence in some cases of local authority supervisory mechanisms to facilitate on-going consideration of the continued necessity for either the order or the powers granted.

Present and past wishes of the adult

5.134 In all the case studies there had been serious attempts to ascertain the present and past wishes of the adult. MHOs and safeguarders or curators were particularly concerned to establish the adult’s views, but others, including RMOs, GPs, and care managers also took responsibility for this principle. Combinations of different ways of determining the adult’s wishes and feelings were used. In addition to drawing on their prior knowledge of the adult, some professionals would speak directly to the adult, meet the adult with someone who knew them well and could provide some interpretation of the adult’s responses, or observe the adult’s behaviour and their non-verbal responses.

5.135 There were no examples within the cases of people undertaking assessments using technology to overcome communication barriers. However, several MHOs commented on the importance of taking time to get to know the adult and their carers, sometimes making several visits to the adult.

5.136 Some of the difficulties experienced by practitioners trying to implement this principle included:

- balancing the adult's expressed views against the adult's safety;
- explaining the use of the Act to adults with limited comprehension or memory problems;
- establishing the adult's past and present wishes without prior knowledge of the adult or his or her circumstances.

Views of nearest relative, primary carer, guardian and continuing/welfare attorney

5.137 The views of nearest relatives and others with an interest in the welfare of the adult were sought in a variety of ways, through interviews and meetings, including case conferences. All MHOs were in contact with the nearest relative as were, to varying degrees, GPs, RMOs, social workers, solicitors, and safeguarders. Generally, nearest relatives were satisfied that they had been kept consulted and informed. One relative said she felt "heard and listened to". However one relative found the meetings she attended daunting and hard to understand and another had felt excluded from earlier decision making.

5.138 In one case there was a tension between the need to observe this principle and the adult's wish that the MHO should not contact their nearest relative, which was felt to have resulted in some damage to the relationship between the MHO and the adult.

Exercise of skills

5.139 Under AWI, guardians, continuing or welfare attorneys, and managers of establishments exercising functions should encourage the adult to exercise his/her skills and to develop new skills. There was generally less awareness of the need to have regard to this principle than others within the Act. Concerns were, though, raised about the lack of opportunity for some adults to develop their skills, either because of the resources available within a particular environment, for example to prepare meals, and/or due to a perceived lack of sufficient support.

ACCESSIBILITY AND EQUALITIES

5.140 The extent to which the legislation and the way it is implemented could be said to be accessible to non-professionals has a number of dimensions, including, for example, the availability of timely and easily understandable information on the Act, the clarity of procedures, and the support available for adults and non-professionals. The analysis, however, suggests that in practice there are barriers to accessibility. To explore this in more detail the experiences of adults are distinguished from those of non-professionals who may be acting as applicants or interveners.

Accessibility to non-professionals and adults with incapacity

5.141 From the experiences of the respondents a number of issues arise suggesting that the procedures may be experienced as an obstacle for non-professionals. For example, the need for less complex information to be available, before an application is made, as well as once an order is granted, was raised by professionals and non-professionals.

5.142 Several people described how they sat in on meetings without really comprehending what was being discussed. Summarising their own experience, one non-professional described how “as a lay person they felt out of control of the situation – have to learn quickly”. A number underlined the need to be, or learn to be, articulate and assertive because of the complexities and demands of the processes, suggesting that being less articulate or assertive could impede access.

5.143 Echoing issues raised in the context of support and supervision, the different resources which private individuals and statutory agencies had at their disposal were highlighted by an MHO who remarked, “How many people have the equivalent of local authority legal section behind them?” The formality of court procedures could also be off-putting for non-professionals. Private applicants especially also described the “stress” and “pressure” of responding to the demands of the different agencies involved.

5.144 Although private individuals are not precluded from applying or becoming an intervener, from the experiences of non-professionals there may be a question of whether the infrastructure and processes are sufficient to maximise appropriate involvement. In practical terms, this may have implications for the willingness of individuals to make private applications or to act as interveners.

5.145 Although several professionals described attempting to set out what was proposed in ways that the adult could understand, the point was made by one MHO that,

“for the client group for whom it is intended, i.e. those with incapacity, it is too complex. By the time they need it is too difficult to explain.”

As described earlier, specific processes, including court appearances, may also work against inclusion.

Access by people with different types of incapacity

5.146 Different perspectives were expressed about the extent to which the legislation was responsive to the needs of people with different causes of incapacity. Two non-professional respondents suggested that the legislation might not be appropriate for people with learning disabilities. In both instances the shortcomings of the legislation appeared to hinge not on Part 6 per se, but on concerns in relation to Part 5 provisions. On the other hand, one clinician felt that, because of different “treatment issues” the Act was less relevant to people with dementia than for people with learning disabilities or mental health problems.

Access by people from different equalities groups

5.147 In terms of access to the legislation by different equalities groups, for example, people from black and minority ethnic communities, men and women, people who are lesbian, gay, bisexual or transgender, one respondent felt that what should come out of the research was recognition of the difficulties faced by people who are viewed as different. In particular, there needs to be an understanding of how the experience of victimisation, for instance, on the basis of sexual orientation, can both lead to mental distress and inform how people respond when they are mentally distressed, and for this recognition to inform service responses.

5.148 It is notable, that, unlike the new Mental Health (Care and Treatment) (Scotland) Act 2003, the principles of AWI do not make specific reference to issues of non-discrimination, equality and respect for diversity, though clearly these are not precluded.

5.149 There is insufficient data from this research alone to illustrate the impact of difference, based on sexual orientation or ethnicity, and the study did not involve a gendered analysis of routes to use and outcomes from using Part 6. Nor did the small sample, including people from across the age ranges, lend itself to analysis by age. The potential for access difficulties to be compounded for particular groups may be an area for further research.

EMERGING THEMES

5.150 Clearly the small sample size of thirteen cases, some of which were among the earliest users of the legislation, limits the extent to which the findings can be generalisable. However, in-depth analysis drawing on the different perspectives of the participants has revealed a number of emerging themes which have echoes in the findings from the implementation element of the consultancy, and which offer detailed and new angles on the process, from the perspectives of a variety of people with different roles in a case.

5.151 First, the data raise issues of knowledge and understanding. At the time these cases were in process, knowledge or awareness of the scope and purpose of the legislation appeared limited to MHOs and consultant psychiatrists. This may largely be a reflection of the newness of the Act. But the data also suggest a need to widen awareness of the legislation beyond those with a role to play in applications to include, for example, children and young people's services which include people coming up to or aged 16 years and over.

5.152 The need to widen understanding also arises from the approaches taken to the five principles, which have largely embedded themselves in the consciousness of the key professionals involved in the assessment process. Beyond the assessment and application process their significance may, however, fall away. Care managers, social workers, care providers, as well as 'lay' people with authority as guardians or attorneys, may be less aware of principles or use them less in their practice once an order is granted.

5.153 Second, the study revealed two ‘triggers’ and associated decision-making models: a risk minimisation model and a decision-making orientation. The first, largely brought into play in respect of people assessed as having partial incapacity, aims to minimise the risk to which the adult may be exposed. The objective is to authorise *powers over* the adult, and local authorities are noticeably the initiators when this is the case. The second orientation, largely being effected in relation to people with ‘global’ incapacity, aims to give decision-making *power to* an authorised body or person, usually a nearest relative. It is recognised that in terms of the legislation the two orientations are not mutually exclusive – to authorise power over, also implies a body having authority to exercise these powers. The distinction drawn, however, may have more than just conceptual value.

5.154 In the context of on-going debates about when the Act should be invoked, the model raises the question who initiates an action when the adult lacks capacity but there is no immediate risk, and no-one is seeking decision-making powers on their behalf, but where decisions may be being made? Potentially it places at a legal disadvantage those people who are not actively at risk or actively objecting to a move, who do not have ‘advocates’ acting on their behalf.²¹

5.155 The granting of *power over* raises issues of reciprocity. Unlike the new Mental Health (Care and Treatment) Scotland Act 2003, in which importance is placed both on providing the maximum benefit to the patient and providing appropriate services, within AWI there is no similar explicit statement balancing any loss of rights with a responsibility on public bodies to provide services. For the 2000 Act a lot, therefore, hinges on the interpretation of the principle of benefit to balance the legitimate decision-making authority which gives ‘*power over*’ with on-going benefits to the adult through the provision of appropriate services and supports. There are insufficient data from this research to conclude where that balance might currently lie. Longitudinal research, proposed as part of a longer term AWI research strategy (in Appendix 4) may, however, reveal the extent to which obtaining *power over* is matched by a reciprocal concern with resource input including the development or maintenance of the adult’s skills.

5.156 A third theme to emerge from the study is the processual disadvantage experienced by private individuals seeking to use the legislation compared to local authorities. Consistently it appears that the processes and infrastructures in place to facilitate assessment and application, as well as on-going support for the burden of responsibility, are either not available to private individuals or place them at a disadvantage.

5.157 This ties in with the fourth conclusion: barriers to accessibility. It is suggested that in terms of the availability of information, support through and after the process (including independent advocacy), the transparency of the process, and, potentially, the associated costs, adults and nearest relatives or significant others, may be deterred from participating in the process. While it would perhaps be too strong to suggest that the system is disempowering, the comments of non-professionals interviewed suggested that, as a *process*, it could be experienced as a loss, rather than a gaining of control.

²¹ Recent guidance has been issued by the Social Work Services Inspectorate (2004) of the Scottish Executive, which seeks to clarify the circumstances under which an intervention under Part 6 should be considered by the local authority.

5.158 Finally, in terms of the outcomes realised the study was perhaps limited in drawing conclusions, and, again, longitudinal or comparative research would better reveal the impacts of the legislation. The nature of the ‘outcome’ is also problematic: rather than a specific identifiable impact the implications for the adult may be more subtle. An action under Part 6, for example, might effect a needed change in the adult’s circumstances, minimise a risk, or prevent deterioration. The process of assessment may also generate alternative options and solutions. More abstractly, but fundamentally, it also provides a legal basis for decision-making. It is this ‘outcome’, being able to protect an adult unable to make decisions themselves from arbitrary and opaque decision-making, that may be the single most significant achievement of the legislation.

SUMMARY: KEY POINTS

Fifty-eight interviews were undertaken with various individuals involved in thirteen cases, from three local authority areas, where an intervention under Part 6 of the AWI had been considered and an application made, or alternatives pursued. From analysis of this qualitative data the following key points emerged.

- The data from the thirteen case studies suggest two *overlapping* triggers to consideration of use of Part 6 of the Act: to minimise risk or to establish legitimate decision-making authority.
- While there are structures and processes in place to initiate and co-ordinate local authority applications under Part 6, private applicants are working very much on their own: there are no equivalent facilitating structures upon which they can draw.
- In local authority applications the multi-disciplinary assessment process and the system of case conferences opens up opportunities for joint and collaborative working. The opportunities and possible advantages of joint working do not appear to extend to private applications.
- The principle that a person may be legally capable of making some decisions and actions and not capable of others was generally welcomed by respondents. In practice, the cases in the sample fell into three groups in terms of level of assessed incapacity: “global incapacity”, partial incapacity and capacity.
- MHOs have a core role in drawing attention to, and putting into effect, alternatives to an application under Part 6. But contingent factors also play a part.
- Recognition that incapacity is not all or nothing does not systematically extend to consideration of the powers sought under the legislation. Powers may be formulated outwith the discussions which inform the decision to progress an application under Part 6 or the assessment of incapacity.

- The data suggest that the Act is being invoked in relation to two distinct populations: one population able to communicate and act, but with impaired decision-making judgement over aspects of their lives, exposing them to financial and/or welfare risks; and another population of people who may have “global incapacities”, for whom the concern is to ensure an identified body with legitimate decision-making authority. It is suggested that these two populations generate two different but overlapping decision-making models: one focusing on risk and risk minimisation, where the emphasis is on seeking *powers over*; and one focused on decision-making and forward planning, which seeks to obtain *powers to*. Within the sample, risk oriented cases were largely initiated by local authorities. Cases where the impetus was to obtain decision-making authority were initiated by private individuals (although the applicant may be the local authority).
- The study suggests differences in practice relating to the appointment of safeguarders or curators, the involvement of independent advocates and in applications for caution.
- Immediate outcomes can be distinguished between direct ‘substantive’ changes in aspects of the adult’s life, and ‘procedural’ or ‘due process’ outcomes, that is, ones providing a formal legal basis for decision-making.
- There appear to be differences in practice in relation to the nature, regularity and frequency of local authority supervision of guardians and guardianship orders.
- The data highlight the difficult balance to be struck between meeting the needs of financial guardians (and attorneys) for information, support and advice and the requirement to demonstrate financial probity. In relation to financial guardianship especially, the procedural ‘disbenefits’ were felt, in some cases, to outweigh the advantages, particularly where an adult has limited funds.
- The study begins to suggest that although the legislation is ‘accessible’ in the sense that private individuals are not precluded from applying or becoming interveners, the infrastructure and processes may not facilitate this access. Similarly, although not excluding adults, the complexity of the procedure may not enhance inclusion. There was insufficient material to indicate the extent to which the Act was accessible to, and used by, different equalities groups, for example, people from black and minority ethnic groups.
- In all cases, the principles of AWI were an important feature of the decision-making processes initiated under the Act. Interpretation and balancing the principles against each other could, however, be complex, and may not extend beyond the application process.

CHAPTER SIX

THE LEARNING FROM EXPERIENCE PROJECT: CONCLUSIONS

INTRODUCTION

6.1 By the time the consultancy commenced in September 2002, Parts 1, 2, and 3 of the Adults with Incapacity Act had been in operation for eighteen months, and Part 6 for six months. What each of the elements of the consultancy reflects is the impact of a complex piece of legislation in the early stages of implementation. Together they present a dynamic picture. Some of the issues that have been raised since the Act came into force are already being addressed by the Scottish Executive in response to the findings from this consultancy and other projects (for example the work on Part 5 - Davidson et al. 2004; Drinkwater et al. 2004). Other policy and practice implications will only become fully apparent over time.

6.2 The evidence from this early phase suggests that the Act is working and is yielding benefits for adults with incapacity and for those who care for and about them. But what is also revealed are possible legislative, procedural and practice issues which may inhibit the full realisation of the objectives behind the legislation. These are discussed here along with suggestions for how to approach these matters which are addressed to the wide range of organisations, professionals and other individuals who engage with the Adults with Incapacity Act.

LEGISLATION

When to invoke the Act

6.3 A fundamental issue highlighted in the course of the consultancy was the lack of clarity amongst local authorities on when to evoke the Act. This has given rise to concerns about: equity of access to the benefits afforded by the legislation; and transparency in decision-making about use of the Act. The criteria for using the Act should be made explicit in every case. This is being addressed, at the time of writing, through new guidance from the Scottish Executive (SWSI 2004), but has implications for the policies and practices of local authorities. Adults and carers also need to be provided with clear information about the grounds for using the Act so that they can exercise their rights.

Principles

6.4 The principles are fundamental to the operation of the Act and as such have implications for the on-going support and supervision of guardians, attorneys and intromitters. Awareness and understanding of the principles have to extend beyond those immediately involved in making an application to encompass those providing continuing care and support for the adult - beyond the supervisory roles of the OPG and MWC, to include social workers and care managers.

Financial proxies

6.5 Restrictions on who can act on behalf of an adult with moderate means, either as an intromitter or as a financial guardian to manage their affairs, have been identified by local authorities and the OPG as creating a major problem. These limitations can have two consequences for the adult. First, where there is no-one to act as intromitter, but the local authority is prepared to fund or part-fund a solicitor to act as a financial guardian, this still may represent recourse to a more restrictive option than is necessary to benefit the adult and may mean some loss of income for them. On the other hand, if no individual is able or willing to intromit and the local authority is unable to fund a solicitor then it opens up a decision-making vacuum. The consultancy identified several potential legislative and non-legislative solutions to this issue for further consideration.

Sale and registration of property

6.6 The OPG and carers who have experience of the situation, have suggested that the requirement on guardians to register heritable property in the General Register of Sasines or the Land Register of Scotland should be reviewed as it is costly, time-consuming and offers the adult no additional safeguard. Clarity is required on circumstances in which the guardian must seek the consent of the OPG for the sale and price of an adult's property. The current wording in Schedule 2 6 (1) is ambiguous and potentially leaves the adult without a safeguard.

ACCESSIBILITY

6.7 For the Act to be accessible people need to be aware of and able to use the legislation effectively. Barriers to access include lack of information and support, costs and procedures.

Information and awareness

6.8 To be able to use the Act, or advise others who may wish to use it, the public, individual adults, carers, and professionals across the caring and financial sectors, need to be aware of and informed about the legislation. Evidence from the consultancy suggested that, beyond the core of MHOs and psychiatrists, knowledge and understanding of the Act have been very variable. This has wide implications in terms of facilitating the use of the least restrictive intervention (for example, power of attorney at early diagnosis of dementia).

6.9 To enhance access to the legislation requires that professionals, with a role in the care of adults who may come within the purview of the legislation, be aware not only of the broad outlines of the legislation but an understanding of its principles and the concept of incapacity.

6.10 Financial institutions also must be aware of the Act as they have a role in facilitating access to the legislation through the advice they give to customers and by responding

appropriately to someone with authority to access funds. They have a key role in ensuring that their customers and potential customers with mental disability are not subject to discrimination.

6.11 A public awareness-raising programme could start to address the apparent low level of general consciousness of the legislation, and might be best undertaken collaboratively by the Scottish Executive, local authorities, specialist voluntary organisations and user groups.

Access to support and supervision

6.12 The consultancy uncovered the different structures in place to support local authority and private applications. Relatives and carers, as applicants and proxies, did appear to be very isolated in dealing with complex welfare, financial and procedural matters.

6.13 Whilst the legislation makes provision for formal supervision, lay proxies have expressed a need for a less formal system of support. There may be something to be learnt from the guardianship system in Germany where this gap has been recognised and specialist voluntary organisations are funded to provide support for private applicants, both in the course of making an application and over time.

Giving users a voice

6.14 To enable adults to have a voice in the process requires: information that may be easily understood; access to support throughout the process; and representation in the course of the application.

6.15 The review of information carried out by the consultancy found that, other than on a very general level, there was no information designed to explain to the adult, in an accessible way, their rights under the legislation, including their right to appeal. This gap needs to be addressed collaboratively between the Scottish Executive, local authorities and the different user groups.

6.16 The Act makes provision for the appointment of safeguarders, but evidence from the consultancy suggests variability in practice in the use of safeguarders, although the reasons for this were unclear. There is also little evidence of the use of independent advocacy to support the adult, which may reflect a lack of local knowledge about services or the patchy provision of such across Scotland (Advocacy Safeguards Agency 2003). Given the importance of hearing the adult's voice, further research could explore the mechanisms for representing the adult within the process.

Fees and legal aid

6.17 Under Parts 2, 3 and 6 of the Act, costs are incurred at each stage. For Part 2 this can involve solicitor's fees and fees to the OPG for registration. Intromission with funds requires fees for medical certificates of incapacity and for registration. In private applications under Part

6, the costs can include solicitor's fees, medical certificate costs, and the registration fee to OPG. In cases of financial guardianship, applicants may be required to apply for caution and to pay the OPG an annual fee for reviewing the management accounts. Even for local authority applications there are costs associated with medical certification and registration. Furthermore, if orders under Parts 3 and 6 are granted for a limited period, for example three years, and a new application applied for, all these costs will be incurred again.

6.18 In relation to actions under Part 6, although it was not possible to estimate the number of cases where private individuals, because of the costs they feared would be involved, have been deterred from pursuing an application, anecdotal information has suggested that the expenses involved, particularly solicitor's fees (approximately 70% of all costs), may be a barrier to private applications under the Act.

6.19 Means-tested legal aid is available for intervention and guardianship orders under the Adults with Incapacity (Scotland) Act 2000. There are two stages at which applications for legal aid may be appropriate. The first is at the pre-application stage when legal aid for Advice and Assistance may be applied for by the person wishing to make an application on behalf of the adult. Eligibility for advice and assistance is based on the resources of the person who is making the application and not the adult. Civil legal aid can be made available for representation in proceedings under Adults with Incapacity (Scotland) Act 2000, and financial eligibility is assessed on the resources of the adult and not the applicant.

6.20 Before the transfer of guardianship under the Adults with Incapacity (Scotland) Act 2000, Advice by Way of Representation (ABWOR) had been available, without a means test, for proceedings under Part V of the Mental Health (Scotland) Act 1984 and was therefore available for applications for appointment of guardians under Part V.

6.21 The impact of this change in the eligibility rules for guardianship applications is widely and strongly viewed across the stakeholder groups as representing a substantial rights issue. It is thought that many adults who could benefit from the protection offered by the Act will be prevented from doing so because of a fear of the expenses that may be incurred by their primary carer or next of kin. Secondly, it is regarded as unjust that the burden of the costs of a legal intervention to remove decision-making powers from an adult (especially in the sphere of welfare decision-making) should fall on that adult. In response the Scottish Executive has initiated discussion with Scottish Legal Aid Board (SLAB) and the Law Society of Scotland to consider this matter further.

COURT PROCEDURES

6.22 Hearings under Part 6 are usually held in the sheriff courts, and can be held in chambers. A consistent theme to emerge from across the different elements of the consultancy was the perceived inappropriateness of the court environment for these cases.

6.23 Although there may be good reason for the formality that comes with a hearing before a sheriff, the physical environment of the court, its associations with criminality, and the

possibility of being heard in public can make the experience intimidating, particularly for nearest relatives and adults. Steps are being taken to encourage holding hearings in private session, but consideration could also be given to holding them in less formal surroundings. In the long term, consideration should perhaps be given to extending the function of tribunals under the Mental Health (Care and Treatment) (Scotland) Act 2003 to hearings under the Adults with Incapacity (Scotland) Act 2000.

TIMESCALES

6.24 Two issues arose in relation to timescales for Part 6 applications. The current period of 30 days, required for preparation and co-ordination of the application, including the MHO and medical reports, can on occasion be insufficient, for example, if the adult is unfamiliar to the medical practitioners or MHO undertaking the assessment. Thought should be given to the need for, and implications of, extending the current statutory timescales.

6.25 Second, there may be issues in relation to the period from commencement of the application process to a decision being made. It was not possible for the consultancy to quantify timescales involved in processing Part 6 applications, but both the implementation and research elements suggested that in some cases it can be quite prolonged. Some of the delay derives from difficulties in meeting the 30-day deadline described above, with the result that the whole process has to commence again. Once an application has been submitted, delays can result from: the legal aid process; adjournments of hearings to obtain further evidence; or to allow for the attendance of persons with an interest.

6.26 A more detailed future analysis of the process, looking at court and SLAB records, could be undertaken to better understand the timescales and possible delays involved.

PRACTICE

Information and training for professionals

6.27 The consultancy carried out a review of training activities that took place during the first two years of the legislation. In the early stages of implementation the Scottish Executive initiated a number of training activities as did other agencies, targeted at different professional groups. However, identifying and meeting the different levels of knowledge and specialist skill required have proved to be difficult and complex to accomplish and present an ongoing challenge.

Communicating with the adult

6.28 The consultancy found that the principle of taking into account the past and present wishes and feelings of the adult was clearly understood by professionals involved in the assessment process. Being able to communicate is fundamental to assessing the adult's capacity but it is not clear the extent to which people undertaking assessments try to maximise the

capacity of the adult to communicate by using different ways to obtain their views. In reflecting the views of practitioners from across the professions, it is suggested that guidance and training needs to be further developed to encourage greater consideration of the range of technological and other means to assist communication.

Assessing incapacity

6.29 The consultancy found that amongst practitioners there is a general level of understanding that capacity is not 'all or nothing'. However, general medical practitioners expressed a lack of confidence in their competence to carry out assessments of incapacity in relation to specific areas of decision-making. This finding was confirmed through the consultation on the Part 5 code of practice and by research into the implementation of Part 5 (Drinkwater et al 2004; Davidson et al 2004). As a consequence, the training needs of medical practitioners and other health care professionals who may become involved in assessing capacity are to be addressed by the Scottish Executive.

6.30 For the purposes of making an application under Part 6, there is recognition that incapacity is decision-specific. However, evidence from the Mental Welfare Commission, in relation to welfare guardian applications, suggests that there is often a mismatch between the powers sought and assessed need, in that more powers may sometimes be sought than are necessary for the benefit of the adult in terms of their needs at that time. Whilst there may be some justification (such as the adult having a degenerative illness) this represents an infringement of the 'least intervention' principle and the rights of the adult. This indicates the need for the different practitioners with a role in the pre-application phase to work together to ensure greater consistency between the areas of incapacity that have been identified in relation to decision-making and the powers sought and granted.

INTERFACE ISSUES

6.31 There are complex interface issues between the Adults with Incapacity (Scotland) Act 2000 and current mental health law as well as with other pieces of legislation, including data protection and financial services laws. The implementation of the new Mental Health (Care and Treatment) (Scotland) Act 2003 from 2005 and possible vulnerable adults legislation in the future suggest an even more complex legislative picture with implications for practice. The Scottish Executive recently commissioned a detailed comparison of the texts of the 2003 Mental Health Act and the Adults with Incapacity Act, which highlighted areas of potential interface between the two which will be available in autumn 2004 on the Scottish Executive website (Gordon). It has been suggested that further research could be undertaken specifically to explore a range of interface issues.

CONCLUSION

6.32 As the foregoing indicates, a number of core issues have been identified from across the three elements of the consultancy, some of which are already being addressed, others that are yet to be tackled. The consultancy has also established a basis for future monitoring of Parts 2, 3 and 6 of the Act. From the activities of the project and the analysis of data gathered in the course of these, it has been possible to identify areas that could be focussed on in further research. An important, concluding point from this multifaceted exploration of the legislation is that the varied evidence demonstrates that broadly the Act is working and yielding benefits for adults with incapacity and for those who care for and about them.

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Legislation, web resources, etc.

All the legislation referred to in this report is available at www.hmso.gov.uk.

Detailed information about the Adults with Incapacity (Scotland) Act 2000, the codes of practice, the text of the Act, application forms, explanatory notes and other resources are available at the official website for the Act:

www.scotland.gov.uk/Topics/Justice/Civil/16360/4927.

The website of the Office of the Public Guardian contains a range of application forms and guidance relating to power of attorney, accessing funds and intervention orders, and guardianship: <http://www.publicguardian-scotland.gov.uk>

Information about the Mental Health (Care and Treatment) (Scotland) Act 2003 is accessible at www.scotland.gov.uk/about/HD/PHPU1/00015216/page1242212802.aspx.

The website of the Mental Welfare Commission for Scotland contains information about guardianships and intervention orders: www.mwscot.org.uk

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Network 1

Age Concern Scotland
Alzheimer Scotland-Action on Dementia
Angus Mental Health Association
Archdiocese of Glasgow
Autism (Scotland)
Bield Housing Association
Black & Minority Ethnic Elders Group
Blide Trust
Borders Dementia Carers Panel
British Association of Social Workers
Camphill Scotland
Capability Scotland
CAPS
CARD Carers Centre
Care Aberdeen
Carers of West Lothian
Carers Scotland
Central Fife Association for Mental Health
Chinese Elderly Support Association
Confederation of Scotland's Elderly
Crossroads (Scotland)
Depression Alliance Scotland
Direct Payments Scotland
Down's Syndrome Scotland
Dundee Association for Mental Health
Eastwood Mental Health Forum
ELCAP
ENABLE
Epilepsy Association of Scotland
FAIR (Family Advice & Information Resource)
Falkirk & District Association for Mental Health
Fife Mental Health Survivors Group
Forth Valley Advocacy Service
Friendset
Garvald Centre (Edinburgh)
Glasgow Association for Mental Health
Headway Glasgow
Headway House (Dumfries & Galloway Association)
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Minerva Housing Association
Montview
National Childbirth Trust
PAMIS (Profound and Multiple Impairment Service)
Penumbra
Princess Royal Trust for Carers
Quality Action Group
Scottish Association for Mental Health
Scottish Association of Health Councils
Scottish Community Care Forum
Scottish Council for Single Homeless
Scottish Federation of Housing Associations
Scottish Head Injuries Forum
Scottish Huntington's Association
Scottish Older People's Advisory Group
Scottish Partnership for Palliative Care
Scottish Pensioners' Forum
Scottish Pensions Association
Scottish Society for Autism
Sense Scotland
Strathclyde Carers Forum
The Action Group
The Advocacy Project
The Princess Royal Trust
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Balfour & Manson WS
Barton & Hendry Solicitors
Better Government for Older People Network (South Lanarkshire)
Better Government for Older People Stirling
Black & Ethnic Minority Elders Group

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Buchanan Dickson Frame
Caesar & Howie Solicitors
Committee of Scottish Clearing Banks
Department of Private Practice
Dumfries & Galloway Elderly Forum
East Ross Community Mental Health Team
Fife Elderly Forum Executive
Henderson Boyd Jackson WS
Highland Senior Citizens Network
Law Society for Scotland
Legal Services Agency, Mental Health and Disability Committee
Life 50+ Scottish Borders Elder Council
Maclay Murray & Spens
McCash & Hunter
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Perth & Kinross & North Tayside Pensioners Forum
Registered Nursing Home Association
Royal College of General Practitioners
Royal College of Nursing
Royal College of Psychiatrists
Scotland Older People's Advisory Group
Stewarts & Murdochs
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Turnbull & Ward
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Network 3

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CoSLA
Mental Welfare Commission
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Sheriff's Association

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APPENDIX 4 FORWARD RESEARCH STRATEGY

One of the tasks of the consultancy was to devise suggestions for future research. On the basis of the findings from the implementation, monitoring and research elements, the following five areas are suggested as a focus for further research.

Longitudinal research of implementation of Part 6.

Longitudinal research in relation to people for whom an action under part 6 was considered could be pursued. This would facilitate the identification of:

- longer term outcomes;
- changes in practice over time;
- the ways in which legislation may be used for people with different causes of incapacity; and for different age groups (including those approaching 16);
- the ways in which the legislation may be used for people from different equalities groups, including people from black and minority ethnic groups.

Implementation of Parts 2 and 3: the role of proxies

The research element of the consultancy was unable to explore in depth the impacts of Parts 2 and 3 for granters, adults and proxies. Further research could be undertaken focusing on the outcomes for each of these groups.

In addition research could be undertaken into the roles of proxies, particularly attorneys, who were not included within the consultancy research. This would allow, for example, comparison of the roles, responsibilities and accountability of welfare attorneys with welfare guardians.

Interface between AWI and other welfare and financial legislation

The consultancy revealed complex interface issues within AWI and between AWI and mental health and financial legislation. In the light of the new Mental Health (Care and Treatment) (Scotland) Act 2003 due for implementation in 2005, further research could be undertaken which would systematically map points of interface, areas of conflict or tension, and the ways in which professionals negotiate their ways through the complexities of using the different legislation.

Quantitative analysis of process issues

Neither the monitoring data, nor the research undertaken within the limits of the consultancy were able to capture detailed elements of process, including numbers of interim orders, appeals, non-intimations, and variations in orders. Nor was it possible to indicate the timescales between

stages. Research focusing on court records could be undertaken to provide, for a sample of cases, a more detailed quantitative picture of the process of applying for an order under Part 6, the time involved and areas where delays can occur.

More detailed evidence is also required on the numbers of applications for Advice and Assistance and civil legal aid by type of action under the AWI, and the outcomes, timescales and amounts involved. This could involve the analysis of Scottish Legal Aid Board records.

Cost Analysis

Although it would be extremely difficult to undertake, it would be useful to explore some aspects of the financial impacts of the legislation. For instance, some cost/benefit analyses could be undertaken of the process and outcomes of actions under Parts 2, 3 and 6, as they impact upon the adult, their nearest relative or primary carer, proxies, statutory authorities and the courts. This could include the costs of pursuing alternatives to an application under Part 6 of the legislation.

APPENDIX 5 PART 6 RESEARCH CASE STUDIES

A is female, aged over 76 and has dementia. She was initially considered for both welfare and financial guardianship. During the assessment it was agreed to apply for both welfare and continuing powers of attorney as alternatives to guardianship. A friend of A has taken on the role of welfare attorney and shares the role of financial attorney with a solicitor.

B is female, aged between 50 and 65, and has a diagnosis of ‘other incapacity’.²² The local authority applied for a welfare guardianship order, which was granted. The local authority acts as the welfare guardian.

C is female, aged between 26 and 50, and has a learning disability. She was initially considered for both welfare and financial guardianship. The local authority subsequently made an application for welfare guardianship and a financial intervention order. The welfare guardianship was granted but the intervention order was refused. The local authority acts as welfare guardian.

D is male, aged between 16 and 25, and has a learning disability. His nearest relatives made an application for both welfare and financial guardianship. Both applications were granted, and the relatives act as joint welfare and financial guardians.

E is female, aged between 26 and 50, and has a learning disability. The local authority made an application for welfare guardianship at the request of her nearest relative. The application was granted. E’s nearest relative acts as welfare guardian.

F is male, aged between 66 and 75, and has a diagnosis of ‘other incapacity’. His nearest relative made an application for welfare guardianship, which was granted. F’s nearest relative acts as welfare guardian.

G is male, aged between 50 and 65, and has a diagnosis of ‘other incapacity’. He was initially considered for a welfare guardianship. During the assessment alternatives to guardianship were explored, and it was agreed that it was not necessary to take any actions under Adults with Incapacity legislation to achieve the desired outcomes.

H is male, aged under 40, and has an acquired brain injury. The local authority made an application for welfare guardianship and this was granted. The local authority acts as welfare guardian.

J is male, aged between 66 and 75, and has dementia. An application was made by the local authority for a welfare guardianship and a financial intervention order. Both orders were granted. The welfare guardianship is held by the local authority. A solicitor acted as the financial intervener. A friend also holds financial power of attorney.

²² ‘Other Incapacity’ includes all cases where diagnosis is either of a combination of factors e.g. Acquired Brain Injury and Korsakoff’s psychosis, or where the precise diagnosis is unclear.

K is female, aged between 26 and 50, and has a learning disability. Applications were made by the local authority for welfare guardianship and a welfare intervention order. A welfare guardianship was granted. The local authority acts as her welfare guardian.

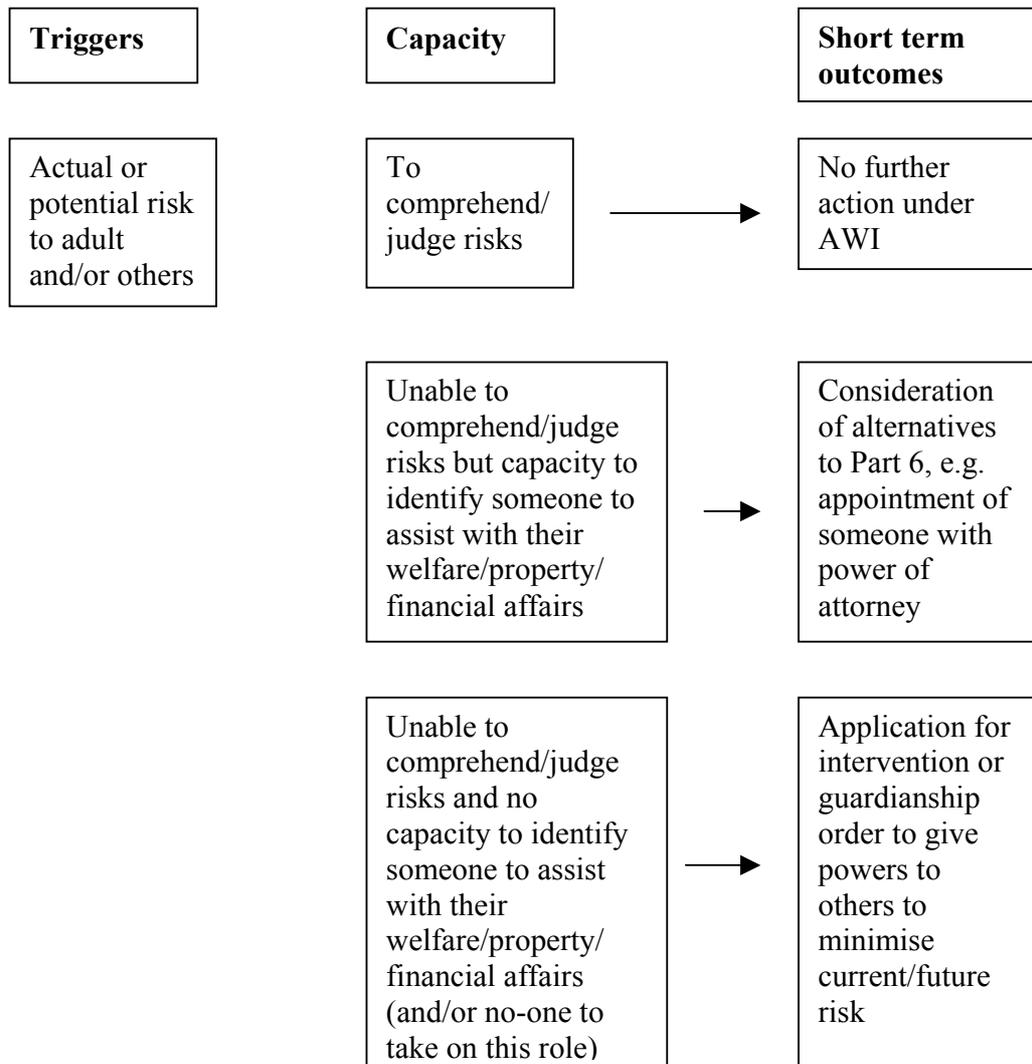
L is male and has a mental illness. Application was made by the local authority for a financial guardianship and was granted. A solicitor acts as his financial guardian.

M is female, is aged over 76, and has dementia. An application was made by the local authority for welfare guardianship and granted. Her nearest relative is her welfare guardian.

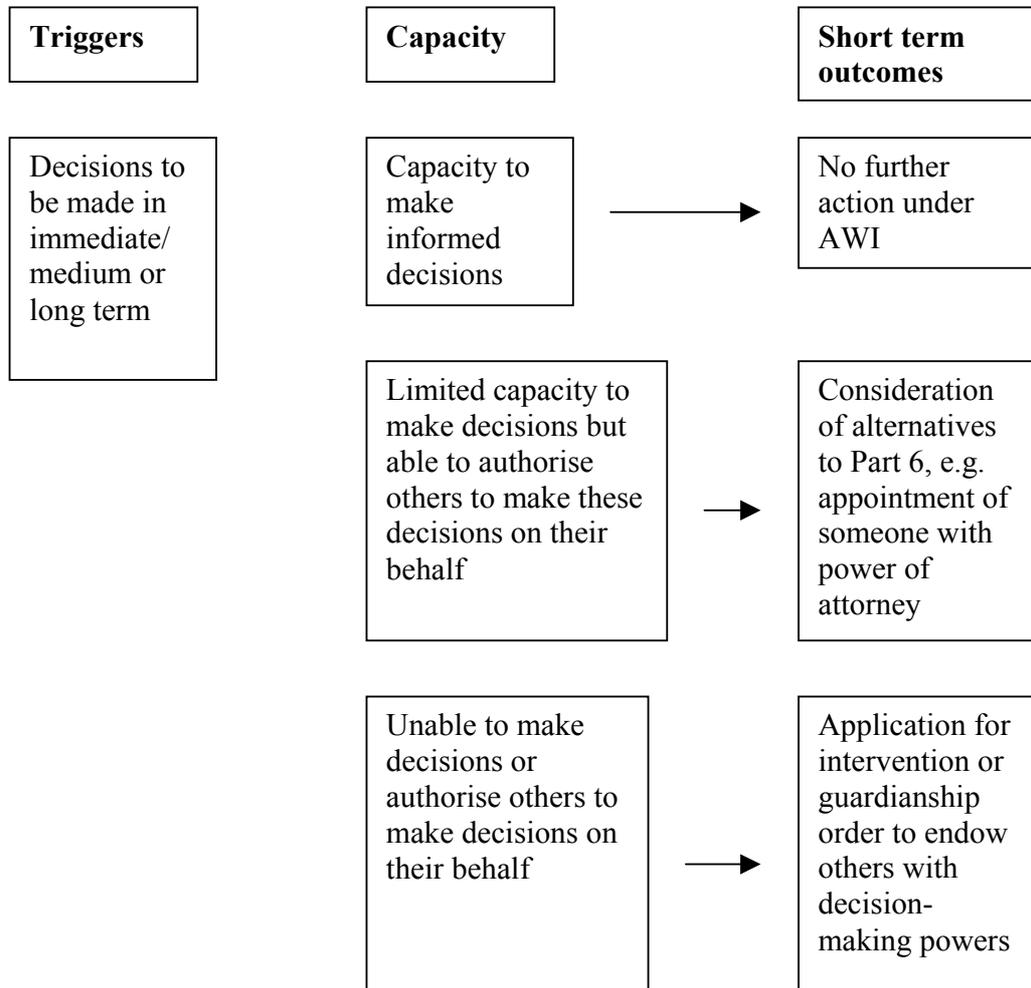
N is male, is aged over 76, and has dementia. He was initially considered for welfare guardianship. During the assessment it was agreed to apply for both welfare and financial powers of attorney as alternatives to guardianship. His nearest relative became his financial and welfare attorney. At a later stage his nearest relative made an application for financial guardianship. His nearest relative is now his financial guardian.

APPENDIX 6 MODELS OF DECISION-MAKING

Model 1: Risk Orientation Model



Model 2: Decision Orientation Model



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