

THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

SCOTLAND

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SECTION 1 – GENERAL

- 1. Briefly describe the current legal framework (all sources of law) regarding the protection and empowerment of vulnerable adults and situate this within your legal system as a whole. Consider state-ordered, voluntary and ex lege measures if applicable. Also address briefly any interaction between these measures.**

In Scotland, persons aged 16 or over have legal capacity to enter into any transaction, by virtue of the Age of Legal Capacity (Scotland) Act 1991 (“1991 Act”). “Transaction” is defined as “any transaction having legal effect” and, according to section 9 of the 1991 Act, includes:

- “(a) any unilateral transaction;*
- (b) the exercise of testamentary capacity;*
- (c) the exercise of any power of appointment;*
- (d) the giving by a person of any consent having legal effect;*
- (e) the bringing or defending of, or the taking of any step in, civil proceedings;*
- (f) acting as arbiter or trustee;*
- (g) acting as an instrumentary witness.”*

Where an adult (i.e. individual over the age of 16 years) is vulnerable, they may lack the capacity to enter into a transaction having legal effect. In Scotland, the law relating to adults with incapacity is governed primarily by statute.

Adults with Incapacity (Scotland) Act 2000

In particular, the Adults with Incapacity (Scotland) Act 2000 (“2000 Act”) sets out a legal framework for safeguarding both welfare and financial issues for adults lacking capacity. The 2000 Act provides for powers of attorney (Part 2), where individuals can grant powers voluntarily to another person to make decisions for them, should they become incapable in future.

The 2000 Act regulates Powers of Attorney, whereby an adult may voluntarily make arrangements to take effect if and when the adult loses

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capacity. There are two types of Powers of Attorney: Continuing Powers of Attorney and Welfare Powers of Attorney.

Continuing Powers of Attorney deal with financial and property issues. These may take effect immediately i.e. while an adult retains capacity. They are often used when an adult is going to be absent for a length of time. Further, Continuing Powers of Attorney can take effect on an adult's loss of capacity.

Welfare Powers of Attorney deal with decisions in relation to the adult's welfare and powers can be exercised only on the loss of the adult's capacity.

The 2000 Act also covers Intervention and Guardianship Orders (Part 6). These are state-ordered, specifically court-ordered, measures which can be sought by an interested person (e.g. a family member) once an adult is deemed incapable of taking relevant decisions. An Intervention Order is appropriate where action needs to be taken on a particular issue i.e. on a one-off basis. A Guardianship Order, on the other hand, grants authority to the appointed Guardian to make decisions on a long-term basis on the adult's welfare, finances or both. A Guardian or intervener can be an individual person or, in some circumstances it may be the state, in the form of the local authority social work department.

The 2000 Act sets out general principles which must underpin any decision or action taken. The principles are set out as follows in section 1 of the 2000 Act.

“(2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.

(3) Where it is determined that an intervention ... is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

(4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of—

(a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;

(b) the views of the nearest relative, named person and the primary carer of the adult, in so far as it is reasonable and practicable to do so;

(c) the views of—

(i) any Guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and

(ii) any person whom the sheriff has directed to be consulted, in so far as it is reasonable and practicable to do so; and

(d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views

have been made known to the person responsible, in so far as it is reasonable and practicable to do so.

(5) Any Guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.”

The 2000 Act created the Office of the Public Guardian (Scotland) (“OPG(S)”). Established in April 2001, the OPG(S) forms part of the wider Scottish Courts and Tribunals Service. By virtue of section 6 of the 2000 Act, the Public Guardian has the power, among other things, to supervise any Guardian or any person authorised under an Intervention Order in the exercise of their functions relating to the property or financial affairs of an incapable adult.

The 2000 Act is supplemented by various Codes of Practice e.g. a Code of Practice for Medical Practitioners. These Codes comprise guidance rather than law, but it is likely that any non-compliance with a Code would be treated unfavourably by a court or tribunal.

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

The Mental Health (Care and Treatment) (Scotland) Act 2003 (“2003 Act”) obliges local authorities to provide care and support to “mentally disordered persons”. This includes detaining any person where there is significant risk to the health, safety and welfare of that person or to the safety of any other person.

The 2003 Act is rights-based legislation which allows people to express their views about their care and treatment. It provides the right to independent advocacy, submission of an advanced statement (stating an individual’s wishes) and allows individuals to choose a named person who can make decisions on their behalf.

When discharging functions under the 2003 Act, section 1 provides that professionals must have regard to various matters as follows.

- “(a) the present and past wishes and feelings of the patient which are relevant to the discharge of the function;*
- (b) the views of–*
 - (i) the patient's named person;*
 - (ii) any carer of the patient;*
 - (iii) any Guardian of the patient; and*
 - (iv) any welfare attorney of the patient,*
which are relevant to the discharge of the function;
- (c) the importance of the patient participating as fully as possible in the discharge of the function;*
- (d) the importance of providing such information and support to the patient as is necessary to enable the patient to participate in accordance with paragraph (c) above;*
- (e) the range of options available in the patient's case;*

- (f) *the importance of providing the maximum benefit to the patient;*
- (g) *the need to ensure that, unless it can be shown that it is justified in the circumstances, the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation;*
- (h) *the patient's abilities, background and characteristics, including, without prejudice to that generality, the patient's age, sex, sexual orientation, religious persuasion, racial origin, cultural and linguistic background and membership of any ethnic group."*

The 2003 Act created a new Mental Health Tribunal for Scotland on 5 October 2005.

The statutory framework created by the 2003 Act is largely beyond the scope of this Questionnaire and focus will be principally on the 2000 Act.

Social Work (Scotland) Act 1968

The Social Work (Scotland) Act 1968, as amended by the Adult Support and Protection (Scotland) Act 2007, allows local authorities to “take any steps which they consider would help an [incapable] adult to benefit from [a community care] service” (section 13ZA). This includes moving an adult in these circumstances to residential care.

Common Law

Precedent can be developed in Scotland by way of case law. The statutory powers relating to vulnerable adults lacking capacity are now so wide, that the majority of cases in recent years have been focused on statutory interpretation.

European Convention on Human Rights

Despite Brexit, the United Kingdom (and therefore Scotland) remains subject to the European Convention on Human Rights (ECHR). Therefore, adults with incapacity have their human rights protected by virtue of the ECHR and, ultimately, any alleged breach by the state may be dealt with by the European Court of Human Rights.

- 2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: *curatele*; Russia: *oneka - opeka*]. As explained in the General Instructions above, please briefly explain these terms by making use of the definitions section above wherever possible or by referring to the official national translation in English.**

| Term | Definition |
|--------------|--|
| “1968 Act” | Social Work (Scotland) Act 1968 |
| “2000 Act” | Adults with Incapacity (Scotland) Act 2000 |
| “2001 Rules” | Act of Sederunt (Summary Applications, Statutory |

| | |
|--------------------|---|
| | Applications and Appeals etc. Rules) Amendment (Adults with Incapacity) 2001 |
| “2003 Act” | Mental Health (Care and Treatment) (Scotland) Act 2003 |
| “2007 Act” | The Adult Support and Protection (Scotland) Act 2007 |
| “CRPD” | Convention on the Rights of Persons with Disabilities |
| “CTO” | Compulsory Treatment Order |
| “Attorney” | An individual appointed by another individual on a voluntary basis to make decisions on their behalf |
| “ECHR” | European Convention on Human Rights |
| “Guardian” | An individual appointed to make decisions on behalf of an incapable adult under the 2000 Act |
| “Hague Convention” | Hague Convention on the International Protection of Adults |
| “Intervener” | An individual appointed to make a particular decision or decisions on behalf of an incapable adult under the 2000 Act |
| “MHO” | Mental Health Officer |
| “MWCS” | Mental Welfare Commission for Scotland |
| “OPG(S)” | Office of the Public Guardian (Scotland) |
| “RMO” | Responsible Medical Officer |
| “SMHLR Report” | Scottish Mental Health Law Review Final Report, September 2022 |

Terminology Relating to Incapacity

There exists a variety of terminology relating to incapacity in the Scottish system. Wording varies between statutes and common law, which may seem unhelpful on the face of it, but each definition is tailored to the specific area of law. For example, the 2000 Act deals with adults who are “incapable by reason of mental disorder or inability to communicate” (see the preamble to the Act here). That is because the 2000 Act allows other individuals to make decisions for someone incapable of making those decisions for themselves.

The 2003 Act simply deals with “mentally disordered persons”, however (see the preamble here). Arguably an individual who is “mentally disordered” is still capable of making decisions. The difficulty may be that those decisions will put the adult or others at risk.

Other statutes are even more specific. For example, the Marriage (Scotland) Act 1977 understandably limits its definition to whether or not an individual is capable of “understanding the nature of a marriage ceremony or of consenting to marriage” (section 20A(3)).

In this questionnaire, the relevant terminology will be used depending on the area of law being discussed.

3. Briefly provide any relevant empirical information on the current legal framework, such as statistical data (please include both annual data and trends over time). Address more general data such as the percentage of the population aged 65 and older, persons with disabilities and data on adult protection measures, elderly abuse, etc.

In common with many other countries, Scotland’s population is ageing, with the most recent census (2022) showing a higher number of older people than ever before. In the age groups of 65 and over, the number now exceeds one million (1,091,000), in contrast to the number of people in the youngest age groups (under 15), of whom there are 832,300. At the date of the last Census (20 March 2022), the total population of Scotland was estimated to be 5,436,600.²

The Mental Welfare Commission for Scotland publishes statistical data as part of its duties under the 2000 Act.³ This includes details on Guardianship and Intervention orders. In 2022, there were 17,101 individuals subject to a guardianship order, slightly higher than in the previous year (16,033). While the full figures for 2023 are not yet available, the MWCS have confirmed the continued upward trend with a total of 17,849 Guardianship Orders in place in the current year.⁴

The Care Home Census for Adults in Scotland, published in September 2022, provides data for the most recent 10-year period from 2011/12 to 2021/22. The data excludes the year 2019/20 when the census did not take place due to the pandemic. This Census provides data for all care homes in

² [Scotland’s Census 2022](#).

³ MWCS, [Adults With Incapacity Act monitoring report 2021-22](#).

⁴ MWCS, [Annual Report 2022-23](#).

Scotland for adults, over the age of 18 “including care homes for older people (65 years and over) and for those with learning disabilities, mental health problems, physical and sensory impairment, alcohol and drug misuse, and blood borne virus (such as HIV/AIDS).” In March 2022, there were an estimated 33,352 adults, resident in care homes in Scotland; 11% fewer than in 2012 (37,335). Admissions for long stay residents to care homes for older people had however increased by 15% in 2021/22 as compared to 2011/12. In 2022, the estimated number of residents in care homes for older people was 29,465, of whom 62% (18,405) had dementia.

4. List the relevant international instruments (CRPD, Hague Convention, other) to which your jurisdiction is a party and since when. Briefly indicate whether and to what extent they have influenced the current legal framework.

Convention on the Rights of Persons with Disabilities (CRPD)

The United Kingdom ratified the CRPD on 8 June 2009. Scotland published a Delivery Plan for the CRPD in 2016, covering five years to 2021.

The CRPD has not significantly influenced the current legal framework which, in the main, pre-dated the ratification. The CRPD is referred to occasionally in cases dealing with measures imposed upon incapable adults e.g. in the Application in respect of M 2012 S.L.T. (Sh Ct) 25, Sheriff Baird commented that the CRPD provided that such measures “should apply for the shortest time possible”.

However, the UN Committee on the Rights of Persons with Disabilities concluded a review (“Concluding Observations”) of the United Kingdom’s compliance with the CRPD, which identified a number of areas of concern. Please see the answer to question 15 below for further information.

Hague Convention

Scotland ratified the Hague Convention on the International Protection of Adults on 5 November 2003 (“Hague Convention”).

To date, the Hague Convention has been relied upon in only two Scottish decisions, neither of which are of particular relevance in relation to the development of the law (F v S 2012 S.L.T. (Sh Ct) 189 and Darlington BC, Applicants 2018 S.L.T. (Sh Ct) 53).

European Convention on Human Rights

As discussed above, Scotland, as part of the United Kingdom, is subject to the ECHR. Decisions by the European Court of Human Rights have influenced policy and therefore law in Scotland. For example, the decision in the case of HL v UK [2004] ECHR 471 (“Bournemouth”) which is discussed in some detail below (in answer to question 6), led to changes in the way in which adults unable to consent to living at a particular residence are treated.

5. Briefly address the historical milestones in the coming into existence of the current framework.

The 2000 Act was seen as a key modernising statute in Scotland. It has been described as

“part of a general trend ... to shift from what may be termed ‘old law’ to ‘new law’. ‘Old law’ was typified by a ‘black and white’ approach under which people were simplistically classed as sane or insane, educable or ineducable, fully capable and responsible or lacking in capability and responsibility ‘New law’ recognises the great variety of intellectual disabilities and resulting impairments of capacity. In each case, such capacity as a person in fact has should be respected, safeguarded and if possible encouraged”.⁵

The 2000 Act followed the Scottish Law Commission’s *Report on Incapable Adults* 1995: Part 1 and Part 2 (“1995 Report”). It attempted to consolidate the law in relation to adults lacking capacity in Scotland. Prior to the 2000 Act coming into force, the law had developed in a piecemeal fashion and even dated back, in places, to the Middle Ages (see the Curators Act 1585, which was repealed by the 2000 Act). It was described as looking “like an archaeological site”.⁶

Under the previous system, there was a range of different types of “guardian” possible. The Scottish Law Commission, in their review, described the different forms - “mental health guardians”, “tutors-dative”, “tutors-at-law” and “curators bonis”- and focused on the criticisms and limitations of each.

The Mental Health (Scotland) Act 1984, which consolidated the Mental Health (Scotland) Act 1960, dealt with “mental health guardians” (see Part V). Section 41 granted a guardian the following powers:

“power to require the patient to reside at a place specified by the authority or person named as guardian;
(b)power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training;
(c)power to require access to the patient to be given, at any place where the patient is residing, to any medical practitioner, mental health officer or other person so specified.”

In practice, most “mental health guardians” were the local authority or Director of Social Work.⁷

Tutors-dative provided a “more personal type of guardianship”, compared to mental health guardianship. The Commission says:

⁵ A. Ward, *Adult Incapacity*, W. Green, Edinburgh, 2003, 3-1.

⁶ A. Ward, *Adult Incapacity*, W. Green, Edinburgh, 2003, 3-1.

⁷ Scottish Law Commission’s Report on Incapable Adults 1995 at 6.2.

“[Tutors-dative] are appointed by the Court of Session after consideration of two medical certificates of incapacity. Centuries ago tutors-dative were appointed to act on behalf of incapable adults in all aspects of their lives. In modern practice tutors-dative are granted personal welfare powers only, tailored to the needs of the individual adult.”

The 1995 Report goes on to criticise certain aspects of tutors-dative. The powers and duties had been, according to the Scottish Law Commission, “gathered from centuries-old cases” and so it was unclear how far these powers and duties remained authoritative “in a society with a different outlook and values” (page 86).

Tutors-at-law were also criticised, not least because it was a role which would be held only by “the nearest male relative”: a restriction which was “incompatible with modern notions of sexual equality”.⁸

Curators-bonis dealt with an adult’s estate, property and finances, rather than their personal welfare. Again, the Scottish Law Commission was critical of the system existing in 1995 for the appointment of a curator-bonis (page 86). For example, the Commission pointed out that the curator was “all of nothing”, in that the curator would take over the management of an adult’s estate “and the curator’s powers are not tailored to the needs and abilities of the adult”.

Having considered, and consulted on, various options for amending or abolishing each of these different roles, the Scottish Law Commission recommended:

“a new flexible system of personal and financial guardianship for incapable adults based on the principles of least restriction, consultation with the adult and others involved and encouraging the adult to use and develop skills. This new guardianship should replace guardianship under the Mental Health (Scotland) Act 1984, tutors-at-law, tutors-dative and curators bonis.”⁹

2000 Act

The 2000 Act therefore replaced the previous system involving mental health guardians, tutors-dative, tutors-at-law and curators-bonis and set out a new statutory regime with a more coherent and integrated approach.

The 2000 Act was the fourth Act passed by the newly devolved Scottish Parliament (the new Parliament met for the first time in May 1999). At the time, the 2000 Act was seen as a significant improvement to the previous system. In 2018, the Scottish Government explained that, at the time of its implementation, the 2000 Act “was widely acclaimed as ground-breaking law”. However, the Government went on to say that law is “ever evolving” and sets out a number of proposals for reform “Adults with Incapacity

⁸ Scottish Law Commission’s Report on Incapable Adults 1995 at 6.5.

⁹ Scottish Law Commission’s Report on Incapable Adults 1995 at 6.12.

(Scotland Act 2000: proposals for reform 2018”). Please see below for further discussion.

The Adult Support and Protection (Scotland) Act 2007 (“2007 Act”) was the next milestone in this area. The 2007 Act tightened up measures to identify and protect adults at risk from harm. The 2007 Act placed a duty on local authorities to make necessary enquiries to establish whether or not further action is required to stop or prevent harm occurring, where it is known or suspected that an adult is being harmed (section 4). The 2007 Act also amended the 2000 Act, with a view to “improving how it operates in practice” (see the Explanatory Notes). For example, section 55 of the 2007 Act inserted new subsections (5A) and (5B) into section 3 of the 2000 Act, providing that Sheriffs “must take account of the wishes and feelings of the adult who is the subject of the application or proceedings so far as they are expressed by a person providing independent advocacy services”.

The 2007 Act also amended the Social Work (Scotland) Act 1968 Act to insert a new section 13ZA, which allows a local authority to, among other things, move an adult with incapacity to residential care where the adult is compliant and there is no disagreement.

Meantime, the Mental Health (Care and Treatment) (Scotland) Act 2003 (“2003 Act”) replaced the Mental Health (Scotland) Act 1984. It established new arrangements for the detention, care and treatment of persons who have a mental disorder. It also created the Mental Health Tribunal for Scotland.

- 6. Give a brief account of the main current legal, political, policy and ideological discussions on the (evaluation of the) current legal framework (please use literature, reports, policy documents, official and shadow reports to/of the CRPD Committee etc). Please elaborate on evaluations, where available.**

Since the entry into force of the current statutory framework, there have been a number of reviews and reports, giving rise to a range of recommendations. The Scottish framework has been reviewed and analysed as part of a major project comparing the approach across the three jurisdictions in the UK: The Essex Autonomy Project Three Jurisdictions Report. A recent Briefing on Adults with Incapacity, compiled by the Scottish Parliament Information Centre (SPICe), provides a helpful overview of the principal reports and their various recommendations. Most recently, a major independent review was conducted in the form of the Scottish Mental Health Law Review, with publication of the Final Report in September 2022 (“SMHLR Report”). This is a substantial (943 pages) and wide-ranging Report, providing a review of the law relating to mental health and capacity law.

Deprivation of Liberty

While deprivation of liberty in respect of adults with incapacity is beyond the scope of this questionnaire, it is noted here that it has been a significant challenge for the courts and legislators and it is the aspect of detention, rather

than specifically capacity, that has to a large extent been the focus of attention in Scotland. An English case which reached the European Court of Human Rights (“ECHR”), *HL v UK [2004] ECHR 471* (“*Bournewood*”), highlighted failings in both the English and Scottish systems. In that case, an adult with severe autism was removed from his carers and placed into a psychiatric hospital. The state’s position was that, given the adult was compliant, he had not been deprived of his liberty. The carers disagreed and took the case to the ECHR. The ECHR held that the adult had been deprived of his liberty and that Article 5 of the European Convention on Human Rights had been breached (right to liberty and security).

In Scotland, this issue was discussed in several Sheriff Court cases. For example, in *Muldoon, Applicant 2005 SLT (Sh Ct) 52*, an applicant sought Guardianship in respect of his mother, who lacked capacity and resided in a nursing home (where she appeared content). The Mental Health Officer (“MHO”) on behalf of the local authority, opposed the appointment of the applicant on the basis a Guardianship Order was the least restrictive option (as required by the general principles of the 2000 Act). It was argued that an informal framework of care was the least restrictive option. Sheriff Baird took into account the ECHR’s decision in *Bournewood* and held that the adult would be deprived of her liberty without the Guardianship Order. This approach was followed in other cases (e.g. *RMcC, Applicant*, unreported, 26 February 2009 at Kilmarnock Sheriff Court).

The Scottish Government published a Code of Practice for Local Authorities in 2008, setting out their duties and powers under the 2000 Act. In particular, the Code of Practice included guidance to “promote and support good practice in assessing whether a proposed care intervention amounts to ‘deprivation of liberty’”. By this date, the 2007 Act had inserted new section 13ZA into the 1968 Act, allowing local authorities to move an adult to residential accommodation if necessary (among other things).

In 2012, Sheriff Principal Lockhart held that a woman subject to a CTO under the 2003 Act (who was placed in a locked facility) was not being deprived of her liberty, on the basis that the overriding purpose of the 2003 Act is to provide care and treatment and the woman was being detained for her safety (*B v Rosriguez 2012 G.W.D. 34-702*).

Notably, the Supreme Court set out an “acid test” on what constitutes a deprivation of liberty in this context in an English case (*P v Cheshire West and Chester Council, P and Q v Surrey County Council [2014] UKSC 19*). In short, the test is as follows:

- is the person subject to continuous supervision and control; and
- is the person free to leave?

In response to the *Bournewood* case, the Scottish Law Commission (“SLC”) published a Discussion paper on Adults with Incapacity. The Discussion Paper sought views from stakeholders and led to the publication of the SLC’s Report on Adults with Incapacity in October 2014. The Report recommended that the 2000 Act should be amended to include a legal process

to authorise measures preventing an adult from going out of a hospital and a more detailed legal process for the scrutiny of significant restriction of liberty (this phrase is used rather than “deprivation of liberty”) of an adult in a care home or other placement in the community. Further, the Report recommended that the 2000 Act should also be amended to provide for a right to apply to the sheriff court for release of an adult who may lack capacity from unlawful detention in certain care settings.

The Scottish Government consulted on the SLC’s Report in 2016 (Scottish Government Consultation on the Scottish Law Commission Report on Adults with Incapacity). The findings from this consultation were clear in stating that there is a need to ensure a lawful process is in place for those persons who may need to be deprived of their liberty in community or hospital settings and lack capacity to agree to such a placement.

Supported Decision-making

In 2017, the UN Committee on the Rights of Persons with Disabilities concluded a review of the United Kingdom’s compliance with the CRPD which identified a number of areas of concern. It recommended that all forms of substituted decision-making (when someone makes decisions on behalf of someone who is deemed not to have capacity) be abolished. Instead, it is clear that a system incorporating supported decision-making is recommended.

In the article ‘Supported Decision-Making and Paradigm Shifts: Word Play or Real Change?’ (Front. Psychiatry 11 January 2021), Jill Stavert discusses this issue, saying:

“The CRPD message is essentially that if real equal rights enjoyment is to be achieved then it is necessary to start with a level playing field: persons with physical and mental disabilities who may experience greater practical, institutional and societal challenges with enjoyment of such rights must be supported—whether by, for example, supported decision-making, reasonable accommodation, or universal design—to achieve this on an equal basis with other. Only when this level playing field has been reached can the restriction of rights, applying the same criteria for all, be considered. To start from a position where certain persons are not entitled to full enjoyment of rights because they possess a certain characteristic – in the case of persons with persons with mental disabilities owing to others’ perceptions of their capabilities – results in structural inequalities, and thus discrimination, from the outset.”

The view that there is inherent discrimination in using substituted decision-making, rather than supported decision-making, has gained traction. Indeed, the SMHLR Report confirms that responses to its consultation were very much in favour of a wide-ranging supported decision-making scheme.

There are, of course, concerns regarding risks to adults, such as the possibility for undue influence and conflicts of interest. Also, ascertaining an adult’s wishes can be challenging. The SMHLR Report looked at these issues

in some detail. Regarding undue influence and conflict, there were a number of suggestions including the use of independent advocates. It is clear that the use of independent advocates needs to be promoted in Scotland, with only 5% of people who have a right to independent advocacy accessing that right (SMHLR Report, page 136). The Report also considered how to improve the use of advance statements / directives – see below.

Advance Statements / Directives

It is clear from the SMHLR Report that reforming the law in relation to advance statements is challenging. Ultimately, the Report recommends that the Scottish Government should implement a model of “advance choices”, reflecting an individual’s will and preferences (page 145). The Report says the following at page 134.

“Overall, we conclude that there is a strong case for a stronger, comprehensive and holistic model of advance choice, in anticipation of the possibility of being unable to make an autonomous decision in future. This should encompass both treatment for mental or intellectual disability and physical conditions, and potentially other aspects of a person’s life.”

Culture Change

The SMHLR Report states that a substantial number of responses to its consultation “mentioned the need for culture change” (page 121). There appears to be a general feeling among those affected by the laws and procedures discussed here that their voices are not heard. The Midlothian Health and Social Care Partnership said that “the cultural shift towards viewing decision-making as being located with the person regardless of their autonomy [is] necessary...”.

The Scottish Government is taking steps to eradicate perceived discrimination in legislation. For example, the Government commissioned an Independent Review of Learning Disability and Autism in the 2003 Act. The Final Report was published in December 2019. The Report made a number of recommendations focused on reducing or removing the discrimination of autistic people and people with intellectual disability in existing legislation. The Report’s key recommendations include the following.

- That learning disability and autism are removed from the definition of mental disorder in the [2003 Act].
- That changes in law and improvements in services are put in place before this happens. A date should be set for this.
- That Scotland works towards law that removes discrimination in detention and compulsory treatment on the basis of disability.
- That a new law is created to support access to positive rights, including the right to independent living.

Part of this culture change must include looking closely at terminology generally. As noted above, Scotland uses a variety of terminology to describe adults lacking capacity to make decisions. The SMHLR Report says (at page 25):

“...stigma persists in society and practice and continues to find a place in the language of deficit inherent in some crucial legal terms (“mental disorder” being just one example). We aim to continue the journey of the language in this area towards names, words and phrases that better reflect the feelings of the individual and meaningful enablement – what they can do, rather than what they cannot do without greater support, adjustment and accommodation”.

7. Finally, please address pending and future reforms, and how they are received by political bodies, academia, CSOs and in practice.

There are currently no reforms pending and detailed proposals are awaited. As highlighted in the answer to Q.6, above, however, there have been various reform proposals.

In 2018, the Scottish Government published a Consultation Paper, *Adults with Incapacity (Scotland) Act 2000: proposals for reform*. Among the proposals was a system of graded guardianship which would be “more easily tailored to the adult’s circumstances, that can apply for only the time necessary and with safeguards that will be proportionate to the degree to which such measures affect the person’s rights and interests”. There would be three grades available as follows:

- A Grade 1 guardianship would be used for day to day welfare matters and for managing simpler financial affairs under a threshold to be set by regulations.
- A Grade 2 guardianship would be used for managing property and financial affairs above the threshold set by regulations, as well as more complex welfare needs such as a move of accommodation where there might be a significant restriction on a person's liberty.
- A Grade 3 guardianship would be used for all the financial and welfare powers of Grade 2 and is used where there is some disagreement between interested parties, including the adult, about the application.

The process for applying for each grade would differ, with the Grade 1 process being simplest. The Government also suggested that the OPG(S) could hear Grade 1 applications, while either a Sheriff or Mental Health Tribunal legal panel member could hear Grade 2 and 3 applications, depending on the circumstances (see [discussion here](#)).

In their *Summary and Analysis of Consultation Responses*, published by Scottish Government in August 2018, it was evident that, while there was strong support for reform of the 2000 Act, there was no clear consensus on the

detailed substance of that reform. The proposed system of graded guardianship, in particular, was criticised “with many respondents suggesting that it did not provide enough safeguards, nor provide enough support to enable the adult to make their own decisions. Further, rather than making the process less complex, we ran the risk of creating more bureaucracy, which certainly was not the intention.”

The Scottish Government indicated that they would wait for the report of the SMLHR. As noted above, this Report was published in September 2022. In June 2023, the Scottish Government published its Response to the Report, setting out its broad commitment to reform. While detailed plans for reform are still awaited, it is clear that Scotland’s current legal landscape with regard to adults with incapacity requires urgent reform. Importantly, there is significant support for the introduction of a person-centred, supported decision-making system. Ultimately, ensuring that adults’ human rights are maintained and that they are able to make and act upon their own decisions appears to be of the utmost importance to political bodies, academia, CSOs and in practice.

SECTION II – LIMITATIONS OF LEGAL CAPACITY

8. Does your system allow limitation of the legal capacity of an adult? N.B. If your legal system provides such possibilities, please answer questions 8 - 15; if not proceed with question 16.

No, the Scottish system does not allow for limitation of the legal capacity of an adult. The starting point, as explained in the answer to Q.1, is that all adults have legal capacity in accordance with the Age of Legal Capacity (Scotland) Act 1991. In Scotland, and for this purpose, adult is considered to be a person over the age of 16.

- a. on what grounds?**
- b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?**
- c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?**
- d. can the limited legal capacity be restored and on what grounds?**
- e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?**

f. are there any other legal instruments,¹⁰ besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?

9. Briefly describe the effects of a limitation of legal capacity on:

- a. property and financial matters;**
- b. family matters and personal rights (e.g. marriage, divorce, contraception);**
- c. medical matters;**
- d. donation and wills;**
- e. civil proceedings and administrative matters (e.g. applying for a passport);**

N/A

10. Can limitation of legal capacity have retroactive effect? If so, explain?

N/A

11. Which authority is competent to decide on limitation or restoration of legal capacity?

N/A

12. Who is entitled to request limitation or restoration of legal capacity?

N/A

13. Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:

- a. a requirement of legal representation of the adult;**
- b. participation of family members and/or of vulnerable adults' organisations or other CSO's;**
- c. requirement of a specific medical expertise / statement;**
- d. hearing of the adult by the competent authority;**

¹⁰ Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of his/her acts

- e. **the possibility for the adult to appeal the decision limiting legal capacity.**

N/A

14. Give a brief account of the general legal rules with regard to *mental capacity* in respect of:

- a. **property and financial matters;**

Scotland has a common law presumption of capacity. The OPG(S) explains that the law in Scotland “generally presumes that adults i.e. those over the age of 16 are capable of making personal decisions for themselves and of managing their own affairs. The starting point is a presumption of capacity and this can only be overturned where there is medical evidence stating otherwise”.

It is settled law in Scotland that adults lacking capacity may not enter into contracts (see *John Loudon & Co v Elder’s CB, 1923 S.L.T. 226*, where a contract for the sale of meat was deemed void by Lord Blackburn, due to the defender’s “insanity” (an appropriate term in 1923)).

However, contracts entered into when an adult had mental capacity and which continue on after the adult loses mental capacity may remain enforceable. For example, a partnership entered into by a person who loses mental capacity at a later date remains in place until dissolved formally by the court (see section 35 of the Partnership Act 1890, which has the following problematic wording: “When a partner is found lunatic... by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind... the partnership [may] be dissolved”).

Solicitors must be satisfied when taking instructions that the client has the capacity to give instructions in relation to that matter. See the Law Society of Scotland’s Guidance on capacity.

- b. **family matters and personal rights (e.g. marriage, divorce, contraception);**

Adults are unable to marry if they are incapable of understanding the nature of a marriage ceremony or of consenting to marriage (see section 20A(3) of the Marriage (Scotland) Act 1977).

Adults lacking capacity cannot raise actions of divorce themselves (see (e) below), but a Guardian or Intervener could do so on their behalf by virtue of Part 6 of the 2000 Act.

The MWCS has published Advice Notes on “Contraception and Adults with Incapacity”. It is suggested that specific powers should be sought from a Court where contraception primarily relates to preventing

pregnancy. Alternatively, if it relates to a medical condition, then this is dealt with in the same way as any medical treatment (see (c) below).

c. medical matters;

Provisions exist in the 2000 Act (see Part 5) to cover the situation where an adult is incapable of consenting to medical treatment. In those circumstances, where a medical practitioner is of the opinion that an adult is incapable in relation to a decision about medical treatment and has certified that he is of that opinion, then he shall have authority for the duration of the period specified in the certificate to do what is reasonable in the circumstances in relation to the treatment in question to safeguard or promote the physical or mental health of the adult (section 47).

d. donations and wills;

The Age of Legal Capacity (Scotland) Act 1991 provides at section 2(2) that a person over the age of 12 years shall have testamentary capacity. However, if an adult does not have sufficient mental capacity to execute a will, the will is void i.e. invalid and unenforceable from the outset. Courts can “reduce” a will in these circumstances. See *Boyle v Boyle’s Executor 1999 SC 479*.

e. civil proceedings and administrative matters (e.g. applying for a passport).

An adult who “lacks the requisite mental capacity” has no *persona standi in judicio*, i.e. cannot sue or be sued in a Scottish Court.¹¹

Adults lacking mental capacity are, however, entitled to obtain a passport.

15. What are the problems which have arisen in practice in respect of your system on legal capacity (e.g. significant court cases, political debate, proposals for improvement)? Has the system been evaluated and, if so, what are the outcomes?

Any problems and issues relating to legal capacity in Scots law have arisen within the wider context of the statutory framework relating to adults with incapacity, and as such are discussed in the answer to Q.6 above.

SECTION III – STATE-ORDERED MEASURES

¹¹ Macphail’s Sheriff Court Practice 4th.ed. at paragraph 4.08.

Overview

16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.

There are two forms of state-ordered measures, Intervention Orders and Guardianship Orders, as provided for by the 2000 Act. An Intervention Order (section 53) is appropriate where action needs to be taken on a particular issue i.e. on a one-off basis. In terms of section 53(6), an Intervention Order may:

- “(a) direct the taking of any action specified in the order;*
- (b) authorise the person nominated in the application to take such action or make such decision in relation to the property, financial affairs or personal welfare of the adult as is specified in the order.”*

It may be appropriate, for example, in respect of selling a property or executing a deed.

A Guardianship Order (section 57), on the other hand, grants authority to the appointed Guardian to make decisions on a long-term basis on the adult’s welfare, finances or both.

Before discussing in more detail each of these Orders, it is worth remembering the general principles which apply to the operation of the 2000 Act and which are fundamental to understanding the nature and operation of Intervention and Guardianship Orders. These principles are set out in section 1 of the Act as follows:

- “(1) The principles set out in subsections (2) to (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult.*
- (2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.*
- (3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.*
- (4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of–*
 - (a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid*

(whether of an interpretative nature or otherwise) appropriate to the adult;

(b) the views of the nearest relative, named person and the primary carer of the adult, in so far as it is reasonable and practicable to do so;

(c) the views of—

(i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and

(ii) any person whom the sheriff has directed to be consulted,

in so far as it is reasonable and practicable to do so; and

(d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.

(5) Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.”

There is also provision within the 2000 Act for much more limited access to an adult’s funds (without a formal Intervention or Guardianship Order). This system, regulated by [Part 3](#) of the Act, provides for an individual, local authority or other organisation to be given access to and authority to manage funds belonging to the adult. The “Access to Funds” scheme is only likely to be suitable where the circumstances are simple. It does not require a court order but is managed by application to the OPG(S). The scheme does not fit clearly into the classification of “state-ordered measures”, as used in this Questionnaire, and will not be addressed separately in each of the following questions. It will be explained briefly, however, in the answer to Q.25, below.

Pay attention to:

a. can different types of state-ordered measures be applied simultaneously to the same adult?

Yes, different types of state-ordered measures can be applied simultaneously to the same adult. For example, emergency orders under the 2003 Act (such as detention in hospital) can be applied to an adult who already has a Guardian under the 2000 Act (note in [section 64](#) of the 2003 Act that a

Tribunal must afford a Guardian the opportunity to make representations and so on before determining an application for a CTO).

Also, arguably a Guardian could apply for an Intervention Order under section 53 of the 2000 Act, where they wish to take action not authorised by the Guardianship Order. However, it may be more appropriate in those circumstances to vary the Guardianship Order itself by virtue of section 74: they should pursue whichever would be the least restrictive option, in accordance with the second general principle in section 1(3).

b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;

Any action taken should be the least restrictive option (2000 Act, s1(3)). So, for example, where there is a question regarding the granting of an Intervention Order or Guardianship Order, the court should grant the Intervention Order (if appropriate) as it is, by its very nature, less restrictive.

c. does your system provide for interim or ad-hoc state-ordered measures?

Yes, the system allows for interim state-ordered measures. The 2000 Act provides for interim Guardianship (subsection 57(5)). Interim powers are generally granted in circumstances where there is an urgent matter to be dealt with before the final decision.

Start of the measure

Legal grounds and procedure

17. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.

The legal grounds for the granting of a Guardianship Order are set out in section 58(1) as follows:

“(1) Where the sheriff is satisfied in considering an application under section 57 that–

- (a) the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable; and*
- (b) no other means provided by or under this Act would be sufficient to enable the adult's interests in his property, financial affairs or*

personal welfare to be safeguarded or promoted, he may grant the application.”

The legal grounds for making an Intervention Order are related to the scope of the application. Section 53(1) provides that the sheriff must be satisfied that the adult is “incapable of taking the action, or is incapable in relation to the decision about the adult’s property, financial affairs or welfare to which the application relates”.

For Intervention Orders and Guardianships, the 2000 Act sets out in section 1(7) the definition of when an adult is deemed “incapable” as follows:

“incapable” means incapable of–
(a) acting; or
(b) making decisions; or
(c) communicating decisions; or
(d) understanding decisions; or
(e) retaining the memory of decisions,
as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and
“incapacity” shall be construed accordingly.”

Simply because an adult is an addict or tends towards prodigality is unlikely to be sufficient for any state-ordered measure (or, indeed, any measure). Any applicant would have to satisfy the criteria set out above for each Act. Similarly, a physical impairment is not sufficient unless the criteria are met.

18. Which authority is competent to order the measure?

The Sheriff Court is the competent forum in respect of both Intervention and Guardianship Orders. The general powers of the sheriff, across the 2000 Act, are set out in section 3 of the Act.

Scotland has a system of local sheriff courts which deal with both civil and criminal matters. There are six sheriffdoms, each presided over by a Sheriff Principal. Each sheriffdom is further divided into districts with a sheriff court in each. The sheriff court is presided over by a sheriff, a member of the judiciary of Scotland.

19. Who is entitled to apply for the measure?

Any party who claims “an interest in the property, financial affairs or personal welfare of an adult” including the adult him or herself may apply

under the 2000 Act for an Intervention (section 53(1)) or Guardianship Order (section 57(1)). This includes family members and friends.

Further, the state (local authority) may, and in certain circumstances shall, apply. Where it appears to the local authority that the grounds for making of either Order are satisfied, that no application has been or is likely to be made, and that an Order is “necessary for the protection of the property, financial affairs or personal welfare of the adult”, the local authority must apply in terms of either section 53(3) (Intervention) or section 57(2) (Guardianship). The Chief Social Worker is the named person for an application for an Intervention or Guardianship Order under the 2000 Act, but in practice any social worker can make the application.

20. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?

Consent is not required but is considered. Where an adult objects, they have the right to an evidential hearing in the Sheriff Court in relation to an application for Intervention or Guardianship Orders. The papers must be served on the adult before any decision is made. However, where intimation of an application “would be likely to pose a serious risk to the health of the adult” then the court may direct that no such intimation be given (section 11(1) of the 2000 Act).

Section 14 of the 2000 Act allows the adult or any person claiming an interest to appeal against the decision as to incapacity (section 14). There is also a general right of appeal: see below.

See the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) Amendment (Adults with Incapacity) 2001 (“2001 Rules”) for information on the process.

21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:

a. a requirement of legal representation of the adult;

There is no requirement for an adult to be legally represented. While an adult is entitled to legal representation in any proceeding, they may not have capacity to be able to instruct legal representation. Regardless of representation, section 3(4) requires the sheriff to “consider whether it is necessary to appoint a person for the purpose of safeguarding the interests” of the adult who is the subject of the application.

b. availability of legal aid;

Legal aid is available (generally without any means assessment) for an adult opposing a welfare guardianship. However, if financial powers are

sought, then legal aid may be available, depending on the adult's resources. See the [Scottish Legal Aid Board's website](#).

c. participation of family members and/or of vulnerable adults' organisations or other CSO's;

It is one of the general principles of the 2000 Act, as set out in section [1\(4\)\(b\)](#), that, in relation to any intervention under the Act, which would include the making of a Guardianship or Intervention Order, account must be taken of "the views of the nearest relative, named person and the primary carer of the adult".

There is provision, however, in [section 4](#) for an order to be made to the effect that "(a) certain information shall not be disclosed, or intimation of certain applications shall not be given, to the nearest relative of the adult". In such cases, it may be provided in the order that another person should fulfil the function of the "nearest relative". Any such order can only be made on the application of either the adult to whom the application relates or any person claiming an interest in that adult's property, financial affairs or personal welfare.¹²

Under the 2000 Act, an application must be served on the adult's nearest relative, primary carer (if any) and named person (if any) (see Rule [3.16.4](#) of the 2001 Rules). It is therefore appropriate for any of those persons to attend hearings and so on.

d. requirement of a specific medical expertise / statement;

An application under the 2000 Act must be accompanied by three reports (see [section 57](#)). Two of the reports must be from medical practitioners, one of whom must be a psychiatrist or equivalent. The third report should be completed by an MHO (appointed by the local authority) if powers are sought in relation to welfare. If powers relate only to the property of financial affairs of the adult, the third report need be by a person "who has sufficient knowledge to make such a report" e.g. a solicitor. Importantly, the reports must be based on interviews and assessment of the adult carried out not more than 30 days before the lodging of the application.

e. hearing of the adult by the competent authority;

The adult is entitled to be represented or, indeed, to make their own representations at a hearing under either procedure. A safeguarder may also be appointed as explained under Q.21a, above.

f. the possibility for the adult to appeal the order.

¹² 2000 Act, s4(3A).

Section 2 of the 2000 Act provides a right of appeal. Any decision of the sheriff may be appealed to the sheriff principal and, with leave, any decision of the sheriff principal may be further appealed to the Court of Session.

22. Is it necessary to register, give publicity or any other kind of notice of the measure?

Provision is made in the 2000 Act for the registration of Intervention and Guardianship Orders with the OPG(S). For further detail, see the OPG(S) website.

In terms of section 53(10) of the 2000 Act, where an Intervention Order is made, a copy is sent by the sheriff clerk to the OPG(s) to be entered into the register maintained for that purpose (under section 6(2)(b)). When the person appointed under the Order has provided caution or other security as required, a certificate of appointment shall be issued by the OPG(S) to the person appointed (section 53(10)(aa)). The adult and the local authority shall also then be notified (section 53(1)(b)).

Provision is made in very similar terms in respect of registration and notification of a Guardianship Order by section 58(7).

Where a Guardianship Order is made which vests in the guardian any rights or interests in respect of heritable property, there is further provision in section 61 of the Act for registration in the appropriate public register, i.e. the General Register of Sasines or the Land Register of Scotland.

23. Who can be appointed as representative/support person (natural person, public institution, CSO's, private organisation, etc.)?

Any suitable individual (or individuals) may be appointed as Guardian(s) to an adult (or Intervener by virtue of an Intervention Order). See sections 53 and 59 of the 2000 Act. Generally, a family member, friend, carer or even solicitor will apply. The state (local authority) may also be appointed.

Section 59 of the 2000 Act sets out who can be appointed as guardian in the following terms:

- “(1) The sheriff may appoint as guardian–*
- (a) any individual whom he considers to be suitable for appointment and who has consented to being appointed;*
 - (b) where the guardianship order is to relate only to the personal welfare of the adult, the chief social work officer of the local authority.*
- (2) Where the guardianship order is to relate to the property and financial affairs and to the personal welfare of the adult and joint guardians are to be appointed, the chief social work officer of the local authority may be appointed guardian in relation only to the personal welfare of the adult.*
- (3) The sheriff shall not appoint an individual as guardian to an adult unless he is satisfied that the individual is aware of–*

- (a) *the adult's circumstances and condition and of the needs arising from such circumstances and condition; and*
 - (b) *the functions of a guardian.*
- (4) *In determining if an individual is suitable for appointment as guardian, the sheriff shall have regard to–*
- (a) *the accessibility of the individual to the adult and to his primary carer;*
 - (b) *the ability of the individual to carry out the functions of guardian;*
 - (c) *any likely conflict of interest between the adult and the individual;*
 - (d) *any undue concentration of power which is likely to arise in the individual over the adult;*
 - (e) *any adverse effects which the appointment of the individual would have on the interests of the adult;*
 - (f) *such other matters as appear to him to be appropriate.*
- (5) *Paragraphs (c) and (d) of subsection (4) shall not be regarded as applying to an individual by reason only of his being a close relative of, or person residing with, the adult.”*

Please consider the following:

a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?

Under the 2000 Act, any person the Sheriff “considers suitable for appointment and who has consented to being appointed” may be appointed as a Guardian. Subsection 59(3) of the 2000 Act states that a Sheriff:

“shall not appoint an individual as guardian to an adult unless he is satisfied that the individual is aware of–

- (a) *the adult's circumstances and condition and of the needs arising from such circumstances and condition; and*
- (b) *the functions of a guardian”.*

Subsection 59(4) of the 2000 Act goes on to set out what the Sheriff must have regard to when determining if an individual is suitable for appointment as follows:

“(a) the accessibility of the individual to the adult and to his primary carer;

- (b) *the ability of the individual to carry out the functions of guardian;*
- (c) *any likely conflict of interest between the adult and the individual;*
- (d) *any undue concentration of power which is likely to arise in the individual over the adult;*

- (e) any adverse effects which the appointment of the individual would have on the interests of the adult;
- (f) such other matters as appear to him to be appropriate.”

In order to assist the Sheriff, any application must be accompanied by a report which goes into detail on the suitability of an applicant. Where welfare powers are sought, the report must be completed by an MHO (appointed by the local authority). If powers relate only to the property of financial affairs of the adult, the third report need be by a person “who has sufficient knowledge to make such a report” e.g. a solicitor. A link to the requisite forms is [available here](#). The reports require the reporter to provide their opinion, based on interviews, of the applicant’s ability to carry out the functions of a Guardian, their awareness of the functions of a Guardian and so on.

b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?

The preferences of the adult and relevant family members are taken into consideration to a significant extent under the 2000 Act. Indeed, the general principles as set out in [section 1](#) of the 2000 Act make it clear that account *shall* be taken of the adult’s present and past wishes and feelings, as well as the views of the nearest relative, named person and primary carer of the adult.

The reports referred to above require the reporter to attempt to ascertain the past and present wishes of the adult as far as possible. They also oblige the reporter to interview the nearest relative, named person and primary carer, as well as “any other relevant person”.

c. is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?

Not necessarily. Ultimately, the legislation is designed to ensure any orders will benefit the adult and the adult’s past and present wishes are of more importance than any perceived ranking. So, for example, if an adult had expressed that a friend should be their Guardian rather than their child and the Sheriff is satisfied that this is the case, it is likely that the friend would be appointed, assuming they are suitable.

Sheriffs are occasionally in the difficult position of having to hear competing applications. For example, in the case of *West Lothian Council, Applicant 2015 G.W.D. 12-219*, the adult’s son had been appointed interim Guardian. However, the local authority applied for a Guardianship Order on the basis it felt that the son was unsuitable. The Sheriff ultimately agreed that the son was unsuitable, as he had failed to carry out the functions properly when interim Guardian and there was potential for conflict of interest and

undue concentration of power to arise should he be appointed. The local authority was therefore appointed. This demonstrates that there is no ranking based on relationship to an adult; it comes down to suitability.

d. what are the safeguards as to conflicts of interests at the time of appointment?

The report writer (an MHO if welfare powers are sought or a person with sufficient knowledge e.g. solicitor if only financial powers are sought) must consider any possibility for a conflict arising by looking at all circumstances and interviewing the persons involved. Further, the Sheriff must consider the possibility of conflict at the point of granting any order.

Where finances are involved, then it is common for a Sheriff to set caution. Caution is effectively insurance and protects the adult's estate should there be any mismanagement of the adult's finances.

e. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?

Yes. The 2000 Act provides for both Joint and Substitute Guardians. Joint Guardians ([section 62](#)) are provided with powers simultaneously. In practice, Sheriffs will generally appoint only family members as Joint Guardians (e.g. siblings for a parent), to save any potential difficulties with decision-making. However, it is possible for any two individuals to be Joint Guardians.

Substitute Guardians ([section 63](#)) are named in an application and, assuming they are deemed suitable, will become Guardian automatically if and when the original Guardian is unable to continue to act. Often, a spouse will be appointed as Guardian and a child named as Substitute Guardian.

f. is a person obliged to accept appointment as representative/support person?

No. Indeed, the Sheriff must consider whether the person has consented to act.

During the measure

Legal effects of the measure

24. How does the measure affect the legal capacity of the adult?

As explained above, in answer to Q.17, an Intervention Order (s.53) or a Guardianship Order (s.58) should only be granted where the adult lacks capacity. In general, it is that assessment of “incapability” rather than the granting of the order itself which is relevant to the legal capacity of the adult.

Section 67 of the 2000 Act, however, provides that:

“(1) The adult shall have no capacity to enter into any transaction in relation to any matter which is within the scope of the authority conferred on the guardian except in a case where he has been authorised by the guardian under section 64(1)(e); but nothing in this section shall be taken to affect the capacity of the adult in relation to any other matter.”

Section 64(1)(e) provides that a Guardianship Order may confer the power on a Guardian to “authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.”

Powers and duties of the representatives/support person

25. Describe the powers and duties of the representative/support person:

- a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
- **property and financial matters;**
 - **personal and family matters;**
 - **care and medical matters;**

An application can be made for powers to deal with any or all of the adult’s financial affairs. On behalf of an adult, a Guardian can obtain powers to sell property, enter into transactions and so on.

Specifically in respect of Intervention Orders, section 53(5)(b) provides that the Order authorises the person nominated in the application to take such action or make such decision in relation to the property, financial affairs or personal welfare of the adult as is specified in the order. There is an additional requirement in section 53(6) where the Intervention Order directs the disposal or acquisition of accommodation for the adult. In that case, the consent of the OPG(S) is required before the accommodation is acquired or disposed of.

General provision as to the functions and duties of a guardian are set out in section 64(1) of the 2000 Act, subject always to the specific details of the order. The powers are as follows:

- “(a) power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;*
- (b) power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;*
- (c) power to pursue or defend an action of declarator of nullity of marriage, or of divorce or separation in the name of the adult;*
- (d) power to manage the property or financial affairs of the adult, or such parts of them as may be specified in the order;*
- (e) power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.”*

Section 64(3) gives a general power to the Guardian, subject to any restrictions set out in the Order, to act as the adult’s legal representative in any matter falling within the scope of the Order.

Where the Guardian has property and financial powers under the Order, then they are entitled, in terms of section 64(5) to use capital and income of the adult’s estate “for the purpose of purchasing assets, services or accommodation so as to enhance the adult’s quality of life.”

There are also provisions in the 2000 Act regarding access to an adult’s funds (without a formal Intervention or Guardianship Order). An individual can apply to the OPG(S) for power to intrude with the adult’s funds, for the benefit of the adult (see Part 3 of the 2000 Act). Specifically, an individual may access the adult’s funds for the following purposes.

- “(a) the payment of central and local government taxes for which the adult is responsible;*
- (b) the provisions of sustenance, accommodation, fuel, clothing and related goods and services for the adult;*
- (c) the provision of other services provided for the purposes of looking after or caring for the adult;*
- (d) the settlement of debts owed by or incurred in respect of the adult, including any prescribed fees charged by the Public Guardian in connection with an application under this Part;*
- (e) the payment for the provision of items other than those mentioned in paragraphs (a) to (d) such as the Public Guardian may, in any case, authorise.”*

Any order granted to an individual must be related to the adult’s finances / property and welfare. On that basis, any power over an adult in relation to personal and family matters must incorporate an element of safeguarding the adult’s finances / property or welfare. For example, if the Guardian felt that a particular family member was a bad influence on the adult and wanted the adult to stay away from that person, the Guardian would have to have very specific powers granted by the sheriff in this regard. As always, any power must be the

least restrictive option and it is assumed that a sheriff would be extremely cautious about granting any power that could potentially breach human rights.

Care and medical matters are caught under welfare powers. Again, specific powers must be sought in relation to relatively minor aspects of care such as choice of clothing, to more significant aspects such as where the adult resides and what medical treatment the adult should receive.

In respect of care and medical matters, there are specific statutory exclusions under section 64 which include decisions in respect of organ donation and medical research. Further, the 2000 Act does not allow any Guardian or Intervener to place an adult in a hospital for the treatment of a mental disorder against the adult's will (section 64(2)). If this is required, an MHO will seek an order under the 2003 Act.

b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?

Any Guardian or Intervener must have regard to the fundamental principles underlining the 2000 Act. Indeed, section 1(5) obliges any person with powers over an adult to “in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills”. Of course, any individual with powers is also constrained by the wording of the order granting those powers. It is therefore imperative that powers sought are clear and unambiguous. They must also, of course, be the least restrictive option.

Where an adult refuses to comply, then the court may make an order implementing the Guardian's decision (section 70 of the 2000 Act). So, for example, where an adult refuses to reside in a particular place (e.g. a care home) then the Sheriff may grant a warrant authorising a police officer to apprehend the adult and remove them to the residence.

The 2000 Act's explanatory notes specifically state that the “best interests” test is not used in this context. Paragraph 6 says:

“The “best interests” concept was developed in the context of the law on children. It is a general term and is considered more protective than is appropriate for adults, as it would not give particular weight to the individual's own views, including those expressed previously while they had the capacity to do so”.

c. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?

A Guardian must “keep records of the exercise of his powers” (section 65 of the 2000 Act).

A Financial Guardian must submit an inventory of estate and management plan to the OPG(S) within three months of receiving their certificate of appointment. They must also submit annual accounts to the OPG(S). There is no obligation to report formally on exercise of powers relating to welfare.

However, an interim guardian must report monthly to the OPG(S) and relevant local authority in respect of exercise of financial and welfare powers respectively.

d. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?

No, there are no specific duties in this regard. However, the individual's accessibility to the adult is something which must be taken into account by the Sheriff at the point of granting any order. If, for example, a Welfare Guardian is reported to the local authority for not visiting an adult at all, then the local authority may intervene and seek to have the Guardian removed.

e. is there any right to receive remuneration (how and by whom is it provided)?

There is no general right to remuneration although, as provided by section 68(1), a Guardian is entitled to be reimbursed for "any outlays reasonably incurred by him in the exercise of his functions." Where any remuneration is to be paid, it must be approved by the OPG(S) in line with section 68.

If remuneration has been agreed, section 69 of the 2000 Act provides that any person claiming an interest in the adult's property, financial affairs or personal welfare, may apply to the sheriff for forfeiture in whole or part of such remuneration where the guardian is in breach of any duty of care, fiduciary care or other obligation under the Act.

26. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:

a. if several measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?

In terms of section 62, a Joint Guardian is obliged to consult the other Joint Guardian(s) before exercising any functions conferred on them, unless consultation would be impracticable in the circumstances or the Joint Guardians agree that consultation is not necessary.

However, where they disagree as to the exercise of their functions, either or both of them may apply to court for directions.

b. if several representatives/support persons can be appointed in the framework of the same measure, how is authority distributed among them and how does the exercise of their powers and duties

take place (please consider cases of concurrent authority or joint authority and the position of third parties)?

Section 62 further provides that Joint guardians may exercise their functions individually. However, each Guardian shall be liable for any loss or injury caused to the adult arising out of that Guardian's own acts or omissions or failure to take reasonable steps to ensure that any duty of care or fiduciary duty owned to the adult is not breached.

If more than one Guardian is liable for any losses as set out above then they shall be liable jointly and severally.

Where there are Joint Guardians, a third party in good faith is entitled to rely on the authority to act of any one or more of them.

27. Describe the organisation of supervision of state-ordered measures. Pay attention to:

a. what competent authority is responsible for the supervision?

The OPG(S) is required to supervise any individual with financial powers under a Guardianship or Intervention Order, as provided by section 6(2)(a) of the 2000 Act. The local authority and, ultimately, MWCS supervise any individual with welfare powers, in terms of section 10(1).

b. what are the duties of the supervisory authority in this respect?

The OPG(S) supervises any person (including the local authority) dealing with an adult's finances under the 2000 Act. The OPG(S) has the power to investigate any circumstances where the property or finances belonging to an adult appear to be at risk (section 12 of the 2000 Act).

The MWCS can investigate any concerns relating to the welfare of any adult subject to any order under the 2000 or 2003 Acts.

The local authority must identify a supervisor, who will meet the Welfare Guardian and adult within three months of the order. The supervisor will continue to supervise throughout the duration of the order.

c. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;

Following an investigation by the OPG(S) as above, the OPG(S) can put in place various safeguards or take further action. Section 6 of the 2000 Act provides the Public Guardian with wide powers, including "to take part as a party in any proceedings before a court or to initiate such proceedings where he considers it necessary to do so to safeguard the property or financial affairs of an adult...". Effectively, this allows the Public Guardian scope to seek any judicial remedy. The OPG(S)'s website sets out examples of further action

which may be undertaken, by virtue of section 6 of the 2000 Act. These examples are as follows.

- Provide advice and guidance to the appropriate parties.
- Contact the bank or building society to freeze the adult's accounts or suspend income until it can be redirected for the benefit of the adult.
- If there is an indication of fraud or theft then the Public Guardian may refer the matter to the police.
- Recommend that an appropriate body or person consider making an application under the 2000 Act for authority to deal with or manage the adult's funds. This could be making an application under the access to funds scheme or for financial guardianship.
- Make an application, or encourage another party to apply to the Sheriff to have a continuing attorney:
 - supervised by the Public Guardian;
 - ordered to submit accounts for audit by the Public Guardian;
 - have any of the powers they were given revoked / terminated; or
 - have their appointment revoked /terminated.

The MWCS can conduct full investigations into any concerns about an adult's care and treatment. The MWCS has high-level authority, in that it can make wide-ranging recommendations on how National Health Service Boards should conduct reviews and so on.

d. describe the financial liability of the representative/support person for damages caused to the adult;

If a Guardian or similar uses any funds of an adult in breach of their fiduciary duty or outwith their authority or power to intervene in the affairs of the adult, then they may be liable to repay those funds (section 81 of the 2000 Act). Of course, there is also likely to be an insurance policy (caution) in place to protect the adult.

e. describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.

If an adult is incapable of contracting, then any such contract must be void (see above). If, however, an adult is capable of entering into contracts then there should be no power over the adult in any event. Regardless, it is clear that it would be the adult's estate which would be liable and not any Guardian or Intervener.

28. Describe any safeguards related to:

a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;

Under the 2000 Act, decisions to be taken by the Guardian etc should be prescriptive. Therefore, safeguards are in place by way of the application process and ultimate supervision by, for example, the OPG(S). If the adult makes a decision outside the parameters of these powers, then the adult is entitled to do so. If the Guardian takes the view that it needs powers to deal with this particular decision (or, at least, future decisions of a similar nature), then the Guardian will need to return to court.

On contractual / third parties, it is suggested that the common law position prevails. In other words, if an adult, without the knowledge or approval of a Guardian, enters into a contract, then that contract would be void if the adult lacked capacity to do so. If the adult has capacity to enter into a contract and the Guardian has no powers over the adult in that regard, then the contract must stand and the third party will have all the usual protections under contract law.

b. unauthorised acts of the adult and of the representative/support person;

Section 67(1) of the 2000 Act provides that the adult has no capacity to enter into any transaction in relation to any matter which falls within the scope of the Guardianship Order, with the exception of any transaction or type of transaction which has been authorised by the Guardian in terms of section 64(1)(e).

Section 67(4) of the 2000 Act provides that:

“the guardian shall be personally liable under any transaction entered into by him – ... (b) which falls outwith the scope of his authority.” In terms of protection for third parties, section 67(6) provides that any transaction for value between the guardian “purporting to act as such” and a third party, shall not be invalid on the ground only that “the guardian acted outwith the scope of his authority”.

c. ill-conceived acts of the adult and of the representative/support person;

The 2000 Act makes no specific provision for “ill-conceived acts”.

d. conflicts of interests

Again, the Sheriff must have regard to any potential conflict of interest at the point of granting the order (see, for example, section 59(4)(c) of the 2000

Act). Otherwise, any such conflict may be picked up during the reporting to the OPG(S).

End of the measure

29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.

The 2000 Act provides that an order granted can come to an end on the expiry of the order, death of the adult or recall of the order. Section 58(4) of the 2000 Act provides that guardianship orders may be granted for three years “or such other period (including an indefinite period) ... on cause shown”. An order can be recalled if, at any point before its expiry if, for example, it is deemed not necessary / not the least restrictive option. If an order comes to an end, then the individual no longer has powers to make decisions on the adult’s behalf.

To have a guardianship order recalled, an application would need to be served on all the relevant persons e.g. the adult, nearest relative and primary carer (section 73(5)(b) of the 2000 Act).

Reflection

30. Provide statistical data if available.

In terms of its supervisory function under section 9 of the 2000 Act, the MWCS undertakes statistical monitoring of the Guardianship Orders. The most recent detailed statistics are available in the [Adults with Incapacity Act monitoring report 2021-22](#). Key findings include:

- 17,101 individuals were subject to a Guardianship Order in 2022 compared to 16,033 in 2021.
- 3,371 Guardianship Orders were granted in 2021-22. This figure reflects a very significant increase on the previous year (52%) but that is a reflection of the impact of covid-related measures. When compared with pre-pandemic records, the annual increase is likely to be closer to 2% which was seen in pre-pandemic years.
- Of those Guardianship Orders granted in 2021-22, 94% were new orders and 6% were renewals of existing orders.
- Of those Guardianship Orders granted in 2021-22, 80% were for a period of 5 years or less, 16% were for 6 years or more and 4% were indefinite orders.
- Most Guardianship Orders granted in 2021-22 were in respect of individuals with a learning disability (46%) or dementia (39%). 64% of adults concerned were 45 or older with an almost even split by gender (51% male; 49% female).

31. What are the problems which have arisen in practice in respect of the state-ordered measures (e.g. significant court cases, political debate, proposals for improvement)? Have the measures been evaluated, if so what are the outcomes?

The implementation of the 2000 Act was significant in Scots law, given it consolidated the law around adults with incapacity. However, even at an early stage, some commentators were critical. Writing in 2003, Margaret Ross commented that: , said in the

*“...not only is the Act untidy in its drafting; adult life which it seeks to articulate is untidy in itself. This makes for a difficult process of operation and interpretation.”*¹³

The Act has been amended over the years, but difficulties remain. In particular, the 2000 Act is being criticised currently for not encouraging supported decision-making (see discussion earlier). While the 2000 Act does require consideration to be given to an adult’s past and present views and wishes, this duty carries no more weight than other duties. For example, a Sheriff must also take into account the views of the adult’s nearest relative and it is notable that the adult’s own views are not given precedence.

The SMHLR Report acknowledges this issue and recommends that the will and preferences of the adult must be given higher priority (page 684).

SECTION IV – VOLUNTARY MEASURES

Overview

32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure. ¹⁴

Adults may grant Powers of Attorney under the 2000 Act. There are two types of Powers of Attorney: Continuing Powers of Attorney and Welfare Powers of Attorney.

Continuing Powers of Attorney deal with financial and property issues. These may take effect immediately i.e. while an adult retains capacity. They are often used when an adult is going to be absent for a length of time. Further, Continuing Powers of Attorney can take effect on an adult’s loss of capacity.

Welfare Powers of Attorney deal with decisions in relation to the adult’s welfare. These powers can be exercised only on the loss of the adult’s capacity.

¹³ M. Ross, ‘The Adults with Incapacity (Scotland) Act 2000: a long and winding road’ (Edin.L.R.2003, 7(2), 226-233).

¹⁴ Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]).

- 33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measures. Please consider, among others:**
- a. the existence of specific provisions regulating voluntary measures;**
 - b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

A power of attorney is a unilateral act. Part 2 of the 2000 Act provides for the creation of both Continuing and Welfare powers of attorney, to deal with finances and personal welfare respectively.

Section 15(1) provides as follows in respect of a Continuing Power of Attorney:

“Where an individual grants a power of attorney relating to his property or financial affairs in accordance with the following provisions of this section that power of attorney shall, notwithstanding any rule of law, continue to have effect in the event of the granter’s becoming incapable in relation to decisions about the matter to which the power of attorney relates.”

Section 16 regulates the creation of a Welfare Power of Attorney.

Since the coming into force of the 2000 Act, only a power of attorney granted in accordance with section 15 or 16 will have effect “during any period when the granter is incapable in relation to decisions about the matter to which the power of attorney relates.”¹⁵

- 34. If applicable, please describe the relation or distinction that is made in your legal system between the appointment of self-chosen representatives/support persons on the one hand and advance directives on the other hand.**

The 2000 Act does not make any specific provision for advance directives. However, the principles of the Act should mean that any advance directive has considerable force as a doctor is bound by the principles to consider an advance directive as evidence of the adult’s wishes and feelings. On this basis, an Attorney is unlikely to be able to override an advance directive. Indeed, the SMHLR Report states that there is “considerable uncertainty” in the law and that “many commentators believe that an advance directive in relation to medical treatment may have legal effect in Scotland, but no-one can be sure” (page 128).

¹⁵ 2000 Act, s18.

However, the 2003 Act does explicitly state that regard shall be given to a patient's wishes in an advance statement (section 276).

It has been suggested that the law in Scotland should be updated to include clear provision for advance directives: see the Scottish Government's Proposals for Reform in 2018. The SMHLR Report suggests that "advance choices" should be implemented.

35. Which matters can be covered by each voluntary measure in your legal system (please consider the following aspects: property and financial matters; personal and family matters; care and medical matters; and others)?

As with Guardianship Orders above, powers contained in a Power of Attorney may be wide-ranging. Continuing Powers of Attorney can cover all property and financial affairs of an adult. Welfare Powers of Attorney can cover everything from consenting or withholding consent to medical treatment, making decisions of diet, dress and personal appearance and deciding with whom the adult should consort.

There are certain powers that cannot be sought by virtue of section 16 of the 2000 Act e.g. a Welfare Attorney may not "place the granter in a hospital for the treatment of a mental disorder against his will".

Start of the measure

Legal grounds and procedure

36. Who has the capacity to grant a voluntary measure?

Any person over 16 years old who is capable under the 2000 Act (see answer to question 8b above for the definition of "incapable under the 2000 Act) may grant a Power of Attorney. Any person subject to bankruptcy restrictions may be unable to grant a Continuing Power of Attorney.

37. Please describe the formalities (public deed; notarial deed; official registration or homologation by court or any other competent authority; etc.) for the creation of the voluntary measure.

The formalities for creation of a Power of Attorney are set out in the 2000 Act: section 15 concerns a Continuing Power of Attorney and section 16 a Welfare Power of Attorney. Broadly they require that the document creating the Power of Attorney must be signed and dated by the granter immediately after they have been interviewed by a practising solicitor in Scots law or UK medical doctor. The solicitor or doctor must then complete a certificate of capacity, which forms part of the Power of Attorney. The document itself must

include a statement to the effect that it is intended to create a Continuing¹⁶ and/or Welfare Power of Attorney.¹⁷ Where a combined Continuing and Welfare Power of Attorney is granted, a single certificate in respect of both is sufficient.¹⁸

In order to be valid, section 18 of the 2000 Act provides that the Power of Attorney (with certificate of capacity) must be registered with the OPG(S) before the attorney has authority to act.

38. Describe when and how voluntary measures enter into force. Please consider:

a. the circumstances under which voluntary measures enter into force;

Continuing Powers of Attorney can begin on any date specified by the granter, on the basis the Attorney is able to make decisions for the granter, despite the granter's capacity (e.g. if the granter is on an extended holiday).

Welfare Powers of Attorney (and Continuing if a date is not specified as above) enter into force when the granter loses capacity.

b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?

The 2000 Act does not prescribe any formalities but the document creating the Power of Attorney must include a statement to the effect that consideration has been given to how the determination of incapacity will be made (section 15(3)(ba) for Continuing; section 16(3)(ba) for Welfare).

The Power of Attorney itself should therefore ideally state how the granter's incapacity is to be determined. Commonly, the Power of Attorney will state that a doctor should make the determination. However, it is possible for the Power of Attorney to allow the Attorney to decide when the granter is incapable.

c. who is entitled to initiate the measure entering into force?

The Attorney is entitled to initiate the measure into force. Otherwise, Welfare Powers of Attorney (and Continuing if a date is not specified as above) enter into force when the granter loses capacity.

d. is it necessary to register, give publicity or to any other kind of notice of the entry into force of the measure?

¹⁶ 2000 Act, s15(3)(b).

¹⁷ 2000 Act, s16(3)(b).

¹⁸ 2000 Act, s16A.

No, it is not necessary to register, give publicity or any other kind of notice of the entry into force of the measure. In practice, an Attorney will have to advise relevant third parties e.g. the granter's doctor, bank and family members.

Appointment of representatives/support persons

39. Who can be appointed representative/support person (natural person, public institution, CSO's, private organisation, etc.)?

Please consider:

a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the granter, etc.)?

An Attorney must be aged over 16 and be willing to take on the role. There does not need to be any particular relationship between the granter and Attorney. The granter can appoint either individuals or an organisation, such as a firm of solicitors, as a Continuing Attorney. (Although an individual who is currently declared as bankrupt cannot be a Continuing Attorney.) However, as provided by section 16(5)(a) individuals only may be appointed as Welfare Attorneys.

b. what are the safeguards as to conflicts of interests?

There are no formal safeguards in place. However, any person with concerns regarding Continuing or Welfare Attorneys may report those concerns to the OPG(S) and local authority respectively.¹⁹ Those organisations can then investigate.

The MWCS has considered the potential for undue influence and conflict of interest and published a guide entitled Common Concerns with Power of Attorney in July 2020.

c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?

There is no limit to the number of Attorneys that can be appointed. It is possible to appoint a sole Attorney, joint Attorneys and substitute Attorneys within one single measure.

During the measure

¹⁹ 2000 Act, s.6(2)(c) and s.10(1)(c).

Legal effects of the measure

40. To what extent are the voluntary measure and the wishes expressed within it legally binding?

The Power of Attorney is legally binding once signed by the grantor. It becomes valid on registration with the OPG. Once the Power of Attorney is initiated (e.g. by the grantor's incapacity), the Attorney has all legal rights as afforded by the specific powers.

The wishes expressed within the Power of Attorney are not legally binding on the attorney but he or she must act in accordance with the general principles of the 2000 Act.

41. How does the entry into force of the voluntary measure affect the legal capacity of the grantor?

It does not affect the legal capacity of the grantor. Continuing Powers of Attorney may be in force while the grantor retains full capacity. Otherwise, the Power of Attorney may not enter into force *until* the grantor is deemed incapable. The determination of incapability comes before the Power of Attorney enters into force.

It is of note, though, that the OPG(S) provides guidance making it clear that capacity "is not all or nothing". It is clear that Attorneys must use judgement: they should not make decisions where the grantor is able to do so. As with all acts under the 2000 Act, the general principles apply and, in particular in this respect, the principle in section 1(5) to the effect that any attorney "shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills."

Powers and duties of the representative/support person

42. Describe the powers and duties of the representative/support person:

- a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:**
 - **property and financial matters;**
 - **personal and family matters;**
 - **care and medical matters?**

The Attorney can act in the place of the grantor, on the basis the grantor has lost capacity in relation to a particular decision / action and the Attorney has the requisite powers under the Power of Attorney.

The Attorney is bound by the general principles of the 2000 Act, set out in section 1 and must take the grantor's views into account where possible. In line with section 1(5), the Attorney "shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has

concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.”

b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?

The will and preferences of the adult must be taken into account, per the principles of the 2000 Act. The Code of Practice for Attorneys says that “even if the person has lost the capacity to make a decision, he/she may still have wishes or feelings about the matter, and [the Attorney] must ascertain those wishes or feelings in whatever way is appropriate to the individual, and take account of them in exercising... powers”.

c. is there a duty of the representative/support person to inform and consult the adult?

Yes. Section 1(4)(a) of the 2000 Act is clear that account *shall* be taken “of the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication...”.

d. is there a right to receive remuneration (how and by whom is it provided)?

No, there is no formal remuneration of Attorneys. Attorneys with relevant powers can be employed as personal assistants paid for using publicly funded social care budgets, but only if they are not family members of the granter (The Self-directed Support (Direct Payments) (Scotland) Regulations 2014).

43. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:

- a. if several voluntary measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**
- b. if several representatives/support persons can be appointed in the framework of the same voluntary measure how is the authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?**

The granter is encouraged to consider how Joint Attorneys should act together when drafting the Power of Attorney. The granter may state that the Attorneys must make decisions together. Alternatively, one Attorney may be given powers in respect of certain decisions and a second given powers in respect of different decisions. It is ultimately up to the granter.

The 2000 Act does, however, envisage this situation in the general principles which underpin it and section 1(4)(c) provides for the views to be considered of any other “guardian, continuing attorney or welfare attorney”.

44. Describe the interaction with other measures. Please consider:

- a. if other measures (state-ordered measures; *ex lege* representation) can be simultaneously applied to the same adult, how do the representatives/support persons, acting in the framework of these measures, coordinate their activities?**

One of the general principles of the 2000 Act, as set out in section 1(3), is that any action taken should be the least restrictive option. If a state-ordered measure, in the form of a Guardianship Order is required, then it must be assumed that the powers contained in the Power of Attorney were not extensive enough to deal with particular decisions. In this situation, while the Attorney should be informed of the proceedings, there must be a clear distinction between what, say, a Guardian is empowered to do and what the Attorney is empowered to do. Otherwise, the subsequent order would breach the 2000 Act’s principle of least intervention.

- b. if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?**

Third parties are generally informed on an *ad hoc* basis. Again, there should be no *overlapping* measures.

45. Describe the safeguards against:

- a. unauthorised acts of the adult and of the representative/support person;**

If they do anything unauthorised with respect to their powers, then they could be investigated by the OPD or local authority.

On contractual / third parties, it is suggested that the common law position prevails. In other words, if an adult, without the knowledge or approval of an Attorney, enters into a contract, then that contract would be void if the adult lacked capacity to do so. If the adult has capacity to enter into a contract, then the contract must stand and the third party will have all the usual protections under contract law.

- b. ill-conceived acts of the adult and of the representative/support person;**

Ill-conceived acts could cover a number of things. On the basis an Attorney is appointed by the adult themselves, there is no supervision and therefore, unless a third party has concerns about the welfare of an adult (or

about their finances), there is no real protection against ill-conceived acts. Where there are concerns, the OPG(S) and / or the local authority may intervene in financial and welfare matters respectively.²⁰

c. conflicts of interests

Again, due to the lack of formal supervision, any conflict (to the detriment of the adult) would have to be raised by a third party with concerns.

Please consider the position of the adult, contractual parties and third parties.

46. Describe the system of supervision, if any, of voluntary measures. Specify the legal sources. Please specify:

- a. is supervision conducted:**
 - **by competent authorities;**
 - **by person(s) appointed by the voluntary measure.**
- b. in each case, what is the nature of the supervision and how is it carried out?**
- c. the existence of measures that fall outside the scope of official supervision.**

There is no formal supervision. This is on the basis an adult has appointed the Attorney(s) and therefore it is deemed too onerous for a supervisory body to interfere. However, if any person has concerns that an adult is, for example, exposed to undue influence by the Attorney, there are mechanisms in place for reporting to, and investigation by, the OPG(S) and relevant local authority.²¹

End of the measure

47. Provide a general description of the termination of each measure. Please consider who may terminate the measure, the grounds, the procedure, including procedural safeguards if any.

The Power of Attorney terminates on the death of the grantor or Attorney (unless the grantor appointed a Substitute Attorney).

As provided in section 23 of the 2000 Act, the Attorney may resign. They must inform the OPG, grantor and the grantor's primary carer (or Guardian).

²⁰ 2000 Act, s.6(2)(c) and s.10(1)(c).

²¹ 2000 Act, s.6(2)(c) and s.10(1)(c).

The resignation will not take effect for 28 days after the OPG receives notification.

Where the granter and Attorney are spouses or in a civil partnership, [section 24](#) of the 2000 Act provides that the Power of Attorney will come to the end of the granting of a decree of separation, decree of divorce / dissolution or decree of nullity of the marriage / civil partnership.

The Power of Attorney may have been granted on very narrow grounds e.g. in relation to one particular decision. Once that decision has been made, the Power of Attorney is at an end.

The granter may regain capacity and revoke the Power of Attorney (or, indeed, may revoke the Power of Attorney before losing capacity). A Sheriff may revoke a Power of Attorney (for example, following an investigation finding that the Attorney has abused their powers).²²

Finally, as mentioned above, an individual who is bankrupt may not be a Continuing Attorney. If an individual becomes bankrupt after the granting of the Power of Attorney, then the Power of Attorney is brought to an end.

Reflection

48. Provide statistical data if available.

There is no available statistical data on Powers of Attorney.

49. What are the problems which have arisen in practice in respect of the voluntary measures (e.g. significant court cases, political debate, proposals for improvement)? Has the measure been evaluated, if so what are the outcomes?

The [SMLHR Report](#) suggests that the current system of Power of Attorney is generally well-received (page 684). However, there does exist some criticism.

First, it can cost money to have a Power of Attorney properly drafted and registered. Currently, registering a Power of Attorney with the OPG(S) costs £83. With a cost of living crisis in the United Kingdom at present, many people will be unable to afford this fee.

It is also clear that there is a general lack of awareness among the public at large and so promoting Powers of Attorney in general needs to be a priority. Educating the public on what is actually expected of an Attorney is also key. The SMHLR Report suggests targeted engagement and multimedia involvement (page 696).

There is concern in some quarters regarding the lack of supervision of Attorneys. Others take the view that imposing supervisory responsibilities on local authorities would be prohibitive, given workload capacity. The SMLHR Report addresses this, and recommends that provision should be made in law

²² 2000 Act, [s.22A](#).

for an Attorney to be subject to supervision but only where an investigation determines this is required (page 695).

SECTION V – EX LEGE REPRESENTATION

Overview

- 50. Does your system have specific provisions for *ex lege* representation of vulnerable adults?**

N/A

- 51. What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the *ex lege* representation?**

N/A

- 52. Is medical expertise/statement required and does this have to be registered or presented in every case of action for the adult?**

N/A

- 53. Is it necessary to register, give publicity or to give any other kind of notice of the *ex-lege* representation?**

N/A

Representatives/support persons

- 54. Who can act as *ex lege* representative and in what order? Think of a partner/spouse or other family member, or other persons.**

N/A

- 55. What kind of legal or other acts are covered: (i) property and financial matters; (ii) personal and family matters; (iii) care and medical matters. Please specifically consider: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.**

N/A

56. What are the legal effects of the representative's acts?

Can an adult, while still mentally capable, exclude or opt out of such *ex-lege* representation (a) in general or (b) as to certain persons and/or acts?

N/A

57. Describe how this *ex lege* representation interacts with other measures? Think of subsidiarity

N/A

Safeguards and supervision

58. Are there any safeguards or supervision regarding *ex lege* representation?

N/A

59. Provide a general description of the end of each instance of *ex-lege* representation.

N/A

Reflection

60. Provide statistical data if available.

N/A

61. What are the problems which have arisen in practice in respect of *ex lege* representation (e.g. significant court cases, political debate, proposals for improvement)?

N/A

Specific cases of ex lege representation

Ex lege representation resulting from marital law and/or matrimonial property law

- 62. Does marital law and/or matrimonial property law permit one spouse, regardless of the other spouse's capacity, to enter into transactions, e.g. relating to household expenses, which then (also) legally bind the other spouse?**

N/A

- 63. Do the rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration etc. of that property? Please consider both cases: where a spouse has/has no mental impairment.**

N/A

- 64. Does the private law instrument *negotiorum gestio* or a similar instrument exist in your jurisdiction? If yes, does this instrument have any practical significance in cases involving vulnerable adults?**

N/A

SECTION VI – OTHER PRIVATE LAW PROVISIONS

- 65. Do you have any other private law instruments allowing for representation besides *negotiorum gestio*?**

No.

- 66. Are there provisions regarding the advance planning by third parties on behalf of adults with limited capacity (e.g. provisions from parents for a child with a disability)? Can third parties make advance arrangements?**

Section 79A of the 2000 Act provides for an application for a Guardianship Order to be made in respect of a child in the three months prior to their 16th birthday. Although the application may be made in advance, the order will not come into effect until the child becomes an adult at the age of 16.

SECTION VII – GENERAL ASSESSMENT OF YOUR LEGAL SYSTEM IN TERMS OF PROTECTION AND EMPOWERMENT

- 67. Provide an assessment of your system in terms of *empowerment* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**
- a. the transition from substituted to supported decision-making;**
 - b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;**
 - c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;**
 - d. effect of the measures on the legal capacity of vulnerable adults;**
 - e. the possibility to provide tailor-made solutions;**
 - f. transition from the best interest principle to the will and preferences principle.**

The SMLHR Report suggests that the current system of Power of Attorney is generally well-received (page 684). However, there does exist some criticism.

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- 68. Provide an assessment of your system in terms of *protection* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**
- a. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;**

- b. protection during a procedure resulting in the application, alteration or termination of adult support measures;**
- c. protection during the operation of adult support measures:**
 - **protection of the vulnerable adult against his/her own acts;**
 - **protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**
 - **protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions;**
 - **protection of the privacy of the vulnerable adult.**

Generally, the Scottish system is fairly robust with regard to protection of an adult during any related procedures. The adult's views are always considered and the adult is entitled to be represented at any hearing. Further, the decision by the ECHR on deprivation of liberty has provided for increased protection.

However, protection of adults during the operation of support measures could, arguably, be improved. While there are processes available for investigations into potential abuse, these are generally only initiated following a report. For example, there is no current system for supervision of Attorneys. Guardians are technically supervised, but in practice it is not possible for local authority supervisors to be significantly involved.

On care homes, the Care Inspectorate is the national regulator for care in Scotland. The Care Inspectorate regularly carries out inspections on care homes.

On a vulnerable adult's privacy: the general laws relating to privacy extend to every person. Court orders must be explicit in providing any individual the right to obtain and adult's medical records and so on.