



SCOTTISH EXECUTIVE

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Scottish Independent Advocacy Alliance

Dear Colleagues

GUIDANCE FOR LOCAL AUTHORITIES: PROVISION OF COMMUNITY CARE SERVICES TO ADULTS WITH INCAPACITY

Introduction

1 This circular provides local authorities with updated guidance on the use of their powers under the Social Work (Scotland) Act 1968 (“1968 Act”) and the Adults with Incapacity (Scotland) Act 2000 (“2000 Act”), to provide services to adults with assessed needs who lack capacity to consent to receiving services.

The guidance takes account of new section 13ZA of the 1968 Act which commenced on 21 March 2007.

The guidance in the Annex aims to:

- describe how the relevant duties and powers under the 1968 Act and 2000 Act sit alongside each other;
- promote and support good practice when major decisions require to be made on behalf of an adult with impaired decision-making capacity;
- promote and support good practice in assessing whether a proposed care intervention amounts to “deprivation of liberty” in terms of Article 5 ECHR;
- ensure consistency in the way the legislation is implemented.

New Guidance

2 The guidance should be read in conjunction with the code of practice for local authorities on the 2000 Act and guidance on Care Management in Community Care (CCD8/2004).

Monitoring

3 The Executive will wish to monitor local authorities’ use of their powers and duties under the 1968 Act and the 2000 Act in order to be alerted to any possible areas of ongoing difficulty. (See paragraph 4 of Annex).

Resources

4 The resource implications of the guidance should not be onerous. Care Managers and Mental Health Officers in particular will need to be updated; other social and health care staff working with adults with impaired decision-making capacity will need to be aware of the guidance. Local authorities may want to review their local protocols and, in addition, may need to adapt their case record data collection programmes in order to account for cases where the local authority has used its power under section 13ZA of the 1968 Act to provide services.

Action

5 Local authorities, in collaboration with their health service partners, are invited to review current policy and practice in the light of the guidance in the Annex.

Enquiries

6 Enquires about this circular should be addressed in the first instance to Jan Killeen, AWI National Practice Co-ordinator, Civil Justice, Law Reform and International Division, Justice Department, Scottish Executive, 2nd Floor West, St Andrew’s House, Regent Road, Edinburgh EH1 3DG. Telephone 0131 244 4840 or e-mail jan.killeen@scotland.gsi.gov.uk



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**Scottish Executive: Guidance for Local Authorities (March 2007)
Provision of community care services to adults with incapacity**

BACKGROUND

1 The background to the production of this guidance for local authorities is an issue which arose about local authorities' use of their powers under part 6 of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"). Local authorities have duties under the 2000 Act to apply for a guardianship or intervention order where that is necessary to protect the welfare (or financial affairs) of an adult with incapacity and no one else is available or willing to apply. In some areas a practice had grown up of the local authority requiring an order to be obtained in all cases where an adult with incapacity is to be moved to residential accommodation, even where the adult is compliant and there is no disagreement as to the appropriateness of the service to be provided. This has resulted in unnecessary delays in discharging patients from NHS hospital care when they are clinically fit. This is at odds with the Executive's policy of ensuring that community care services are provided as quickly as possible following an assessment, and that such provision should be effected without recourse to the courts, unless that is necessary.

2 The Executive has on a number of occasions issued guidance to local authorities as to when an order under the 2000 Act should be sought. However, responses to new draft guidance, updated to take account of the relevant European Court of Human Rights (ECtHR) case law on deprivation of liberty and issued for consultation in May 2006, revealed a continuing difference of view as to what the law allows local authorities to do. The Executive's view was that local authorities' implied powers under the Social Work (Scotland) Act 1968 ("the 1968 Act") were sufficient to allow them to move an adult with incapacity into residential care or provide them with community care services, depending on the circumstances of the case.

3 The Executive explored a possible solution with relevant interest groups, with the outcome that it would be helpful to clarify the law in this area. Section 13ZA of the 1968 Act was inserted by amendment at Stage 3 of the Adult Support and Protection Bill in February 2007 (www.scottish.parliament.uk/business/bills/62-adultSupport/index.htm). Section 13ZA makes it explicit that, where a local authority has, following an assessment of the adult's needs, concluded that the adult requires a community care service, but is not capable of making decisions about the service, they may take any steps which they consider necessary to help the adult benefit from that service. Local authorities as public authorities must act compatibly with the European Convention on Human Rights (ECHR) and the power does not allow steps to be taken which would be incompatible with those rights, including depriving an adult of their liberty in terms of Article 5, ECHR¹.

¹ Section 6 of the Human Rights Act 1998

Monitoring

4 The Executive believes that the clarificatory amendment to the 1968 Act described above will help ensure that there are no unnecessary legal barriers to adults with incapacity receiving the services they need. The Executive will wish to monitor local authorities' use of their powers and duties under the 1968 Act and the 2000 Act in order to be alerted to any possible ongoing areas of difficulty. The Mental Welfare Commission, Office of the Public Guardian and NHS Delayed Discharge Team already collate data on the use made by local authorities of Part 6 of the 2000 Act and the Executive will continue to use this to monitor trends. In addition, the Social Work Inspection Agency may, from time to time, examine case records in relation to the application of this guidance and the use made of section 13ZA of the 1968 Act. **It will therefore be vital that local authorities ensure effective, documented assessment and care planning in relation to each individual who lacks capacity to consent to services.**

INTRODUCTION

5 This guidance is to assist local authorities in the provision of community care services when someone has been assessed as needing a service, but lacks the capacity to consent to receiving the service. In this situation, there are a range of factors the authority needs to take into account. If the authority is taking action itself, it needs to consider how to proceed in the light of its powers and duties under the 1968 Act and the 2000 Act.

6 The guidance aims to:

- describe how the relevant duties and powers under the 1968 and 2000 Acts sit alongside each other;
- promote and support good practice when major decisions require to be made on behalf of an adult with impaired decision-making capacity; and
- ensure greater consistency in the way the legislation is implemented.

7 Under section 5 of the 1968 Act, local authorities are required to perform their functions under the general guidance of Scottish Ministers. **This document is guidance for that purpose.** Furthermore, because this guidance relates also to local authorities' duties under the 2000 Act, it forms part of the code of practice for local authorities, which Scottish Ministers are required to publish under section 13 of the Act. It should be used in conjunction with the code of practice for local authorities, chapter 3, 'How the Act fits into Assessment and Care Management.'²

8 The guidance outlines the process for making and recording actions and decisions about community care services made on behalf of adults who lack the capacity to act or make some or all decisions for themselves. It advises on factors to consider, in individual cases, in order to differentiate between circumstances in which a decision and/or actions may require

² Adults with Incapacity (Scotland) Act 2000, Code of Practice For Local Authorities Exercising Functions under the Act. available at: www.scotland.gsi.gov.uk/justice.incapacity

an order under the 2000 Act, and those where it would be appropriate for the local authority to use its powers in the 1968 Act.

9 Throughout this document, the term 'order' is used when referring to both intervention orders and guardianship orders under the 2000 Act. The term 'adult' and 'person' are used interchangeably, to mean someone aged 16 or over who is, or may be, incapable in relation to the decision and/or action in question. The term 'proxy' means a person appointed under the 2000 Act to act for a person with incapacity. The term includes continuing and welfare attorneys, guardians and persons authorised under intervention orders. The term 'carer/s' refers to spouses, partners, family members and friends who support the adult in an unpaid capacity.

ASSESSMENT, CARE PLANNING AND DECIDING HOW TO PROCEED

10 This guidance aims to ensure that the rights of the adult are protected. The assessment and decision-making processes, whilst rigorous, should be carried out as quickly and efficiently as possible. Unnecessary delays may put the health and welfare of the adult at risk.

11 The procedure applies to adults for whom major decisions need to be made and who:

- have complex and/or significant care needs; and
- may be incapable in relation to the decision/action in question (see section 1 (6) of the 2000 Act).

12 This guidance assumes that an adult who appears to have a measure of cognitive impairment, and for whom there are doubts about his/her ability to make major care decisions, falls within assessment and care management procedure³. The adult will have a needs assessment (which includes consideration of risk and vulnerability, care options and capacity issues).

13 Where the adult has capacity to make his/her own decisions and give consent to care arrangements, section 13ZA of the 1968 Act and the 2000 Act do not apply. If the adult has relevant capacity, then a decision by the adult to refuse services must be respected, even if no one else agrees. The only exception would be in the rare circumstance that procedures under the Mental Health (Care and Treatment) (Scotland) Act 2003 could be appropriate. For example, where the person's refusal of treatment for mental disorder puts the person at risk to themselves or others.

14 It is assumed that at an early stage in the assessment and care management procedure it will have been established if the person has a proxy or proxies with welfare powers or if such an appointment is in process. (This can be checked with the Office of the Public Guardian who maintains a public register of all powers of attorney, guardians, and persons appointed under intervention orders.) The involvement of any existing proxy with relevant decision making powers will be crucial. His/her consent will be necessary before the local authority is able to provide services to the adult.

³ Scottish Executive (10 August 2004) Guidance on Care Management in Community Care (CCD8/2004)

15 The local authority is not able to use the power in section 13ZA of the 1968 Act if it is aware that:

- the adult has a guardian or welfare attorney with relevant powers; or
- an intervention order has been granted relating to the proposed steps; or
- an application has been made but not yet determined for an intervention order or guardianship order relating to the proposed steps.

Clearly, the local authority does not need to act on behalf of the adult under the 2000 Act where there is a proxy with relevant powers in place (unless it has concerns about the ability or intention of the proxy to safeguard the adult's welfare – see chapter 4 of the local authority code of practice). The following paragraphs outline the key elements in the process of considering each case where the person lacks capacity to consent to the decision and/or action in hand and the local authority needs to act on behalf of the adult to ensure the provision of services to meet assessed needs.

16 Where the capacity of the adult to consent to the proposed care plan is in doubt, it will be necessary to consider how to:

- take forward decisions on behalf of the adult, and
- address any ongoing concerns about the adult's need for safeguards to be put in place.

This will require an up-to-date multi-disciplinary review. This is likely to happen at a case conference. However, where this is impractical, it will still be essential to act on all the elements of the review process outlined below. The views of all relevant parties should be sought - including the adult, independent advocate (if there is one), GP, relatives, carers, proxies (with powers other than those relevant here). In many cases the involvement of a mental health officer would be extremely helpful.

17 The following procedure could be usefully employed or adapted as appropriate to circumstances.

17.1 *Preparatory meeting* - the care manager or other member of the community care/discharge team should meet with the adult, their independent advocate (if they have one), and their carer to discuss the possible steps that might be taken. The carer should be regarded as a key partner in care⁴ and will usually be the source of much relevant information to feed into the decision-making process. The meeting should also be used to provide information to the adult and carer about how the decision-making process works. Every effort must be made to maximise the capacity of the adult to make their own decision, through providing information in an accessible format and using appropriate communication tools. Guidance on assessing capacity has been prepared by the Scottish Executive and should be referred to conjunction with this guidance. It is available at: www.scotland.gov.uk/justice/incapacity. It might also be appropriate to consider if the

⁴ Community Care and Health (Scotland) Act 2002, New Statutory Rights for Carers: Guidance. Circular No. CCD 2/2003, 31 March 2003, Carers as Key Partners paragraph 3.1

adult could benefit from support, possibly from an independent advocate (if they don't already have one), to express his/her views, especially if it becomes apparent that there may be major disagreements between the wishes of the adult and others.

17.2 *Initial assessment of capacity* - the care manager co-ordinating the review will have formed a preliminary view about the capacity of the adult to give consent to the proposed care plan. This will be based on direct contact with the adult, and from consultations with others as part of the assessment process. It might also be useful to request an initial assessment of the adult's capacity in relation to the area of decisions-making in question, from a suitably experienced health care professional. For example: the adult's GP; psychiatrist; speech and language therapist (especially if there are communication difficulties); clinical psychologist; discharge team clinician; or possibly a nurse with the relevant assessment of capacity training. Experience has shown that this can help to inform the review and speed up decision-making.

18 The multi-disciplinary review process should take the following points into account.

18.1 Agreement should have been reached on the care and support the individual is assessed as requiring **before** consideration is given to what legal authority might be used to implement key aspects of the proposed care plan.

18.2 The capacity of the adult must be assessed in relation to the decision in hand. **Where it is agreed that the adult lacks sufficient capacity to make some or all of the decisions required, the meeting will need to consider whether authority under the 2000 Act will be necessary to implement essential aspects of the care plan to which the adult is unable to give informed consent, or whether it would be appropriate to use the powers under the 1968 Act.**

19 In determining the course of action to take the following key elements should be fully considered.

Applying the principles

19.1 The principles of the 2000 Act must inform consideration in each case of the action to be followed. As well as applying to decisions under that Act, it is explicit in section 13ZA of the 1968 Act that the general principles of the 2000 Act apply to whatever steps are taken by the local authority under the 1968 Act in relation to the provision of community care services to an adult with incapacity.

This involves:

- considering what actions and decisions will be of **most benefit** to the adult – and what decision or action will be the **least restrictive** of the adult's freedom, consistent with the benefit to be achieved.
- Taking account of the **past and present wishes and feelings of the adult** and in doing so, supporting the person to participate in the decision-making process as far as possible, with appropriate assistance. This should include considering the benefit of involving an independent advocate.

- So far as is practicable, considering the **views of significant others** in the life of the adult to assess whether there is agreement or disagreement on the proposed care intervention. This will include their carer/s, relatives, friends, proxies (with powers other than those relevant here), health and social care professionals, and others with an interest.

Local authorities should provide access to a local advocacy service for those with a mental disorder under the Mental Health (Care and Treatment) (Scotland) Act 2003⁵.

Assessment of needs and risks

19.2 **Where the needs assessment gives rise to care and protection concerns, a specialist risk assessment may be needed.**⁶ This will inform considerations as to whether an order is necessary in terms of the criteria set out in sections 53(3) and 57(2) of the 2000 Act. This may include circumstances where there is a severe family conflict about the future care of the adult, or where the adult themselves is resisting help.

Deprivation of liberty

19.3 Consideration must be given as to whether the proposed care intervention would amount to a “deprivation of liberty” under Article 5, ECHR. **Factors to consider in assessing whether a person is or is likely to be deprived of their liberty are set out in Annex A.** Where the conclusion is reached that the circumstances amount to deprivation of liberty, then an order will be required to ensure that such deprivation is in accordance with a procedure prescribed by law in terms of Article 5, ECHR.

Assessment of financial management arrangements

19.4 Because welfare decisions often have financial implications it will be necessary to assess whether the adult is also unable to manage his/her finances or deal with legal contracts (such as a tenancy agreement, or the sale of a house etc) in relation to the decision in hand. It will be essential to find out if anyone has relevant powers over the adult’s property and finances. Where no arrangements are in place an assessment of the financial circumstances of the person will be needed in order to decide if any financial interventions will be appropriate. (See code of practice for local authorities, chapter 3).

Recording decisions and informing interested parties

20 The minute of the case conference or ‘record of views’ (where a review has been conducted outwith a case conference) will provide the key record of decisions taken, including arrangements for future reviews. **It is essential to record the decision about which power to use to provide services and the reasons for taking this decision.** In addition to the record, a formal letter should be sent to the person, his/her primary carer, independent advocate (where there is one) and relevant professionals. The letter should:

- inform them of the outcome of the case conference/review;
- confirm what care package and or actions were agreed; and

⁵ Mental Health (Care and Treatment)(Scotland) Act 2003, Section 259.

⁶ Scottish Executive, National Training Framework for Care Management (March 2006), Module 2 session 5.

- state clearly whether or not an order is going to be sought, with reasons for the decision, and arrangements for the next review.

A copy of this letter should be placed on the adult's file.

21 Where the local authority has decided either to apply for an order under the 2000 Act or to use the power in the 1968 Act in order to provide a community care service or services, the person, his/her independent advocate (if there is one), anyone else providing support, and others with an interest in the person's welfare, should be given written information about their right to object i.e. about the local authority's complaints procedure, the role of the Scottish Public Services Ombudsman, and about agencies offering independent advice, including legal advice.

Monitoring and review

22 Routine arrangements for monitoring and review of the person's care, as set out in guidance for assessment and care management,⁷ will need to be put in place and followed rigorously, whether action has been taken under the 1968 Act or the 2000 Act. It should be recognised that changes may occur for the individual and in their relationship to the social and physical environment which could have implications for the power under which the local authority can act. Reviews should explicitly consider whether any such change affects previous decisions about whether the person is or is likely to be deprived of their liberty in terms of Article 5, ECHR.

SUMMARY

23 Which power a local authority decides to use in each case is a matter for judgement and decision by the authority. However, the following features would be present in a case where the powers and duties contained in the 1968 Act would be sufficient to allow a local authority to move an adult to a care home or make other significant changes to care arrangements:

- there is no proxy with relevant authority and there is no application for an order under the 2000 Act with relevant powers in the process of being determined; and
- the risk assessment indicates that there are no issues that would warrant an order under the 2000 Act; and
- it is considered that the adult will not be deprived of his or her liberty under Article 5, ECHR; and
- there would be no other benefit to the adult in applying for an order.

⁷ Scottish Executive (10 August) guidance on Care Management in Community Care(CCD8/2004) paragraphs 32-35.

In addition to these features, indicators that a care intervention under the 1968 Act may be appropriate would be:

- the person does not disagree with proposed action; it appears that he/she is unlikely to indicate an unwillingness to remain in the care arrangements;
- all interested parties agree with care intervention proposed.

24 A local authority should obtain an order under part 6 of the 2000 Act where:³

- the circumstances in section 53 and 57 arise, i.e. it appears to the local authority that the adult is incapable, no application has been made for an order in relation to the decision in question, and an order is necessary for the protection of the property, financial affairs or personal welfare of the adult; and/or
- in providing the care intervention needed, the circumstances amount to a deprivation of liberty;

In addition to these features, indicators that a care intervention under the 2000 Act may be appropriate would be:

- the person with impaired capacity is **opposed to the proposed course of action as far as can be ascertained;**
- the carer/family members have expressed a different view to that of the person and/or the health and social work professionals involved with the needs assessment and care plan, or there is disagreement amongst professionals. In such cases, where no agreement can be reached, local authorities may conclude that the only way to protect the personal welfare of the individual would be through an application for an order and a hearing in front of a sheriff. **Even where there is doubt about how convincing the evidence may be in court, where concerns remain over the capacity of the individual to protect their own welfare and there is such a disagreement, the matter should be placed before the court for a decision.**

ANNEX A

ASSESSING WHETHER THE PROPOSED CARE INTERVENTION AMOUNTS TO “A DEPRIVATION OF LIBERTY” IN TERMS OF ARTICLE 5, ECHR

1 Where a person lacks the capacity to give informed consent to the proposed care intervention, consideration must be given as to whether the circumstances would amount to a “deprivation of liberty”. This guidance seeks to summarise the factors identified as relevant by the ECtHR cases to date. Professionals using this guidance should take account of these factors in assessing whether a person in their care may be deprived of their liberty.

2 “Deprivation of liberty” is not defined in Article 5, ECHR itself. However, the European Court of Human Rights (ECtHR) and domestic courts have considered its interpretation. What amounts to a deprivation of liberty will depend on the circumstances of each individual case. It is therefore not possible to have rigidly defined criteria stating what will and will not amount to a deprivation of liberty. It will depend on the particular care intervention/package that is being proposed for the adult and the circumstances of the adult him or herself.

3 However case law can provide us with an indication of what might be considered to amount to a deprivation of liberty. A recent example of a decision of the ECtHR in this area was in the case *H.L. v UK* (referred to as “Bournewood”).⁸ The ECtHR in Bournewood considered that what amounts to a “deprivation of liberty” will depend on the specific situation of the person concerned, taking account of a whole range of factors arising in their particular case, such as the type, duration, effects and manner of implementation of the measure in question. The court further elaborated that the distinction between deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance. In brief this particular case concerned an adult with autistic spectrum disorder who did not have the capacity to consent and whose carers were opposed to his being resident in hospital. The ECtHR decided that there had been a deprivation of liberty and as it had not been in accordance with a procedure prescribed by law it breached Article 5.

4 Another case in point is that of *H.M. v Switzerland*⁹. In that case a vulnerable but mentally capable woman was placed in a nursing home against her will. The ECtHR concluded that placing her in a nursing home was a responsible measure taken by the competent authorities in the applicant’s own interests in order to bring about the necessary medical care and adequate living conditions and was not a deprivation of liberty. The case of *Muldoon*¹⁰ is a Scottish case in which the sheriff considered the above two ECtHR cases in the circumstances of compliant but incapable adult who was placed in a nursing home without a Part 6 order having been obtained. The sheriff concluded that where an adult was compliant with a regime, but legally incapable of consenting to or disagreeing with it, then the adult was deprived of his or her liberty and that therefore that step should not be taken without express authority governing it (i.e. a Part 6 order). The Scottish Executive does not agree with this interpretation of the ECtHR cases. The ECtHR cases make it clear that all of the circumstances of the case have to be taken into account and that incapacity of itself does not automatically mean that there will be a deprivation of liberty in the provision of the care

⁸ (2004) 40 EHRR 761

⁹ (2002) ECHR 157

¹⁰ 2005 SCLR 613

intervention/package to that adult. It is of note that in the case of *H.M. v Switzerland* the ECtHR concluded that there had been no deprivation of liberty even where the adult was capable.

Identifying deprivation of liberty

5 **What amounts to deprivation of liberty depends on the interaction and accumulation of factors, as well as degree and intensity, in relation to the specific circumstances of the individual.** It could be argued that institutional care will always be more restrictive than care at home, but this may not necessarily be the case. **This guidance should therefore be applied regardless of care setting.**

6 The following list of factors is illustrative of those which may be relevant in considering whether the care intervention might constitute “deprivation of liberty”. Consideration needs to be given to whether deprivation, within the meaning of Article 5 ECHR, is likely to arise either immediately or in the future; and, if so, whether such deprivation is justified in the light of all the relevant factors. It will be necessary to consider the combined impact of all the restrictions place upon the adult.

- Factors affecting personal autonomy, including:
 - **the person’s past and present wishes** – daily choices available within the care setting i.e. activities, meals, bedtimes, etc.
 - **access to resources** to support physical and social autonomy and interests as far as possible;
 - **the extent/nature of limitations on contact** with the outside world, including for example: contact with their partner, spouse, family members, friends, others with an interest in the person; opportunity for visits, telephone contact; access to local community. If the person is prevented from leaving the facility, whether by locked doors or restraint, that would be a factor in considering whether or not there is deprivation of liberty. **However, restrictions placed for the person’s protection would not necessarily amount to deprivation of liberty if opportunities exist to see family and friends and go out accompanied.** A person is not deprived of their liberty simply because they lack the physical ability to leave or the mental capacity to form a genuine intention to leave;
 - **internal design of physical environment and accessibility** - the extent/nature of limitations on living/moving about within a care setting. For example, if the person is not allowed any freedom of movement within the facility they are probably deprived of their liberty. Restrictions which are unavoidable within a group living situation and which apply to all residents, would be unlikely in themselves to constitute deprivation of liberty. But this would depend on the context and the extent of other restrictions imposed on the person concerned;
 - **external physical environment and access** e.g. safe garden. If the person is accustomed to and enjoys being outside for a while each day and is prevented

from doing so, then this will be a factor to consider in terms of deprivation of liberty;

- **the use of restraints** e.g. limitations on movement such as placing the person in seating or situations from which they do not have the physical ability to remove themselves/duration of any limitations. Although the use of restraint to administer treatment or care would not necessarily constitute a deprivation of liberty in the absence of any other restrictions, it should be seen as an indicator that a person's wishes may be being over-ridden and careful consideration should be given as to whether they are deprived of their liberty. (See the Mental Welfare Commission's Guidance (2006) 'Rights, Risks and Limits to Freedom' and Guidance on 'Covert Medication (2007);

- **skills and abilities of staff** to communicate with person and quality of that interaction.

- **Effect of change in care regime** – consider whether the changed care regime will be more or less restrictive than the person is accustomed to e.g. will the person have greater freedom of choice and less restricted environment, for example, the person with learning disability moving from hospital to community; person with dementia being moved from isolated top tenement flat to ground floor room in a care home with a safe garden area.

7 Deciding what amounts to “deprivation of liberty” will depend on the circumstances of each individual case. Such decisions may involve a fine balancing of elements and in such cases practitioners might want to consider taking advice from their own legal departments.

