

Safeguarding vulnerable adults in Scotland

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**Good Practice across the Counselling Professions 002
Safeguarding vulnerable adults in Scotland**

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Context

This resource is one of a suite commissioned by BACP in liaison with other professionals, to enable members to develop good practice across the counselling professions.

Using Good Practice across the Counselling Professions Resources

BACP members have a contractual commitment to work in accordance with the current *Ethical Framework for the Counselling Professions*. The Good Practice across the Counselling Professions resources are not contractually binding on members but are intended to support practitioners by providing information on specific fields of work including good practice principles and policy applicable at the time of publication.

Specific issues in practice will vary depending on clients, particular models of working, the context of the work and the kind of therapeutic intervention provided. As specific issues arising from work with clients are often complex, BACP always recommends discussion of practice dilemmas with a supervisor and/or consulting a suitably qualified and experienced legal or other relevant practitioner.

In this resource, the word 'therapist' is used to mean specifically counsellors and psychotherapists and 'therapy' to mean specifically counselling and psychotherapy.

The terms 'practitioner' and 'counselling related services' are used generically in a wider sense, to include the practice of counselling, psychotherapy, coaching and pastoral care.

The aim of this resource is to give information to practitioners about what may be required in order to understand legal principles in respect of working with vulnerable adults in Scotland.

Introduction

This resource offers information to assist practitioners in determining their legal obligations to vulnerable adults. There is no single law which applies to 'vulnerable' adults in Scotland but there are several pieces of legislation, which are particularly relevant to people who may be vulnerable by reason of mental illness, incapacity, infirmity or disability. It is important to note here that not all adults who have a mental illness, learning or other disability are automatically 'vulnerable', nor should they be treated as such. This resource therefore focuses on laws which may affect adults who come into contact with counselling and psychotherapy services. Scotland has a separate legal framework from the rest of the UK in many of these matters and this resource is intended for practitioners in Scotland.

The law in this area is in a state of development and is significantly influenced by international human rights law and evolving beliefs on concepts such as 'capacity', 'support' and 'vulnerability'. This resource contains a section on human rights law and highlights the importance of human rights for practitioners in each chapter.

Except where otherwise indicated, the authors have endeavoured to state the law as at 1st January 2018

1 The Legislative Framework

1.1 Introduction

This part of the resource gives a brief overview of the three main pieces of legislation which may be relevant to vulnerable adults in Scotland: the Adults with Incapacity (Scotland) Act 2000, the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007. It identifies the main provisions and highlights some key concepts/terminology.

1.2 Adults with Incapacity (Scotland) Act 2000

Scots law, supported by human rights law, is designed to maximise autonomy for people with cognitive impairments, but also to provide necessary protection. Any concept of total incapability was abolished by the Adults with Incapacity (Scotland) Act 2000 ('the 2000 Act'), the main law in capacity/incapacity matters. Therefore, when deciding whether someone is incapable for the purposes of the Act, the focus is on particular acts or decisions, in particular circumstances, at a particular time.

'Incapable' is defined as someone being incapable of:

- acting; or
- making decisions; or
- communicating decisions; or
- understanding decisions; or
- retaining the memory of decisions.

'Acting' is important: it covers effectively taking any initiative where appropriate. 'Retaining the memory' means being able to remember for a reasonable time in relation to the matter in question. 'Inability to communicate' means inability which cannot be made good by any human or mechanical aid. The law does not contain an explicit requirement to provide all support appropriate to enable an adult to act or decide competently, but this is implied by the Act's principles and is required by human rights law (see Part 2 of this resource).

Factors other than incapability may make an apparent act or decision not legally valid. For example, this may be the result of undue influence; coercion; or taking unfair advantage of someone's weakened ability to resist the influence of another person or a situation.

The broad concept of 'acting and deciding' includes the ability to give valid consent to healthcare, psychological and other interventions.

The law does not allow decisions to be made based on an adult's best interests. 'Best interests' was explicitly rejected as the test for deciding what should happen to adults with incapacity. Making a decision based on someone's 'best interests' is appropriate only for children and signals a paternalistic approach which is inconsistent with the UN Convention on the Rights of Persons with Disabilities (Part 2 of this resource). All decisions and interventions under the 2000 Act require to be made having regard to the principles explained in Part 2.2 of this resource.

The principal measures covered by the 2000 Act are these:

- **Powers of attorney** (Part 2 of the 2000 Act) – These are generally regarded as the preferred measure whereby an individual can appoint an attorney or attorneys to make decisions for them whenever they choose in relation to financial matters, and in the event they become incapable in relation to welfare matters. 'Continuing powers of attorney' cover property and financial matters. 'Welfare powers of attorney' can cover personal and welfare, including healthcare, matters. They need to be registered with the Public Guardian.
- **Accounts and funds** – A relatively simple system for dealing with accounts and funds (Part 3 of the 2000 Act) is administered by the Public Guardian, who can issue certificates requiring information to be provided, allowing accounts to be opened, and authorising receipt and payment of funds. Part 3 of the 2000 Act also contains (in section 32) an important provision that a joint account may continue to be operated by one party to the account if the other becomes incapable, unless the account expressly states otherwise.
- **Residents' finances** – Management of residents' finances by hospitals, registered care homes, etc. is set out in Part 4 of the 2000 Act.
- **Medical matters** – Authority to give medical treatment (Part 5 of the 2000 Act), is through certification by 'the medical practitioner primarily responsible for the medical treatment of the adult', who can also authorise others. Part 5 of the 2000 Act also contains other provisions about medical treatment and research, and procedures for resolving disputes.
- **Intervention orders** (Part 6 of the 2000 Act) – These are granted by the sheriff court and authorise acts and decisions which (normally) are inter-related and of short-term or self-limiting duration.

- **Guardianship orders** (Part 6 of the 2000 Act) – These are granted by the sheriff court and appoint one or more guardians to make decisions on an adult's behalf. A guardianship order may cover some or all property and financial matters, some or all welfare matters, both financial and welfare matters, and powers to deal with particular matters, to pursue or defend divorce and similar proceedings, and to authorise the adult to carry out transactions specified by the guardian.
- **Other powers of the sheriff** – The sheriff court has various powers of intervention in relation to each of the following, and various ancillary powers (Part 1 of the 2000 Act), including powers to make interim orders, and an important stand-alone power to give directions to anyone exercising any functions under the 2000 Act. This covers not only situations where there is controversy, but also where someone seeks the guidance of the court on how they ought to proceed. The sheriff court can also authorise registration of non-Scottish measures by the Public Guardian (Schedule 3, paragraph 8 of the 2000 Act) – see Part 9 of this resource.

Relevant in this context, though not contained in the 2000 Act, is a procedure under section 13ZA of the Social Work (Scotland) Act 1968, under which the local authority may take steps to help an adult benefit from a local authority service. This can include moving an adult to residential accommodation provided under the 1968 Act. The principles in the 2000 Act (see Part 2.2 of this resource) apply to this procedure.

An attorney only has the powers conferred by the power of attorney document. Guardians and others only have the powers contained in their certificates of appointment. These documents should be checked before accepting any decisions, instructions or consents from anyone acting on behalf of an adult.

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

The Mental Health (Care and Treatment) (Scotland) Act 2003 is the main law in Scotland which governs the treatment of mental disorder. Mental disorder is defined in the 2003 Act as any mental illness, personality disorder or learning disorder, however caused or manifested.

The law sets out:

- When and how people can be treated if they have a mental disorder;
- When people can be given treatment or taken into hospital against their will;
- What people's rights are, and the safeguards which ensure that these rights are protected.

Unlike the Adults with Incapacity (Scotland) Act 2000, which uses the concept of capacity, the 2003 Act uses the concept of '**significantly impaired decision-making ability**' (SIDMA) as one of the requirements/ tests for deciding whether an individual can be subject to compulsory detention and treatment. While SIDMA is separate to the concept of capacity, similar factors will be taken into account when assessing both.

Named Persons – If someone over 16 considers that it is likely they could become subject to compulsory measures under the 2003 Act they can appoint a named person, who has the right to be consulted when certain things happen and to have their views taken into account. The named person can also initiate appeals against certain orders on the other person's behalf.

There are three main types of orders that can be made under the 2003 Act:

Emergency Detention

An Emergency Detention Certificate can be granted by a doctor and authorises a person to be held in hospital for up to 72 hours while their condition is assessed. If possible, a mental health officer should also agree to the making of the Emergency Detention Certificate. Only urgent treatment can be given under this type of detention. It is not possible to appeal against an Emergency Detention Certificate.

Short-Term Detention

Short-term Detention can be authorised by an approved medical practitioner (usually a psychiatrist approved by the health board) and can last for up to 28 days. It must also be approved by a mental health officer. Before granting the order, the doctor must consult the person's named person and have regard to any views they express. In line with the principles of the 2003 Act, the doctor should speak to the person and take into account their wishes. Under a Short-term Detention Certificate a person can be given treatment without their consent in certain circumstances. The individual or their named person can appeal against Short-term Detention to the Mental Health Tribunal for Scotland (for more information about the Tribunal see Part 3 of this resource).

Compulsory Treatment Orders

Applications for Compulsory Treatment Orders (CTOs) are made to the Mental Health Tribunal by Mental Health Officers. The application must include two medical reports, a Mental Health Officer report and a proposed care plan. The Tribunal holds a formal hearing where it decides whether to grant the CTO. CTOs set out the conditions that the person must comply with. They may require the person to stay in hospital, or they can apply while the person is living in the community. CTOs may also stipulate that the person must receive certain medical treatment. CTOs can last up to six months and can be extended for a further six months, and then for periods of 12 months at a time.

Accessing Support under the 2003 Act

Independent Advocacy

Under the 2003 Act everyone with a mental disorder has the right to access independent advocacy services – even those who are not subject to an order under the Act. Independent advocates are independent from all other services and are there solely to support the individual and to ensure that their views and feelings are heard and respected. Independent advocates may support someone by explaining information to them or accompanying them to meetings and tribunal hearings.

Advance Statements

The 2003 Act also makes provision for the making of advance statements. An advance statement is a document where a person writes down the ways they wish and do not wish to be treated for mental disorder in the event that they become mentally disordered and their ability to make decisions becomes significantly impaired.

There are no guarantees that the advance statement will be followed – doctors and the Mental Health Tribunal are not bound to follow statements but they must have regard to their contents.

There is more information about advance statements on the Mental Welfare Commission's website <http://www.mwscot.org.uk/get-help/getting-treatment/advance-statements>

1.4 The Adult Support and Protection (Scotland) Act 2007

If there is concern that an adult may be at risk of harm, the Adult Support and Protection (Scotland) Act 2007 may be used to protect the person. The 2007 Act is intended to make sure that relevant authorities have the powers they need to allow them to intervene if it is considered that an adult may be at risk of harm or abuse.

'Adults at risk' are defined in the 2007 Act as adults who:

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

Just because someone has a disability or a mental illness does not mean that they are automatically an adult at risk.

The 2007 Act covers situations where risk to the adult comes from another person, or where the risk to the adult is caused by herself or himself.

'Harm' covers all harmful conduct including physical harm, psychological harm, unlawful conduct which adversely affects property rights or interests, and conduct which causes self-harm.

Duty to make inquiries

A council is required to make inquiries about a person's wellbeing, property or financial affairs if it knows or believes that the person is an adult at risk and that they might need to intervene in order to protect the person.

Co-operation

Specific public bodies (including the Mental Welfare Commission for Scotland, the Care Inspectorate, Health Care Improvement Scotland, the Public Guardian, councils, the Chief Constable of Police Scotland, health boards) are required to cooperate about adult protection matters, including when a council is making inquiries. If these public bodies know or believe that an adult is at risk and that action needs to be taken to protect that person, they must report the facts and circumstances of the case to the council where that person is.

Investigations

The 2007 Act gives the local authority the power to enter any place if this is necessary to help them to conduct an inquiry to establish whether an adult is at risk. A local authority officer may interview the adult and/or undertake a medical examination of the adult with their consent. They may also access health, financial or other records about the adult at risk.

Protection Orders

There are certain orders (known collectively as 'protection orders') which can be granted by the court to help the local authority in protecting an adult at risk:

An **assessment order** can be granted by the court to assist the council in carrying out their inquiries which authorises a council officer to take a person from a place in order to allow an interview or medical examination to take place.

A **removal order** granted by the court can authorise a council officer to move a person to a specified place and to take such reasonable steps as necessary to protect the person from harm. The court may grant this order if the person is an adult at risk who is likely to be harmed if they are not moved and if there is a suitable and available place for the adult to be moved to.

A **banning order** may be granted by the court to ban someone from being in a specific place. A banning order bans a third party from a specified place, it does not ban the adult at risk.

A **protection order** must not be made if the adult at risk has refused to consent to the order. An adult's refusal to consent to the making of an order can be ignored by the court if it reasonably believes that the adult has been unduly pressurised to refuse consent and that there are no steps which could reasonably be taken with the adult's consent which would protect the adult from harm.

Counsellors should inform the local authority if they are concerned that a person may be an adult at risk. For more information see the Adult Support and Protection website: <http://www.actagainstharm.org>

2 Principles of the Legislation and the Human Rights Framework

2.1 Introduction

When the Adults with Incapacity (Scotland) Act 2000, the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007 were being drafted, it was agreed that certain principles should be included to guide how the law is applied. These principles are designed to ensure that the rights of the people who are being dealt with under these laws are protected and that the person concerned is at the centre of the decision-making process. The three pieces of legislation are therefore underpinned by guiding principles which people must apply when working with the legislation.

2.2 The Principles

Adults with Incapacity (Scotland) Act 2000 Principles

Anyone authorised to make/take decisions for an adult under the 2000 Act must apply the following principles:

- **Provide benefit** – Any intervention in the adult's life must benefit them and it must be shown that the benefit cannot reasonably be achieved without the intervention.
- **Take the least restrictive option** – Any intervention must be the least restrictive option. This means that the intervention must restrict the person's freedom as little as possible.

- **Take account of the views of the adult** – In deciding whether to make an intervention, and the type of intervention to be made, account must be taken of the past and present wishes and feelings of the adult as far as they can be ascertained by any means of communication that the person uses e.g. through speech, signs, a computer.
- **Take account of the views of others** – The views of other important people like the nearest relative, named person, the primary carer of the adult, any guardian or continuing or welfare attorney, in as far as it is reasonable and practicable to do so, should be taken into account.
- **Encourage the use of existing skills and the development of new skills** – The person should be encouraged to use and develop their skills and to make their own decisions as much as possible.

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

Professionals should apply the following principles when they are providing care and treatment under the 2003 Act:

- Take into account the **present and past wishes and feelings** of the person;
 - This means that someone providing care or treatment must find out the person's wishes and feelings and consider these when making decisions.
- Take into account the **views of the patient's carer, named person, guardian, welfare attorney**;
 - This means that someone providing care or treatment must find out the views of the person's carer or anyone else who plays a role in their life and take these into account.
- Enable the person to **participate as fully as possible** in their care;
 - This means that someone providing care or treatment must actively help the person to participate as much as they are able to.
- Provide the person with the **information and support they require** to enable them to participate;
 - This means that someone providing care or treatment must give the person the necessary help and support they need to participate.
- Look at the full **range of options available** for the person's care;
 - This means that someone providing care or treatment must consider all available options for the person, and not only those which are easiest to achieve.
- Provide treatment which gives **maximum benefit** to the person;
 - This means that someone providing care or treatment must make sure that any treatment provided is the best for that person.

- Ensure that the person is not treated less favourably than other people in a similar situation;
 - This means that someone providing care or treatment must not be discriminatory to the person.
- Take into account the person's abilities, background and beliefs;
 - This means that someone providing care or treatment must take into consideration the whole of the person's identity, not just that which is related to their mental health.
- Take into account the person's carer's needs and provide them with the information and support they need to care for the person;
 - This means that someone providing care or treatment must take into consideration the impact on the person's carer, their needs and how they can be supported.

Adult Support and Protection (Scotland) Act 2007

A person may intervene, or authorise an intervention, under the 2007 Act only if they are satisfied that the intervention –

- Will provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs,
 - Any intervention in the adult's life must benefit them and it must be shown that the benefit cannot reasonably be achieved without the intervention.
- Is, of the range of options likely to fulfil the object of the intervention, the least restrictive to the adult's freedom.
 - Any intervention must be the least restrictive option. This means that the intervention must restrict the person's freedom as little as possible.

In addition to this, anyone performing a function under the 2007 Act must have regard to:

- The adult's ascertainable wishes and feelings (past and present);
 - Account must be taken of the past and present wishes and feelings of the adult as far as they can be established by any means of communication that the person uses e.g. through speech, signs, a computer;
- Any views of the adult's nearest relative, any primary carer, guardian or attorney of the adult and any other person who has an interest in the adult's wellbeing or property;
 - The views of other important people like the nearest relative, named person, the primary carer of the adult, any guardian or continuing or welfare attorney, in as far as it is reasonable and practicable to do so, should be taken into account;

- The importance of the adult participating as fully as possible in the performance of the function and providing the adult with such information and support as are necessary to enable the adult to so participate;
 - The adult should be encouraged to take part in the decision-making as much as they can. They should be given the support and information they need so that they are able to participate fully.
- The importance of ensuring that the adult is not, without justification, treated less favourably than the way in which any other adult (not being an adult at risk) might be treated in a comparable situation;
 - The adult must not be treated in a discriminatory way.
- The adult's abilities, background and characteristics (including the adult's age, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage);
 - This means that the whole of the adult's identity should be taken into consideration, not only that which is related to them being/potentially being a person at risk.

The principles of all three of the Acts are intended to make sure that the person is at the centre of the decision-making process. The principles are not hierarchical and they should all be considered equally. It is very important that the principles are applied in practice and that practitioners are aware of this duty when working with people under the legislation.

2.3 The Human Rights Framework

The Human Rights Framework in the UK is made up of all of the international and regional treaties and agreements that the UK has signed up to, and the human rights laws which have been passed by the UK parliament.

The UK has made various human rights commitments at national and international level. This includes treaties which it has entered into at a regional level (e.g. the European Convention on Human Rights), and treaties which it has entered into with international bodies such as the United Nations (e.g. the Convention on the Rights of Persons with Disabilities). This means that the UK has signed up to legally binding agreements which require it to do (or not do) certain things and to be held to account for this by monitoring bodies, including courts.

The UK has also signed up to various non-legal human rights guidelines and declarations. While these are not legally binding they are important sources of information which can guide how human rights are interpreted and inform developments in the law.

The UK also has national laws which provide for the protection of human rights. This could be in relation to specific issues, e.g. the Equality Act 2010 which protects people against discrimination. The main human rights law in the UK is the Human Rights Act 1998 which also applies in Scotland. It incorporates into domestic law the European Convention on Human Rights (ECHR). This means that most of the ECHR rights are directly enforceable in the UK. Other international treaties, which the UK has signed but has not incorporated into domestic law, (e.g. the United Nations Convention on the Rights of Persons with Disabilities) are not directly enforceable in the UK and cannot be relied upon in court.

The Human Rights Act

The Human Rights Act gives direct effect to ECHR rights by requiring public authorities to act in accordance with the incorporated ECHR rights. This means that it is unlawful for a public authority to act in a way which is incompatible with an ECHR right. 'Public authority' is not defined in the Human Rights Act but includes organisations which carry out public functions like the NHS, local authorities and the police. Private companies, which provide services on behalf of a public authority, for example a private counselling service providing treatment on behalf of the NHS, would be considered to be exercising a function of a public nature and would therefore be required to comply with the ECHR rights.

Acting in accordance with ECHR rights means that public authorities must protect relevant ECHR rights. For example, a public authority providing health and social services must protect Article 8, the right to private and family life, by protecting confidentiality and respecting a person's right to refuse treatment. Article 2, the right to life, means that the authority must protect the lives of service users by preventing and addressing risks.

Courts are also required to interpret laws in compliance with ECHR rights.

In Scotland, the Scotland Act 1998 requires that legislation made by the Scottish Parliament and actions of the Scottish Ministers, are compatible with ECHR rights. If they are found not to be compatible they will be invalid.

ECHR rights included in the Human Rights Act:

- Right to life – Article 2
- Freedom from torture, inhuman or degrading treatment or punishment – Article 3
- Freedom from slavery and forced labour – Article 4
- Right to liberty and security – Article 5
- Right to a fair trial – Article 6
- No punishment without law – Article 7

- Right to respect for private and family life – Article 8
- Freedom of thought, conscience and religion – Article 9
- Freedom of expression – Article 10
- Freedom of assembly and association – Article 11
- Right to marry – Article 12
- Prohibition of discrimination – Article 14
- Restrictions on political activity of aliens – Article 16
- Protection of abuse of rights – Article 17
- Limitation on use of restrictions on rights – Article 18
- Protection of property – Article 1 of Protocol 1
- Right to education – Article 2 of Protocol 1
- Right to free elections – Article 3 of Protocol 1.

All of these rights are important to protect the freedom and dignity of every person. Some of these rights are qualified, like the right to private and family life, and have to be balanced with other considerations including the rights of other people. This means that they can be restricted in certain circumstances as long as the restriction is well-defined by the law and is proportionate. Some rights are absolute, like the prohibition on torture and inhuman or degrading treatment, which means that they can never be restricted.

Many of the rights contained in the ECHR and the Human Rights Act are relevant for people who may come into contact with health and social care services on a voluntary or compulsory basis, e.g. because they have a mental disorder or a disability.

Relevant human rights considerations will be highlighted throughout this resource.

The UN Convention on the Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities (CRPD) is an international treaty which the UK signed in 2009. It is not incorporated into UK law in the same way as the ECHR. However, under international law the UK is still required to comply with its provisions. The CRPD reinforces many of the rights contained in the ECHR but it restates them in a way which explains how they should apply to people with disabilities.

It is important to note Article 12 of the CRPD which states that people with disabilities enjoy legal capacity on an equal basis with others. This means that people with disabilities, like those without, have the right to make their own decisions. Article 12 also requires that all reasonable support must be given to ensure that a person can exercise their legal capacity on an equal basis with others. Many people, including friends, relatives and professionals, may be involved in providing people with the support they need. This is discussed in more detail in Part 5 of this resource.

3 Key organisations

3.1 Introduction

Various organisations have responsibility for monitoring and/or implementing parts of the law relating to vulnerable adults, including those relating to mental health and incapacity. Counsellors and therapists may come into contact with these organisations if they work with vulnerable people and/or people with mental health issues. These organisations can also be important sources of information and support for practitioners and clients. This part of the resource provides some information about relevant organisations.

3.2 The Mental Welfare Commission for Scotland

The Mental Welfare Commission for Scotland (MWC) is an independent statutory body, which works to safeguard the rights and welfare of people with a mental illness, learning disability or other mental disorder. The MWC's duties are set out in mental health and incapacity laws and include visiting people who are receiving care and treatment, monitoring implementation of the legislation, carrying out investigations, providing information and advice, and influencing and challenging policy.

Monitor – The MWC has a duty to monitor the operation of the 2003 Act and to promote best practice. Connected to this, it is required to tell the Scottish Ministers about any matters concerning the operation of the 2003 Act, which it considers ought to be brought to their attention, and also any matters of general interest or concern regarding the welfare of any person who has a mental disorder.

Raise concerns – The MWC has a duty to raise any concerns about any social service or health care provided to a person who has a mental disorder with the Care Inspectorate, Healthcare Improvement Scotland or any other relevant person or organisation.

Advice – The MWC has a duty to give advice to a variety of people and organisations on any matter arising out of the 2003 Act, including the Scottish Ministers, local authorities, health boards, the Care Inspectorate. More widely, it is also required to provide advice (as far as is reasonable) to any person about any matters relevant to the functions of the MWC.

Publish information – The MWC may publish information or guidance about any matter relevant to its functions and also its conclusions which it makes in relation to an investigation or inquiry under the 2003 Act.

Visits – The MWC is required to visit, as often as it considers it appropriate, people who are detained under the 2003 Act or under the Criminal Procedure (Scotland) Act 1995. They may also visit people who are not detained in hospital but who are subject to an order under the 2003 Act, e.g. a compulsory treatment order. Visits are intended to give the patient an opportunity to discuss with the MWC Visitor any concerns they may have and allows the MWC Visitor to assess whether the requirements of the relevant legislation are being met.

Interviews – The MWC is authorised to interview any patient or person it considers appropriate to interview in connection with carrying out its duties under the legislation. Interviews can be conducted in private.

Medical examination – The MWC, in connection with its duties under the legislation, is also able to carry out medical examinations of patients where appropriate. This must be done by a MWC Visitor who has been appointed as a Medical Visitor.

Inspection of records – The MWC, in connection with its duties under the legislation, is authorised to require any person holding medical or other records of a patient to produce them for inspection.

Adults with Incapacity – The MWC also has duties under the Adults with Incapacity (Scotland) Act 2000 to investigate complaints about the welfare of an adult in relation to welfare attorneys or guardians if they are not satisfied with any investigation made by a local authority or if the local authority failed to investigate the complaint.

The MWC also has a duty to provide guardians and welfare attorneys (or people authorised under an intervention order) with information and advice in relation to their personal welfare functions.

3.3 The Office of the Public Guardian

The Office of the Public Guardian was created by the Adults with Incapacity (Scotland) Act 2000. It has general functions to:

- Maintain a public register of powers of attorney that have been registered, guardianship and intervention orders granted and authorisations granted under the access to funds scheme.
- Register powers of attorney that are to begin or continue in the event of incapacity.
- Supervise those individuals who have been appointed to manage the financial and property affairs of adults who lack capacity to do so for themselves.
- Investigate circumstances where the property or finances belonging to an incapable adult appear to be at risk.

3.4 Mental Health Tribunal for Scotland

The Mental Health Tribunal for Scotland (the Tribunal) was created by the Mental Health (Care and Treatment) (Scotland) Act 2003. The President of the Tribunal presides over the discharge of the Tribunal's functions.

The Tribunal makes decisions on applications for compulsory treatment orders under the 2003 Act. It also hears appeals against compulsory measures, for example short-term detention and compulsory treatment orders. The Tribunal also reviews compulsory treatment orders after they have been in operation for two years and every two years after that.

The Tribunal is obliged to provide a number of people with the opportunity to make representations and lead or produce evidence during a hearing.

A Tribunal panel consists of three members: a legal member (who acts as Convenor), a medical member and a general member.

3.5 The Care Inspectorate

The Care Inspectorate is the social care regulator for Scotland. It undertakes inspections of social services, local authority social work departments and is also responsible for the scrutiny of children's services.

The Care Inspectorate must exercise its functions in line with the following principles:

- The safety and wellbeing of all persons who use, or are eligible to use, any social service are to be protected and enhanced;
- The independence of those persons is to be promoted;
- Diversity in the provision of social services is to be promoted with a view to those persons being afforded choice;
- Good practice in the provision of social services is to be identified, promulgated and promoted.

Information

The Care Inspectorate must provide information to the public about the availability and quality of social services. If someone requests information, they are entitled to receive it in the format they require (if this request is reasonable).

The Care Inspectorate may provide, at any time, advice to the Scottish Ministers about any matter relevant to their functions. If the Scottish Ministers ask the Care Inspectorate for advice they are obliged to provide it.

The Care Inspectorate must, when asked to do so, provide advice to: anyone who provides or wants to provide social services; people or groups who represent those who use or are eligible to use social services; people or groups representing those who care for those who use or are eligible to use, social services; local authorities; health boards.

The Care Inspectorate may also disseminate such information as it considers relevant, of general or specific application, arising out of or in connection with the discharge of its functions.

Registration and inspections

Anyone who provides a care service in Scotland must apply to register with the Care Inspectorate. It is an offence to provide a care service while not registered or to pretend that a care service is registered.

The Care Inspectorate has the power to inspect any social service. The inspection may include:

- reviewing and evaluating the effectiveness of the provision of the service;
- encouraging improvement in the provision of any such services;
- considering any recommendations for improvements to be included in the report;

investigating any incident, event or cause for concern.

Inspections carried out by the Care Inspectorate are usually unannounced and can take place at any time when the care service is operational. A report based on the inspection will be prepared by the Care Inspectorate and a copy will be sent to the service which is being inspected. The person providing the service will be given the opportunity to comment on a draft report. The Care Inspectorate is obliged to publish reports and they are available on their website.

For more information on the Care Inspectorate see Part 5 of this resource.

3.6 Adult Protection Committees

Under the Adult Support and Protection (Scotland) Act 2007, each council must establish an Adult Protection Committee.

Functions of Adult Protection Committees:

- **Keep under review the procedures and practices** of the council, the Care Inspectorate, Healthcare Improvement Scotland, the relevant Health Board and the Chief Constable of Police Scotland (and any other body specified by the Scottish Ministers) which relate to the safeguarding of adults at risk who are present in the council's area.
- **Give information or advice or make proposals** to the council, the Care Inspectorate, Healthcare Improvement Scotland, the relevant Health Board and the Chief Constable of Police Scotland (and any other body specified by the Scottish Ministers) on the exercise of functions which relate to the safeguarding of adults at risk who are present in the council's area.
- **Make, or assist in or encourage the making of, arrangements for improving the skills and knowledge** of the council, the Care Inspectorate, Healthcare Improvement Scotland, the relevant Health Board and the Chief Constable of Police Scotland (and any other body specified by the Scottish Ministers) and their employees who have responsibilities relating to the safeguarding of adults at risk present in the council's area.

- Any other function relating to the safeguarding of adults at risk as the Scottish Ministers may specify.

The Committees are multi-agency and have representatives from the council, the NHS, the police and other organisations who play a role in adult protection. The Convenor of the Committee must not be a member of the council. The Committees must also allow a representative of the Mental Welfare Commission for Scotland, the Public Guardian, the Care Inspectorate and any other body as specified by Scottish Ministers to attend their meetings.

Each Adult Protection Committee must submit a report to the Scottish Ministers every two years on the exercise of the Committee's functions.

3.7 Contact details

Mental Welfare Commission for Scotland

Email – enquiries@mwscot.org.uk

Phone – 0131 313 8777 (professionals),

0800 389 6809 (service users and carers only)

Office of the Public Guardian for Scotland

Email – opg@scotcourts.gov.uk

Phone – 01324 678 300

Mental Health Tribunal for Scotland

Email – mhtspresidentsoffice@scotcourtsribunals.gov.uk

Phone – 0800 345 7060 (Enquiries from patients, carers, general public),

01698 390 000 (Professionals)

The Care Inspectorate

Email – enquiries@careinspectorate.com

Phone – 0345 600 9527

4 Confidentiality

4.1 Introduction

Confidentiality is critically important within the counselling professions, where clients need to feel able to discuss sensitive thoughts and personal issues. However, confidentiality can never be absolute, because there are situations in which a practitioner has statutory duties of reporting (e.g. terrorism and certain other offences) or where the practitioner may need to break confidentiality in the public interest for the safety of the client or others, see BACP, GPiA 014 *Managing confidentiality*. For this reason, clients should be made aware of any limitations on confidentiality, before the therapeutic work starts.

4.2 Duty of Confidentiality

Counsellors and therapists have a basic ethical and legal duty to protect confidentiality, within the limitations of the law. BACP's *Ethical Framework for the Counselling Professions* sets out that:

We will protect the confidentiality and privacy of clients by: a. actively protecting information about clients from unauthorised access or disclosure, b. informing clients about any reasonably foreseeable limitations of privacy or confidentiality in advance of our work together.
(Good Practice, Points 25 a-b)

Organisations and individuals who hold personal information about individuals are under a common law duty to keep that information confidential (*A-G v Guardian Newspapers Ltd* [1990] AC 109; *W v Edgell and others* [1990] 1 All ER 835). There are also specific statutory duties of confidentiality and obligations contained within professional codes of conduct, like that under BACP's *Ethical Framework*.

However, it should also be recognised that there will be times when information cannot be kept confidential and disclosure is required in the public interest, by an Act of parliament or by a court. These occasions will be discussed later on in this section.

4.3 Contractual Duty of Confidentiality

The *Ethical Framework for the Counselling Professions* commits members to show respect by 'agreeing with clients on how we will work together' (Commitments 3c), 'communicating clearly what clients have a right to expect from us' and 'any benefits, costs and commitments that clients may reasonably expect' (Commitments 4a and b).

Confidentiality clauses in contracts

A contract is a legally enforceable agreement. For therapeutic work, a contract does not always have to be in writing, but wherever possible, it should be recorded in a form appropriate to the needs of the client. This recording provides evidence of the terms agreed upon and acts as an aide-memoire for both client and practitioner. The contract should cover the main terms of the therapeutic work, including the limits of confidentiality, which may include building in clauses about reserving the right to breach confidentiality where the client presents a risk of harm to self or to others.

Some essential contract terms can be clarified by providing the client and/or their guardian, attorney or carer with a leaflet to read in advance, which sets out the basic terms of the therapy offered, or by careful discussion with new clients at their intake assessment or first session. The terms of the contract must be made clear to the client from the outset.

Be careful about reliance on verbal contracts reached at the first session: vulnerable clients might be anxious or not able to concentrate, so may be less able to reach a considered agreement with the practitioner or may fail to recall what was agreed.

A person must have capacity to be able to enter into a contract. Scots law is clear that a contract will be null if either of the parties to the contract did not have capacity to understand the nature of the contract at the time it was made.

If a person has a guardian or an attorney (see Part 1 of this resource) then they may be authorised to enter into contracts on the person's behalf by virtue of a power of attorney, a guardianship order or an intervention order under the Adults with Incapacity Act. For more detailed information see Jill Stavert, *Mental Health, Incapacity and the Law in Scotland*, 2016.

Contracting about making, keeping and storing records

Contracts for counselling-related services should also make clear the status of the client's records, including who might have access to their content. Counsellors may be bound by data protection laws (discussed later at Part 4.4 of this resource), which require that data and information are used and stored in accordance with the legislation. It is also important to make clear to clients that other law or court orders may permit and/or require the disclosure of their information. For example, the court may require disclosure of counselling, medical or social care records, or access may be required by those who have legal responsibility for the affairs or wellbeing of a vulnerable adult, for example under guardianship or powers of attorney.

Even if there is no contract between a counsellor and a client, the duty of confidentiality still applies because of the nature of the relationship. Counsellors may also owe a duty to third parties, including others mentioned in the course of therapy. For example, a duty of confidentiality arises when a therapist finds out personal information about a third party. For more information see – BACP, GPiA 014 *Managing confidentiality*.

4.4 Data protection and case records

Personal information (data) should be protected (i.e. treated with respect and confidentiality) and in Scotland the legal issues applicable to the holding of personal data are governed by the Data Protection Act 1998, the Freedom of Information (Scotland) Act 2002 and other relevant subsidiary legislation.

The Freedom of Information (Scotland) Act 2002 applies to information held by public authorities and gives people the right to request, and be given access to, lots of different types of information. The 2002 Act is enforced and promoted by the Scottish Information Commissioner (see website for further information – <http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.aspx>).

The Data Protection Act 1998 (DPA) applies across the UK and gives people the right to see and potentially correct information held about themselves. The DPA also governs the way in which personal information is handled, including sensitive personal data. Processing is defined as obtaining, recording or holding information or data or carrying out any operation or set of operations on the information or data. This would include communications within a counselling-related service (in whatever context it takes place), particularly appointments or other data related to providing and receiving services, all of which could constitute 'sensitive personal data'. 'Sensitive personal data' means information relating to the racial or ethnic origin of the person; his or her political beliefs; his or her religious or other beliefs; whether he or she is a member of a trade union; his or her physical or mental health condition; his or her sexual life; the commission or alleged commission by him or her of any offence; or

any proceedings for any (alleged) offence committed by him or her, the disposal of the proceedings or the sentence given by the court. In other words, most therapeutic records will contain sensitive personal data.

The operation of the law relating to data protection in Scotland is administered by the Scotland Office of the Information Commissioner's Office (separate from the Scottish Information Commissioner) which is based in Edinburgh.

The Data Protection Act requires that most organisations, which process personal data electronically, notify the ICO of certain details about that electronic processing. Failure to register, when required to do so, is an offence of strict liability, punishable with fines. For more information on registration see the ICO's website.

The Data Protection Act sets out principles which govern the use of personal information, anyone processing data must apply these. The principles are detailed below together with some explanation of what they require (see ICO, Data protection self-assessment toolkit for further information at: <https://ico.org.uk/for-organisations/resources-and-support/data-protection-self-assessment>):

1. Personal data shall be processed fairly and lawfully.

This means that you must:

- *Have legitimate grounds for collecting and using the personal data;*
- *Not use the data in ways that have unjustified adverse effects on the individuals concerned;*
- *Be transparent about how you intend to use the data, and give individuals appropriate privacy notices when collecting their personal data;*
- *Handle people's personal data only in ways they would reasonably expect; and*
- *Make sure you do not do anything unlawful with the data. (Pp18-19 ICO Guide)*

2. Personal data shall be obtained only for one or more specified and lawful purposes and shall not be further processed in any manner incompatible with that purpose or those purposes.

This requirement... aims to ensure that organisations are open about their reasons for obtaining personal data, and that what they do with the information is in line with the reasonable expectations of the individuals concerned. (P24 ICO Guide)

It means that you must:

- *Be clear from the outset about why you are collecting personal data and what you intend to do with it;*

- Comply with the Act's fair processing requirements – including the duty to give privacy notices to individuals when collecting their personal data;
- Comply with what the Act says about notifying the Information Commissioner; and
- Ensure that if you wish to use or disclose the personal data for any purpose that is additional to or different from the originally specified purpose, the new use or disclosure is fair. (P24 ICO Guide)

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

This means that you should ensure that:

- You hold personal data about an individual that are sufficient for the purpose you are holding it for in relation to that individual; and
- You do not hold more information than you need for that purpose. (P27 ICO Guide)

4. Personal data shall be accurate and, where necessary, kept up to date.

Personal data may not be inaccurate if it faithfully represents someone's opinion about an individual, even if the opinion proves incorrect... (P13 ICO Guide)

This means that you should:

- Take reasonable steps to ensure the accuracy of any personal data you obtain;
- Ensure that the source of any personal data is clear;
- Carefully consider any challenges to the accuracy of information; and
- Consider whether it is necessary to update the information. (P31 ICO Guide)

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

This means that you will need to:

- Review the length of time you keep personal data;
- Consider the purpose or purposes you hold the information for in deciding whether (and for how long) to retain it;
- Securely delete information that is no longer needed for this purpose or these purposes; and

- *Update, archive or securely delete information if it goes out of date.*
(P38 ICO Guide)

6. Personal data shall be processed in accordance with the rights of data subjects under the Act.

The rights of individuals referred to are:

- *A right of access to a copy of the information comprised in their personal data;*
- *A right to object to processing that is likely to cause or is causing damage or distress;*
- *A right to prevent processing for direct management;*
- *A right to object to decisions being taken by automated means;*
- *A right in certain circumstances to have inaccurate personal data rectified, blocked, erased or destroyed; and*
- *A right to claim compensation for damages caused by a breach of the Act.*
(P44 ICO Guide)

7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

In practice, it means you must have appropriate security to prevent the personal data you hold being accidentally or deliberately compromised. In particular, you will need to:

- *Design and organise your security to fit the nature of the personal data you hold and the harm that may result from a security breach;*
- *Be clear about who in your organisation is responsible for ensuring information security;*
- *Make sure you have the right physical and technical security, backed up by robust policies and procedures and reliable, well-trained staff; and*
- *Be ready to respond to any breach of security swiftly and effectively.*
(P75 ICO Guide)

8. Personal data shall not be transferred to a country or territory outside the EEA unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of that personal data.

If you are considering sending personal data outside the EEA, work through the following checklist to help you decide if the eighth principle applies and, if so, how to comply with it to make a transfer:

- *Do you need to transfer personal data abroad?*
- *Are you transferring the data to a country outside the EEA or will it just be in transit through a non-EEA country?*
- *Have you complied with all the other data protection principles?*
- *Is the transfer to a country outside the EEA?*
- *Is the transfer to a country on the EU Commission's list of countries or territories providing adequate protection for the rights and freedoms of data subjects in connection with the processing of their personal data?*
- *If the transfer is to the United States of America, has the US recipient of the data provided adequate protection for the transfer of personal data?*
- *Is the personal data 'passenger name record' information?*
- *Can you make an assessment that the level of protection for data subjects' rights is 'adequate in all the circumstances of the case'?*
- *If not, can you put in place adequate safeguards to protect the rights of the data subjects whose data are to be transferred?*
- *Can you rely on another exception from the restriction on international transfers of personal data? (Pp83-85 ICO Guide)*

4.5 Information sharing

Inter-agency sharing of information is increasing to the extent that it has now become the norm, with appropriate client consent, in many contexts, for example social care, healthcare and education. Practitioners working in a team providing these services may need to share information for the protection of the public or the safety and welfare of a vulnerable client or others, and/or to enhance the quality of the service provided.

The sharing of information for the purposes of health and social care is seen as a key aspect of securing person-centred, efficient care. The Scottish Government has published a strategic framework for health and social care information sharing to enable '*practitioners working across sectors to share the information required to offer people the best care and support to meet their needs, and to plan how organisations more effectively involve people in information sharing to support their care.*' (Scottish Government, *Health and Social Care Information Sharing – A Strategic Framework: 2014–2020*)

Information sharing is therefore an important part of the provision of modern health and social care services and there will likely be times when practitioners need to share client information. This will usually be done with the full explicit consent of the client.

BACP's GPiA 014 *Managing confidentiality* states that:

If a client consents to referral on or to a change in the confidentiality agreed with them at the outset of the work with their therapist, then there is little likelihood of any ground for legal or other action against the therapist if the actions then taken are with the full knowledge and consent of the client. If possible, obtain the client's explicit consent. Implicit or implied consent may be relied upon by the therapist, but it can be nebulous and is rather more difficult to prove. A client who is anxious and perhaps confused at the commencement of therapy is less likely to recall in any detail a discussion with their therapist about the terms of their therapeutic contract. In the event of a complaint or legal action, both therapist and client are best protected by a therapeutic contract, with terms including explicit consent, that are evidenced in writing.

4.6 Referrals and disclosures

Public interest

As noted in Part 4.2 of this resource, there may be occasions when practitioners are required, by law or an order of a court, to disclose information without the consent of the client. A practitioner may also exercise their discretion to make a disclosure in the public interest, for example where there is an imminent risk of serious harm to the client or others. In these situations, the practitioner's exercise of their discretion to disclose information in the public interest is protected by the courts, in that the courts will not enforce a client's right to confidentiality by punishing the practitioner for disclosure without client consent in cases where the practitioner acted in good faith and the public interest was protected by making the disclosure. (See *W v Edgell and others* [1990] 1 All ER 835).

Wherever possible, disclosures should be made with the consent and co-operation of the vulnerable adult concerned. However:

- if there is an imminent and serious risk to the client or others, or
- if the client is not competent to make their own decisions and the consent of those with legal responsibility for the client is required, or
- if there are some safeguarding situations where seeking prior consent from the client, carers or others might put the client or others at greater risk of significant harm or risk jeopardising a police investigation or social care enquiry,

then in these circumstances the counsellor should wherever possible, discuss the matter in supervision, and where necessary seek appropriate legal advice.

Statutory obligations

Specific statutory provisions may also require practitioners to disclose information without consent. For example, under the Adult Support and Protection (Scotland) Act 2007 where a public body or office-holder knows or believes that a person is an adult at risk and that action needs to be taken, they must report the facts and circumstances of the case to the council. Public bodies and office-holders include the Mental Welfare Commission, the Public Guardian, councils, chief constables of police forces, Health Boards, and any other specified by the Scottish Ministers. Disclosure can be made under the 2007 Act without obtaining the consent of the adult as it places a legal duty on public bodies and office-holders.

It should be noted that more and more services and support are being provided on behalf of local authorities by third parties. While these organisations are not under the duty to report a person who may be at risk, the code of practice to the Adult Support and Protection (Scotland) Act says that they should 'discuss and share with relevant statutory agencies information they may have about adults who may be at risk of harm.' (Adult Support and Protection (Scotland) Act 2007 – Code of Practice, 2014: p23)

It has also been noted that despite the absence of a duty under the legislation, most independent organisations will nevertheless be under an obligation to inform the local authority where it knows or believes that an adult may be at risk of harm. This obligation is included in service level agreements and contracts commissioning services, which will often set out that the organisation must report all suspected incidences of harm or abuse to the local authority; this is a contractual obligation. (Smith and Young, 2016: para.13.17)

The Adult Support and Protection (Scotland) Act 2007 Code of Practice states that while information sharing is necessary to allow investigations by the council to take place, information should only be shared with those who need to know and only if relevant to the particular concern identified. The amount of information shared should be proportionate. (Adult Support and Protection (Scotland) Act 2007 – Code of Practice, 2014)

Court Orders

A court may also order that a practitioner discloses information by attending court or supplying notes and records. Refusal to do so may place the practitioner in contempt of court.

When sharing or disclosing information it is important that careful professional judgment is exercised. Counsellors and therapists should take account of any applicable law, professional rules and guidance.

Referrals

Counsellors have an ethical responsibility to act within their particular range of qualifications and expertise. This might require referral to other practitioners where they are asked to work with vulnerable adults but lack the necessary expertise or experience to do so. When working with vulnerable adults, practitioners may be out of their depth unless trained in this area of work. In these cases, referral is ethically both appropriate and necessary, and wherever possible, made with appropriate consent. BACP's *Ethical Framework for the Counselling Professions* (2018) makes this clear.

4.7 Human Rights and the Protection of Data

The protection of personal data is a vital aspect of protecting an individual's right to respect for their private and family life provided for under Article 8 of the ECHR. The European Court of Human Rights has highlighted the importance of protecting personal and medical data:

'...the protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.' (MS v Sweden para 41 (1999) 28 EHRR 313 (1997)).

The gathering of information, the storage of information and the disclosure without consent of personal information and data, are an interference with Article 8. As noted in Part 2 of this resource, some rights are qualified, which means that they can be restricted if there is a good reason to do so. Indeed, the gathering, storage and sharing of information are permitted by the law in the UK. Practitioners must therefore make sure that they adhere to the law and that any information sharing is also done in conformity with their organisation's policy and/or any applicable professional codes and guidance. This should ensure that information sharing is done in a proportionate way which protects the person's rights as much as possible.

5 Working with Vulnerable Adults in the Context of Social Care

5.1 Introduction

When working with a vulnerable adult it is possible that they may be receiving some form of social care. Social care agencies include all those agencies working with, or providing community care to, adult clients who are elderly or vulnerable, or who have special needs, mental illness or disability. Social care may also include work with those who are socially or economically vulnerable, e.g. refugees or homeless.

The NHS and local authorities will provide a large proportion of social care services. Specific laws regulate social care services to ensure that they are of a certain standard and that the people who use the services are protected. Certain laws also apply to private care services.

5.2 Accessing social care services

Under section 12A of the Social Work (Scotland) Act 1968, local authorities have a duty to assess the needs of any person in their area who appears to be in need of community care services. The local authority will carry out the assessment to find out what the person's needs are and will record how these needs will be met. Depending on the type of care required, the input of a medical practitioner may be necessary. A local authority may provide community care services or arrange for them to be provided without carrying out an assessment if a person requires them urgently.

A social work assessment can be an extremely important tool in meeting the needs of vulnerable adults and the provision of community care services, which are put in place as result of the assessment, can reduce or prevent harm or abuse.

The way in which social care services are provided has changed in recent years. Under the Social Care (Self-Directed) Support (Scotland) Act 2013, local authorities must offer people receiving social care a range of choices on how they receive their support. Self-directed support enables people to decide what kind of support they receive and how it is delivered. This can be done through:

1. Direct payments (cash) provided to the person to arrange their own support;
2. Services arranged by the council to be provided to the person;
3. Funds allocated directly to a service provider which the person has chosen; or
4. A combination of these.

The aim of self-directed support is to give users more choice and control over their life and to help them to live independently and participate in society.

The *Self-Directed Support Practitioner's Guide* states that:

'While the advent of self-directed support requires a broad interpretation of the legislation – it is not necessary for the local authority to provide a service in response to assessed need – it remains the case that local authorities should operate eligibility criteria to determine whether or not an individual assessed as having a social care need can access formal support and if so, which of their needs are to be met by that support.'

People may have to contribute to the cost of the care services depending on their available income.

5.3 The Care Inspectorate

The Care Inspectorate is the social care regulator for Scotland (see Part 3 of this resource). It undertakes inspections of social services, local authority social work departments and is also responsible for the scrutiny of children's services. 'Social services' means care services and social work services. A care service is any of the following: a support service; a care home service; a school care accommodation service; a nursery agency; a child care agency; a secure accommodation service; an offender accommodation service; an adoption service; a fostering service; an adult placement service; child minding; day care of children; a housing support service (s.47 Public Services Reform (Scotland) Act 2010).

The Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 state that: *'A provider of a care service shall provide the service in a manner which promotes quality and safety and respects the independence of service users and affords them choice in the way in which the service is provided to them.'*

Anyone who provides a care service in Scotland must apply to register with the Care Inspectorate. For more information about registering a care service please visit the Care Inspectorate's website (<http://www.careinspectorate.com/index.php/register-a-care-service>).

Throughout registration, care services must continuously meet the requirements of all applicable legislation and regulations.

Inspections carried out by the Care Inspectorate are usually unannounced and can take place at any time when the care service is operational. When checking the quality of care services the Care Inspectorate assesses compliance with (in addition to any other statutory obligations) the National Care Standards. The National Care Standards set out that care services in Scotland should reflect the principles of dignity, privacy, choice, safety, realising potential and equality and diversity. The Standards are currently under review and a consultation took place in 2014 which set out a range of human rights-based proposals for developing new standards. An independent analysis of the consultation was published in 2015 and new National Care Standards are currently being developed and tested and will be introduced soon.

There is a duty on care service providers to notify the Care Inspectorate about any adult protection issues, including the death of any service user who has died while the care service was being provided; any serious injury sustained by a service user; any theft or accident; or any allegation of misconduct by the provider or person employed by the provider (Regulation of Care – Requirements as to Care Services Regulations, Regulation 21).

Another relevant regulatory body is Healthcare Improvement Scotland which has functions in relation to supporting, ensuring and monitoring the quality of health care provided or secured by the health service. It also has duties to provide information to the public about the availability and quality of services provided under the health service; provide information to a person in the format requested; provide advice to the Scottish Ministers about any matter relevant to healthcare functions; inspect any service provided under the health service, any independent health care service and the organisation or co-ordination of any independent health care service.

People seeking to provide an independent health care service must apply to Healthcare Improvement Scotland for registration of the service.

5.4 Services for people with a mental illness

Clients may be, or may have been, subject to measures under the Mental Health (Care and Treatment) (Scotland) Act 2003 (for further details see Part 1 of this resource). Practitioners working with clients who have a diagnosed mental illness may be involved with the provision of patient after-care following discharge from hospital and in the provision of client care in the community.

Under the Mental Health (Care and Treatment) (Scotland) Act 2003 local authorities have a duty to provide care and support services to people who have, or have had, a mental disorder but who are not in hospital (section 25). The Act says that for people who are in hospital and have or have had a mental disorder, the local authority may provide such services but is not under an obligation to do so. The services provided by local authorities should minimise the effect of the mental disorder and give people the opportunity to lead lives which are as normal as possible. This could include the provision of residential accommodation and personal care and support. It does not include nursing care. The Code of Practice for the 2003 Act states that 'personal support' means counselling or other help which is provided as part of a planned programme.

A similar duty, also provided for under the Mental Health (Care and Treatment) (Scotland) Act 2003 (section 26), requires local authorities to provide services which are designed to promote the well-being and social development of people who have or have had a mental disorder. This should include social, cultural and recreational activities, training for people over school age and assistance in obtaining and undertaking employment.

Local authorities are also obliged to provide travel assistance as may be necessary for people to participate in any of the services mentioned (section 27).

Part 14 of the (Mental Health (Care and Treatment) (Scotland) Act 2003 also places a duty on local authorities to assess the needs of adults for community care services under Section 12A of the Social Work (Scotland) Act 1968 when notified by a Mental Health Officer that the person may be in need of such services (see Part 5.2 of this resource).

5.5 Duty of care

Therapists have a contractual and professional duty of care to their clients under the law of negligence (delict). This means that they must take reasonable care and avoid acts or omissions that could cause harm to a client. Clients have a reasonable expectation that therapists will act with reasonable skill and care when delivering their services.

The duty of care includes a duty of confidentiality owed by a therapist to their client (discussed above). Sometimes the duty of care to a client (or to a third party) is greater than the duty to protect confidentiality, for example where an individual is at risk of harm.

A breach of the duty of care by a practitioner may lead to a formal complaint to the relevant agency or authority and/or the practitioner's professional body and/or also a legal claim. The practitioner's own professional liability insurers should be notified immediately of any complaint or legal action made against the insured practitioner. Claims may also be covered by an employer's professional insurance. In situations

where the practitioner has acted in the course of their work (e.g. where the practitioner has complied with the relevant employer's agency policies and government guidance), the agency (e.g. local authority, adoption agency) may be held vicariously liable for the actions of the practitioner acting in the course of their employment (see Mitchels and Bond, 2010: Chapters 3 and 9).

Therapeutic contracts with clients are regulated by the general law relating to the duty of care (Mitchels and Bond, 2010: Chapters 3 and 4) – the practitioner's professional code of conduct giving the client a right of complaint – and also by general contract law. Agency policies and procedures may place limits on the contractual agreements between a practitioner and client working in social care (e.g. the place where the practitioner may see the clients, times of appointments, health and safety procedures, confidentiality in making, keeping and storage of records, and fees payable).

5.6 The Adult Support and Protection (Scotland) Act 2007

If there is concern that an adult may be at risk of harm, the Adult Support and Protection (Scotland) Act 2007 may be used to protect the person. This gives relevant authorities the powers they need to allow them to intervene if it is considered that an adult may be at risk of harm or abuse, from another person or from themselves. For a more detailed explanation see Part 1 of this resource.

Harm can take different forms including: financial, physical, psychological, sexual and neglect. It is important that counsellors inform the local authority if they are concerned that a person may be an adult at risk. For more information see the Adult Support and Protection website: <http://www.actagainstharm.org/>

5.7 Dementia

Around 90,000 people in Scotland have dementia and this number is expected to increase in the coming years. Since 2013 everyone in Scotland diagnosed with dementia has been entitled to a minimum of one year's post-diagnostic support. This support is intended to be holistic and to help people to understand their diagnosis, navigate services and plan for their future care. Counselling could form part of this support.

The Scottish Government has published a framework for health and social care services staff who work with people living with dementia to support the delivery of the Dementia Strategy aspirations and change actions (*Promoting Excellence: A framework for all health and social services staff working with people with dementia, their families and carers*, 2011). The

framework sets out the skills and knowledge required by practitioners who have contact with people living with dementia. For example, all practitioners should be able to interact with people who have dementia, their families and carers, in a way that recognises their wishes and priorities. Practitioners who have direct and/or substantial contact with people living with dementia should support and encourage the person to develop new roles, skills and relationships. View the framework here – <http://www.gov.scot/Resource/Doc/350174/0117211.pdf>

It is important to be aware of the different needs of people with different conditions. Any specific guidance on such conditions should also be taken into account.

5.8 Human Rights and Social Care

ECHR Rights

The protection of human rights is vital in the provision of health and social care. Various rights contained within the ECHR (and the Human Rights Act) are relevant and applicable to people who use health social care services. Organisations, which are carrying out functions of a public nature, are under a duty to act in conformity with ECHR rights.

Here are some examples of the types of things that are required to comply with ECHR rights:

The right to life, **Article 2** ECHR, prohibits the intentional taking of life and also requires that positive steps are taken to safeguard life. Organisations must ensure that they protect service users' lives by putting in place procedures, which address potential risks and which include particular safeguards for vulnerable people e.g. those at risk of suicide. Organisations are also required to carry out an investigation if a person dies because of a failure to protect their life.

Article 3 ECHR, the prohibition of torture and inhuman or degrading treatment, requires that people are treated with respect when engaging with services and are not subjected to physical or psychological harm. Like Article 2, organisations should have policies and procedures to protect people from harm and abuse, and processes for addressing any abuse and neglect which may happen.

Establishing a breach of Article 3 can be difficult because treatment must reach a 'minimum level of severity' before it will be considered treatment which is serious enough to breach Article 3. However, where people are considered to be vulnerable, it is more likely that the threshold will be met. Determining whether treatment is serious enough to be a violation of Article 3 depends on all the circumstances of the case, including the age of the victim and their state of health. It is therefore arguable that organisations should take greater care to make sure that the rights of vulnerable people are protected.

In general, the ECHR does not prohibit compulsory psychiatric treatment, however it requires strong protections. Any compulsory treatment must be 'therapeutically necessary' which means that it must be shown by a qualified person that it is medically necessary, according to the standards of the medical profession, for the person to have the treatment (see *Herczegfalvy v Austria* (1993) 15 EHRR 437).

Article 8, right to respect for private and family life, requires that the person's physical and psychological integrity are protected. This right has been interpreted very widely and can include a range of things relating to health and social care. For example, Article 8 requires the protection of a person's right to privacy e.g. medical records, and respect for their right to decide whether or not to undertake medical treatment. It requires that people's sexuality and identity are respected, that people with disabilities or specific needs are able to access services and that services provided are of a certain quality.

Article 8 can catch treatment which would not be serious enough to be considered a violation of Article 3.

Article 8 is a qualified right which means that it can be interfered with if there is a strong justification for doing so. An interference must be necessary, legitimate and proportionate. In the health and social care realm, professionals and people receiving care may disagree about the best course of action. Professionals must respect the decision of the person unless they have a legal duty or power to intervene.

Article 14 ECHR prohibits discrimination in the enjoyment of Convention rights. It is not a standalone right but can be invoked when another provision of the Convention has been engaged. Discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status is prohibited.

Principles of dignity, equality and non-discrimination are present throughout all human rights provisions. Practitioners should always keep these in mind when providing services.

The UN Convention on the Rights of Persons with Disabilities – Supported Decision-Making

The UK has also signed up to the UN Convention on the Rights of Persons with Disabilities. Although this is not incorporated into UK law in the same way as the ECHR, it still imposes legal obligations on the UK and should be considered (see Part 2 of this resource).

Of particular interest when working with vulnerable adults in the context of social care, is the requirement under Article 12 of the CRPD for the state to provide people with disabilities with access to support to exercise their legal capacity. While the UK has not yet passed any laws to give effect to this requirement, there is much that practitioners can do to support people in making decisions.

While the precise meaning and requirements of 'support for the exercise of legal capacity' are still being debated, supported decision-making can be said to be a process which places the person's rights, will and preferences at the centre of decisions concerning them. It helps people to feel involved in decisions about their life, to feel happy with the outcomes and to develop their decision-making skills.

Everyone is given support to make decisions at some points in their life. We often look to more qualified people, e.g. a doctor, for advice which supports us to make an informed decision about which medical treatment we undertake. Some people may require more extensive and long-term support to make decisions in some or many areas of their life. Supported decision-making helps individuals to access this advice and support and to hopefully be able to make a decision.

Support must be person-centred and may include explaining the decision to be made and the available options in a way in which the person can understand and describing the potential consequences of each option. It can also include using alternative forms of communication, making decisions over a longer period of time and getting specialist advice. These methods may already be used by practitioners but it is important to highlight the value of continuing to use and develop such practices.

For more information on supported decision-making see the Mental Welfare Commission, 'Good Practice Guide – Supported Decision-Making' (http://www.mwcscot.org.uk/media/348023/mwc_sdm_draft_gp_guide_10_post_board_jw_final.pdf).

6 Disclosure and Protection of Vulnerable Groups

6.1 Introduction

Practitioners working, or in contact, with vulnerable adults will be required to undergo some form of criminal records check. These processes are designed to protect children and vulnerable adults from potential abuse or neglect.

6.2 Disclosure Scotland

Disclosure Scotland is an Executive Agency of the Scottish Government which provides criminal records checks. It was established under the Police Act 1997 and became an Executive Agency of the Scottish Ministers in 2009.

Disclosure Scotland issues certificates – known as ‘Disclosures’ – which give details of an individual’s criminal convictions, or states that they have none. Individuals can apply for a basic disclosure for any purpose. A basic disclosure certificate contains information about an applicant’s criminal convictions. This does not include spent convictions. A spent conviction is a conviction which does not have to be disclosed after a certain amount of time has passed. The amount of time that has to pass for a conviction to become spent depends on the sentence which was received.

A standard disclosure certificate may be required for people working in specific roles e.g. people involved in the provision of care services. It is applied for on behalf of an employee or volunteer. In a standard disclosure certificate information is given about unspent convictions, relevant spent convictions and unspent cautions.

An enhanced disclosure may be required for specific roles and should be applied for on the person’s behalf. For example, an enhanced disclosure is required for people who want to adopt. An enhanced disclosure certificate contains information on unspent convictions, relevant spent convictions, unspent cautions, inclusion on children’s and adults’ lists, other relevant information held by police forces and other Government bodies.

6.3 Protection of Vulnerable Groups Scheme

The Protection of Vulnerable Groups Scheme was introduced by the Scottish Government through the Protection of Vulnerable Groups (Scotland) Act 2007 which came into effect in 2011. The Scheme is managed and delivered by Disclosure Scotland and is intended to improve the disclosure arrangements for people working with vulnerable groups.

A PVG check helps to ensure that people who have regular contact with children and protected adults, through paid and unpaid work, do not have a known history of harmful behaviour. If a person is barred from working with children and/or protected adults they will be refused PVG membership. If, after a vetting process, the person is not barred from working with vulnerable groups, they will be issued with a PVG scheme membership certificate. PVG members are subject to ongoing monitoring which means that vetting information is kept up to date and any new information will be used to assess the person's suitability to continue doing regulated work with children and/or protected adults.

A protected adult is a person aged 16 or over and who is receiving: a support service, an adult placement service, a care home service, a housing support service, a prescribed healthcare service, a community care service (provided under the Social Work (Scotland) Act 1968 or Mental Health (Care and Treatment) (Scotland) Act 2003) or a prescribed welfare service.

Membership of the PVG Scheme is not mandatory but, as it is an offence under the 2007 Act for an organisation to allow a barred individual to do regulated work, it is beneficial for organisations to be part of the Scheme.

The PVG Scheme only applies to regulated work in Scotland. Regulated work with adults is: caring for adults; teaching, instructing, training and supervising adults; being in sole charge of adults; providing assistance, advice or guidance to adults; inspecting care services on behalf of Social Care and Social Work Improvement Scotland (known as the Care Inspectorate) and Healthcare Improvement Scotland.

See the Disclosure Scotland website for more details <https://www.disclosurescotland.co.uk>

6.4 Professional registration

Membership of a professional body provides the public with the knowledge that the practitioner adheres to a code of professional ethics and conduct, with redress in the form of complaints, professional conduct and disciplinary procedures.

Clients may therefore feel greater confidence in a practitioner who has achieved registration with a professional body, confirming that the practitioner has acquired a certain level of qualification and expertise, e.g. registration with the Professional Standards Authority.

7 Vulnerable witnesses in court (and eligibility for ‘special measures’)

7.1 Introduction

Vulnerable adults may be required to attend court for a number of reasons including: because they are accused of a crime, a victim of a crime or a witness to a crime. Vulnerable adults may also be involved in civil court cases. The courts recognise that giving evidence in criminal trials may be stressful and vulnerable victims and witnesses are therefore entitled to ‘special measures’.

7.2 Who is a vulnerable witness?

The Criminal Procedure (Scotland) Act 1995 (amended by the Victims and Witnesses (Scotland) Act 2014) states that a person is a vulnerable witness if they are under the age of 18 on the date of commencement of the proceedings in which the hearing is being or is to be held.

A person is also a vulnerable witness if there is a significant risk that the quality of the evidence they will give will be diminished because they have a **mental disorder** (as defined under the Mental Health (Care and Treatment) (Scotland) Act 2003) or because of the **fear or distress that will occur in connection with giving evidence** at the hearing.

The reference to the ‘quality of evidence’ relates to the quality in terms of completeness, coherence and accuracy.

The Victims and Witnesses (Scotland) Act 2014 also added other categories of vulnerable witnesses known as ‘deemed vulnerable witnesses’:

- alleged victims of an offence in the Sexual Offences Act;
- alleged victims of trafficking for exploitation;

- alleged victims of domestic abuse;
- alleged victims of stalking.

The legislation also provides that a person will be a vulnerable witness if it is considered that there will be a significant risk of harm to the person because they are going to give evidence in the proceedings.

To determine whether a person is a vulnerable witness because of their mental disorder, or because significant harm may arise by giving evidence, the court is required to take the following into account:

- the nature and circumstances of the alleged offence to which the proceedings relate;
- the nature of the evidence which the person is likely to give;
- the relationship (if any) between the person and the accused;
- the person's age and maturity;
- any behaviour towards the person on the part of – the accused, members of the family or associates of the accused;
- any other person who is likely to be an accused or a witness in the proceedings, and;
- other matters including – the social and cultural background and ethnic origin of the person; the person's sexual orientation; the domestic and employment circumstances of the person; any religious beliefs or political opinions of the person, and; any physical disability or other physical impairment which the person has which appears to the court to be relevant (section 271(2)).

The court must also have regard to the best interests of the witness and take account of any views expressed by the witness.

Where a party intends to cite a vulnerable witness (except a child witness or deemed witness), they must take reasonable steps to carry out an assessment which determines whether the person is likely to be a vulnerable witness and, if so, what special measure or combination of measures should be used for the purpose of taking the person's evidence (section 271BA). In deciding whether a person is likely to be a vulnerable witness the assessment must take into account the following:

- the nature and circumstances of the alleged offence to which the proceedings relate;
- the nature of the evidence which the person is likely to give, the relationship (if any) between the person and the accused;
- the person's age and maturity;

- any behaviour towards the person on the part of the accused, members of the family or associates of the accused;
- any other person who is likely to be an accused or a witness in the proceedings, and;
- other matters including the social and cultural background and ethnic origin of the person; the person's sexual orientation; the domestic and employment circumstances of the person; any religious beliefs or political opinions of the person; and, any physical disability or other physical impairment which the person has which appears to the court to be relevant.

Regard must also be had to the best interests of the person and any views expressed by the person.

If the party decides that the person they are citing as a witness is a vulnerable witness they must make an application to the court for an order which authorises the use of one or more special measures for the purpose of taking the witness's evidence. The application should specify the special measures that are being sought.

Any party to the proceedings may object to special measures which have been sought in the application.

7.3 Identifying a vulnerable adult witness

The party or person citing a witness has a duty to make a Vulnerable Witness Application if it considers that the person may be a vulnerable witness and that there are special measures that could be used when taking evidence from the witness.

Various agencies may have a role in identifying a vulnerable witness, including the police, the Crown Office and Procurator Fiscal Service, solicitors etc. Early identification of vulnerable witnesses and their need for special measures is important for the wellbeing of the person and the resultant quality of their evidence (*Vulnerable Witnesses (Scotland) Act 2004 – Special Measures for Vulnerable Adult and Child Witnesses – A Guidance Pack, 2005*). The party or person citing the witness is responsible for considering whether a witness may be regarded as a vulnerable witness and whether special measures could assist the adult in giving their evidence. If the party considers that the adult may be vulnerable, they are responsible for making the application to the court. The Guidance states that parties should consider approaching other organisations for information and advice about a person's vulnerability including social workers, GPs, care providers or other services used by the witness (*Special Measures for Vulnerable Adult and Child Witnesses*). The court may also call on expert witnesses in determining whether an adult is a vulnerable witness e.g. a doctor, therapist or other qualified person.

Before applying for special measures *Special Measures for Vulnerable Adults and Child Witnesses* states that:

3. All parties citing a witness should consider whether the witness's anxiety can be alleviated by support and assistance or whether the witness may be vulnerable under the terms of the legislation, what effect it may have on them if they were required to give their evidence without using a special measure and whether they may be more able to give their evidence with the benefit of a special measure.

Special Measures for Vulnerable Adults and Child Witnesses also sets out some things to consider when identifying a vulnerable adult witness:

Key Indicators of Vulnerability

40. Vulnerable witnesses are not a homogenous group and identifying adult witnesses who may be eligible and benefit from special measures is not an exact science, nor is it enough to rely on instinct or a 'gut' feeling. Wherever possible, practitioners should refer to particular emotional or behavioural evidence, always bearing in mind the requirements of the Act.

Mental Disorder

42. The Act states that mental disorder may indicate vulnerability as a witness and therefore render the witness eligible for special measures under the Act. The definition of 'mental disorder' (mental illness, personality disorder or learning disability) is to be found in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Practitioners should refer to that section for clarification of the definition.

43. Adults subject to a Guardianship Order or Intervention Order (under the Adults with Incapacity (Scotland) Act 2000) may also be defined as having a mental disorder. They may therefore also be vulnerable witnesses eligible for special measures. Individuals subject to a Guardianship or Intervention Order will lack capacity to make some or all decisions for themselves, because of mental disorder (including learning disability) or an inability to communicate.

44. In many cases a medical, psychiatric, psychological report or social work report will alert practitioners to any known mental health problems or learning disability or emotional or behavioural problems amounting to a personality disorder. However, the absence of such a report does not necessarily indicate the absence of mental disorder.

45. Special attention should be paid if an Appropriate Adult was used during any police interviews. An Appropriate Adult is someone who, on account of their expertise in dealing with people with a mental disorder, can facilitate communication where possible between the interviewer and the witness and alert the interviewer to any communication problems which may arise because of any lack of understanding on either side.

46. Local Authority social work departments supervise welfare guardians, and the Office of the Public Guardian supervises financial matters and property. Any individual (especially family members), or an office holder such as the Chief Social Work Officer, can be appointed as a guardian to supervise an adult's personal welfare. A private individual may be nominated as a financial guardian, or it may be a professional such as a lawyer, accountant, or banker.

47. Consultation with these and other specialists will help practitioners identify whether a witness's mental health, medication or any learning disability will affect the quality of their evidence. For example, some witnesses may experience poor concentration or memory as a side effect of treatment and these are likely to be exaggerated when facing an unfamiliar and often lengthy legal process.

48. In terms of best practice, practitioners should also consider whether the witness's mental disorder may be affected by attending court proceedings and giving evidence and what non-statutory support may be required to address this. In particular, consideration should be given to the stigma often experienced by people with a mental disorder (mental illness or learning disability) as this may be a factor in any distress they may be suffering or explain their possible reluctance to give evidence.

49. Practitioners should also note that a witness may have a recent history of emotional disturbance but not be currently suffering from a mental disorder... However, this may still be relevant in indicating a significant risk that the quality of that witness's evidence will be diminished as the result of fear or distress.

7.4 Special measures

The 2004 Act sets out various types of special measures, which may be used for the purposes of taking evidence from a vulnerable witness. These are:

- Taking of evidence by a commissioner
- Use of a live television link
- Use of a screen
- Giving evidence in chief in the form of a prior statement
- Excluding the public during the taking of evidence.

The Crown Office and Procurator Fiscal Service offer a dedicated service called 'Victim Information and Advice' to victims, witnesses and bereaved relatives of those affected by certain crimes.

All vulnerable victims and witnesses will be referred by the Crown Office and Procurator Fiscal Service to Victim Support Scotland's 'Witness Service' before the trial. If the witness wishes, the 'Witness Service' may arrange a court visit before the trial (Court Familiarisation Visit) to allow the person to learn about how the court processes work.

The Scottish Government's '*Information about child, young and adult witnesses to inform decision-making in the legal process*' provides some information to police officers on how to identify child and vulnerable witnesses.

The Vulnerable Witnesses (Scotland) Act 2004 makes provision for special measures for vulnerable witnesses in civil cases. The provisions are largely the same as in criminal cases.

7.5 Appropriate Adult scheme

In Scotland the Appropriate Adult scheme is intended to provide support to people who are being interviewed by the police and who may be at risk of not understanding what is happening and their rights in this situation. An Appropriate Adult may be used for all categories, including witnesses, victims and suspects.

Guidance produced by the Scottish Appropriate Adult Network states that an Appropriate Adult should be present whenever someone with a mental disorder is interviewed by the police (*Guidance and National Standards for Appropriate Adult Services in Scotland*, 2015). This includes people with mental illness, learning disability, acquired brain injury and dementia. The Scottish Appropriate Adult Network Guidance also explains the role of the Appropriate Adult:

The primary role of the Appropriate Adult is to facilitate communication; in addition to this their presence may also provide support and reassurance for an interviewee who is being interviewed by Police Officers as a witness, victim, suspect or accused person. This involves, but is not limited to:

- *Helping the person understand why they are being interviewed and the questions they are being asked.*
- *Ensure, as far as possible, that the person understands their rights as explained by the police.*
- *Ensure, as far as possible, they understand the explanation for, and give informed consent to, any examination or other police procedure.*
- *Reassuring and putting the person at ease.*

If the police interview someone who appears to have a mental disorder they should arrange for them to be examined by a medical professional. If the person is confirmed as having a mental disorder the interview should be suspended until an appropriate adult can be present.

For a useful explanation of the Appropriate Adult Scheme see Jill Stavert, *Mental Health and Incapacity and the Law in Scotland*, 2016.

Stavert also notes that:

The Criminal Justice (Scotland) Act 2016 introduced a specific duty on the state to provide support to 'vulnerable persons' who are involved in any way in criminal investigations and proceedings, to help them understand what is happening and assist with communication. A 'vulnerable person' is defined as an adult who, because of mental disorder, is unable to understand sufficiently what is happening or communicate effectively. The Act also requires that there is training for and quality assessment of such support.

7.6 Human rights

Article 6 of the ECHR states that everyone is entitled to a fair hearing and requires that if someone is charged with a crime they should be informed promptly, and in a language which they understand, why they have been charged. **Article 5**, the right to liberty and security, also requires that if someone is arrested they should be informed promptly and in a language which they understand of the reason for their arrest. This does not just mean interpreting from one language to another, it requires that any communication needs are provided for. For example, in *ZH v Hungary* the European Court of Human Rights found that Hungary had violated Article 5(2) because it did not attempt to address the communication needs of a person with a learning disability, who was also deaf and mute.

Being able to effectively participate in the trial is an important aspect of the right to a fair trial. To make sure that there is effective participation in a trial for people with mental illness or learning disability, the person should be able to understand, generally, what is happening. This may require the help of an interpreter, lawyer, friend or other support person. The European Court of Human Rights has said that when a child or young person is not able to participate fully because of her age or maturity, the court should adapt the trial procedure to address her needs. It is probable that the Court would take the same stance in the case of a person who is vulnerable or has specific needs and who is involved in a trial (Stavert, 2016: 44.12).

The special measures that the law provides for in Scotland aim to address these issues for vulnerable people.

8 Pre-trial therapy with vulnerable witnesses

8.1 Introduction

The courts understand that giving evidence is likely to be accompanied by a degree of stress. Nevertheless, cases continue to be reported in the press where vulnerable witnesses involved in the judicial process have been severely affected or re-traumatised by the police investigation and the court process. As a result of these concerns, in criminal proceedings, vulnerable or intimidated adult witnesses are legally entitled to 'special measures' and other forms of support (see Parts 7.4 and 7.5 of this resource).

Practitioners working with vulnerable witnesses (adults and children) will need valid consent to enter into a therapeutic contract, taking into account the court process, and addressing additional confidentiality issues, for example the potential need to share information between professionals and the court (see Bond and Mitchels, 2015: Chapter 11).

The Scottish Government published a Code of Practice called *Therapeutic Support for Adults in 2005 (part of Vulnerable Witnesses (Scotland) Act 2004 – Special Measures for Vulnerable Adult and Child Witnesses – A Guidance Pack)*. The Code is aimed at those providing therapeutic support to adult witnesses and those who commission or arrange for such support to be provided.

In the guidance 'therapeutic support' broadly covers psychotherapy and counselling and includes a wide variety of therapeutic approaches, skills, techniques and methods of intervention. Therapeutic support can be provided by medical, psychiatric, psychological and specialist counselling professionals.

8.2 Pre-trial therapy and evidence contamination

A key issue in a criminal trial is that pre-trial discussions of any kind have a potential effect on the reliability – actual or perceived – of the evidence of the witness and the weight that will be given to their evidence in court. Pre-trial discussions may lead to allegations of coaching and, ultimately, the failure of the criminal case. It should also be borne in mind that the professionals concerned may themselves be called to court as witnesses in relation to any therapy undertaken prior to the criminal trial.

Therapeutic Support for Adults states that the paramount consideration in decision-making about therapeutic support prior to and during court proceedings is the welfare, interests and rights of the vulnerable adult witness.

Evidence contamination can arise as a result of pre-trial discussions, including discussions which take place in the context of therapeutic support. These discussions could lead to allegations of 'coaching' which involves the rehearsal of answers that a witness may give to the court. *Therapeutic Support for Adults* code also states that witnesses may be open to 'suggestibility' and change their story on the basis of ideas which have been presented to them.

Therapeutic Support for Adults is clear in setting out that:

(6) *The provision of therapeutic support will **not** inevitably contaminate evidence. However, there should be raised awareness about the risks of contamination to evidence associated with certain therapeutic support interventions and the questioning techniques employed during therapeutic intervention sessions. In particular, it is essential that service providers:*

- *Avoid any leading questions or practices which could be interpreted as 'coaching';*
- *Avoid discussing particular issues relating to the case because of their potential for being called into evidence;*
- *Avoid any discussions surrounding the material facts of the event in question;*
- *Be aware of the potential impact of prior statements on the case. If a witness discloses new evidence or material, then this should be referred to the relevant agencies, e.g. the police.*

While there is a risk of evidence contamination *Therapeutic Support for Adults* sets out that pre-trial therapy should not be denied to witnesses if they want to engage with such therapy:

(14) *...There is an acknowledgement and acceptance that the provision of therapeutic support prior to and during court proceedings **can** be beneficial to adult victims and witnesses. Therefore, it is **not** expected that the provision of appropriate therapeutic support be either advised against or withheld; witnesses and victims in court proceedings **should not** be denied the support and counselling they may need.*

(15) *Concern has been expressed that victims and witnesses may be denied therapeutic support pending the outcome of court proceedings for fear that their evidence may be tainted through discussion with others, or that they may be coached about what they should say when giving their evidence.*

(16) It is in the interests of justice that witnesses are able to give their 'best evidence', that is the most accurate and truthful recollection of events that the witness can give from their own experience and recall. Witnesses may find the recall of traumatic events during court proceedings stressful and therapeutic intervention may assist to ease that trauma. Pre-court discussions, provided they adhere to the provisions of these guidelines, should be allowed in order to fulfil this purpose.

(17) Studies of the effectiveness of the provision of therapeutic support are well documented (Roth and Fonagy, 1996), including for those with learning disabilities (Parkes et al. 2007). Although studies based on randomised controlled clinical trials (RCTs) are relatively sparse due to practical and ethical reasons, such studies as there are continue to demonstrate the benefits of therapeutic support for adults (Bisson & Andrew, 2007).

(18) Delays in the provision of therapeutic support prior to court proceedings have in some cases occurred because of the fear of evidence contamination. This raises concerns given the lengthy delays that can occur before an adult witness is cited to appear in court proceedings. Studies have shown that if the provision of therapeutic support is excessively delayed there can be detrimental effects and problems or symptoms experienced by the individual concerned may become exacerbated to the extent that they become chronic and resistant to intervention (Bichard, Sinason & Usiskin, 1996; Saywitz, Mannarino, Berliner & Cohen, 2000).

(19) Victims and witnesses **should not** be denied the emotional support and counselling assistance they may need at the time when they need it. Victims, witnesses, service providers and legal practitioners have a **mutual interest** in ensuring, wherever possible, that those who receive therapeutic support prior to a criminal trial or a civil hearing are regarded as witnesses who are able to give reliable testimony.

Therapeutic Support for Adults Key Principle 14 also states that it is the decision of the adult witness, or their representative, about whether to engage with pre-trial therapy:

...The decision to engage in therapeutic support prior to and during court proceedings and the timing of such support lie primarily with the adult witness, or if the adult witness is not of sufficient understanding then with any other competent adult in a position of care or responsibility for the adult witness concerned.

8.3 Communication techniques in pre-trial therapy

Therapeutic Support for Adults states that people involved in providing therapeutic support should adopt appropriate communication techniques so that they do not influence what the adult witness says or contaminate information provided by the adult witness:

(24) ...Service providers should avoid discussing particular issues relating to the case because of the potential for such discussions to be regarded as a further source of evidence. In particular, they should avoid any discussions surrounding the material facts of the event in question, because this may be challenged during the trial or hearing.

What the witness needs to know

(25) Support providers should always inform or confirm with the witness that they were not present at the event in question and may not hold any information about the event. They may, in certain circumstances, have been given information to assist them in their work with the witness. In such cases, the witness needs to be made aware that the information could be called into evidence if it is documented and it pertains to the offence...

Encourage free narrative

(26) Where at all possible support providers should encourage adult witnesses to talk freely, and without interruption ('free narrative'). It should be borne in mind that many people may have difficulties accessing and retrieving memories for the event(s) in question, in a well-structured, focused or strategic way, as is required in free narratives. This may occur simply because they find it difficult to recall events, or the difficulty may arise from stress, trauma, or anxiety, or may be due to mental illness or learning disability.

Focused questioning

(27) In some clinical situations the adult witness may benefit by being asked questions about one particular issue, before the support provider proceeds on to any other issues. These benefits occur because the adult is asked to remember one specific part of one specific memory concerning an event, as opposed to being asked to remember lots of different parts of the same memory. Hence, focused questioning provides a support or structure for attempts to remember in situations where recall may be difficult for the witness, on their own, to achieve. An extensive psychological literature exists on the beneficial effect of providing retrieval 'cues' that strategically structure and focus retrieval attempts (Baddeley, 1999; Memon & Higham, 1999). Four main types of questioning techniques can be adopted to offer this structure during communication between adult witnesses and those involved in support; open-ended questions (which are often in the form of statements) are designed to invite a full or elaborate answer based on the individual's

own knowledge or experience, e.g. 'how does this make you feel?'; specific questions which probe a particular topic, e.g. 'what makes you unhappy?', and closed questions which encourage a 'yes' or 'no' or a single word answer, e.g. 'do you own a car?' These three main forms of questions are acceptable if used with care. The fourth type, leading/misleading questions, which attempt to guide the respondent into a particular answer such as 'how fast was the red car going when it hit the green car?' are not acceptable and should only be used as a last resort.

Inappropriate questioning techniques

(28) Service providers should avoid inappropriate questioning techniques that may incorporate misleading information, such as references to disputed aspects of the events in question which appear to support one particular interpretation of them. Leading questions (questions which prompt for the required response or include the answer, e.g. Was the car red?) should also be avoided and the use of repeated questioning regarding previously answered matters is not advisable. Any indication of disbelief in respect of the answers previously provided is hazardous as it may prompt the witness to alter their testimony.

8.4 Records and confidentiality in pre-trial therapy

In pre-trial therapy, practitioners must pay attention to confidentiality and record keeping, particularly with regard to information sharing in relation to vulnerable adult clients. Practitioners need to develop and match their policies and procedures with current guidance and legislation.

It is possible that practitioners will be required to disclose therapy records for the purposes of a court case. Rules of disclosure require that the Crown disclose all material evidence to the defence. Material evidence is information of any kind given to or obtained by the prosecutor in connection with the proceedings which either:

- materially weakens or undermines the evidence that is likely to be led by the prosecutor;
- materially strengthens the defence case;
- or is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

This could include counselling records. *Therapeutic Support for Adults* acknowledges this and states:

(42) The requirements of disclosure may affect practice, making providers more wary about the level of detail that they collect or retain about individual cases. This is particularly pertinent for those involved in highly sensitive and serious, complex cases such as rape and sexual assault.

(43) Maintaining trust is crucial in the provision of therapy. Any aspects of the therapy that bear no material relation to the criminal proceedings should not have to be disclosed. However, it is important for therapists and witnesses to understand that the Crown does have a duty to disclose relevant material to the defence.

8.5 Therapist qualities and qualifications for pre-trial therapy

Pre-trial therapy should be undertaken by therapists who are confident in their ability to manage their client and the judicial process, and who are able to support their client's needs in the context of court and the issues in the case. Specific training may be helpful for therapists who undertake pre-trial work.

Human rights

As noted, giving evidence at a trial can be a traumatic process, particularly for vulnerable adults. Counsellors should be mindful of the need to respect the rights of people who are receiving pre-trial therapy. Articles 3, 6, 8 and 14 of the ECHR are particularly relevant here.

Being able to effectively participate in the trial is an essential aspect of **Article 6 ECHR**, the right to a fair trial. To make sure that there is effective participation in a trial for vulnerable people or people with mental illness or learning disability, the person should be able to understand, generally, what is happening. Pre-trial therapy can help prepare a person to attend court and can be a form of support to enable them to participate. This also relates to Article 12 of the Convention on the Rights of Persons with Disabilities.

In terms of the provision of pre-trial therapy counsellors must be aware of **Article 8 ECHR**, the right to respect for private and family life, which requires the protection of a person's private information and medical records. As discussed in Part 8.4 of this resource, practitioners may be required by a court to disclose pre-trial therapy records. Article 8 also requires that the person's autonomy is respected, including their right to decide whether to engage in pre-trial therapy. Professionals must respect the decision of the person unless they have a legal duty or power to intervene.

Article 3 ECHR, the prohibition of torture and inhuman or degrading treatment, requires that people are treated with respect when engaging with services and are not subjected to physical or psychological harm. Organisations should have policies and procedures to protect people from harm and abuse and processes for addressing any abuse and neglect which may happen.

Article 14 ECHR prohibits discrimination in the enjoyment of rights under the ECHR. It is not a standalone right but can be invoked when another provision of the ECHR has been engaged. Discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status is prohibited. Practitioners must ensure that they do not discriminate against any individual in the course of their work.

9 Cross-Border Issues – Mental Health (Care and Treatment) (Scotland) Act 2003 and Adults with Incapacity (Scotland) Act 2000

9.1 Adults with Incapacity (Scotland) Act 2000

Cross-border issues can also arise in relation to the Adults with Incapacity (Scotland) Act 2000 and equivalent legislation in other countries, including other parts of the United Kingdom. People subject to measures in one country may move to another. Measures issued in one country may require to be operated or enforced in another. There can be questions about which countries' courts have jurisdiction, and which countries' laws should be applied.

The Hague Convention of 13 January 2000 on the International Protection of Adults provides uniform rules for such international matters. These apply between countries where both have ratified the Convention. The Convention has been ratified in respect of Scotland, but unfortunately in relation to relatively few other countries¹. It has not yet been ratified in respect of the other parts of the United Kingdom.

¹ At time of going to press, it has also been ratified in respect of Austria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Latvia, Monaco, Portugal and Switzerland.

Relevant provisions of the Convention are substantially replicated in Schedule 3 to the 2000 Act. The Scottish courts have jurisdiction if: the adult is habitually resident in Scotland; or in relation to property which is located in Scotland; or in relation to an adult not habitually resident in Scotland who is in Scotland, or has property in Scotland, and the matter is urgent; or the adult is present in Scotland and the measure sought is temporary and its effect limited to Scotland.

The following sections apply both where the other country has ratified the Hague Convention, and where it has not. In the sections below, "other countries" include parts of the United Kingdom other than Scotland.

9.1.1 Non-Scottish powers of attorney in Scotland

There is no procedure for registering non-Scottish powers of attorney in Scotland. A certificate is available on the website of the Office of the Public Guardian to attach to non-Scottish powers of attorney. A Scottish court has held that English powers of attorney, complying with English requirements, are fully operable in Scotland. In the case of powers of attorney issued in countries which have ratified the Convention, in terms of the Convention they should be fully operable if accompanied by an appropriate certificate issued by the authorities of that country in accordance with the provisions of the Convention. However, difficulties can be encountered in operating non-Scottish powers of attorney in Scotland, and it may be necessary to take appropriate legal advice.

9.1.2 Non-Scottish measures other than powers of attorney in Scotland

In the case of measures other than powers of attorney, such as guardianship orders or their equivalent, issued anywhere outside Scotland, the appropriate procedure is to apply to a Scottish sheriff for an order to have them registered with the Public Guardian. They will then be operable in Scotland. Due to necessary notice periods, the procedure can take some weeks, unless an interim order can be obtained. Where there is a possibility that a non-Scottish order may require to be operated in Scotland, it is sensible to register it in Scotland in good time. Sometimes where that has not been done, and urgent need arises (for example, because of abduction to Scotland), it may be necessary to look at other procedures, such as procedure under the Adult Support and Protection (Scotland) Act 2007 (see Part 5.6 of this resource).

9.1.3 Powers of the Scottish courts

Most of the powers of the Scottish courts in relation to the operation of Scottish measures apply also to non-Scottish measures. These include the power of sheriffs, described in Part 1 of this resource, to give directions. The sheriff can give directions to attorneys, guardians and others (or their equivalents) appointed in other countries.

9.2 Mental Health (Care and Treatment) (Scotland) Act 2003²

There can be complex legal problems if a person subject to compulsory measures under the Mental Health (Care and Treatment) (Scotland) Act 2003 needs help or protection abroad or even in another part of the United Kingdom. Cross-border issues relate to: the planned transfer of patients out of Scotland; the planned transfer of patients into Scotland; and cross-border absconding of patients from one jurisdiction to another.

9.2.1 Transfer out of Scotland

These rules apply to both voluntary patients and to people subject to orders under the Mental Health (Care and Treatment) Act 2003 or the Criminal Procedure (Scotland) Act 1995. The rules are complex and comprehensive. What follows is a summary.

Consultation required

The patient's responsible medical officer (or for a voluntary patient, the doctor primarily responsible for treating him) must consult the mental health officer and all relevant parties before considering moving the patient. This will include the patient and any carers, under the principles of the 2003 Act.

A voluntary patient does not have a mental health officer. The doctor must give notice to the relevant local authority of the intention to move him. The local authority appoints a mental health officer. The mental health officer interviews the patient and gives him advice about rights and access to advocacy services.

If, having heard the mental health officer's views, the doctor thinks the move should take place, he should give notice to the patient, the named person (or primary carer if there is no named person) and to any welfare guardian or attorney. The doctor should notify the mental health officer.

Parties have seven days to give a response. The patient should send a copy of his response to Scottish Ministers, as the transfer does not go ahead unless they approve.

Application to Scottish Ministers

Having considered the views of the relevant parties, the responsible medical officer may then apply by warrant to move the patient. The Scottish Ministers must take account of his best interests, the availability of similar care and treatment for him, the wishes of all concerned and any risk factors.

² The following information is taken from 'Mental Health, Incapacity and the Law in Scotland' by Jill Stavert.

If Scottish Ministers approve the transfer, they will grant a warrant to move the patient. At least seven days' notice is required if someone is to be moved within the UK and at least 28 days' if the move is outside the UK, unless there is an urgent need to move him more quickly. Scottish Ministers must obtain the approval of the Mental Welfare Commission to any urgent move.

Appeal rights

The patient (and the patient's named person) may appeal to the Tribunal against a transfer. The Tribunal may decide that he should not be transferred. It will take the principles of the 2003 Act into account as well as the criteria set out in the regulations. If there is an appeal against the Tribunal's decision on a point of law a patient should not be removed from Scotland while the appeal is pending.

The Mental Welfare Commission can refer a proposed transfer to the Tribunal.

There have been human rights challenges to similar transfers by the Home Office in England. In one case, the European Court of Human Rights said that deporting a mentally ill person back to Algeria was not a breach of Article 3 (prohibition on torture and inhuman and degrading treatment) or 8 (right to private and family life) of the ECHR, even though his care would not be as good as in England. The court said that what was alleged was not sufficiently serious to constitute inhuman or degrading treatment.

In another case, the Court of Appeal in England said that it was not inhuman or degrading treatment for a person to have to return to a hospital in Malta, provided there were adequate facilities for his treatment there.

9.2.2 Transfers to Scotland

These rules apply to the transfer to Scotland of people subject to compulsory detention in hospital in England and Wales, Northern Ireland, the Channel Islands, the Isle of Man or the European Union.

Consent of Scottish Ministers

A person subject to detention in another part of the UK or the EU cannot transfer to a hospital in Scotland unless Scottish Ministers agree to the move. Scottish Ministers must receive full information about the patient. They must bear in mind the principles of the 2003 Act when considering the request.

Admission to hospital

The patient will become subject to the order which most closely corresponds to the order under which he was detained outside Scotland. This could include being a restricted patient.

The mental health officer must give him information about his rights, and the responsible medical officer must examine him within seven days of his arrival at the hospital.

The responsible medical officer must establish whether the appropriate grounds for admission apply to the patient. If they do not, he should revoke the order or, if the person is a restricted patient, make a report to the Scottish Ministers.

As soon as possible, and in any event within 14 days of a patient's arrival in Scotland, the responsible medical officer (RMO) should inform the hospital managers whether the grounds for admission apply to him, what type of mental disorder he has and whether the RMO considers the order is necessary.

The hospital managers should notify the patient, his named person, the MWC, the Tribunal (if the patient has become subject to a compulsory treatment order or compulsion order), Scottish Ministers (for restricted patients) and the patient's MHO.

The responsible medical officer must prepare a care plan. The hospital must ensure the patient, and his named person, understand his rights. If the person has language or communication needs, these must be met. The MWC must visit the patient within six months of his arrival in Scotland.

9.2.3 Absconding patients

Patients absent from hospital or with a residence requirement in Scotland, or a requirement for approval of their MHO to change address, may be taken into custody and returned to Scotland from any part of the UK.

About the authors

Adrian D Ward is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. He has lectured and advised, and his prolific output of books and articles has been published, in many countries over more than three decades. He is one of the Scottish contributors to the monthly Mental Capacity Report. As consultant to the Council of Europe, he has recently completed a review of implementation throughout Europe of Council of Europe Recommendation (2009)¹¹ on principles concerning powers of attorney and advance directives for incapacity. His report "Enabling Citizens to Plan for Incapacity", which includes proposals for future action and initiatives at European level, has been adopted and accepted, and was published by the Council in June 2018. Prior to that he was a member of the core research group of the Three Jurisdictions Project which assessed compliance of the UK jurisdictions with the UN Convention on the Rights of Persons with Disabilities and made recommendations to UK government bodies. He has addressed the UN Committee on the Rights of Persons with Disabilities at the UN in Geneva and has had ongoing contact with members of the Committee. He is frequently in demand as keynote speaker at major international conferences. He is an expert adviser to the Centre for Mental Health and Capacity Law, Edinburgh Napier University, and a research affiliate with Essex Autonomy Project.

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