



MENTAL WELFARE COMMISSION  
FOR SCOTLAND

REPORT OF THE INQUIRY  
INTO THE CARE AND TREATMENT  
OF MR B

FEBRUARY 2001

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## **A. BACKGROUND INFORMATION**

1. In February 1998 the Mental Welfare Commission for Scotland received a Social Circumstances Report (SCR) in relation to Mr B (born 1977), following his detention in hospital for psychiatric treatment under Section 26 of the Mental Health (Scotland) Act 1984. The SCR described Mr B as learning disabled. He was the oldest of 7 children. He attended special school as a child. His father died when he was 4 and the family moved from A1 to A2. His mother was noted as having a learning disability herself as well as poor parenting skills. All of her 7 children were taken into care on Place of Safety Orders and Mr B himself lived in a number of children's homes between the ages of 13 and 18 (1995). During his teenage years Mr B was reported as having been involved in many incidents of minor offending as well as a few more serious offences.
2. When Mr B left local authority care in the Autumn of 1995 he initially was supported by Social Work staff in his own flat in T1. This, however, was short lived and he subsequently went to stay with his mother and her partner in T8. In May of 1996 he was placed on probation by SC1 (Sheriff Court) and the order was transferred to the Criminal Justice team in the SWO2 area in December 1996. The situation with his mother and her partner broke down and in November 1996 he went to live with his mother's sister and her husband in T2.
3. The SCR reported that when Mr B's natural father died he had left a considerable amount of money to Mr B and his brother. This was placed in a Trust. The report further indicated that at age 18 (September 1995) Mr B had access to approximately £58,000 and that this had been exhausted by December 1997. It was not clear where this money had gone but there was reference in the report that the money had been spent on furniture and cars for his aunt and uncle. It was not evident that Mr B had substantially benefited from the use of this money. While in hospital Mr B was declared Incapax, because of his learning disability.
4. The Commission made initial enquiries with Social Work Departments in LA4 and LA2 and reviewed the social work case files. From the information received and the files reviewed it was evident that Mr B's capacity to manage his inheritance responsibly had been the subject of concern to social work staff over a number of years. The question of seeking a Curator Bonis when he reached the age of 18 had been mooted but there was no evidence in the case files as to the decision making process which resulted in the Social Work Department not pursuing a Curator Bonis application when Mr B reached the age of 18. The Solicitor who had been acting as judicial factor in relation to his Trust until Mr B was 18 years old was granted Power of Attorney subsequently.
5. In November 1998 the Mental Welfare Commission considered whether there was a case for making further enquiries to determine if those involved in Mr B's care and treatment properly executed their responsibilities in respect of the protection of Mr B's property. A decision was taken at that point to undertake a formal Inquiry under the Commission's Deficiency in Care and Treatment Inquiry procedures.

## **B. TERMS OF REFERENCE**

The Inquiry focused on the following concerns:

1. The nature of Mr B's Community Care Assessment directly before leaving local authority care in 1995 and the arrangements for care and support which were put in place at that time.
2. Whether the Social Work Department was aware that Mr B had a learning disability prior to leaving local authority care in 1995 and, if so, were Mr B's community care needs fully assessed prior to leaving care.
3. Did the Social Work Department properly execute its responsibilities in respect of the protection of Mr B's property ?
4. Was there sufficient communication between social work, medical and legal professions around the question of Mr B's capacity to manage his inheritance?
5. Was consideration given to the appointment of a Curator Bonis prior to Mr B's detention in hospital in January 1998 ?

Mr B's consultant psychiatrist was approached for her views on whether Mr B had the capacity to consent to the Commission obtaining confidential information and correspondence from the various Social Work Departments and his solicitor as well as information from his medical records. She felt that Mr B did have the capacity to consent to this and Mr B subsequently consented.

The Inquiry was conducted by examining social work and medical records, interviewing relevant individuals, including Mr B, and requesting reports as required. A substantive note of the interview was shared with all individuals interviewed with the request to correct any information which was not accurate. The Statement of Fact was subsequently shared with all interviewed for comment and/or corrections of fact. Changes were then made where the Inquiry team felt they were warranted. Where there were differing accounts this was reflected in the text. Finally the full report, submitted to and approved by the Commission, was shared in advance of publication with all those individuals and organisations directly affected by the findings and recommendations, for comment specifically on the findings and recommendations. The comments received as a result of this were considered by the Commission and alterations were made where it was felt to be appropriate.

## **C. INQUIRY TEAM**

1. George Kappler, BA, MSW, Dip Management, Social Work Officer, MWC.  
Chairman of the Inquiry
2. Mrs Faith Cotter MBE, LLB, HM Commissioner, MWC
3. Dr Carolyn Greenwood, MB, ChB, MRC Psych, Medical Officer, MWC
4. Dr Margaret Whoriskey, BA(Hons) Mphil C Psychol PhD, HM Commissioner, MWC
5. Mrs Yvonne Osman, Complaints Officer, MWC

## **D1. LIST OF PERSONS INTERVIEWED**

### **CODE TITLES**

AC	ACCOUNTANT OF COURT OFFICER
ADO	ASSISTANT DISTRICT OFFICER, CHILDCARE
AHSS	ASSISTANT HEAD, SPECIAL SCHOOL
BR	BROTHER OF SUBJECT OF INQUIRY
CLDT/CN	COMMUNITY LEARNING DISABILITIES/COMMUNITY NURSE
CN	CHARGE NURSE
CPI - CP4	CONSULTANT PSYCHIATRISTS
CPNI - CPN 3	COMMUNITY PSYCHIATRIC NURSES
EP	EDUCATIONAL PSYCHOLOGIST
GSM	GENERAL SERVICES MANAGER, HOSPITAL
LT	LINK TEACHER
MWCC	MENTAL WELFARE FOR SCOTLAND COMMISSIONER
P	POLICE
RCW	RESIDENTIAL CARE WORKER
RW	LOCAL AUTHORITY RESOURCE WORKER
S/LA	SOLICITOR/LOCAL AUTHORITY
SI -S4	PRIVATE SOLICITORS
SEP	SENIOR EDUCATIONAL PSYCHOLOGIST
SSWI -SSW2	SENIOR SOCIAL WORKER AND MENTAL HEALTH OFFICERS
SWI -SW5	SOCIAL WORKERS
SWAM	SOCIAL WORK AREA MANAGER

## **D2. LIST OF PLACES**

A1 - A2	AREAS
LAI - LA4	LOCAL AUTHORITIES
LACHI - LACH3	LOCAL AUTHORITY CHILDREN'S HOMES
PC	PSYCHIATRIC CLINIC
PCT	PRIMARY CARE TRUST
PH1 - PH2	PSYCHIATRIC HOSPITALS
RC	RESOURCE CENTRE
SC1 - SC2	SHERIFF COURTS
SF	SOLICITOR FIRM
SSI - SS2	SPECIAL SCHOOLS
SWO1 - SWO2	SOCIAL WORK OFFICES
TI - T12	TOWNS/COUNTRY
YOP1 - YOP2	YOUNG OFFENDERS PRISONS

## **E. ACKNOWLEDGEMENTS**

The Inquiry team would like to thank all those who participated in the Inquiry for their co-operation, both in the interviewing process and through the provision of reports and case file material as requested.

## **F. STATEMENT OF FACT**

1. Mr B (born 1977) first came to the attention of the Children's Panel in 1983 (age 6) when he was made subject of a Supervision Order under Section 44(I)(a) of the Social Work (Scotland) Act 1968. At that time the social worker involved recorded that Mr B was "one of five siblings, all of whom have varying degrees of mental handicap". Reference was made at that point to Mr B's father who died in 1981 having set up a Trust for Mr B and one of his brothers which was being administered by a Solicitor. The Supervision Order was terminated in 1984.

2. In January 1987 Mr B was transferred to special education (SS1 School). He was again referred to the Reporter of the Children's Panel in December 1987 due to lack of parental care. A Record of Needs was opened in April 1987 by EP for LA1 Regional Council. This, reportedly, was reviewed regularly until Mr B left school in 1993. No formal Future Needs Assessment was ever undertaken subsequently.

3. In April 1989 he was referred by the Reporter to the Children's Panel to an Educational Psychologist. He was first admitted to residential care in January 1990 when he was placed in LACH2, a local authority children's home, where he remained until 1993. His behaviour there was noted as being very disruptive at times. During this period he was suspended from SS1 School due to disruptive behaviour, frequent absence and absconding.

4. At a meeting between Social Work and Educational Psychology staff in November 1990, AHSS, the Assistant Head at SS1, informed the meeting that Mr B "had learning difficulties". She is recorded as saying, "he is basically a slow learner and has behavioural difficulties". His link teacher, LT, reportedly "described Mr B as being mildly mentally handicapped" and stated that "he would definitely be unable to function in mainstream schooling".

5. A referral was made to SS2 School in T9 and Mr B started there in August 1991 on a day placement basis. This was another special education facility. He attended there until September 1993. A report from there indicated he had a reading age well below average for his age. His writing ability as well was also below average for his age. He was said to have a "limited knowledge of why and how things happen".

6. At this time S2, Solicitor with SF, was the Curator for Mr B's estate, succeeding S3 as Factor loco tutoris on 23 February 1989. S2 received correspondence from SW1, social worker with the Children and Families team in T1 (LA1 Regional Council Social Work Department), dated 17 June 1993 indicating his concerns that it would not be appropriate for the funds held for Mr B (at that point approximately £37,000) to be made over to him when he reached the age of 16. This correspondence indicated SW1 had consulted his senior social worker, SSW1. On the basis of this S1 of SF wrote to the Accountant of Court and the Sheriff Clerk seeking an expression of views. It was the view of the Sheriff that it was desirable and competent that the curatory should be extended. This was done without a formal hearing, in chambers. The determining factor was said to be the age and inexperience of Mr B. There was no accompanying material in respect of the petition. S1 succeeded S2 as Curator on 22 September, 1993 and continued to act as such until Mr B was 18 years of age.



7. Between the summer of 1993 and Spring of 1995 Mr B resided in LACH3 Children's Home and latterly LACH1 Children's Home. His behaviour continued to give cause for concern and followed a similar pattern with his most disruptive behaviour associated with abuse of alcohol. In November 1994 SW1 put forward an application for supported accommodation for Mr B. In this he wrote that "Mr B is acknowledged to have learning difficulties which seriously impede his skills and abilities. His limited abilities have contributed to his involvement in offending on several occasions over the last 3 years. Many of Mr B's offences have involved his misuse of alcohol and inability to make positive choices when the influence of his peers comes to bear on him. Mr B's limited abilities, lack of understanding of actions and consequences, and ease with which he is led and seeks approval in this manner from some of his peers, plays a major part in his behaviour".

8. S1, writing to the Commission after reviewing the Draft Inquiry Report, stated that he had first made overtures to the Accountant of Court and the Sheriff Clerk at SC2, at the request of the Social Work Department in 1993 when Mr B was approaching his 16<sup>th</sup> birthday. As a result, the Curatory was continued, but S1 stated it was always anticipated "the Curatory would in the normal course come to an end when Mr B attained the age of 18." He said that this was confirmed in his letter to the Social Work Department of 20.10.93 confirming his appointment on this basis. S1 was contacted by SW1 by telephone on 27 March 1995. It was during the course of this discussion which "proceeded on the basis that the Curatory would come to an end when Mr B reached the age of 18" that SW1 first indicated that Mr B wished his funds to be held for him by S1 with an allowance being paid to him. On 29 March 1995, S1 wrote to the Accountant of Court about Mr B's Curatory to confirm, he states, that in the normal course Mr B's Curatory would come to an end when he reached the age of 18. In this letter he stated that "we assume the Curatory will automatically come to an end in any event when he (Mr B) attains the age of 18 years, and that the funds will fall to be made over to him at that stage with the Curator being entitled to apply for administrative discharge". He asked the Accountant of Court to confirm that this was the case.

9. The Accountant of Court's Office (AC) responded to this correspondence on 30 March 1995. He stated that "it is agreed that upon Mr B's 18<sup>th</sup> birthday he will become entitled to administer his own estate, unless, of course, he was declared mentally incapax, which I do not believe to be the case in this instance." As the Commission felt that this statement was ambiguous, we confirmed with AC that by this he meant that he did not believe it the case that Mr B had been **declared** mentally incapax - not that he believed it was the case that he was **not** mentally Incapax. In interview, following distribution of the draft report and receipt of all comments, AC stated that he would not have made comment on Mr B's capacity as he was not medically qualified to do so legally, and on a personal level he had had no face to face contact with Mr B. S1, writing to the Commission following receipt to the draft report, stated that he received the impression that AC did not think Mr B was Incapax as a result of a telephone call to him on 4 July 1995. He said that in this telephone conversation AC indicated that so far as he was concerned matters depended on whether if a petition were to be submitted, the court were to decide that Mr Muihead was mentally Incapax, which, according to S1, AC said was unlikely. In interview with the Commission, AC firmly stated that he certainly never intended to give S1 the impression that he believed Mr B was not Incapax and if this was how S1 perceived the information given, he had taken the wrong impression.

10. On 10 April 1995 SW1 recorded in Mr B's case notes that he had received a telephone call from S1. In the notes, SW1 recorded "no way money can be withheld as he is not mentally incapable". He recorded that Mr B would get approximately £45,000 on reaching 18 years of age. He also recorded that S1 wished to arrange a meeting to discuss this further, prior to Mr B's 18<sup>th</sup> birthday.

11. In looking ahead to paying for Mr B's care when he left local authority care, SW1 discussed with him the options of moving on to supported accommodation or to his own flat with social work support. In Mr B's case file an entry for 25 April 1995 states, "Mr B would like his own flat in a quiet area - he does not want to pay for supported accommodation when it would use his trust money up very quickly - would accept home supports if he had his own place. The possibility of Mr B buying his own place could now be looked at". This appears never to have happened.

12. S1 wrote to SW1 on 16 May 1995 requesting a meeting to discuss Mr B's requirements after the funds being held on his behalf fell to be paid over to him when he attained the age of 18 years. A meeting was ultimately arranged for 4 July 1995. It appeared from a hand-written note on this letter in the social work file that this correspondence was seen by SSW2, SW1's senior social worker at that time.

13. SW1 recorded in the case file on 4 July 1995 that he visited LACH1 to pick Mr B up for the Solicitor's appointment but Mr B had left the home earlier "to spend the day with a local lad he had befriended in court". SW1 wrote that, "This underlies the lack of insight Mr B has in his financial situation of the importance in making plans for his future." SW1 rearranged the meeting for 12 July 1995 in a telephone call with S1. SW1 noted that S1 was to "discuss Mr B's situation with the Accountant of Court to see if any other options exist in managing his money at this point given his limited abilities".

14. The meeting went ahead on 12 July 1995. SW1 did not record what transpired in this meeting in Mr B's case file. He did record on 12 July 1995 that he telephoned S/LA of the Local Authority's legal section. He told him of the meeting with the solicitor to discuss "the following options to continue management of his trust money which is now in the region of £45,000:

### **Options**

- 1) extension of trust;
- 2) varying terms of trust;
- 3) appointment of power of custonry" (sic).

15. SW1 recorded that "these options would require discussion with Mr B and application to Court - possibly an up to date assessment of Mr B (PC ?)". We were unable to establish why there was a reference in the notes to the PC, a forensic psychiatric clinic which takes referrals on people involved in the Criminal Justice System.

16. He further noted that "the fourth option would be to seek Curator Bonis but this would require Mr B to have extremely limited capacity." SW1 agreed to discuss further with

S1 and call back S/LA if necessary. SW1 in interview could recall no further discussions or correspondence with S/LA over Mr B's situation. S/LA at interview was willing to accept the record of the telephone call although he did not know what had been meant by a "Power of Custony". In follow-up correspondence, he thought that this probably referred to 'Power of Attorney'. (SW1 believes this must have been a typographical error which went uncorrected in the case notes which should have read 'Power of Attorney'). S/LA said he was well acquainted with what was involved in seeking a Curator Bonis due to his own direct involvement in such cases on behalf of the Department. He was conversant with the requirements which need to be met as well as the criteria for the Council to pursue a Curator Bonis application

17. S/LA said he had no recollection of the telephone call from SW1 though accepted that it took place.

18. S/LA said that he often gave advice to social workers over the telephone but would only have opened a file if he had received correspondence or had been asked to intervene, eg in contacting another Solicitor. S/LA said that his standard advice in such situations would include telling the Social Worker that they would need to establish capacity as a matter of fact as best they can. He stated that he would never accept or expect social work to be the final judge and jury on a person's legal capacity. One of the questions would be to establish whether there were any medical personnel who could give a view informally - perhaps an educational psychologist. S/LA said that for a Curator Bonis the court required a certificate from a psychiatrist, however. S/LA could not recall the discussion with SW1 but did not appear to believe he would have said that Mr B would have to have had "extremely limited capacity" to justify seeking a Curator Bonis. S/LA could not recall having heard of a solicitor by the name of S1 and was not aware of any direct contact with him. He said that if correspondence came in from another solicitor he would always want to have a look at this, and if a response was to go out he would often offer to have social work staff run it by him to check it out. He was fairly confident he had had no further involvement re this case, especially with specific reference to correspondence or direct discussions with a solicitor which he said he would remember. A case file was never opened on Mr B by the Legal Department of the Local Authority. S/LA was sure that he was never shown or made aware of the various items of correspondence between the solicitor, S1, and the Accountant of Court, and could recall no meetings or other contact with either the solicitor or the Accountant of Court.

19. SW1 at interview said that he could recall only this one contact with the legal section about Mr B's case. He said he did not recall sharing any correspondence from S1 with S/LA but simply recorded his view about the options they appeared to have. He said that S/LA had said that the options open depended on the severity of Mr B's learning disability. SW1 said he would have shared this with his senior at the time but he could not recall whether this would have been SSW2 or SSW1. SSW2 maintained, in correspondence with the Commission following receipt of the draft report, that while she did supervise SW1 for a short period, for reasons of continuity, responsibility for Mr B's case was retained by SSW1. Her focus, she stated, was likely to be on child protection issues affecting Mr B and his other siblings. This did not appear to be SSW1's understanding of the situation. SSW2, in interview, was unable to recall any detail about advice sought by or given to SW1 as to how to proceed in planning for the future management of Mr B's finances. In correspondence following receipt of the Draft Report she stated she gave SW1 3 specific pieces of advice in

respect of Mr B's money: to contact LA1's Legal Section; to contact Mr B's solicitor and to contact the Mental Welfare Commission. SSW2 said she assumed SW1 would have discussed these matters with SSW1. She believes she would have deferred issues such as those surrounding a Curatorship to SSW1. SSW1 does not recall being involved in such discussions.

20. SSW2 at interview said she did have knowledge of the process and criteria for seeking a Curatorship as she was trained as a Mental Health Officer in 1986. She said she had known that, for instance, people required estates of over £15,000 before you would begin to look at it. She thought that there had been a meeting with S/LA and that there had been discussion about a Power of Attorney and Curatorship. She thought this would have taken place around August 1995. SSW2 said she must have been aware that Mr B had a learning disability but she could not recall this clearly as she was involved for a brief period 5 years ago. She recalled generally discussing the future management of Mr B's finances when he reached 18 but could not remember how formal this was and had not been able to secure access to the case file. She thought she recalled Mr B's solicitor and the Department's legal section speaking about whether they should seek a medical assessment and thought someone had spoken to MWCC, HM Commissioner with the Mental Welfare Commission, about this. The Commission has no record of this contact on Mr B's file. S/LA had no recollection of any meeting in respect of Mr B and stated he would have recorded any such meeting and would have expected to record any informal discussion as well.

21. SSW2 could not recall the process by which the Social Work Department arrived at the conclusion not to pursue a Curatorship application. She accepted this must have happened but could not recall whether this was by design or default.

22. After the meeting on 12 July S1 wrote to SW1 on 14 July 1995. He noted that the Social Work Department proposed to obtain a further report from a psychologist who had been dealing with Mr B and asked to have sight of this when available. S1 confirmed in this letter that "in the ordinary course the curatorship in Mr B's case will come to an end on his 18<sup>th</sup> birthday." He further stated that "it would, however, be open to us to enable a motion in Court seeking to have the curatorship continue where it could be shown on the evidence of 2 medical practitioners that Mr B was suffering from mental disorder such that he was not capable of managing his own affairs or giving instructions for their management." S1 explained that the court had no power to extend the curatorship "other than on the basis that Mr B is mentally Incapax ie suffering from some form of mental disorder." He continued "this would be very much a matter for medical evidence but it may well be that whilst there is a general acceptance that it is undesirable that Mr B should be entrusted at this stage with the management of his own affairs on the grounds of immaturity and lack of experience, this is something on which as the law stands Mr B is entitled to and which will happen as a matter of course." S1 proposed a further meeting once the psychologist's report was available.

23. In response to this letter on 31 July 1995 SW1 wrote to S1 enclosing a letter from a SEP, Senior Educational Psychologist, and stated that both he and his senior, SSW2 would like to meet with him to discuss the letter. The letter, dated 19 July 1995, addressed To Whom it May Concern, is as follows:-

"I am writing as Mr B's psychologist, to confirm that he is unlikely to be able to deal with his financial affairs sensibly on account of his learning difficulties. Mr B had

difficulty in coping with mainstream school, was recorded as a child with special educational needs and then proceeded to a special school for children with 'mental handicap'. Mr B spent quite some time in this institution and all the other schools that he attended since have been chosen on account of their ability to cope with children with behavioural and educational difficulties. Though Mr B does not suffer from what I would call a mental disorder, I would feel that it is unlikely he would be mature enough to make sensible decisions about his life in future and may be, therefore, vulnerable to influence by other more worldly wise individuals"

24. At interview SEP confirmed that her use of the term mental disorder in the letter was in the context of Mr B not suffering from a mental illness.

25. On receipt of this letter S1 wrote to the Accountant of Court on 1 August 1995 asking for guidance on the psychologist's report which he had copied to the Accountant of Court. In the letter to the Accountant of Court S1 referred to a telephone conversation he had had with AC from the Accountant of Court's Office on 4 July 1995 in which S1 had informed him that the Social Work Department with whom Mr B was in care "had expressed reservations about the curatory coming to an end (when he reached the age of 18) on the basis that Mr B was unlikely to be able to deal with his financial affairs sensibly on account of his learning difficulties". He referred to the enclosed copy of the letter from Mr B's psychologist "which whilst confirming that Mr B does not suffer from a mental disorder as such expresses similar concerns regarding his abilities".

26. S1 went on to state in this letter that "whilst we are inclined to doubt whether the terms of that letter would in themselves be sufficient to persuade the court that the curatory should be continued beyond Mr B's 18<sup>th</sup> birthday, we have been asked by the Region to meet with their Senior Social Worker to discuss the position and it would, therefore, be helpful if you were able to let us have some guidance as to the extent if any to which the curator is under a duty to make an assessment as to whether application should be made to have the curatory continued, and if so, whether the expense of obtaining for example a Psychiatrist's report concerning this would be a legitimate charge against the ward's estate".

27. S1 received a reply from the Accountant of Court dated 3 August 1995. In this it was stated "In the Accountant's opinion, there is no burden upon the Factor regarding the mental condition of the Ward. It is necessary for him to disburse himself of the Ward's assets once he reached the age of 18." The letter continues, "If the Curatory was to continue, then someone would have to Petition the Court in this regard, and in the circumstances of this case it would be presumed that this would be in the person of the Social Services Department of LA1, as they are acting in parentis for the Ward at present, and it would be up to them whether they believed that the Ward was in such a mental condition that a Petition could be made to the Court saying that he was Incapax, and incapable of taking charge of his own affairs. It is not the Factor's responsibility or duty to do so, nor could the Accountant authorise the use of Curatory funds to have a Psychiatric Report done on the Ward."

28. S1 wrote to the Social Work Department on 4 August 1995 enclosing a copy of the Accountant of Court's letter of 3 August. In this letter he stated "You will see from this that the Accountant of Court has advised that our S1 as Curator is obliged to disburse himself of the Ward's assets once Mr B reaches the age of 18 and that if the Curatory was then to continue, then it would be up to the Region to petition the Court in this regard if they saw fit

to do so. The Accountant of Court takes the view that it is not the Curator's responsibility or duty to do so nor would the Accountant authorise the use of Curatory funds to have a Psychiatric Report carried out in relation to this".

29. S1 concludes the letter by offering the opportunity of a meeting with SSW2 and SW1 to discuss the position, but adds "it rather looks as though the Region's own legal advisers will require to become involved in that the Accountant of Court is taking the view that the current Curator has no locus to do so." S1, in interview, said he had no recollection of whether he had been informed subsequently that this had been discussed with the Region's legal section.

30. S1's letter of 4 August was stamped as having been received at the SWO1, Social Work Office on 7 August. A hand written note on the copy in the case file indicated this was likely to have been seen by SSW2. There was no entry in the case file relating to this correspondence. Most of the entries at that time related to Mr B's court appearances and often difficult behaviour. He was in custody at one point at the end of August 1995 having been charged with breach of the peace and assault having cut phone lines at LACH1 with a Stanley knife and threatened staff when he was drunk.

31. We were unable to establish whether the Local Authority's legal advisers were ever consulted by the Social Work Department about this correspondence, but it does not appear likely that they were.

32. SWAM, the Area Manager of the SWO1 Social Work Office, was clear in interview that she had never seen any Solicitor's letters referring to Mr B's inheritance and would have expected to have been consulted. She was not even made aware there was any issue with Mr B's inheritance. SSW2 could not recall specifically the content of such letters nor recall who may have been consulted as a result of such correspondence. SW1 could recall only the one telephone conversation with S/LA from the legal section and said he did not share any of S1's correspondence with him. S/LA, himself, did not recall having had sight of this correspondence from any source.

33. It appears as though a Child Care review meeting was held on 10 August 1995 but other than a note to the effect that there was a 'poor turn out', no other notes or minutes from this meeting were available.

34. SW1 next wrote a memo on 18 August 1995 to ADO, Assistant District Officer, Child Care in the T1 District concerning the plans which were in progress at that time to identify a suitable placement in the community for Mr B who had been in local authority care for over 5 years at that point. In this memo Mr B was described as having 'moderate learning difficulties'. When Senior Social Worker SSW1 was asked in interview whether a referral to the Community Learning Disabilities team had been considered at any point he said that though there was a team at the time the suggestion never arose as Mr B's case was seen as being more a Children and Families and Criminal Justice team responsibility because of the repeated offending and child care issues.

35. SW1 pointed out that the issue of funding remained unresolved. He intimated that Mr B was set to inherit a substantial trust fund of approximately £35,000 with further funds to follow and that this would happen on his 18<sup>th</sup> birthday. SW1 asked what, if any, contribution

the Department would be prepared to make towards the cost of a supported accommodation placement if this were to be the chosen option. He pointed out that Mr B would be reluctant to pay the full charges and again raised the issue of what was reported as Mr B's proposed alternative of purchasing his own small flat and receiving the continued support of the Department through the "supported accommodation project" and area team.

36. SW1 further states in this memo that, "Earlier considerations to retain Mr B's inheritance in trust would not appear viable at this time as Mr B does not fit the criteria of being mentally incapable of managing his own affairs".

37. SW1 adds that it appeared that "Mr B will choose to retain the services of S1, Solicitor who has administered his funds to date".

38. SW1 next wrote to S1 on 29 August 1995, stating, "Unfortunately we have not managed to talk about Mr B's trust recently and I am now on annual leave until 21 September 1995, which is past Mr B's birthday....I have continued to look at the possibility of pursuing some means to manage Mr B's inheritance on his behalf. Although this seems unlikely, I am still concerned regarding Mr B's vulnerability and risk to exploitation by unscrupulous third parties... In the meantime Mr B has made it clear to me that he would prefer it if you could continue in the role of financial advocate in respect of his funds, if this is possible."

39. S1's reply to this letter is dated 5 September 1995. In this he states "As we interpret your letter, it is not your Department's intention at this time to petition the Court to have the Ward declared Incapax and incapable of taking charge of his own affairs. As you know, under current legislation the Curatory will automatically come to an end when the Ward attains the age of 18 years, and our S1 will then be required to disburse himself of the Ward's assets." S1 goes on to describe the administrative process involving the Accountant of Court and indicates that "once these procedures are completed then the funds at credit of the Curatory Account for Mr B will fall to be made over to him, and where it is Mr B's position that he would wish to instruct our S1 to continue to look after his funds then there is no reason why those instructions should not be accepted. At that stage, however, Mr B would have total control over the funds and we would simply be accepting instructions from him to act on his behalf in relation to these". SW1 in interview referred to this letter, specifically the part in which it was stated that S1 could see no reason why Mr B's instructions should not be accepted if he wished S1 to continue to look after his funds.

40. A medical assessment of his capacity to manage his own financial affairs was never sought at this or any other point prior to Mr B's hospitalisation in January 1998.

41. On 3 October 1995 SW1 completed a Community Care Assessment form in respect of Mr B. (SW1 in follow-up correspondence stated that a community care assessment, as such, was never completed and the draft was used only for consultation with the area team community care senior in respect of a possible application for sheltered housing.) Under the heading "Mental Condition (Note any diagnoses, medication, capacity to manage own affairs)", SW1 wrote, "Mr B has moderate learning difficulties which impede his ability to understand fully actions and consequences. His attention span and ability to retain information are very limited." There is no specific reference to Mr B's capacity to manage his own affairs. Further on it was noted that Mr B had "only a limited motivation and capacity for self care. This reflects on three aspects of his life so far (a) early family life

experience and limited stimulation; (b) his learning difficulty and (c) his experience and dependency on institutional care”.

42. Under the heading “Financial Considerations (including capacity to manage money)” SW1 wrote “Mr B has some understanding of money and financial management, which is evidenced in his ability to shop and cater for himself, with supervision. However, the potential for financial mismanagement is constantly present and does occur from time to time. His sense of value is limited”.

43. In recording the client’s views as part of the assessment SW1 wrote “Mr B has only limited insight ..... which has often meant his resistance to supports provided.”

44. His assessed needs were recorded as follows:

- “1) Supported or sheltered accommodation placement.
- 2) Access to support workers who can help him structure his time, encourage development and cope with aggressive behaviour at times.
- 3) Access to alcohol counselling (currently being implemented).
- 4) Sheltered and flexible employment opportunities.”

45. During the next few months Mr B continued to come to the attention of the police and was charged with a number of offences. He spent a period on remand in YOP1 in October/November 1995. One of the first in a long line of Social Enquiry Reports requested by the courts was written by his social worker, SW1, in October 1995. SW1 referred to the risk to Mr B while on remand at YOP1, noting threats of self harm following his court appearance. He was placed in the Observation Unit while at YOP1. SW1 noted that Mr B’s “limited abilities leave him somewhat vulnerable to exploitation.” His report stated, “Compounding the problems of the offender’s learning difficulties is his lack of insight into his own limitations”. He asked the court to bear in mind “his degree of learning difficulties”. SW1 did not recommend probation stating, “Formalising the care plan through a Probation Order may not be that easily understood by the offender given his level of ability.... Given his general level of ability, including basic literacy, is very limited, his ability to benefit from the predominant group focus of this condition of Probation would be limited.” SW1 advised the court that “the offender is to gain access to this money (inheritance from his father) and would be in a position to pay a fine”.

46. In the case file there is note of a case review on 05.10.95. The minutes of this meeting state:

“Financial implications also require consideration when advising Mr B in respect of his future. Mr B currently has in excess of £50,000 managed for him by SF (S1) Solicitors, this is the product of a trust left to Mr B by his late father. Mr B will also inherit a further £10,000 on his 21<sup>st</sup> birthday. While in principle this is a large sum of money, which Mr B has access to, it would quickly run out if he had to bear the full cost of supported accommodation if that future option came to fruition. At this point in time, Mr B wishes the money to continue to be managed by the Solicitors



mentioned above, he is also aware of the potential approximate cost of supported accommodation and is wary of using up his inheritance on this. Clarification of the Social Work Department's potential contribution through the Section 24 budget is vital at this time to allow clear advice for Mr B and help him make an informed decision about his future. Mr B will have no access to the benefits system given his current financial position".

47. In a subsequent SER written on 20.12.95 Mr B was described as "an immature 18 year old with moderate learning difficulties which result in his functioning at an approximate age of 12-14 years." SW1 informed the court that Mr B "is soon to receive control of a substantial inheritance from his father, which has been managed on his behalf for 12 years...(he) is currently coming to an arrangement with his Solicitor from SF to continue to manage his inheritance and to pay him a weekly allowance".

48. On the same day, 20 December 1995 Mr B granted Power of Attorney to S1. SW1 was present when the Power of Attorney was signed.

49. Although S1 said in his interview with the Commission that he had not checked to see if Mr B was able to read the Power of Attorney document he signed, he was clear that Mr B understood the document and the consequences of signing it. In correspondence with the Commission following receipt of the Draft Inquiry Report, S1 wrote that "the reason he had not tested Mr B's abilities to read and write was that he had no reason to suppose that he was unable to read or write, if that were the case".

50. When S1 was asked at interview with the MWC about the question of Mr B's capacity he said that he had been advised by the Accountant of Court that he could not obtain medical evidence as the factor. S1 felt that the Accountant of Court's advice was clear that it was the responsibility of the Social Work Department to determine how they wished to proceed. He said that if the Social Work Department had felt that prima facie grounds existed they would have obtained medical evidence. He anticipated that if they had taken this view they would have followed such a course.

51. When asked in interview with the Commission whether S1 could confirm that it was his opinion that Mr B was mentally capax given the concerns that had been raised, S1 stated that he did not feel this was within his ambit of responsibility, but was more a matter for the Social Work Department. At another point in the interview in discussing the granting of the Power of Attorney by Mr B, S1 was asked again about his views on Mr B's capacity. He said that he had not had sight of detailed medical reports but had formed his own "unqualified impressions" that Mr B was an immature young man who had been very sheltered and was not well placed to manage his own funds. S1 said he was clear in his own mind that Mr B did not fall into a category where incapacity would bar him from looking after his own affairs. He said he took a common sense approach in determining whether Mr B was able to understand what was being put to him. Based on his assessment that he was, he made the decision that he was capable of managing his own affairs. In correspondence with the Commission, S1 indicated that Mr B clearly understood the significance of money being available to him to which he was entitled.

52. The Commission asked SW1 about his impressions of the meeting between himself, Mr B and S1 where the Power of Attorney was signed. SW1 could not recollect specifically

whether the document had been read to Mr B or discussed broadly. He said that S1 had a meeting with Mr B to satisfy himself about the level of Mr B's ability and had met with him two or three times in 1995/96 to "size him up first hand" rather than to simply defer to SW1's judgement. SW1 felt that Mr B had a fair understanding of what he was signing up to. His money would be managed on his behalf. He would have access to it and if S1 had any concerns he would contact the local authority. When asked whether SW1 had thought this arrangement was likely to work he responded that he had hoped it would work. He also felt that Mr B had a right to "self determine". He thought that the Power of Attorney offered some brake on Mr B impulsively withdrawing money from the bank. Writing in a Social Enquiry Report on 12.02.96 in which he referred to the Power of Attorney, SW1 noted that Mr B's "concept of value, in financial terms is limited".

53. The Commission asked SW1 his views on how a Power of Attorney operates. SW1 stated in interview that a person's money is managed by a third party acting in the best interests of the person. Instructions could be given to a solicitor to pay over the money at any time. When asked specifically whether the function was more an administrative function than anything else, SW1 said that was the impression he would have had. He did add, however, that he thought it would require the individual granted the Power of Attorney to act on more than an administrative basis, that they would have broader responsibilities, but he could not be more specific.

54. When asked at interview about the arrangements for the management of Mr B's finances after the Power of Attorney had been granted, S1 said that the suggestion that the firm continue to assist Mr B came from the Social Work Department. This would appear to be supported in the correspondence from SW1 of 29 August 1995. S1 said that the Social Work Department's intention was that Mr B would be encouraged to budget and an allowance was set up in an attempt to foster an appreciation regarding the management of finances. S1 stated he had made it clear to the Social Work Department that Mr B would have total control over his own funds. S1 said in interview that SW1 had stated at the meeting on 20<sup>th</sup> December 1995 that he would be invited to the next case conference but this never happened.

55. The latter part of 1995 and the early part of 1996 were particularly difficult times for Mr B and those caring for and working with him. Between August 1995 and the end of January 1996 he had been charged with 9 separate offences relating to 5 different incidents. He had spent a period on remand, often absconded and was very difficult to work with in planning his future care. All those whom we interviewed who worked directly with him described him as a likeable young man with considerable potential but someone who constantly fell into trouble and was easily influenced by others. This was particularly the case when he abused alcohol, which he frequently did.

56. At the end of February 1996 he moved out of his independent living flat at LACH1 Children's Home into a furnished rented flat in T1. A fairly intensive programme of support was put in place with input from his social worker, residential care staff and a worker from the throughcare team. RCW, his keyworker in residential care, accompanied Mr B to see S1 in February 1996 to make financial arrangements to allow Mr B to move into his own flat. The meeting had been set up at the request of RW, resource worker from the throughcare team. Mr B required a deposit for his rented flat in addition to the first month's rent in advance. A standing order was issued for his rent in addition to a weekly allowance of £50

paid into Mr B's account. S1 also released £900 for capital expenditure related to setting up the flat.

57. RCW, in interview, felt that the arrangements made at this time were satisfactory as some of the money requested was to go directly to the landlord and the remaining funds would go towards items already priced. He said he would have been worried if Mr B was able to get his hands on the money directly as he would not be able to manage it. RCW said that Mr B's ability to manage his funds was often discussed at reviews but while everyone had concerns about how it could be controlled, the belief was that they had no legal right to intervene. RCW said the real concerns came when he was evicted from his flat and moved in with relatives in A1.

58. RW from the throughcare team first came in contact with Mr B when he was preparing to leave LACH1. She was aware from information passed to her as part of the referral that Mr B had a reading age of approximately 8-11 which would continue to affect him when he was older. He was not operating at his chronological age. He was picking up a lot of criminal charges and although aware that what he had done in committing the offences was not right he was unable to transfer this knowledge to effect any change in his behaviour. RW characterised Mr B as having a learning disability rather than a learning difficulty, the distinction being that this would affect him throughout his life.

59. RW said that the Power of Attorney was in place when she first became involved. RW was asked whether in planning Mr B's future care it was considered that he would be able to access a considerable amount of money and that he would have difficulty handling this responsibility. RW said that she was aware that he would not be able to handle it.

60. RW thought that the Power of Attorney would offer a degree of protection for Mr B. She said that such transition periods are difficult, and often young people act out, going to parties etc. Mr B, she said, was very sociable and nice and she felt people might take advantage of him - eg friends of his from the Residential Unit piling into his flat and encouraging him to use his money "to buy hash and that kind of thing". She believed the arrangement whereby he agreed to be given an allowance of £50 per week helped protect him against this potential exploitation.

61. RW said that Mr B was considered a vulnerable person and as such had a package of care which put in place a high level of support. The support on offer would have been available at least until he was 21 years of age. Unfortunately arrangements in T1 did not work out.

62. In his case transfer summary, SW1 wrote that the "through care and Supported Accommodation Team worker combined to provide a high level of support package while Mr B was living in his flat in T1." "His lack of maturity was clearly not sufficient to allow him to accept the responsibility of such a venture - as had been found, and Mr B increasingly involved himself further in alcohol misuse and irresponsible behaviour. The tenancy was terminated shortly into April and Mr B disappeared for a few weeks". When his tenancy terminated in April 1996 S1 had to pay out £90 in respect of damage incurred to the flat. There was also the forfeit of the £150 deposit.

63. On 1 April 1996 Local Authority reorganisation was implemented and the responsibility for Mr B's care passed to LA2 Social Work Department from LA1 Social Work Department.

64. In mid-April Mr B was arrested for breach of the peace following a visit to his 13 year old sister in a Children's Home in LACH2. He was subsequently remanded for a period of 5 weeks. SW1 wrote in the case transfer summary that this allowed for a period of "ongoing assessment of suitable accommodation and supports to meet his needs."

65. In a Social Enquiry Report dated 12 March 1996, SW1 stated that "Financial management is a key area of support required for the offender". In a subsequent Social Enquiry Report dated 29 April 1996 Mr B is described as being of "limited ability", having "great difficulty in deferring gratification or avoiding negative influences as a result of his limited abilities". Mr B it was said, "Struggles to manage money successfully". The options suggested by SW1 which he felt were open to the Court when Mr B appeared on 9 May 1996 included:

- 1) Supported Accommodation,
- 2) Bed and Breakfast, and
- 3) Living with his mother and her partner in T8.

66. The first two options were discounted because of Mr B's "disinterest and unpredictable behaviour" and "as he would be eligible for full costs he would not be likely to be willing to pay and would be poorly motivated". The third option was suggested. SW1 noted that Mr B's mother's partner had showed a commitment to him and was willing to support him. A further SER dated 23.05.96 noted the "offender struggles to manage finances. His degree of learning difficulty affects his ability and concept of financial value." He was placed on 2 years probation by the court.

67. Following this period on remand Mr B moved in with his mother and her partner in T8. SW1 visited the SWO3 Social Work office twice in July and once later, most likely in August, accompanied by SSW1 he reported. The case notes only refer to planned meetings in T3 for 13.06.96 and T8 in mid August 1996. There is no further note regarding these meetings. He said that the case file was offered to the Area Team at that point but was refused. Copies of Social Enquiry Reports were passed over instead. Writing in the Care Transfer Summary at the end of August 1996 SW1 reported that the "supports available through his mother and her partner although very basic have been as effective as any alternative".

68. The case was notified to LA3 Social Work Department in October 1996 and the case was allocated to SW4, Social Worker in a Criminal Justice Team who worked primarily with young offenders. In interview SW4 stated he received no case transfer summary, although one had been prepared by SW1 in August 1996 as the Commission learned. The formal transfer of the probation order to LA3 never took place. SW4 wrote to Mr B on 11 November and 2 failed appointments followed. He then made a home visit and spoke to Mr B's mother and her partner and was informed that they had had a disagreement with Mr B approximately 2 weeks previously and that he had left the family home. SW4 finally had

contact from the police in T4 who were seeking further information on Mr B. At that point they said he was staying with his aunt and uncle, in T2 SW4 then wrote to Mr B, inviting him to another appointment. He appeared at the Social Work Office in T8 on 29 November accompanied by his aunt from T2. SW4 stated in interview that he had not at that point received any detailed information about Mr B. SW4 had only one further appointment with Mr B on 5 December 1996. As he had advised SW4 of his intention to stay in T2, SW4 contacted SSW1 in SWO1, advising that the probation order should be transferred directly to SWO2 (LA4 ) rather than coming through SWO4 (LA3) as originally intended. At no point had SW4 had any information about Mr B's financial circumstances and associated concerns. He could not recall whether he had been made aware that Mr B had a learning disability and was not aware whether he could read or write. Although Mr B's life was in flux at that point he had been living with his mother from early summer until mid November. SW4 said that he would have expected to be advised if there had been problems with the management of a probationer's finances. He would normally expect to have knowledge of an individual's source of income.

69. S1, at interview, said that the next contact he had with the Social Work Department following the meeting with SW1 and Mr B on 20 December 1995 occurred when he received a telephone call from RW of the Social Work Department in February 1996 advising him that Mr B was to move out of LACH1 into his own flat and required money for furnishings and a deposit. Following this there were a number of small requests over the next several months, often by Mr B himself, either over the telephone or by calling at the office. S1 tried to put a brake on his expenditures. Initially he said to him that withdrawals of capital should only be made in exceptional circumstances. He would require one month's notice which he encouraged him to make in writing. It became increasingly apparent that the firm's administration of Mr B's finances was serving no useful purpose as they were just being used as an intermediary to withdraw funds. Over an 8 month period shortly thereafter the following requests were made by Mr B for release of funds:

**20.06.96** allowance increased to £70 per week at the request of the Social Work Department.

**05.07.96** £100 for trip to T6 and a wreath for his grandmother's grave. The need to budget was reinforced by S1.

**29.07.96** £450 for a CD player.

**15.08.96** £300 Bank Credit.

**27.08.96** £600 Bank Credit for TV/Video.

**23.09.96** £400 for bicycle.

**04.10.96** £400 for clothes following accident on bicycle.

**21.10.96** £400 for trip to T12

**05.11.96** £150 deposit for rental in T7 (a lease was never signed).

**13.11.96** £300 sheets for house.

**29.11.96** £500 for Christmas presents.

**20..01.97** £800 for week-end in T6.

**13.02.97** £900 for Moped.

70. S1 said that he would normally enquire as to why the money was required when it was requested . He did not think the money requested was being used for the stated purposes. His relationship though was one of solicitor to client. He thought the Social Work Department was still supervising him. He said that he had the opportunity to speak to SW5 whom he thought was Mr B's new Social Worker, on 30 August 1996 when they met primarily to discuss BR, Mr B's brother. S1 said that they were able to discuss the extent of the capital withdrawals and the fact that the allowance system was not working. S1 said that SW5 indicated that he would speak to his supervisor and informed him that Mr B's case would be taken on by a Social Worker in T8.

71. SW5, at interview, said that he never had casework responsibility for Mr B, only for his brother. He said he was never involved in any delegated capacity in the absence of the designated social worker. SW5 said that S1 had asked him in late 1996 if he had any locus in Mr B's case and he told him he did not. He said that S1 told him that a substantial amount of money had been withdrawn and that he was not able to offer a service to Mr B in terms of managing his funds. SW5 said that he did not recall telling S1 he would speak to his supervisor but had advised him that the case had been transferred to LA3. He said that he did not leave S1's office with any understanding that he would discuss Mr B's case with any other social worker, and at no point did he agree with S1 to take forward any responsibility in relation to Mr B's case or the concerns expressed by S1.

72. In writing to the Commission upon receipt of the Draft Report, S1 wrote of several specific instances where he said that SW5, Social Worker, had agreed to pass on information regarding Mr B to relevant social work personnel. At a meeting with SW5, on 21 April 1997, S1 says that SW5 informed him that the let of the flat in T7 had not gone ahead and that Mr B had been staying with his aunt and uncle and that out of the weekly allowance of £150 being paid to him he was paying dig money of £30 per week and appeared to be buying all the food in the house. SW5 indicated, he said, that Mr B may also have been claiming Income Support to which he would not be entitled given his level of capital. S1 said SW5 stated he would ascertain the position through a colleague in T5. S1 said that SW5 telephoned him on 12 May 1997 and said he had been assured that Mr B was not claiming income support. S1 further stated in this correspondence that he informed SW5 on 15 September 1997 that the existing Power of Attorney was to be terminated and that SW5 specifically informed him at that point that he would make Mr B's probation officer aware of the situation. S1 assumed that he had done so. S1 informed the Commission that at no point at any stage in his dealings with him did SW5 indicate to him that he did not propose to take any action with regard to the information being made available to him, or that this information should be directed elsewhere. S1 reported a further contact with SW5 in a telephone call on 30 January 1998 following a meeting between S1 and Mr B's brother concerning his own affairs during the course of which he had informed him of Mr B's detention and had asked that he contact Mr B's bank to try to cancel his PIN number. S1 stated he let SW5 know of the steps which he

had taken at Mr B's brother's request with regard to this and reminded SW5 that Mr B would, on attaining the age of 21 in September that year, inherit further funds from his father's estate. He said that SW5 said he would contact the Social Work Department in A1 and suggest to them that they take advice from the Legal Services Agency with a view to seeking the appointment of a Curator to look after those funds if thought fit.

73. On receipt of the new detailed information from S1 in his response to the Draft Report, the Commission wrote to SW5 asking for his comments on the additional information provided by S1 in which S1 had stated that SW5 had offered to pass information on to relevant social work staff on several different occasions. SW5 replied that he did meet with S1 on 3 occasions though the purpose of these meetings was in relation to BR. He had no recollection nor had he made any case-notes of any conversation regarding Mr B. He stated that while such a discussion may have taken place any comments he might have made would have been "purely speculative as I had no involvement with Mr B and therefore no reason to make any substantive enquiries". Neither did he have any recollection of a conversation in relation to Income Support, stating "in all likelihood I would have referred S1 to Mr B's Social Worker in T5 in relation to matters concerning benefits or Skill Seekers Training Placements. SW5 further noted that "contact between S1 and myself in relation to his holding Power of Attorney was specifically in relation to BR and not connected with Mr B. Indeed by the time these discussions were taking place (at the point where S1 could no longer act in this capacity for BR) BR was living in T11 and there was no contact made with Social Work in A1". S1 has informed the Commission that he did not at any stage hold Power of Attorney for Mr B's brother.

74. Mr B's case was allocated to SW3 of LA4 Social Work Department in December 1996. She sent out an appointment for 10 December 1996 and made a home visit. She met Mr B's aunt and her husband, who was known to the Social Work Department as he was a Schedule 1 offender. (Schedule 1 of the Criminal Procedure (Scotland) Act 1995 relates to offences against Children). SW3 next saw Mr B on his own at the office in mid January 1997. She went over the probation order with him. She did not know at this point that he had difficulty reading and writing. She received a "referral narrative" from SW4 which essentially outlined his involvement and contained no background information. Ultimately she received a copy of the Case Transfer Summary prepared by SW1 but it was not clear at which point this was received. The Case Transfer Summary, however, made no reference to the difficulties relating to the management of Mr B's finances. The only reference to finances was in reporting that "at the end of February 1996, a furnished flat was rented by Mr B, with the support of the Social Work Department, using money from Mr B's £50,000 trust fund, held in power of attorney by Mr B Grimson (sic) of SF Solicitors". Mr B's learning disability was not alluded to other than in a vague reference to his "limited abilities" and "short attention span". The summary focused on his damaged upbringing, history of offending and transition from local authority care. The management of finances was not highlighted as an area which needed to be addressed.

75. SW3 said in interview that given the background of an extensive range of offences this had been a difficult case to sort out. Most of the offences were minor in nature and almost all were associated with abuse of alcohol. He reportedly had been drinking heavily prior to moving to T2 and generally his abuse of alcohol and offending behaviour appeared to have lessened following his move to T2.

76. SW3 said that Mr B's aunt and uncle seemed to take an interest in him. Mr B himself said that he got on reasonably well with his aunt and uncle according to SW3. SW3 visited the SWO1 to review the Child Care file because of Mr B's history. SW3 said that at no point did the child care file make any reference to a "learning disability". She said he was referred to as having learning difficulties and was basically a slow learner who had behavioural problems.

77. SW3 learned further details as to Mr B's finances as a result of undertaking a basic benefits check with him in February 1997. Mr B told her he was not in receipt of any benefits. SW3, in interview, said that she had not been aware prior to this discussion that he was actually living off his inheritance. The case summary mentioned the inheritance in relation to charging for proposed supported accommodation costs but it had not occurred to her that he was receiving regular amounts from his solicitor. When she learned from him he was receiving £150 every week from his lawyer she thought initially he was confused. Mr B told her, she said, that he was paying £25 a week to his aunt in addition to £40 for food per week. When she asked him why he was paying the £40 on top of the £25 he reportedly said "because they asked me to".

78. SW3 was concerned that Mr B was receiving such a large sum in pocket money each week and that it must have been reducing his capital.

79. SW3 said that on learning of the arrangements Mr B had with his aunt and uncle she felt dubious about their intent. There was also another boy who had been thrown out by his parents living with his aunt and uncle who was sharing a room with Mr B. SW3 raised her concerns with SSW3, Senior Social Worker, in February 1997 but his view was that there was nothing that could be done as Mr B was over 18 and not in social work care.

80. Mr B was again taken into custody in March 1997 for offences which occurred prior to his probation. On 12.03.97 in SC1 Sheriff Court he received 90 days at YOP2. He was released on 02.05.97. Prior to being taken into custody he was being seen on a weekly basis by SW3. This continued upon his release until the end of September 1997.

81 SW3 was asked at interview whether she ever saw evidence of Mr B coming into large sums of money. She said her only concerns related to the level of his payments for room and board but Mr B himself did not feel this was unreasonable. She said she was reluctant to challenge this for fear of disturbing the relationship between Mr B and his aunt and uncle. He seemed to be doing well there and his offending had reduced considerably. She recalled that at one point Mr B's uncle got a jeep and Mr B was excited about it but he did not say that this had been paid for by him.

82 SW3 said that Mr B's learning disability or learning difficulties had not been highlighted in the case transfer summary. She wondered, as time went on, about his level of understanding as to what had happened to him in the past. She felt she needed guidance about how to work with him about this and wondered whether there was anything the learning disability services had to offer especially in terms of employment prospects. She felt that an assessment by a specialist worker would clarify if there was any specialist training which would make him more suitable for work. She also felt that perhaps he could be given help regarding his literacy. In September 1997 she made a referral to CLDT/CN, Team Leader of the Community Forensic Learning Disability Services based at the RC, Resource



Centre in T8. CLDT/CN in response to SW3 following his assessment of Mr B said that while Mr B had a 'borderline learning disability' he was too 'able' for the traditional learning disability services.

83 During the Summer of 1997 Mr B's requests for funds from S1 escalated considerably:

- **02.05.97** £900 requested
- **16.05.97** £175 week/allowance increased to this level
- **12.06.97** £900 paid out
- **15.08.97** £4,000 paid out
- **28.08.97** £9,000 requested

S1 met with Mr B on 16 May 1997 at which point he requested an increase in his allowance to £175 per week. S1 thought he was living with relatives and needed dig's money. He also asked for £900 on 2 May 1997 to purchase a car for himself. S1 said at interview that he had a lengthy discussion with Mr B at this point. He told him that his funds were dwindling. S1 said that Mr B was aware of his balance and received 6 monthly accounts. He went through the accounts with him and made it clear to him that his continued administration of his funds would serve no useful purpose. On 12 June 1997 £900 was paid out. Following this there was a request for £2,000 for his birthday and a holiday. This was followed a day or two later by a request for a further £2,000. On 15 August 1997 £4,000 was paid out in response to these requests. S1 also received a written request for £9,000 for a van and driving lessons for Mr B on 28 August 1997. This request was preceded by a call from Mr B's aunt in T2 on behalf of Mr B saying that Mr B had written him about this request. Mr B himself phoned S1 on 29 August 1997 and S1 said he would pay this out one month later. S1 said he tried to contact the Social Work Department to alert SW5. He then wrote to Mr B on 10 September 1997 confirming arrangements and asked him to attend a further meeting.

84 Mr B met S1 on 15 September 1997 and S1 advised him that as he had gone through £17,000 out of his £44,000 capital in 4 months there was no point in his continuing to act for him.

85 At a further meeting with Mr B on 10 October 1997 it was agreed that Mr B's remaining capital held in a National Savings Account would be transferred into his own name 4 weeks later. S1 said in interview that these steps were taken in consultation with SW5. On 11 October 1997 £1,350 was withdrawn. The sum to be transferred amounted to £24,697.40

86 Having had the bank account transferred to his name the amount and frequency of the withdrawals increased. The major withdrawals include the following:

- **18.11.97** £10,000
- **25.11.97** £8,000
- **05.12.97** £5,000

In the 3 weeks following the account being transferred to his name Mr B virtually exhausted his remaining capital, having just over £600 in his account on 5 December 1997. Mr B in interview with the Commission on 28.02.00 did not appear to know whether or not S1 still had Power of Attorney in respect of him.

87 SW3 in interview said that she had never questioned for a moment that Mr B's solicitor was still involved at the end of 1996 when she took the case over. She did not know, however, the nature of the relationship S1 had with Mr B or what responsibilities he may have had. She never had any direct contact with S1 until early 1998, months after the Power of Attorney had been terminated.

88. The Commission wrote to SW3, Mr B's probation officer during the period under review, asking if she had any comment to make on the new information from S1 in his response to the Draft Inquiry Report. SW3 wrote back to the Commission stating that she had only met SW5 once on 12.02.97 when she visited SWO1, Social Work Office to collect Mr B's Child Care Social Worker and Mr B's younger brother, who at that point was about to leave local authority care to stay with his aunt in T2 as well. She arranged with SW5 to meet on 27.02.97 in T2 to make a joint home visit. SW5 cancelled this meeting and was to have contacted her again to arrange another time but failed to do so she reported. SW3 checked through the case file where she said she kept a hand-written record of all telephone calls she made or received in relation to the case as well as her telephone message book from 1997 and could find no other mention of SW5. SW3 stated that she was never advised by SW5 that the Power of Attorney for Mr B had been terminated. She was never made aware that he was to have direct access to nearly £25,000.

89. The only subsequent contacts S1 had in respect of Mr B came when he was contacted by BR on 21 January 1998 alleging that his aunt was withdrawing money through Mr B's Cashline while he was in hospital. S1 said he spoke to the bank to alert them to the position. Following this S1 received a telephone call from SW3, Social Worker in T2, enquiring as to Mr B's financial affairs. SW3 in her letter to the Commission in response to S1's comments on the Draft Inquiry Report said she had only become aware of Mr B's financial problem when she telephoned S1, having received his number from S4, Mr B's criminal lawyer. Prior to this she had learned about his financial circumstances "in a broad sense" from her senior social worker on 20.01.98. She believed Mr B had no money left from his inheritance. Subsequently SW2, Community Care Social Worker/MHO, told SW3 that she was having great difficulty finding out details of his bank account. She was at that point compiling a Social Circumstances Report. S1 said in interview it was clear from the information SW3 was seeking that she thought S1 still had a locus in the management of Mr B's finances. She was unaware of the background to the case. S1 said that he had had no contact from the hospital regarding Mr B. SW3 informed the Commission in response to correspondence following S1's reply to the Draft Report that it was not until she spoke to S1 on 10.03.98 that she learned that Mr B had been free to draw on his cash from the age of 18. He also advised her, she reported, that although unwilling to give specific details due to client confidentiality that Mr B had repeatedly requested money from his funds over and above the fixed weekly sum which had been agreed.

90. On 19 January 1998 Mr B was admitted to PH1 Hospital. His Responsible Consultant Psychiatrist at that time was CP3. He had been charged with Breach of the Peace for calling out the '999' emergency services, threatening suicide on the Saturday prior to his admission (17 January 1998). He reportedly threatened to douse himself with petrol and set himself alight. He also is reported as stating that he had turned on the gas and was going to blow the house up. Police isolated the gas supply after evacuating neighbours from the immediate vicinity. Riot police from T10 were summoned when Mr B refused to come out of the house,

saying that he had to die. Police ultimately went into the house through a window and arrested Mr B. He was taken to T5 Police Station where he was kept under 24 hour supervision until a court appearance on the Monday morning (19 January 1998) when he was remanded to PH1 Hospital. Administrative problems resulted in the admission via the Criminal Procedure (Scotland) Act being considered invalid and Mr B was subsequently re-detained under Section 25 of the Mental Health (Scotland) Act 1984 on 27 January 1998. Further detention under Section 26 on 30 January 1998 and Section 18 on 9 April 1998 followed.

91. Mr B's nursing notes from PH1 Hospital record that the ward received a telephone call from SSW3, Senior Social Worker with the Criminal Justice Team in T2, on 23 January 1998. He is recorded as telling the nursing staff that Mr B had moved to live with his aunt in T2 9 months previously. He had been left £58,000 by his father and had been given £150 a week by his Solicitor until September 1997 when the money was put into the patient's own account. He was reported to have had £65 left. (His bank book indicates he actually had £605.23 at the time of admission). The notes go on to state that Mr B bought his uncle a jeep and a van, and his aunt got new carpets and furniture. SSW3 is said to have suspected that the aunt and uncle encouraged Mr B to spend his money. He also informed staff that they had applied for a loan from the social fund on his behalf as he had nothing left.

92. On 24 January Mr B was visited by one of his aunts who is recorded as informing staff that a firm of solicitors in T1 was dealing with his Trust. She was to get back to staff with details.

93. Nursing process notes record telephone contact on 25.01.98 from one of Mr B's aunts expressing concern about the aunt with whom he had been living. She reportedly said that the relatives had had their children taken away due to neglect and she wondered how Mr B had come to be in their care. She said he had been given drink and drugs at their house and she thought the environment was terrible. She is also recorded as saying that they (the aunt and uncle) encouraged Mr B to spend all his money and was "extremely worried should Mr B on recovery return to the environment". Charge Nurse (CN) in correspondence with the Commission after seeing the Draft Inquiry Report indicated that he returned to duty on 26.01.98 and would have been made aware of this information on his return. He also said that this information would have been discussed in a review meeting led by CP3 on 27.01.98 and attended by SSW3. This would have been standard practice. CP1 in correspondence with the Commission after reviewing the Draft Report, stated that this information had never been made known to her and had never been discussed in multi-disciplinary meetings when she had consultant responsibility for Mr B. She in fact, stated that this information when she read it in the Draft Report came as a shock to her. She said that had she been made aware of this information it may well have altered her management of Mr B's care, especially in relation to discharge plans. CP1 took over responsibility for Mr B's care in early February 1998. She saw him briefly when she returned from leave on 4 February. He was transferred to the ICU at PC2 Hospital under the care of CP4 on 07.02.98 returning to PH1 on 16.02.98. CP1 did not resume responsibility for Mr B's care until 23.02.98.

94. Nursing notes also record that Mr B was visited by a previous carer from a Children's Home in which he had lived. This person informed staff that Mr B was to inherit a further £20,000 on his 21<sup>st</sup> birthday.

95. CP3 who had responsibility for Mr B's care for a period after his admission to hospital, wrote to the Commission after reviewing the Draft Report and CP1's correspondence. He said that from what he could put together reviewing the case-notes and from his own personal recall of the case, he had led a multi-disciplinary review on 27 January 1998. Mr B was extremely ill and, at least to begin with, appeared to be in a life threatening condition. This, he said was "probably the first point at which I became aware of the issue of his legacy being spent." CP3 did not recall the specific information provided by Mr B's aunt in her telephone contact of 25.01.98 being raised but said that it may have been. CP3 did recall that during this period of his admission Mr B was thought to have no money left. CP3 said he "did not regard (or arguably failed to regard) Mr B's financial affairs as a priority at that point". CP3 was unable to recall the specifics of his handover to CP1 but was "reasonably certain this would have focused on psychiatric treatment issues - at that point ECT and a Mental Welfare Commission Second Opinion were being actioned.". "CP1's case-notes entry on 04.02.98", he continued, "refers to a £58K legacy issue, so I assume either I told her or she read my previous case-note entry to the same effect." In referring to the issue of handing over clinical responsibility to another consultant CP3 said, "It is clearly obvious that in general, as full information as possible, both in written and verbal form should be exchanged in handing over from one consultant to another. Given the passage of time it is difficult to be certain how fully the handover met this specification." CP3 felt it was important to point out that although it is now clear that Mr B was financially exploited over a significant period of time, "during the period of his initial admission to hospital there were significant diverting factors not least the severity of his illness and the patient's own inability to communicate. With hindsight it might be argued that earlier steps to declare him Incapax should have been taken but I would usually regard this as a significant decision and it is worth noting that no-one from either health or social work side made (to my recollection) any suggestion that formal steps to remove control of his affairs be taken. This would be an unusual step at such an early point in the context of an acute psychiatric admission."

96. The Social Circumstances Report completed by SW2 on 17 February 1998 and sent to CP1 as well as to the Mental Welfare Commission commented on the fact that Mr B had apparently had access to an inheritance of £58,000 from September 1997 and withdrew the majority from September to January 1998 leaving him a balance of £65.00. The report stated that it was unclear where a substantial amount of the money had gone. In the conclusion to this report SW2 wrote "The writer feels that Mr B requires some form of protection where finances are concerned as a substantial amount of money was spent in a short period of time. The question of Mr B being exploited by family members needs to be looked at as Social Work staff are of the opinion that this is a possibility".

97. Nursing staff spoke to Mr B about his inheritance on 26 February 1998. It is recorded that Mr B thought that he still had plenty of money left and that he would get more on his 21<sup>st</sup> birthday.

98. The Commission was advised in a letter from CP1 dated 31 March 1998 that Mr B had inherited £58,000 the previous year and that he only had £600 left at that point. (In fact a withdrawal of £600 on 11 March 1998 had left him with only £5. This withdrawal happened on the first day Mr B was allowed out from the hospital for the day on leave of absence, in the company of his aunt and uncle from T2.). CP1 wrote that Mr B lived with his aunt and uncle and it appeared that he had given much of his inheritance to them. Mr B, she stated, "being of borderline intelligence, has very little understanding of his financial situation and is

in my opinion incapable of controlling his own finances". CP1 made Mr B Incapax following a multidisciplinary meeting on 24 March 1998.

99. There was a breakdown in the hospital system at this point as the Hospital Managers were never informed that Mr B had been declared Incapax. Mr B's bank books were never requested by the hospital either before or after he was declared Incapax, nor does it appear any enquiries were made of him or relatives as to existing accounts.

100. Charge Nurse from PH1 Hospital psychiatric admission unit, said that Mr B himself had never raised any concerns about his money. He said that Mr B appeared to have a good relationship with his aunt and uncle and spoke fondly of them. His aunt often visited and took him out for short periods and for overnight leaves of absence and participated in some case discussions. His first recorded leave of absence from PHI Hospital was on 11 March.

101. CP1 in interview said that Mr B was already on a Section 26 when she took over his care. She did not recall seeing the SCR (which was addressed to her) but said she must have received one as he was on a Section 26. She did recall speaking to SW2 on a number of occasions specifically about his finances and the advisability of pursuing a Curator Bonis application.

102. CP1 said that concerns about the possibility of financial exploitation emerged shortly after she took over Mr B's care. CP1 described these concerns as being more than strong suspicions. She remembered asking his aunt and uncle how they came to have money to buy a jeep, a loft conversion and a closed circuit home security system. They reportedly said that the loft conversion was to provide a bedroom for Mr B but were silent on the other purchases. CP1 was asked whether she had raised this issue with Mr B himself without his family being present. CP1 said that he had agreed that all of these purchases had been made but she did not think that he really had any concept that his money had paid for it. She also described Mr B as being dependent on them and said he wanted to go back to live with them. She said that in his own way he appeared fond of them and they of him. CP1's impression was that his aunt and uncle may not have put him under any duress to part with his money. She felt that it was more that he had knowingly and voluntarily let them have what they wanted. She had the impression that Mr B regarded his inheritance as a bottomless pit and had no concept of its value. She felt he did not really appreciate the difference between £50,000 and £5,000. The question of contacting the police never arose. CP1 felt that the reality of the situation was that Mr B appeared to be genuinely fond of his uncle and aunt and in many respects they were the only people in his life. He wanted to carry on living with them. He saw them as caring and did not think they were bad.

103. When CP1 was asked why she declared Mr B Incapax on 24 March 1998 she said that it was because the story about the jeeps and closed circuit TV and the loft conversion were well established by then. People had seen it and it was no longer just a rumour. CP1 agreed that she had decided that he was not capable of managing his own money and was being exploited.

104. CP1 at interview explained that the normal hospital procedures when someone is declared Incapax would be that the decision is taken following a multidisciplinary discussion. Then the General Services Manager of PH1 is notified and "he takes it from there". In this case, however, the General Services Manager was never notified as there appears to have

been a breakdown in the arrangements. We interviewed GSM who was the General Services Manager at the time. He confirmed he would have been the one notified but had never been told about Mr B. For all intents and purposes the decision on Mr B's capacity, once made, never had any practical effect because there was never any notification to the hospital General Services Manager. CP1 has speculated in correspondence following the interview with the Commission that the bank books were never collected or sought because at that point he had no money. It is not clear how staff may have reached that conclusion other than by what was reported in the SCR. Again, however, this was at odds with what CP1 recorded in her letter to the Commission of 28 March at which time it was believed Mr B still had £600 left. The latter figure was closer to the true value of his bank account prior to the withdrawal on 11 March 1998 when he was on a day's leave of absence with his aunt and uncle. There is no reference at all in the case notes to any financial transactions on 11 March 1998. There was no indication of him coming into a substantial amount of money following a day's LOA, no evidence of purchases of any significance either for himself or his aunt or uncle, and no note of money being gifted to his aunt or uncle.

105. Mr B was granted extended Leave of Absence to his aunt and uncle's house in T2 on 30 April 1998. He was not eligible for Income Support because the Benefits Agency was aware of the details of his inheritance. He was discharged on LOA with a sole income of Disability Living Allowance, low rate mobility (approximately £100 per month). SW2, Social Worker, said in interview that she was not involved in any assessment of Mr B's home circumstances prior to his discharge on LOA. She said she was aware that there was a suspicion that his uncle had been a Schedule 1 offender but she had been unable to confirm this. On 25 November 1998 while still on Leave of Absence he received a payment of interest on his account of £1,923.35. On 1 December 1998 a withdrawal of £1,900 was made from Mr B's account. Community Mental Health Team notes record contact from SW2 on 3 December 1998. She said that Mr B's aunt had been in the office complaining about Mr B's lack of motivation and his lack of money. SW2 reportedly said the aunt was unsure whether she wanted him to continue living with her. CPN1, visited Mr B on 3 December. Her notes indicate that he appeared reasonably well. There is no mention of money having been withdrawn on 1 December, new purchases made etc. His aunt and uncle had previously complained on several occasions as to Mr B's lack of money.

106. When Mr B was discharged on extended Leave of Absence it was under Care Programme Approach arrangements. The person designated as being responsible in relation to financial matters was SW2. Community nursing staff said that this was not an area they addressed in their work with Mr B. Their assessment of home circumstances related to Mr B's mental health but they would not generally look into what was described as the 'social work aspects of his care'.

107. Mr B was readmitted to hospital from 17 March to 2 April and from 24 May to 18 June 1999.

108. CP2 took over Mr B's care on 1 June 1999. She said that Mr B remained Incapax at that point, saying he had been made Incapax because of his borderline learning disability rather than his schizophrenia which he also was assessed as having following his admission to PH1 Hospital and that this (his learning disability) was not something that would change over time.

109. The Commission was not able to determine that any of the social work, nursing or psychiatric staff involved in Mr B's care and/or supervision ever asked him directly if he felt he had been pressurised in any way to part with his money for the benefit of his aunt and uncle.

## G. COMMENTS AND FINDINGS

### Terminology

1. A fundamental issue at the heart of the confusion surrounding the assessment and care planning in respect of Mr B, especially as it related to the management of his finances, is that of the terminology used to describe his needs. The following is a list of the terms the Inquiry encountered which were used in case-notes, reviews, correspondence, care plans, Social Enquiry Reports and interviews, all of which were an attempt to describe his cognitive/intellectual functioning:

- Learning Disability
- Learning Disabled
- Borderline Learning Disability
- Learning Difficulties
- Moderate Learning Difficulties
- Mental Handicap
- Mildly Mentally Handicapped
- Mental Disorder
- Borderline Intelligence
- Mental Disability
- Limited Intellectual Ability
- Limited Abilities

2. Mr B was first referred to as having a 'mental handicap' in a report to the Children's Panel at the age of 6. He was later said to have 'learning difficulties' according to an educational psychologist and was referred to a special school for children with 'mental handicap'. His link teacher described him as 'mildly mentally handicapped'. The term 'learning difficulties' was often used in educational assessments/reviews. In SEP (Senior Educational Psychologist) letter to SW1 of 31 July 1995 she uses the terms 'learning difficulties' and 'mental handicap' but added that she did not feel Mr B suffered from a 'mental disorder'. By this she meant he did not suffer from a mental illness. The Mental Health (Scotland) Act 1984 includes mental handicap as a mental disorder but this is not something which is likely to be known to educational psychologists generally. SW1, Mr B's social worker, was not a trained Mental Health Officer. As a main grade social worker in a Child Care team he would not have been expected to be aware of the definition of mental disorder under the Act. Both his Senior Social Workers, however, were trained Mental Health Officers and should have been aware that someone with a 'mental handicap' or 'learning disability' would be considered as having a mental disorder under the legislation. Had SW1 been given the appropriate advice by his managers he might not have acted on the assumption that Mr B did not meet the grounds for the appointment of a Curator Bonis.

3. A tension often exists in social work between using labels which have the potential of limiting one's understanding of a person and being potentially stigmatising, and accepting that certain 'labels' can be helpful in furthering the understanding of the individual and ensuring more appropriate assessment and access to services. This may have contributed to the way in which the various social workers involved with Mr B's care approached this issue. Although people may have assumed they had a common understanding of the terms used this often was clearly not the case. SW1 made no distinction between 'learning difficulty' and



'learning disability'. SSW1, his senior at one point, felt that Mr B's problems were mainly due to poor upbringing and poor socialisation and did not appear to find the 'label' of learning disability or learning difficulty helpful. SSW2 another of SW1's seniors when he was responsible for Mr B's case, said she was aware that Mr B had a learning disability. Furthermore, she appeared to realise that this would be considered a mental disorder and it would be possible to petition a court for the appointment of a Curator Bonis if it was otherwise warranted. RW, the social worker in charge of the Throughcare Team responsible for co-ordinating support for Mr B on his discharge from residential care, characterised Mr B as having a 'learning disability' rather than a 'learning difficulty'. The distinction she made was that this would affect him throughout his life. SW3, the social worker who took on the supervision of Mr B's Probation Order, visited the SWO1 to view his Child Care file. She said that at no point did the Child Care file make any reference to a 'learning disability'. She said he was referred to as having 'learning difficulties' and was basically a slow learner who had behavioural problems. It was clear she made the same distinction as RW although they worked on different assumptions about his actual 'label', RW believing he had a learning disability and SW3, a learning difficulty. What was evident throughout was that there was no co-ordinated, articulated consensus about the specific nature of Mr B's disability - or even the fact that he had what could be classified as a disability.

4. In **The Same as You?**<sup>1</sup>, the Scottish Executive's review of services for people with learning disabilities, they helpfully address this problem of terminology. The report states that it is important to have a definition 'so that people with learning disabilities get the services and support they need, and so that agencies can plan these services better'.<sup>2</sup> The review feels it is important 'to make sure that people are not disadvantaged as a result of being unable to use appropriate services because of definitions and cut-off points'.<sup>3</sup> The review noted that there is currently confusion between terms such as 'learning difficulty' and 'learning disability'. Although the term 'mental handicap' is used in the Mental Health (Scotland) Act 1984, this has been replaced by the use of the term 'learning disability' in health and social services across the UK for well over a decade. The learning disability review defines learning disability as "a significant, lifelong condition which has three facets:

- reduced ability to understand new or complex information or to learn new skills;
- reduced ability to cope independently; and
- a condition which started before adulthood (before the age of 18) with a lasting effect on the individual's development".<sup>4</sup>

5. The Inquiry concludes that **the confusion and lack of agreement and understanding over the terminology used in respect of Mr B played a key role in adversely affecting the quality of his assessment and care planning.** This was true for both child and adult services involved in his care. It had an impact on the way people conceptualised Mr B's problem and ultimately blocked access to services which may have been helpful in contributing to his assessment and care planning. It does not appear, for example, that health service personnel were involved at any point in Mr B's assessment prior

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<sup>1</sup> Scottish Executive (2000) *The Same As You?* A review of services for people with learning disabilities

<sup>2</sup> Ibid. P.3

<sup>3</sup> Ibid. P.101

<sup>4</sup> Ibid. P.103

to his hospitalisation. **Had there been greater clarity over the terminology used, and its meaning, those involved might well have pursued a different course of action in attempting to assist Mr B in the safe and responsible management of his finances.**

### **The Transition from Child to Adult Services**

6. The Education (Scotland) Act 1980 places duties on Education Authorities in relation to children with Special Education Needs (SEN).<sup>5</sup> A child is defined as having SEN if because of a learning difficulty, he requires educational provision additional to, or otherwise different from, the provision made generally for children of the same age in the authority's schools.<sup>6</sup> "Where children over two have SEN which are pronounced, specific or complex", the education authority is required to assess these needs to determine whether a formal Record of Needs should be undertaken.<sup>7</sup> This Record of Needs identifies a child's learning difficulties so that strategies can be developed to address the special needs of the child. When there is a Record of Needs the Education authority has a responsibility to assess the future needs of the child once they cease to be of school age. This assessment should be carried out between the ages of 14 years 6 months and 15 years 3 months. The Education Authority must enquire from the local authority whether or not the child is a disabled person under the terms of the Disabled Person's (Services, Consultation and Representation) Act 1986 before carrying out this Future Needs assessment. **Guidance to the Children (Scotland) Act 1995** states that 'where a child has a Record of Needs, the requirement to prepare a 'Future Needs Assessment' .... can prompt the beginning of a planning process which takes account of the full range of the young person's need'.<sup>8</sup> A key component of the Future Needs Assessment relates to health care needs. The guidance makes the point that the young person's health care needs should be assessed by health care staff and health services. The intent of the legislation is clearly to co-ordinate assessment and future planning to help ensure a smooth transition to adult life. The Report of the Beattie Committee noted, however, that only 51% of secondary pupils attending a special unit had a Record of Needs.<sup>9</sup> The Special Educational Needs Forum, a recently established group chaired by the deputy minister for children and education, Mr Peter Peacock, has identified as a priority the need to review the record of needs process across the country as a result of differential recording rates across the different local authorities and concerns about outcomes.

7. We could find no evidence that a formal Future Needs Assessment had been carried out in respect of Mr B. Educational psychological services in LA2 speculated that this may have been due to the fact that Mr B had transferred sometime previously from a school for pupils with "learning difficulties" to one for "behavioural difficulties". Both education and social work assert, however, that Mr B was involved in a process of future planning involving school staff, social work colleagues, psychologists and care staff. There was no input, however, from anyone from the health services with a specialist knowledge and interest in learning disabilities. A formal Future Needs Assessment would have helped ensure that this had taken place.

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<sup>5</sup> The Education (Scotland) Act 1980

<sup>6</sup> Ashton G and Ward A, (1992) *Mental Handicap and the Law*. London. Sweet and Maxwell. P.315

<sup>7</sup> 1980 Act (5.60(2))

<sup>8</sup> Scottish Office (1997) *The Children (Scotland) Act 1995 Regulations and Guidance*. Social Work Services Group. P.50

<sup>9</sup> Scottish Executive (1999). *The Report of the Beattie Committee, Implementing Inclusiveness - Realising Potential*. P.28

8. The guidance to the Children's (Scotland) Act 1995 indicates that some of the principles and practices in care management for vulnerable adults may be of use when thinking about how to meet the requirements of the Act to assess and co-ordinate packages of services to assist children in need who are disabled. Unfortunately, however, the organisational structures of most Social Work Departments do not facilitate harnessing the experience and knowledge of Adult Community Care teams when a case is the responsibility of a Child Care or Criminal Justice team. SW1, Mr B's social worker, was working in a Child Care team as were his direct line managers. When SW1 filled out a draft Community Care Assessment form and consulted a community care team senior around the possible application for sheltered housing, a formal Community Care Assessment was never completed for Mr B. As a result, he was never integrated into the adult community care management system. At the point at which the draft form was being completed Mr B had already committed a number of offences and was the subject of numerous Social Enquiry Reports. Instead of gravitating towards an adult community care team, Mr B was headed towards being the casework responsibility of a Criminal Justice team to which he would ultimately be transferred by SW1.

9. There were good reasons for wanting to maintain continuity in the social work staff involved with Mr B. Mr B was a difficult person to work with at times. Despite the problems due to Mr B's abuse of alcohol and inconsistent compliance with agreed plans, SW1 appeared to have built up a reasonable relationship with him. A change of social workers was something to have been avoided where possible. The challenge for those involved in his care was to access specialist advice within the department from those experienced with working with young people with learning disabilities. Unfortunately this was never sought. Such advice could have contributed to a comprehensive assessment of his community care needs and would have helped ensure that further specialist health care advice would have informed this process. The fact that both SW1's seniors were Mental Health Officers should have helped mitigate the fact that his case was not being managed by a Community Care team. Their focus, however, remained squarely on issues related to the transition from local authority care and those related to his offending behaviour.

10. This is one clear example of how the lack of clarity and agreement over the terminology used may have interfered with the service Mr B was given. He was not conceptualised as a 'disabled person' because of his learning disability, although clearly falling within the definition used in the Disabled Person's Act.<sup>10</sup> (The definition of disabled person refers to persons with a chronic disability including mental disorder who come within the provisions of social work legislation.) Despite having a Record of Needs as a child he did not receive a Future Needs Assessment. As a school leaver he remained the responsibility of a Child Care team within the Social Work Department and subsequently a Criminal Justice team and never received a Community Care Assessment.

11. We conclude that **LAI Council failed to meet its statutory obligation to undertake a formal Future Needs Assessment. Had Mr B benefited from a Future Needs Assessment and a Community Care Assessment, these would have been informed by the participation of specialist health personnel whose contribution to the decision making as to Mr B's capacity to manage his inheritance could have been crucial.**

### Assessment of Capacity

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<sup>10</sup> Disabled Persons (Services, Consultant and Representation) Act 1986

12. The concerns over Mr B's ability to manage his inheritance first arose as he approached his 16<sup>th</sup> birthday. These concerns were raised by SW1, Social Worker. They were related primarily to Mr B's age and inexperience. The matter did not appear to feature in child care assessments/reviews and was not mentioned in the social work case-notes until raised with SW1 by S1 in April of 1995. S1 had written to the Accountant of Court's Office asking for confirmation that the Curatory would automatically come to an end at Mr B's 18<sup>th</sup> birthday (1995).

13. In the response to this letter of AC (Accountant of Court's Office) of 30 March 1995 he stated that 'it is agreed that upon Mr B's 18<sup>th</sup> birthday he will become entitled to administer his own estate, unless, of course, he was declared mentally Incapax, which I do not believe to be the case in this instance'. The Inquiry Team felt that this statement was ambiguous and that it might have been open to the interpretation that the Accountant of Court's Office did not believe Mr B was mentally Incapax. AC when approached by the Commission stated that he believed that the meaning of this sentence was clear; that is, that Mr B had not been **declared** mentally Incapax. In the interview S1 appeared to take the view that he thought the Accountant of Court did not believe it was the case that Mr B was Incapax. When asked by the Commission on what this opinion of the Accountant of Court might have been based, S1 responded that he could not answer as to what was in the Accountant of Court's mind but that the general background of the case had been known to the Accountant of Court from previous discussions and correspondence. SW1 wrote in Mr B's case-notes that he received a telephone call from S1 on 10 April 1995. The entry included the statement 'no way money can be with-held as he is not mentally incapable'. The Inquiry was unable to establish, why, at that point SW1 firmly stated that Mr B was not mentally incapable, although it would appear likely that this was related to a misinterpretation of the Accountant of Court's letter.

14. S1 wrote to SW1 on 16 May 1995 requesting a meeting to discuss Mr B's requirements once the Curatory came to an end. This letter would appear to have been seen by SSW2 SW1's line manager at the time. The meeting ultimately took place on 12 July 1995. SW1 had been in telephone contact with S1 in the intervening period to arrange and re-arrange appointments. SW1 noted in the case-file following a telephone conversation with S1, 'S1 to discuss Mr B's situation with the Accountant of Court to see if any other options exist in managing his money at this point given his limited abilities'. S1 spoke to the Accountant of Court's Office on 4 July 1995 noting the Social Work Department's concerns that Mr B would be unlikely to deal with his affairs sensibly on account of his "learning difficulties". In correspondence with the Commission following receipt of the Draft Report, S1 indicated that he received the impression that AC believed Mr B was not Incapax as a result of this telephone call. AC in interview with the Commission stated that he never formed a view on Mr B's capacity as he had never met him and in any case was not qualified to do so legally. He said that he had never intended to give S1 the impression the he believed Mr B was not Incapax.

15. The meeting between Mr B, S1 and SW1 on 12 July 1995 was not recorded in the social work case-file. A note of a discussion between SW1 and S/LA of the local authority's legal section indicated that there were four possible options open to them in respect of the management of Mr B's finances. One of these would have been to seek a Curator Bonis. SW1 noted in the file that this option would require Mr B 'to have extremely limited

capacity'. S/LA could not recall the specific telephone call but it did not appear from the interview or subsequent correspondence that he would have intended to give the message that 'extremely limited capacity' was required to seek a Curator Bonis.

16. S1 wrote to SW1 following the meeting confirming that the Social Work Department proposed to obtain a report from the psychologist who had been dealing with Mr B's case. S1 asked for sight of this report when available. He also said that the option of petitioning the court to have the curatory continue would be possible if 2 medical practitioners could attest that Mr B was suffering from a mental disorder such that he was not capable of managing his own affairs or giving instructions for the management. He states in the letter that this was a matter for medical evidence. He also indicated that while there may be a general acceptance that Mr B was not in a position to manage his financial affairs because of immaturity and inexperience, this is something which would happen at his 18<sup>th</sup> birthday automatically, given the law. The implication in the letter was that this would take place unless a petition to court went forward.

17. The letter from SEP dated 19 July 1995 addressed 'To whom it may concern' is at the centre of the confusion surrounding terminology and the way in which the terminology used directly affected the course of management of Mr B's care - particularly in relation to the management of his finances. SEP clearly stated that she did not feel Mr B was likely to be able to deal with his financial affairs sensibly because of his "learning difficulties". She even pointed out in this letter Mr B's history of attending a school for children with 'mental handicap'. She feared he would be vulnerable to influence by other 'more worldly wise individuals'. What apparently confused the issue, however, was the statement that 'Mr B does not suffer from what I would call mental disorder'. In interview SEP said that she used this term in the context that Mr B was not suffering from a mental illness.

18. SW1 in interview stated at that time he did not believe the term mental disorder included learning disability. At this point in mid July 1995 he had correspondence from S1 indicating that the presence of mental disorder was required to petition a court for Curator Bonis, and now he was in receipt of a letter from Ms Thomson stating that in her opinion Mr B did not have a mental disorder.

19. S1 wrote to the Accountant of Court upon receipt of the statement from SEP, the psychologist, inquiring whether he as Curator was under a duty to make an assessment as to whether the curatory should be continued, and if so, whether the expense of obtaining a psychiatrist's report regarding capacity could be charged against the ward's estate. The Accountant of Court office replied that there is no burden upon the 'factor' regarding the mental condition of the 'ward'. Any burden, it was presumed by the Accountant of Court, would fall upon the Social Work Department. S1 intimated this to the Social Work Department in a letter dated 4 August 1995. In this letter he invited SW1 and SSW2 to a meeting to discuss the position and suggested the department's legal advisers become involved. This meeting never took place.

20. Unfortunately, it does not appear that any of this crucial correspondence was ever shared by SW1 or his line manager with the council's legal section. SW1 was confident this correspondence would have been seen by his line manager. SSW2 stated in the interview that she may well have seen this but did not recall it. SWAM, the area manager, said in interview she would have expected such correspondence to have been brought to her

attention, but whether staff had been made aware of this expectation is not clear. There was no entry in the social work case-notes relating to S1's letter of 4 August 1995, a letter which clearly put the onus on social work to decide how to proceed. As pointed out in the Statement of Fact, Mr B's behaviour was quite chaotic at this point. He often absconded and was charged with a number of offences and at the end of August 1995 was in custody. The attention of the social workers and managers involved at this point may well have been diverted from focusing on the future management of Mr B's finances.

21. At no point in this period was there any consideration that the Social Work Department may have had a responsibility under Section 92 of the Mental Health (Scotland) Act 1984 to establish whether Mr B was incapable of adequately managing and administering his property and affairs by reason of mental disorder. SSW2 and SSW1, SW1's senior social workers, were both approved Mental Health Officers. They, more than others in the Child Care section of the department who were not MHOs, should have been aware of the department's statutory role under Section 92 of the Act and sought proper legal and medical advice as to how to proceed. It would appear from the comments of SSW2, Mr SSW1 and SW1, that there was a considerable lack of clarity in relation to SW1's line management at this crucial juncture.

22. There were no minutes available for the child care review meeting held on 10 August 1995. This was a meeting in which a discussion as to how the department would respond to S1's letter of 4 August should have been a main agenda item. It is not clear who attended this meeting. The only entry in the social work case-file which referred to this meeting said that it was poorly attended.

23. When SW1 wrote to ADO, Assistant District Officer, Child Care, on 18 August 1995, it appears that the decision had been taken not to discuss the matter further with the legal section. Somehow SW1 arrived at the decision that 'Mr B does not fit the criteria of being mentally incapable of managing his own affairs'. The Inquiry Team could not determine who other than SW1 made the decision, who was consulted and when it was made. Despite coming to this conclusion, SW1 wrote to S1 on 29 August 1995 that he was 'still concerned regarding Mr B's vulnerability and risk to exploitation by unscrupulous third parties'. He asked on Mr B's behalf for S1 to continue in the 'role of financial advocate in respect of his funds'. S1 responded on 5 September that he was interpreting the letter of 29 August as indicating that it was not the department's intention to petition the court to have Mr B made Incapax and a Curator Bonis appointed.

24. The risks and seriousness of the implications of not taking possible action to protect Mr B's finances were not properly explored because the question of Mr B's **capacity** was not addressed as part of the ongoing social work assessment. It has already been noted that Mr B's assessment was hampered by the lack of input from specialist health care staff. However, while the concerns of social work staff as to Mr B's ability to manage his inheritance competently were often recorded in the case-file and associated correspondence, the social work perspective on his **capacity** was never addressed. There was no focused exploration of how his past behaviour and demonstrated limitations might affect his ability to manage his sizeable inheritance. The importance of the relationship between an individual's financial well-being and his general welfare was never acknowledged in the assessment process. Concerns were expressed about his vulnerability and susceptibility to influence by others as

well as his poor impulse control but these were never related to his learning disability. His inability to read and write was not addressed in this context either.

25. In many ways the decision to seek a Curator Bonis for an individual is counter-intuitive to social workers. Social work values respect the autonomy of individuals. SW1 in the interview spoke of his belief that Mr B ‘had the right to self-determine’. The social work task is to help restore social functioning. The emphasis is on helping individuals regain and maximise their skills, independence and personal responsibility. This is evident in the work which was being done with Mr B at the time, despite the inherent difficulties. People were working with him to help establish his independence as he left local authority care. A Curator Bonis would have excluded him from having any legal authority to have managed any aspect of his financial affairs. (Thankfully this ‘all or nothing’ approach has been changed in the Adults with Incapacity (Scotland) Act 2000.) It is understandable and only right that the seeking of a Curator Bonis is not something undertaken lightly by social workers.

26. In addition to the facilitating and enabling role of social workers, however, there exists a professional duty of care to individuals as well as the organisational statutory duty to protect the individual and their finances in situations such as this. These, at times, competing professional values and duties as well as the organisational responsibilities leave front-line social workers and managers in need of clear guidance as to how and when to assess the social aspects of an individual’s capacity, when to involve a medical practitioner in assessing capacity, and when to seek legal advice.

27. Social workers were working at that time with very little guidance which focused on the assessment of an individual’s capacity to make decisions regarding his/her welfare, finances or medical treatment. The main reference document on community care practice for social work staff at that time was the **Practitioner’s Guide to Care Management and Assessment**.<sup>11</sup> This was jointly produced by the Department of Health (Social Service Inspectorate) and the Scottish Office (Social Work Services Group) in 1991. This guide makes virtually no reference to the assessment of capacity. The only direct reference is under the section on Finance in the guidelines on Comprehensive Assessment.<sup>12</sup> This is only a vague reference to the need to involve the Court of Protection as appropriate. The Court of Protection does not exist in Scotland. There is no reference to the role of the Accountant of Court in Scotland or the local authority’s responsibility under Section 92 of the Mental Health (Scotland) Act 1984. The Scottish Office Circular SWSG11/91, Community Care in Scotland Assessment and Care Management also was silent on the question of assessment of capacity.<sup>13</sup>

28. Operational procedures existed in the Social Work Department at that time in the Adult Care section titled ‘Power to Protect’. These procedures were concerned with the Social Work Department’s responsibilities and powers in regard to protection and management of clients’ monies and property when the client is deemed incapable of handling his or her own affairs by reason of mental disorder. The local authority’s responsibility under

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<sup>11</sup> Department of Health, Social Services Inspectorate and Scottish Office, Social Work Services Group (1991) *Care Management and Assessment: Practitioners Guide*

<sup>12</sup> Ibid

<sup>13</sup> Scottish Office, Social Work Services Group (1991) SWSG 11/91. *Community Care in Scotland. Assessment and Care Management*

Section 92 is referred to in these procedures. They stipulate that ‘if it is felt that a curatory may be appropriate in a particular case, this will be discussed in the context of a case review’. These procedures, while some help, do not provide practice guidance to social work staff on how to go about assessing capacity from a social work perspective. The Inquiry Team did not ask SW1 or his line manager whether they were aware of these procedures and had referred to them in Mr B’s case. There was no evidence uncovered in the course of the Inquiry, however, which would have suggested this was the case. There was no reference regarding the question of seeking a Curator Bonis in any of the child care review minutes provided to the Inquiry.

29. More recent guidance in the form of CCD2/1999 **Protection of the Finances and other Property of People Incapable of Managing their own Affairs** helps fill the gap in this area to some extent.<sup>14</sup> At the outset the point is made in this guidance that ‘where there is doubt about an individual’s capacity to manage their affairs, and appropriate formal arrangements have not already been made, professional psychiatric and legal advice should be sought’.<sup>15</sup> **The Adults with Incapacity (Scotland) Act 2000** places a new responsibility on local authorities to ensure action is taken to manage the finances and welfare of adults with incapacity when necessary and no-one else has taken the appropriate action. The guidance and Code of Practice for local authorities currently being developed will be important reference points for management and front-line staff in the future.

30. The Inquiry concludes that **the Social Work Department failed to carry out its responsibilities under Section 92 of the Mental Health (Scotland) Act 1984 in not securing a medical assessment of Mr B’s capacity to manage his own finances and affairs to determine whether an application should have been made to court for the appointment of a Curator Bonis.** SSW2 and SSW1 were not asked directly by the Inquiry whether they were operating actively as MHOs during the period under review. They did state that they were MHOs at the time but did not volunteer whether they actually practised as such. There is an acknowledged problem of ensuring that Mental Health Officers operating in Child Care and Criminal Justice teams obtain sufficient experience in working with mental health legislation to learn how it can be used to safeguard the health and welfare of people with mental illness and learning disabilities. This is highlighted in the Social Work Services Inspectorate Report on its Mental Health Officer Survey (1998).<sup>16</sup> The Report reflected the reality that in many authorities, MHOs in Criminal Justice, Child Care teams and management positions were not involved in active MHO work. The Report emphasised that ‘MHOs need to practice regularly to develop their confidence and competence’.<sup>17</sup> It stressed as well the need for local authorities to continue to review the mental health expertise in Offender/Criminal Justice and Child Care teams. The SWSI guidance on **The Role of Social Circumstances Reports in Planning the Care of People Detained in Hospital (1999)**<sup>18</sup> takes up this theme as well. This guidance also makes the important point that ‘MHOs should know who to look to for further consultation and support’.<sup>19</sup> It was evident to the Inquiry that **the line managers of SW1, both of whom were MHOs, did not**

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<sup>14</sup> Scottish Executive (1999) *Protection of the Finances and Other Property of People Incapable of Managing Their Own Affairs*. CCD2/1999

<sup>15</sup> Ibid. Para. 1.2

<sup>16</sup> Scottish Executive, Social Work Services Inspectorate (1998) *Mental Health Officer Survey*

<sup>17</sup> Ibid. P.8. para 51

<sup>18</sup> Scottish Executive, Social Work Services Inspectorate (1999) CC1/1999. *The Role of Social Circumstances Reports in Planning the Care of People Detained in Hospital*

<sup>19</sup> Ibid. P.9 para 41



**appear to have sufficient knowledge of mental disorder and the Mental Health Act and failed to consult with those in the department who had such knowledge. This was responsible in part for the department's failure to carry out its responsibilities under Section 92 of the Act.**

31. It may be that Mental Health Officer training at the time at which SSW2 and SSW1 were approved did not sufficiently address the assessment of capacity, its relationship to the local authority's duties in Section 92, and the use of the Act in relation to people with learning disabilities. The revised **Requirements and Guidance for the Training of Social Workers to be Considered for Appointment as Mental Health Officers under the Mental Health (Scotland) Act 1984** (paper 19.21)<sup>20</sup> published by C.C.E.T.S.W in 1992 makes no reference in the section on Core Competencies to the assessment of capacity or the local authority's responsibility to protect the property of people with incapacity. The newly revised guidance, **Assuring Quality for Mental Health Work**<sup>21</sup> makes only passing reference (in the section on the knowledge base of Mental Health Officer practice) to the need for MHOs to be aware of legislation and policies relevant to the MHO role - giving incapacity and vulnerable adults as examples. **The importance of MHOs being skilled in assessing the social factors relevant to a person's capacity to make decisions concerning finances, welfare or medical treatment is not specifically addressed in the C.C.E.T.S.W guidance on core competencies in MHO training.** While it may be argued that the guidance was not intended to be so detailed and specific, **given the nature of the task and responsibilities and the possible implications of taking or not taking action under the legislation, this should be seen as an area of knowledge and skill essential to MHO practice and be included in the core competencies for Mental Health Officer training.**

### **The Granting of Power of Attorney**

32. S1, once aware of the concerns of the Social Work Department and of SEP, Senior Psychologist, about Mr B's likely inability to manage his finances on account of his "learning difficulties", sought advice from the Accountant of Court on his responsibilities as Curator. He was informed and he subsequently clearly advised the Social Work Department in his letter of 4 August 1995 that it would be up to the department to decide whether to petition a court for the appointment of a Curator Bonis. He received a letter back from SW1 on 29 August in which he said it was unlikely any means of managing Mr B's money on his behalf would be pursued. He requested S1 continue in the role of 'financial advocate' to Mr B in the meantime. S1 wrote on 5 September 1995 to SW1 that he interpreted this letter of 29 August as indicating that the department did not intend to petition the court for the appointment of a Curator Bonis. This interpretation was never challenged by SW1.

33. One clear distinction between the appointment of a Curator Bonis and the granting of the Power of Attorney is that the first requires the formality of 2 medical certificates attesting to the person's incapacity, while there is no converse legal requirement that the capacity of the grantor of Power of Attorney has to be established at the time of granting. There is, however, the issue of the solicitor's professional responsibility to the grantor. The Law

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<sup>20</sup> C.C.E.T.S.W (1992) *Requirements and Guidance for the Training of Social Workers to be Considered for Appointment as Mental Health Officers under the Mental Health (Scotland) Act 1984*

<sup>21</sup> C.C.E.T.S.W (2000) *Assuring Quality for Mental Health Social Work Requirements for the Training of Approved Social Workers in England, Wales and Northern Ireland and of Mental Health Officers in Scotland*

Journal in July 1995 reminded solicitors in an article on professional practice that in relation to Powers of Attorney, “a solicitor must have instructions from his or her client and that solicitors are not the judge of mental capacity”.<sup>22</sup> ‘That is for the medical profession from whom advice should be sought if there is any doubt as to a client’s capacity.’<sup>23</sup> Adrian Ward and Gordon Ashton writing in **Mental Handicap and the Law** echo this advice. In this they state, ‘in situations where doubt exists as to the capacity of the donor to execute the power ..., it is wise to obtain a medical report before execution’.<sup>24</sup> ‘A person granting a Power of Attorney must ... have capacity to do so at the time when it is executed.’<sup>25</sup>

34. The matter becomes somewhat more clouded, however, when the degree of capacity necessary to grant the Power of Attorney is considered. Adrian Ward and Gordon Ashton write that ‘the grantor must have adequate understanding of all the delegated powers to be granted, as expressed in the deed, but he may have sufficient understanding to grant the power though lack capacity fully and properly to exercise them himself’.<sup>26</sup> If a solicitor only has to focus on the individual’s ability to understand, specifically, what is being agreed to in granting the Power of Attorney, this underscores the importance of the assessment by those involved in the care and treatment of the individual into the individual’s capacity to manage their own affairs. Such assessments could be crucial in determining the likely consequences of accepting instructions regarding a Power of Attorney when there is any doubt as to the capacity of the grantor. S1, in interview, said that although he had not had sight of detailed medical reports, he had formed his own ‘unqualified impressions’ that Mr B was an immature young man who had been very sheltered and was not well placed to manage his own funds, but he was clear in his own mind that he did not lack the capacity to manage his own affairs. S1 stated he believed that Mr B was able to understand the significance of the powers being granted. SW1 as well believed that Mr B had a fair understanding of what he was signing up to in granting the Power of Attorney.

35. It is evident SW1 never sought legal or medical advice regarding the issue of Mr B’s capacity following the receipt of S1’s letter of 4 August 1995. He appeared, in interview, to attach considerable weight to S1’s statement in S1’s letter of 5 September 1995 that if it were Mr B’s position that he would wish to instruct S1 to continue to look after his funds then there was no reason why those instructions should not be accepted. The question of seeking a medical view on capacity did not arise in this context, as this was a reference to the granting of a Power of Attorney. S1, it appears, had already satisfied himself that Mr B would have sufficient capacity to instruct him. It was not clear what if any influence the Social Work Department’s decision not to seek a psychiatric assessment on capacity and not to petition the court for the appointment of a Curator Bonis may have had on him arriving at this decision. He appeared to have an open mind in his earlier correspondence, however, that a medical assessment may have found that Mr B, in fact, lacked sufficient capacity to manage his funds or to instruct someone to manage them on his behalf. S1 deferred to the local authority’s decision to do nothing, a decision apparently arrived at by default rather than design. He never asked specifically whether the local authority obtained a medical view on Mr B’s capacity.

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<sup>22</sup> Journal of the Law Society of Scotland. July 1995. Professional Practice Article.

<sup>23</sup> Ibid. P.21

<sup>24</sup> Ashton G and Ward A (1992) *Mental Handicap and the Law*. London: Sweet and Maxwell P.545

<sup>25</sup> Ibid. P.614

<sup>26</sup> Ibid. P.614

36. It is difficult, with hindsight, to determine how well Mr B understood the nature and detail of the agreement when he granted the Power of Attorney. CP1 and CP2 both felt that his lack of capacity was due to his learning disability which was a life-long condition. This being the case, it is likely that a similar determination of his lack of capacity would have been made had it been assessed by a medical practitioner prior to the granting of the Power of Attorney. Had Mr B been assessed by a medical practitioner and deemed Incapax prior to his 18<sup>th</sup> birthday, it would not have been competent for S1 to have accepted his subsequent instructions regarding Power of Attorney. S1 did not know whether or not Mr B was able to read or write. Although he stated that he had no reason to believe he could not. His reading and writing in fact was on a very basic level and he was not able to read the document he was asked to sign. It is acknowledged that a person can enter a contract which they cannot read so long as they understand it. On the other hand some people are able to read but would not be capable of giving instructions re a Power of Attorney because they are not able to understand what they are reading.<sup>27</sup> Although it is difficult to say to what degree Mr B's subsequent illness affected his recall and understanding, it was evident that he still believed S1 was acting on his behalf long after the contractual relationship had been terminated by S1.

37. The Inquiry also uncovered evidence that key social work staff were not exactly clear themselves as to what Mr B had agreed to in granting the Power of Attorney and the exact nature of S1's role in managing his affairs. SW1 thought that it would offer some brake on Mr B impulsively withdrawing money from the bank. He also thought that any concerns about Mr B's access to his funds would be intimated to the Social Work Department by S1. S1 indicated that he certainly attempted to do this, although unsuccessfully. (It is also apposite to note here that S1 in interview said that SW1 indicated that on the day that Power of Attorney was granted that he would be invited to the next case conference. This never happened.) RW from the Social Work Department's Throughcare Team thought that the Power of Attorney would offer a degree of protection for Mr B. SW3, Social Worker from LA4 who took on the supervision of Mr B's Probation Order, believed that S1 was still managing Mr B's funds on his behalf as late as 1998. The Inquiry Team had the impression that generally there was a feeling among social workers that S1 was able to exercise greater management and control over Mr B's affairs than was possible. (S1 in turn appeared to assume that social workers involved with Mr B were supervising and monitoring his situation more closely than they were and exercising more authority than they had.) It is likely that if the professional social workers involved were less than clear as to S1's specific role in managing Mr B's finances then Mr B himself may not have been fully aware as to the exact implications of granting the Power of Attorney.

38. Ashton and Ward state that "Powers of Attorney are strictly construed and it is necessary to express specifically in the deed all the powers which are to be exercised, as none will be implied".<sup>28</sup> The Powers of Attorney in respect of Mr B were drafted in general rather than specific terms. They were not drafted in such a way as to take account of Mr B's specific circumstances. It would have been possible, for instance, to place specific conditions in the contract in which Mr B could have been asked to agree that S1 would clear any requests for withdrawals of sizeable amounts of capital with the Social Work Department before transferring funds. As the Powers of Attorney were drafted in general terms there was no specific detailed authority for the disbursement by S1 of large amounts of capital such as those disbursed routinely to Mr B - often in response to written requests and often, S1

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<sup>27</sup> McKay C and Patrick H (1995) *The Care Maze*. Enable and Scottish Association for Mental Health

<sup>28</sup> *Mental Handicap and the Law*. P.614

suspected, not for the purposes stated. It is worth noting here that Ashton and Ward speaking of the standards of care expected of solicitors in such relationships state that “an attorney must use such skill as he possesses and show such care as he would in conducting his own affairs ... the attorney must exercise the care, skill and diligence of a reasonable man, and if acting in the course of a profession must exercise proper professional competence”.<sup>29</sup>

39. We have real concerns that **S1, having been made aware of questions as to Mr B’s capacity to manage his own financial affairs, did not advise the Social Work Department and Mr B that he would only be able to act on Mr B’s instructions if his capacity were first assessed by a medical practitioner. We are also of the view that given S1 decided to accept Mr B’s instructions, the Powers of Attorney could have been drafted specifically to take account of Mr B’s particular circumstances.**

40. We found there was a breakdown in communication between S1 and the Social Work Department once Mr B left local authority care despite S1 believing that he had passed relevant information on to the appropriate social work staff via SW5. This resulted in lost opportunities to reassess the question of Mr B’s capacity and the possibility of petitioning the court for a Curator Bonis once further evidence became available indicating that the administration of the Power of Attorney was not working to the benefit of Mr B.

#### **Transfer of Social Work Case-work Responsibility from A2 to A1 and Termination of Power of Attorney.**

41. Leaving aside the issue of Mr B’s finances and the lack of health service input in the assessment and planning process, the Social Work Department put considerable effort into supporting Mr B in his move out of local authority care. A fairly intensive programme of support was put into place involving his social worker, residential care staff, a worker from the Throughcare Team and the department’s Supported Accommodation Team. This, however, was a difficult time for Mr B. He was repeatedly involved in offending behaviour and was facing a number of criminal charges. Much of his offending was associated with alcohol abuse. He remained vulnerable to the influence of others. The support on offer at this time, which was considerable, would have been available until he was 21 years of age. It did not come as a surprise to staff, however, when he was unable to sustain his tenancy in T1. Upon losing his flat in April 1996 he disappeared for a few weeks and was shortly after remanded for a period of 5 weeks. This period, by SW1’s admission, allowed for time to reassess his accommodation and support needs. Supported accommodation was ruled out as an option. Mr B was unlikely to co-operate, not least because his level of capital would have meant he would have had to bear the full cost of this. The fall-back position was moving in with his mother and her partner in T8. SW1 was still of the view that Mr B’s learning difficulty affected his ability to manage his finances. He noted this in a Social Enquiry Report dated 23 May 1996. Despite this, arrangements for managing his finances were not reviewed at this point. Mr B was then placed on two years probation. The move to his mother’s in T8 was viewed as less than ideal by SW1 but on a practical basis, ‘as effective as any other alternative’.

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<sup>29</sup> Ibid. P.543

42. There was an opportunity lost here of using Probation in a more creative way to ensure that Mr B was more comprehensively assessed so as to inform the action plan prepared by SW1 in conjunction with Mr B. This may have helped address more directly some of the key factors which undoubtedly affected his offending behaviour. It would have been open to the court as well to dispose of the case with a Guardianship Order under Section 58 of the Criminal Procedure (Scotland) Act 1995 given the support of a Mental Health Officer and medical staff. A Guardianship Order would have granted the local authority the powers of access, attendance and residence which may have enabled those involved to exert greater control over a care plan constructed to address Mr B's particular needs. Pursuit of these options was, once again, hampered by the fact that SW1 did not conceptualise Mr B as someone having a learning disability.

43. The Inquiry Team had difficulty establishing exactly how the transfer of the supervision of the Probation Order and case-work responsibility to LA4 was managed. Meetings which SW1 appeared to have had at various times in LA3 were not recorded either in the LA2 case-file, or the LA3 file. The formal transferring of the Probation Order was delayed. This was understandable, however, as the stability of Mr B's living situation was in question. The case was not notified to LA3 until October 1996 by which point it appears as though Mr B had already left his mother's house. When he turned up at an aunt and uncle's house in T2, where it appeared he would be staying for the foreseeable future, his Probation Order was formally transferred to LA4 Social Work Department and subsequently allocated to SW3 of the T2 Office in December 1996.

44. It was evident to the Inquiry Team that there were significant flaws in the quality of the initial information transferred from LA2 Social Work Department to LA3 Social Work Department and ultimately LA4 Social Work Department. It was not possible to establish why this was case. SW1 said he passed on copies of Social Enquiry Reports but these did not seem to have been passed on to the allocated social worker initially. SW4, the first social worker in LA3 to take on case-work responsibility for Mr B, said he never received the case transfer summary. He could not recall in the interview whether he had been made aware that Mr B had a learning disability. He was not aware that he was unable to read or write. He had not been advised that there had been problems with the management of Mr B's finances and said that he would have expected to be advised of this information as a supervising social worker needs to have knowledge of a probationer's source of income.

45. The case summary which had been prepared in August 1996 by SW1 did find its way to SW3 the supervising social worker, ultimately. Very little background information was available at first. She was unaware of the fact that he had a learning disability - even after travelling to T1 to consult the Child Care file because of a lack of information. The case summary when it did arrive made no mention of Mr B's difficulties reading and writing and there was no reference to the problem of managing his finances. There was no mention of 'learning disability' and only a vague reference to 'limited abilities' and a 'short attention span'.

46. It was not until February 1997 that SW3 became aware that Mr B was in receipt of a weekly allowance paid through his solicitor, and of the financial agreement he had with aunt and uncle. She was surprised and concerned at the large sum in pocket money he was receiving each week. She had suspicions as to his relatives' intent. SW3 saw Mr B on a weekly basis until the end of September 1997, aside from a period he spent in custody from

March to May that year. SW3 ultimately questioned his level of understanding and made a referral to the Community Learning Disability Services to see whether they might have something to offer - especially in relation to employment opportunities, specialist training and basic education. The response she received following this assessment was that he was assumed by CLDT/CN to have a 'borderline learning disability' and was too able for the traditional learning disabilities services. This was based on his own assessment and a review of some Social Work and Education Department documentation. No formal assessment was carried out by members of the Community Learning Disability Team to inform his judgement. Once again the terminology used in respect of Mr B blocked his access to services. It was unfortunate that once a referral was finally made to a specialist learning disability service this did not result in a comprehensive assessment. It is difficult to see, given this, how the Community Learning Disability Team through CLDT/CN reached such a definite conclusion as to Mr B's level of learning disability.

47. It was during the summer that the request for withdrawals made to S1 were increasing at an alarming rate both in amount and frequency. SW3 was not aware that Mr B was withdrawing such large sums. She recalled that his uncle had bought a jeep at one point and Mr B was excited about this, but he never told her that this was paid for with his money.

48. S1 said he alerted SW5, Social Worker for Mr B's younger brother, in September and October of 1997 that such a substantial amount of Mr B's capital had been withdrawn in a very short period of time. He believed this information was to be passed on by SW5 to the relevant social workers in LA3. SW5, in the interview, disputes that he ever agreed to this. While we cannot speculate on what may have happened here, what is clear is that these concerns never found their way to SW3. This was particularly unfortunate as SW3 had by this point made a referral to the Community Learning Disability Team and any assessment of the capacity issue at that point in time may have resulted in protective action being taken while he still had substantial assets left.

49. S1 stated that he had informed SW5 on 15 September 1997 that he was no longer to be taking instructions from Mr B and that Mr B's remaining capital, nearly £25,000, would be transferred to Mr B in the next month. Once this money was transferred, £23,000 was withdrawn in 3 separate withdrawals between 18 November 1997 and 5 December 1997. SW3, his Probation Officer, was unaware at the time, that any of this was taking place.

50. The Law Society Code of Conduct for Scottish Solicitors states that "solicitors are free to refuse to undertake instructions, but once acting should withdraw from a case or transaction only for good cause and where possible in such a manner that the client's interests are not adversely affected."<sup>30</sup> Adrian Ward has made the point that in situations where there is a developing disability which makes it more difficult to take instructions, the obligation to act in the client's best interest does not simply disappear.<sup>31</sup> He contends that the solicitor in these circumstances must at the very least institute appropriate procedures for capacity to be assessed and any necessary steps taken to safeguard the client's position.<sup>32</sup> While Mr B's mental capacity was not deteriorating, his lack of capacity due to his learning disability and

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<sup>30</sup> Law Society for Scotland. *Code of Conduct for Scottish Solicitors*. February 1998

<sup>31</sup> Ward. A. Law Society for Scotland. Post Qualifying Legal Education Lectures. *Anticipating Incapacity*. 28.04.99

<sup>32</sup> Ibid.

the concerns surrounding this were of long-standing. What had become dramatically more evident by his behaviour since first instructing S1 regarding the Power of Attorney, were the behavioural grounds attesting to the fact that he was not capable of managing his finances or of sensibly instructing his solicitor regarding the management of his finances.

51. SW3 only became fully aware of Mr B's financial circumstances after speaking to his criminal lawyer and being given S1's telephone number. SW3 contacted S1 for information at this point and discovered that S1 was no longer acting on his behalf. S1 in interview said that it was clear SW3 still believed at that point that he continued to have a locus in the management of Mr B's finances.

**52. We question whether sufficient steps were taken by S1 to protect the interests of Mr B in September and October of 1997. He did not pursue options available to him of making formal requests to either the Social Work Department to act on their responsibilities under Section 92 of the Mental Health (Scotland) Act 1984 or the Mental Welfare Commission to exercise its authority under Section 93 of the Act. We further conclude that the transfer of casework responsibility by LA2 Council Social Work Department to LA3 and latterly LA4 Council was badly handled insofar as key information was not passed on. It is not clear exactly where or why this breakdown in the transfer process occurred, but we found that the lack of information provided to SW3 upon taking on the supervision of the Probation Order significantly affected her ability to properly monitor Mr B's situation and provide him with the advice and assistance he required.**

### **Hospital Management of Incapax Patient Funds**

53. Following Mr B's admission to the psychiatric unit at PH1 Hospital on 19 January 1998, his hospital nursing notes indicate that SSW3, Senior Social Worker with the Criminal Justice Team in T2 (SW3's Line Manager), telephoned and informed staff of Mr B's inheritance and how it had been squandered in the 9 months since moving in with his aunt and uncle in T2. He reportedly said that Mr B had only £65 left although the Inquiry Team learned that his balance at that stage was £605.23. SSW3 also advised staff that Mr B had bought his uncle a jeep and a van as well as new carpets and furniture for the house. SSW3 was suggesting Mr B may have spent this money under some duress.

54. Nursing process notes also reported telephone contact from one of Mr B's aunts expressing her concerns about the care he had been receiving from his other aunt and uncle. She alleged they were encouraging him to spend all his money and gave him drink and drugs. The caller was worried about his eventual return to this environment. CP1, as stated earlier, maintains she was never made aware of this information and it was never discussed in a multi-disciplinary review meeting when she was Mr B's Consultant Psychiatrist. She said this may well have altered her management of the case, especially in relation to discharge planning. CP3 in correspondence with the Commission having read the Draft Inquiry Report and CP1's response to it stated that he was not clear whether this information from Mr B's aunt was raised in review meetings though his financial circumstances were. CP3 felt that the handover would have focused on Mr B's psychiatric treatment due to the severity of his illness at the time and this may have diverted attention from issues relating to his financial affairs. He said that in general as full written and verbal information as possible should be

exchanged in handing over from one consultant to another, but with the passage of time it is difficult to be certain how fully this standard was met in this case. **Clearly this issue of communicating important patient information between responsible consultant psychiatrists when case responsibility is transferred needs to be examined closely within the Trust.**

55. The Social Circumstances Report completed on 17 February 1998 and forwarded to CP1 reiterated many of the concerns expressed by SSW3, alleging financial exploitation by family members and advising that Mr B's finances required some form of protection. It was noted he was to inherit a further sum of money on his 21<sup>st</sup> birthday.

56. No action was taken by the hospital until CP1 declared Mr B Incapax following a multi-disciplinary meeting on 24 March 1998 - over 2 months from when SSW3 alerted the hospital to possible financial exploitation of Mr B. It was not clear to the Inquiry Team why there was such a delay in assessing Mr B's capacity given the concerns that had been raised. CP1, his Responsible Medical Officer, did not actually take on responsibility for Mr B's care until 23 February 1998. She said she would have seen the Mental Health Officer's report completed on 17 February 1998, had spoken with SW2) during the period of the Section 26 detention and had a number of discussions with her about the possibility of a Curator Bonis application, but could not recall specific details. CP1 did state in interview that the assessment of a patient's capacity in terms of finances is not something which would normally be looked at early on in an admission. She felt that it was important first to observe someone, to assess them, to see the effects of medication and to gather relevant information from nursing and social work staff before deciding whether someone is Incapax. She points out that the decision on his capacity was made by her less than one month after she took over Mr B's care. She felt that, given how ill Mr B was, her priority was to bring his psychotic symptoms under control, not investigate his financial situation. She did not believe initially he had any money to control at that time, he was acutely ill, and she felt the assessment of his capacity was not clinically necessary at an earlier point.

57. The consequences of not assessing Mr B's capacity at an early point was that the hospital did not make any inquiries regarding existing bank accounts nor request receipt of his bank books. On the first day he was allowed out of hospital on Leave of Absence in the company of his aunt and uncle, his remaining balance was withdrawn from his account, save for £5.

58. There seemed to be universal acceptance among the multi-disciplinary team that Mr B had been exploited financially by his aunt and uncle but this was, at that point, in the past as his funds had been depleted. Whether Mr B had been placed under any duress to part with his money was less clear. No-one specifically asked him this question. CP1 thought it unlikely. She said Mr B seemed quite fond of his aunt and uncle and wished to return there upon discharge. She described him as being dependent on them.

59. When CP1 declared Mr B Incapax she did so because of his **learning disability** not because he had a mental illness. This is an important distinction as it refers to a condition which would not have significantly changed over time.

60. The Inquiry learned that once Mr B was declared Incapax there was a breakdown in existing procedures which resulted in no practical steps being taken by the hospital to



safeguard what finances he may have had remaining. He was granted Leave of Absence and discharge to his aunt and uncle's house in T2 on 30 April 1998. There was no formalised assessment of the home circumstances involving a visit to the home in T2 by either the social worker or community nurses involved. CP1 was not overly concerned about his return there as Mr B was fond of his aunt and uncle and they appeared fond of him. There were no accusations of any mistreatment by his aunt and uncle according to CP1. She subsequently wrote that those reservations she might have had were discussed with SW2, community nursing staff and in-patient nursing staff. (The allegations of the aunt and uncle facilitating his drug and alcohol abuse were not raised by the Inquiry Team during the interview with CP1.) CP1 thought that he still had £600 left at the point of discharge but this had already been withdrawn as noted earlier.

61. The person designated as being responsible under the Care Programme Approach arrangements for financial matters was a social worker, SW2. Community psychiatric nursing staff said in interview that this was not an area they addressed in their work with Mr B. There does not appear to have been any co-ordinated multi-disciplinary assessment as to the potential and likely impact of Mr B's financial circumstances on his health and welfare upon his discharge. He was discharged on an income of only £100 per month approximately, including his Disability Living Allowance..

62. While Mr B remained on extended Leave of Absence he was still considered Incapax. The clinical team appeared unaware that this information had never been transmitted to the General Service Manager as was the agreed procedure. The consequence of this failure was that bank books had never been requested nor, apparently, had any questions been asked about existing bank accounts. When Mr B subsequently received a payment of interest on his account of £1,923.35 on 25 November 1998 while on Leave of Absence, £1,900 of this was subsequently withdrawn on 1 December 1998.

63. We conclude that **PH1 Hospital failed to implement procedures under Section 94 of the Mental Health (Scotland) Act 1984 to the consequent detriment of Mr B's financial welfare.**

64. We further conclude that **the Care Programme Approach procedures in place at the time of Mr B's discharge from PH1 Hospital on Leave of Absence on 30 April 1998 were not properly implemented, resulting in the inadequate assessment of his home and financial circumstances prior to his discharge from hospital.**

### **Post-Script**

65. The focus of this Inquiry has been on the care with which those professional staff involved with Mr B at a crucial point in his life addressed the issue of his capacity to manage his finances sensibly and safely. In looking at this issue a number of short-comings and failings were uncovered across many of the professions involved in this respect. We were aware through interviewing staff and reviewing available case records and correspondence, that staff, particularly social work staff, were working with a young man with a very damaged upbringing where the management of his inheritance was only one of a number of issues, many of which may have appeared more concerning and in need of more immediate attention. The intensity of his illness on admission to hospital may have diverted attention from the important issue of protecting the property of an Incapax patient.

66. The failures which have been alluded to have not been as a result of insufficient professional attention to Mr B especially on the part of Social Work. Those specific areas of his assessment and care planning which were neglected were more related to a lack of basic knowledge of medical, legal and administrative issues relating to the management of the funds of an adult with incapacity. Many of the findings of the Inquiry speak directly to the need for further professional education and training in this specific area. Other findings relate more to organisational failures. It is hoped that the Report is viewed in this light.

67. The impending implementation of the Adults with Incapacity (Scotland) Act 2000 demands that the professions of law, social work, medicine and nursing look closely at their responsibilities under this new legislation and work together to develop the training and procedures which will help ensure that the finances and property of adults with incapacity are protected and used for their benefit. Social Work Departments and Trusts should move quickly to set up joint implementation teams to consider the organisational, clinical, legal and training implications of the Adults with Incapacity (Scotland) Act 2000.

## **H. SUMMARY OF FINDINGS**

1. The confusion and lack of agreement and understanding over the terminology used in respect of Mr B played a key role in adversely affecting the quality of his assessment and care planning.
2. Had there been greater clarity over the terminology used and its meaning, those involved might well have pursued a different course of action in attempting to assist Mr B in the safe and responsible management of his finances.
3. LA1 Council failed to meet its statutory obligation to provide a Future Needs Assessment. Had Mr B benefited from a formal Future Needs Assessment and a Community Care Assessment, these assessments would have been informed by the participation of specialist health service personnel whose contribution to the decision making as to Mr B's capacity to manage his inheritance would have been crucial.
4. The Social Work Department failed to carry out its responsibilities under Section 92 of the Mental Health (Scotland) Act 1984 in not securing a medical assessment of Mr B's capacity to manage his own finances and affairs.
5. The line managers of SW1, both of whom were MHOs, did not appear to have sufficient knowledge of mental disorder and the Mental Health Act and failed to consult with those in the Department who had such knowledge. This was responsible in part for the Department's failure to carry out its responsibilities under Section 92 of the Act.
6. The importance of MHOs being skilled in assessing the social factors relevant to a person's lack of capacity to make decisions concerning finances, welfare or medical treatment is not specifically addressed in the C.C.E.T.S.W guidance on Core Competencies in Mental Health Officer training. Given the nature of the task and responsibilities and the possible implications of taking or not taking action under the legislation, this should be seen as an area of knowledge and skill essential to MHO practice and be included in the Core Competencies for Mental Health Officer training.
7. S1, having been made aware of concerns as to Mr B's capacity to manage his own financial affairs, did not advise the Social Work Department and Mr B that he would only be able to act on Mr B's instructions if his capacity were first assessed by a medical practitioner.
8. After S1 decided to accept Mr B's instructions, the Powers of Attorney were not drafted specifically to take account of Mr B's particular circumstances.
9. We found there was a break-down in communication between S1 and the Social Work Department once Mr B left local authority care despite S1 believing that he had passed relevant information on to the appropriate Social Worker via SW5. This resulted in lost opportunities to reassess the question of Mr B's capacity and the possibility of petitioning the court for a Curator Bonis once further evidence became available indicating that the administration of the Power of Attorney was not working to the benefit of Mr B.
10. We question whether sufficient steps were taken by S1 to protect the interests of Mr B in September and October of 1997. He did not pursue options available to him of making

formal requests to either the Social Work Department to act on their responsibilities under Section 92 of the Mental Health (Scotland) Act 1984 or the Mental Welfare Commission to exercise its authority under Section 93 of the Act.

11. The transfer of case-work responsibility by LA2 Council Social Work Department to LA3 and latterly LA4 Council was badly handled insofar as key information was not passed on. The lack of information provided to SW3 upon taking on the supervision of the Probation Order in LA4 significantly affected her ability to properly monitor Mr B's situation and provide him with the advice and assistance he required.

12. Following the referral by SW3 of Mr B to the Community Learning Disability Service no comprehensive multi-disciplinary assessment was undertaken to determine the nature and extent of his learning disability and what supports and services the Community Learning Disability Team may have been able to provide to meet his needs. There was no specialist psychological or psychiatric assessment undertaken to inform the conclusion that Mr B had a borderline learning disability and was too able for traditional learning disability services.

13. PH1 failed to implement procedures under Section 94 of the Mental Health (Scotland) Act 1984 to the consequent detriment of Mr B's financial welfare.

14. There was a breakdown in the implementation of Care Programme Approach procedures at the time of Mr B's discharge from PH1 Hospital on Leave of Absence on 30 April 1998 which resulted in home and financial circumstances not being assessed adequately prior to his discharge from hospital.

15. There appeared to be difficulties in the transfer of full clinical information when medical responsibility for Mr B was passed from one consultant psychiatrist to another.

## **I. RECOMMENDATIONS**

### **Social Work**

These recommendations are directed to all those Social Work Departments which were formed from LA1 Council Social Work Department as a result of local government reorganisation in April 1996. It is assumed that policies, procedures and practices in all these departments have been informed, to some degree, by those which existed in LA1 Council Social Work Department prior to reorganisation. A number of these recommendations will have particular relevance to LA2, LA4, and to a lesser extent LA3 Social Work Departments due to their direct involvement with Mr B after April 1996.

We recommend:

1. LA2 Council Social Work Department as the successor authority to LA1 Council review the findings of this report, particularly in relation to LA1 Council's failure to carry out its responsibilities under Section 92 of the Mental Health (Scotland) Act 1984, and that Mr B be compensated for any loss which may have been a consequence of this failure. The Commission makes this recommendation in carrying out its duty under Section 3(2)(d)(iv) of the Mental Health (Scotland) Act 1984.
2. All Departments review procedures and guidance on Assessment and Care Management to ensure that they address the issue of assessment and review of capacity in relation to welfare, medical and financial decisions. This will be essential in advance of the implementation of the Adults with Incapacity (Scotland) Act 2000.
3. All Departments review the expertise of MHOs operating in management positions, child care and criminal justice teams to ensure they have up-to-date knowledge of relevant legislation, particularly as it relates to learning disability, issues of capacity and the protection of property.
4. All Departments develop a system of routine refresher training courses for all Mental Health Officers.
5. All Departments ensure that staff are aware of how to access specialist Mental Health Officer advice and guidance.
6. All Departments develop and/or review policies and procedures for the protection of property and the management of finances for people with mental disorder. These policies and procedures should provide guidance to staff as to the social work role in the assessment of an individual's capacity to manage their finances as well as when medical and legal advice should be sought in this process.

This work will be essential given the implications of the Adults with Incapacity (Scotland) Act 2000.

7. All Departments ensure that all staff are aware of basic information concerning the Mental Health (Scotland) Act 1984 and the Adults with Incapacity

(Scotland) Act 2000 which includes associated professional and departmental responsibilities.

With the implementation of the Adults with Incapacity (Scotland) Act 2000 it will be essential that all staff are made aware of the Department's responsibilities to take forward applications for Intervention Orders, welfare guardianship and financial guardianship where necessary. These responsibilities in relation to financial matters will in future supplant those which currently exist under Section 92 of the Mental Health (Scotland) Act 1984.

8. All Departments develop clear guidance to staff as to when and how they should consult with the council's legal advisors.

9. All departments ensure that all staff are aware of when and how to consult specialist staff in the field of mental disorder around the question of assessing capacity in relation to decisions affecting welfare, finances and medical treatment.

10. All Departments develop and/or review multi-agency procedures and guidelines for the protection of vulnerable adults which address the protection of finances and property of vulnerable adults, as well as the issue of assessment of capacity.

11. LA2, LA3 and LA4 Council Social Work Departments should review procedures for transferring/receiving essential information when the supervisory responsibility for a Probation Order is transferred from one authority to another.

12. LA4 Council Social Work Department review, on a multi-agency basis, existing Care Programme Approach procedures to ensure they adequately address the assessment of home and financial circumstances prior to discharge.

13. All Departments should review the specific arrangements and associated guidance for the transfer of young people with disabilities, from child care and educational services to adult community care services. They should review specifically with Education and Health colleagues the process by which assessments of children with special educational needs are made for the purpose of determining the necessity of providing Records of Needs and Future Needs Assessments. Procedures should address the relationship between these education-led assessments and the local authority's assessment and care management procedures.

## **Education Departments**

This recommendation is directed to all those Education Departments which were formed from LA1 Council Education Department as a result of local government reorganisation in April 1996. It is assumed that policies, procedures and practices in all these departments have been informed, to some degree, by those which existed in LA1 Council Education Department prior to reorganisation.

We recommend:

14. All Departments review with Health and Social Work colleagues the process by which assessments are made of children with a Record of Needs for the purposes of providing formal Future Needs Assessments. Procedures should address the relationship between these Education-led assessments and the local authority's assessment and care management procedures. Departments should also review the terminology used in the statutory assessment of needs. All statutory assessments should take on board the implications of the Adults with Incapacity (Scotland) Act 2000 as well as the Mental Health (Scotland) Act 1984.

15. Educational psychologists be given basic training/information to familiarise them with the fundamental issues of relevance to their practice in the Mental Health (Scotland) Act 1984 and the Adults with Incapacity (Scotland) Act 2000.

## PCT

We recommend:

16. PCT, Primary Care NHS Trust review the findings of this report, particularly in relation to its failure to carry out procedures under Section 94 of the Mental Health (Scotland) Act 1984, and that Mr B be compensated for any loss which may have been as a consequence of this failure. The Commission makes this recommendation in carrying out its duty under Section 3(2)(d)(iv) of the Mental Health (Scotland) Act 1984.
17. PCT review existing procedures for the protection of finances of Incapax patients to see where they can be further enhanced and re-issue guidance to relevant staff following any changes which may be required. Procedures should specifically outline the responsibilities of key staff, both clinical and administrative. Such guidance should address the issue of assessment of the capacity of individuals in respect of financial, welfare and treatment decisions both at the post-admission and pre-discharge stage. Guidance should also address the timescales for such assessments, and take account of guidance issued by the Scottish Executive in Circular No CCO2/1999.
18. The above guidance also specify the responsibility of hospital management, administrative staff and clinical staff under Section 94 of the Mental Health (Scotland) Act 1984 as well as the Adults with Incapacity (Scotland) Act 2000.
19. The Trust review its training strategy in relation to the above procedures to ensure that relevant staff are aware of their legal and clinical responsibilities in relation to the assessment of capacity in individual patients.
20. The Trust review with relevant agencies the implementation of existing Care Programme Approach procedures to ensure they adequately and routinely address the assessment of home and financial circumstances prior to discharge, and operate efficiently on a multidisciplinary, cross-agency basis.
21. The Trust review criteria for referral for assessment of people with learning disabilities to ensure that the needs of individuals are responded to and addressed by the most appropriate services. This is in line with the recent national policy as outlined in **The Same As You**.
22. The Trust develop a joint implementation team with Social Work colleagues to consider the organisational, clinical, legal and training implications of the Adults with Incapacity (Scotland) Act 2000.
23. The Trust review procedures for transferring relevant patient information between clinical staff when the responsibility for a patient's medical care is transferred between consultant psychiatrists.



## Scottish Executive

We recommend:

24. The Scottish Minister should consider issuing a directive that local authorities must re-approve all Mental Health Officers at three year intervals in accordance with requirements to be established by C.C.E.T.S.W.

25. The Planning and Performance Directorate ensure that all NHS Trusts regularly review arrangements and the associated training for implementing procedures and guidance on the responsibilities of hospital and clinical staff in assessing the capacity and protecting the property of vulnerable patients.

26. The Social Work Services Inspectorate update existing guidance on Assessment and Care Management to address the assessment of capacity in respect of financial, welfare and treatment decisions.<sup>33</sup> Such guidance should examine the social work (and other local authority staff) role in the process of assessment of capacity, including the seeking of medical and legal advice as appropriate.

The above would be extremely helpful for local authorities in responding to the new statutory demands of the Adults with Incapacity (Scotland) Act 2000.

27. The drafting of the guidance and Codes of Practice for the Adults with Incapacity (Scotland) Act 2000 be informed by findings and recommendations of this report.

28. The Social Work Services Inspectorate review the National Standards and Objectives in relation to Probation Orders to ensure:

i. consideration is given where appropriate to the individual's capacity to understand and comply with the proposed action plan, particularly with those aspects relating to welfare, finances and/or medical treatments;

ii. All transfers of the supervisory responsibility for Probation Orders are accompanied by essential information which addresses, where present, existing concerns/arrangements as a consequence of an individual's lack of capacity in respect of financial, welfare or medical grounds.

29. The Scottish Executive give urgent attention to the development of a Vulnerable Adults (Scotland) Bill.

30. The Special Educational Needs Forum should take account of the findings of this report with particular reference to issues identified relating to the assessment and recording of special educational needs.

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<sup>33</sup> *SWSG 11/91 Community Care in Scotland. Assessment and Care Management, Department of Health, Social Services Inspectorate and Scottish Office, Social Work Services Group (1991), Care Management and Assessment: Practitioner's Guide*

## **Central Council for Education and Training in Social Work**

We recommend:

31. Current guidance on the training and appointment of Mental Health Officers be reviewed so that the core competencies required of Mental Health Officers include assessment skills in relation to examining the social aspects relevant to determinations of capacity in respect of decisions concerning finances, welfare or medical treatment, as well as knowledge of the relevant legislation relating to the protection of property.

## **The Law Society of Scotland**

We recommend:

32. The Law Society of Scotland review the whole circumstances set out in this report and advise the Mental Welfare Commission for Scotland as to the action it proposes to take in response to the Commission's findings so far as relevant to the Society. Without prejudice to that generality, the Law Society is invited to consider the following matters:

- a. The need to ensure that all solicitors acting as attorneys undertake adequate annual training specific to this area of practice as a requirement of continuing Professional Development Regulations;
- b. Advice to members of the Society on the importance of seeking a medical determination of capacity whenever this is in question when taking instructions from a client (a matter of particular importance given the changes associated with the Adults with Incapacity (Scotland) Act 2000 which extends the powers of an attorney to include welfare matters);
- c. Recognition of Mental Health Law as an accredited specialist area of expertise;
- d. Whether S1 provided an adequate professional service to Mr B, and, if not, the action which will be taken in that respect by the Society in the interests of Mr B.

## **Enable**

We recommend:

33. Enable consider offering legal advice to Mr B as to his rights and as to the remedies available to him in respect of the failings identified in the report, and take such further action as is in his interests and he might wish in that regard.

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