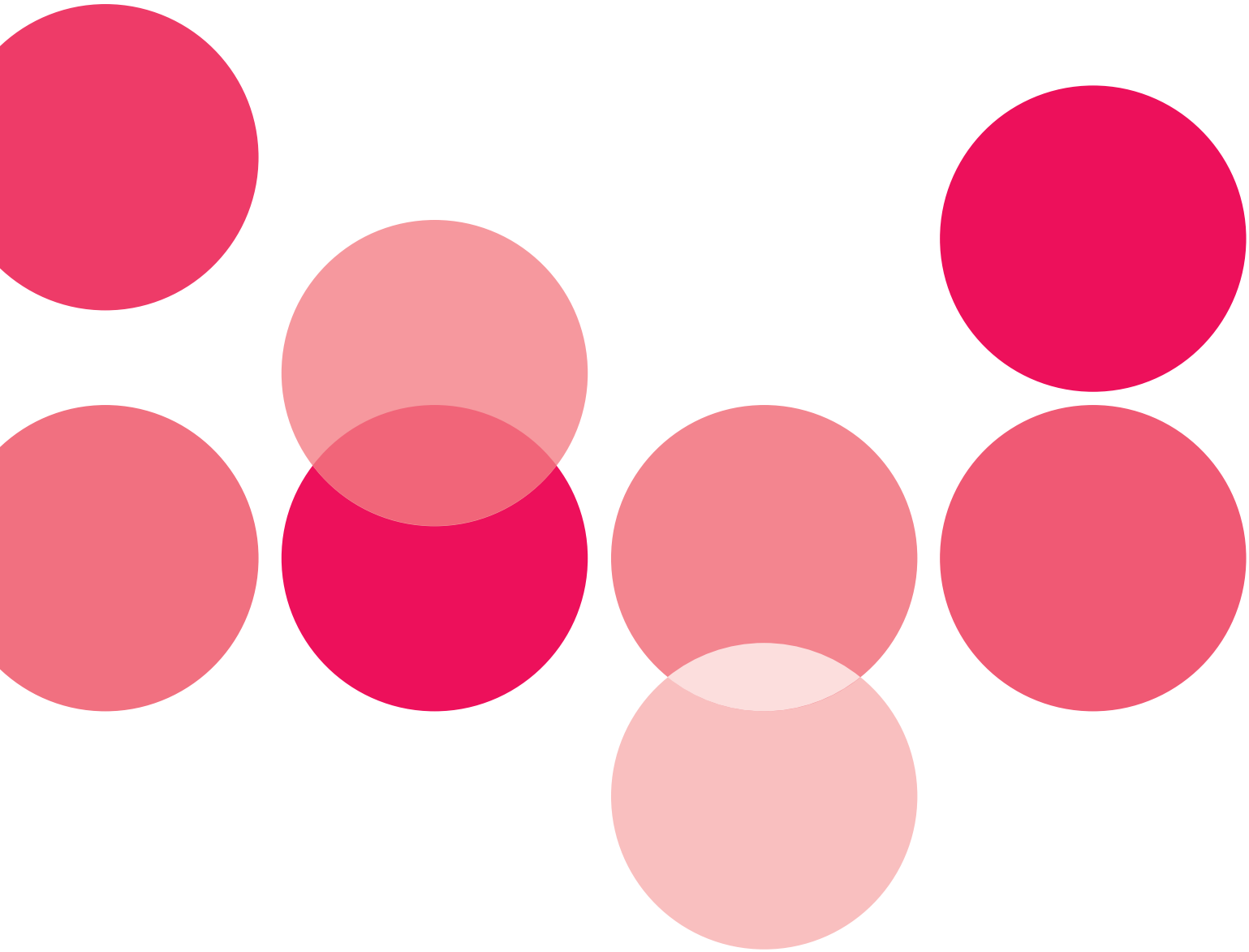
ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

Code of Practice

For Local Authorities Exercising Functions under the 2000 Act

1 April 2008



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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Government by RR Donnelley B58417 11/08

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Introduction

Who this code is for

This code of practice is primarily for local authority staff with duties and powers under the Adults with Incapacity (Scotland) Act 2000 ('the 2000 Act'). It is particularly relevant to mental health officers, managers of community care teams, learning disability teams, and mental health teams. It will also be of relevance to NHS staff directly involved in joint community care teams and hospital discharge teams.

In addition, it will be important for voluntary and private sectors to be familiar with the code for a wide range of reasons – from taking on roles contracted out by the local authority through to awareness of triggers of assessment for a possible formal intervention by the local authority.

What does the code cover?

It contains detailed guidance on all the statutory functions which are conferred on local authorities under the 2000 Act. It supersedes the code published in March 2001 to take into account subsequent changes to the 2000 Act, and in particular those introduced in Parts 2 and 3 of the Adult Support and Protection (Scotland) Act 2007 ('the 2007 Act'). **A summary of all the amendments to the 2000 Act is available at:** http://www.scotland.gov.uk/topics/justice/civil/awi. Throughout the codes of practice, the Part 1 'General Principles' are referred to as 'the principles'.

The code provides guidance, where appropriate, in relation to measures under the 2000 Act, and to other measures which continue to be available where the 2000 Act does not apply or is not invoked. Importantly, it incorporates the **'Guidance for local authorities: provision of community care services to adults with incapacity' (CCD5/2007, 30 March 2007)** which sets out the powers which local authorities have under the Social Work (Scotland) Act 1968 (the 1968 Act), to provide services to adults who lack capacity to consent to receiving services. (See chapter 4). It should be read in conjunction with Scottish Executive Guidance on Care Management in Community Care (CCD8/2004). Readers should also be familiar with the codes of practice for other parts of the 2000 Act.

In addition, the code highlights areas where consideration of interface issues with other legislation is particularly relevant, especially the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) and the Adult Support and Protection (Scotland) Act 2007 (the 2007 Act).

Status of the code

Section 13 provides that Scottish Ministers must prepare codes of practice containing guidance for those exercising functions under the 2000 Act. This code is for local authorities exercising functions under the 2000 Act.

Whilst these codes of practice are guidance and therefore not binding, failure to comply with them may be one of the factors considered by the Public Guardian, the Mental Welfare Commission, the local authority or the sheriff in considering matters such as the continuing suitability of the person to exercise those functions, in investigating circumstances in which the adult appears to be at risk or in applications before the court.

Responsibility of Chief Social Work Officer to implement the code

This code suggests that it should be the responsibility of the chief social work officer of each local authority to ensure that the code of practice is implemented by all staff for whom it is relevant, so far as he/she has control of such staff.

Terms used

- Throughout the code of practice the Adults with Incapacity (Scotland) Act 2000 is referred to as the **'2000 Act'**.
- **'adult'** refers to the person aged 16 and over with impaired capacity – also referred to as the 'person' or 'individual' in this code.

- **'carer'** refers to the partner, spouse, family member or friend who provides cares, in an unpaid capacity, for an adult who lacks the ability to make some or all decisions for themselves.
- **'primary carer'** means the person or organisation primarily engaged in caring for the adult. The primary carer will normally be a relative or friend but could be the service manager responsible for the provision of the day to day care needs of the adult (for example, where the adult is in residential care).
- **'named person'** means the person nominated (under the Mental Health (Care and Treatment)(Scotland) Act 2003, by the adult to represent his/her interests or give support. This is automatically the primary carer where the person had not named someone else.
- **'intimation'** – term used for informing relevant parties (nearest relative, carer, primary carer, named person and anyone else with an interest in the welfare of the adult) of the application and allowing the opportunity for comment or objection.
- **'relevant others'** is used to refer to the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, named person, primary carer, any other proxy, and any other person with an interest in the adult's welfare, such as the care manager.
- **'independent advocate'** this is someone employed by an independent advocacy service to support the adult in having his/her views and wishes heard. This is different from a legal advocate who represents someone at court.
- **'caution'** this is bond which serves as a type of insurance to safeguard the adult form loss caused by the actions of the guardian or intervener.
- **'security'** this means an alternative to caution to provide adequate protection to the adult's estate.
- **'order'** is used where reference is to both intervention and guardianship orders.
- **'interlocutor'** is the decision or order of the court in relation to the application made (a copy of which is sent to the OPG).
- **'social work officer'** is used to cover social work services staff in the broad sense, including, where appropriate, qualified social work officers, occupational therapists, etc., employed to provide social work or similar services.

- **'residential care'** refers to all categories of care home, including those which provide nursing care/specialist nursing care.
- **'proxy'** will be used to refer to anyone who has been empowered under the 2000 Act to take decisions or action on behalf of an adult whose capacity is impaired. Sometimes an officer will also be a proxy, in particular if the officer is exercising powers under an intervention order or carrying out the day to day duties of welfare guardianship on behalf of the chief social work officer.
- **'OPG'** refers to The Office of the Public Guardian (Scotland).
- **'MWC'** refers to The Mental Welfare Commission.
- **'MHO'** refers to Mental Health Officer.
- **'CSWO'** refers to the Chief Social Work Officer.
- **'practising solicitor'** is a solicitor holding a practising certificate issued in accordance with Part 2 of the Solicitors (Scotland) Act 1980 (c.46).
- **'the 1968 Act'** refers to the Social Work (Scotland) Act 1968.

Chapter 1

OVERVIEW OF THE 2000 ACT

1.1 The law of Scotland generally presumes that adults (those aged 16 or over) are legally capable of making personal decisions for themselves and managing their own affairs. That presumption can only be overturned if there is evidence that the person's capacity is impaired in relation to the matter in hand. The 2000 Act sets out a framework for regulating intervention in the affairs of adults who have impaired capacity, in the circumstances covered by the 2000 Act. The framework is underpinned by principles and enables interventions to be tailored to the needs of the individual.

INCAPACITY

1.2 'Incapacity' is defined in the 2000 Act only for the purposes of the 2000 Act. The 2000 Act recognises that a person may be legally capable of some decisions and actions and not capable of others.

1.3 The 2000 Act allows for intervention in a wide range of property, financial or welfare matters where the adult lacks capacity. But an intervention is only permitted where the adult lacks capacity in relation to the subject matter of the intervention. It is necessary to consider whether the adult lacks capacity in relation to the relevant matter each time a decision or action needs to be taken.

1.4 For the purposes of the 2000 Act 'incapable' means incapable of:

(a) acting; or

(b) making decisions; or

(c) communicating decisions; or

(d) understanding decisions; or

(e) retaining the memory of decisions

in relation to any particular matter, by reason of mental disorder or of inability to communicate because of physical disability.

With regard to 'communicating a decision' a person should not be automatically assumed to lack capacity because of a severe communication difficulty. All means appropriate to the needs of the individual should be used to assist the person to communicate. This may include specialist support; assistance from the person who knows the individual well or/and mechanical aids. For further details see Annex 2.

1.5 No person shall be treated as suffering from mental disorder by reason only of: promiscuity or other immoral conduct; sexual deviancy; dependence on alcohol or drugs.

1.6 It is central to the 2000 Act that adults must not be labelled as incapable on the basis of a diagnosis alone, or because they behave in an unusual or unwise manner. The assessment of capacity must be made in relation to the particular matter or matters about which a decision or action is required.

An adult does **not** have impaired capacity simply by virtue, for example, of:

- being in receipt of community care services;
- having a psychotic illness;
- having dementia, particularly in the early stages;
- having difficulties with speech or writing;
- having an addiction;
- having learning difficulties;
- being vulnerable or at risk from him or herself or others;
- behaving irrationally;
- having a history of offending.

THE PRINCIPLES

Taking account of the principles of the 2000 Act

1.7 The 2000 Act requires the following principles to be applied when deciding which measure will be most suitable for meeting the needs of the individual. The principles must also be used whenever decisions need to be made on behalf of the adult. The 2000 Act aims to protect people who lack capacity to make particular decisions, but also to support their involvement in making decisions about their own lives as far as they are able to do so. Any decision or action taken under the 2000 Act will only be lawful if it can be demonstrated that the principles have be applied.

These principles must also be applied where an intervention is authorised under s13ZA of the 1968 Act.

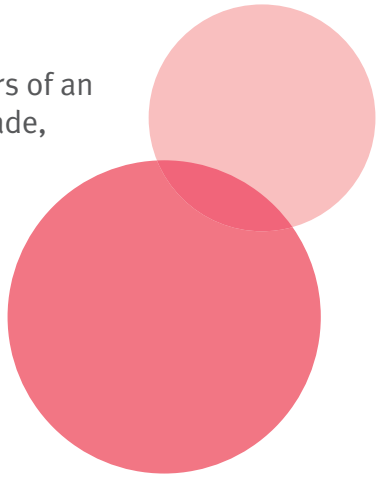
The principles apply to anyone – private individual or professional who is carrying out a function or exercising a duty under the 2000 Act. For example, a care manager with the community care team will need to consider the principles in assessing whether the person who lacks capacity to consent, should be provided with the services he or she needs under the 1968 Act or the 2000 Act. See chapter 4 for detailed guidance. All action should stem from the needs of the adult and must be for his or her benefit.

Principle 1 - benefit

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

Principle 2 - least restrictive option

Where it is determined that an intervention in the affairs of an adult under or in pursuance of the 2000 Act is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.



Principle 3 - take account of the wishes of the adult

In determining if an intervention is to be made, and, if so, what intervention is to be made, account shall be taken of the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult. Before concluding that someone is totally unable to communicate and therefore lacks capacity, strenuous efforts must be made to assist and facilitate communication – using whatever method is appropriate to the needs of the individual, including advice and assistance from a speech and language therapist.

It is important to note that it is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained by any means possible.

Principle 4 - consultation with relevant others

In determining if an intervention is to be made, and, if so, what intervention is to be made, account shall be taken of the views of:

- the nearest relative and primary carer of the adult;
- the named person;
- any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention;
- any person whom the sheriff has directed should be consulted; and
- any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible;

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

Principle 5 - encourage the person to exercise whatever skills he/she has; and the development of new skills

Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act shall, in so far as it is reasonable or practicable to do so, encourage the person to exercise whatever skills he/she has concerning property, financial affairs or personal welfare as the case may be, and to develop new such skills. This would also be normal good practice for others providing support to the person.

1.8 The principles will be referred to throughout this code as they apply to local authorities:

- when considering an intervention under the 2000 Act or under section 13ZA of the Social Work (Scotland) Act 1968 (the 1968 Act);
- in exercising their functions under the 2000 Act.

MEASURES PROVIDED UNDER THE 2000 ACT

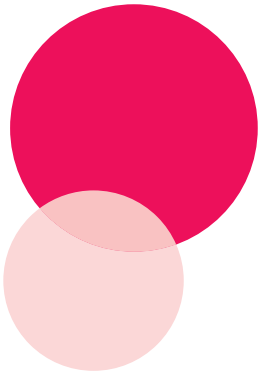
1.9 The 2000 Act provides a hierarchy of measures to act or make decisions in relation to the welfare, property, financial affairs of adults who are unable to do so for themselves. Briefly, these measures are as follows:

Powers of attorney

Under part 2, a person may appoint an attorney with powers over property and financial affairs commencing or continuing on incapacity (referred to as 'a continuing attorney'); and/or an attorney with powers over personal welfare, exercisable only on his/her own loss of capacity (referred to as 'a welfare attorney'). For further details see the Code of Practice for Continuing and Welfare Attorneys.

Access to funds - withdrawal of funds (previously referred to as intromission with funds)

Under part 3, a person (usually a carer) or an organisation, including local authorities, may apply to the Public Guardian for authority to withdraw funds from the account of an adult, to provide for the adult's day to day care. For further details see the Code of Practice for people authorised to access funds. Additional guidance for organisations is available from the Office of the Public Guardian (Scotland) (OPG).



Management of residents' finances

Under part 4, authorised establishments (care homes and hospitals) may manage the funds of resident adults up to a prescribed limit. (For further details see the Code of Practice for managers of authorised establishments under Part 4 of the 2000 Act.)

Medical treatment and research

Under part 5, medical practitioners are given a general authority to treat adults where there is a certificate of incapacity in relation to specific treatments or medical treatment plan – subject to certain safeguards and exceptions. In addition, certain other health care practitioners, if accredited to do so, have authority to provide treatments which they are qualified to administer. It should be noted that proxies with welfare powers which include medical decision-making powers have the right to be involved in treatment decisions (where practicable and reasonable). The principles also require that others with an interest in the person should be consulted, again, where practicable and reasonable.

Medical research involving adults who cannot consent is also authorised subject to safeguards and conditions. (For further details see Code of Practice for persons authorised to carry out medical treatment or research under Part 5 of the 2000 Act.)

Intervention orders and guardianship

Under part 6, it is possible to apply to the sheriff for an intervention order to deal with clearly defined, 'one-off' financial, property or personal welfare matters in relation an adult. A guardianship order can include powers over property, financial affairs or personal welfare or a combination of these. In this code a guardian with powers over financial affairs and property is referred to as a 'financial guardian' and a guardian with powers over personal welfare is referred to as a 'welfare guardian'.

CO-EXISTENCE OF THE 2000 ACT WITH OTHER LEGISLATION

1.10 The 2000 Act does not authorise intervention in every matter where an individual may have impaired capacity. For example consent to marriage or making a will are not matters where anyone else, either within or outwith the powers conferred by the 2000 Act, can consent on behalf of another person. Certain medical treatments are also outwith the scope of the 2000 Act, in particular those specified in the Mental Health (Care and Treatment) (Scotland) Act 2003 ('the 2003 Act').

1.11 In many circumstances it will be appropriate for the local authority to use its powers under the 1968 Act to provide services to an adult who lacks capacity to consent to receiving services (for detailed guidance see chapter 4).

1.12 Social work officers need to be aware of the inter-relationship between Part 1 of the Adult Support and Protection (Scotland) Act 2007 (the 2007 Act), and the 2000 Act. Cases may arise which require careful consideration as to whether an urgent intervention is needed because of the risk to which the person is exposed, or whether an application for guardianship by the local authority might be more appropriate. Action under the former might lead to an assessment that guardianship is required to protect the person in the longer term.

1.13 The officer should also be aware that the 2000 Act co-exists with other interventions in the affairs of an adult. For example in relation to financial matters it is possible that:

- a joint 'either or survivor' bank or building society account may have been put in place whilst the adult had capacity – this can continue to be operated by the other signatory to the account;
- a trust has been set up for the benefit of the adult;
- someone has been appointed by the Department of Work and Pensions (DWP) to receive benefits on behalf of the adult.

1.14 If an officer is in doubt as to whether an intervention can be authorised under the 2000 Act, or under some other statutory or common law provision, or cannot be authorised at all, then he/she should seek legal advice.

LIMITATION OF LIABILITY

1.15 Section 82 of the 2000 Act provides that no liability shall be incurred by a guardian, a continuing attorney, a welfare attorney, a person authorised under an intervention order, a withdrawer or the managers of a residential establishment for any breach of any duty of care or fiduciary duty owed to the adult if he, she or they have:

(a) acted reasonably and in good faith and in accordance with the principles; or

(b) failed to act and the failure was reasonable and in good faith and in accordance with the principles.

This is a crucial provision which emphasises the importance of anyone exercising powers under the 2000 Act being fully familiar with the principles and applying them properly to decisions and actions taken.

STATUTORY BODIES WITH RESPONSIBILITIES UNDER THE 2000 ACT

1.16 The statutory bodies given responsibilities under the 2000 Act are:

The sheriff

1.17 The sheriff court is the main forum for proceedings under the 2000 Act. A detailed description of proceedings under the 2000 Act and the powers of the sheriff are given in paragraphs 1.22-39 below and in subsequent parts of this code wherever relevant. Where there is doubt about how to proceed in relation to a particular case, or conflict between the local authority and others involved, it may be necessary to seek directions from the sheriff. Only the sheriff can make an intervention or guardianship order. The normal appeal mechanisms from the sheriff court to the sheriff principal, and thence to the Court of Session, apply to proceedings under the 2000 Act.

The Court of Session

1.18 The Court of Session provides a court of appeal from decisions of the sheriff principal. It is also the court which deals, at the first instance, with disputes over medical treatment.

The Public Guardian

1.19 The Public Guardian registers powers of attorney, intervention orders and guardianship orders, and authorises access to funds under part 3. The Public Guardian's investigative and supervisory functions are generally confined to property and financial affairs. The Office of the Public Guardian (OPG) also has an advice, information and training function. For further details consult the website of the OPG at www.publicguardian-scotland.gov.uk.

The Mental Welfare Commission

1.20 The Mental Welfare Commission (MWC) retains a general oversight of individuals whose incapacity is due to a mental disorder. The MWC's responsibility is to the adult on guardianship but they are interested in the views of the guardian on any matter affecting the health, welfare and safety of the adult. The MWC has investigatory powers in relation to those exercising personal welfare powers, but is only likely to use these where dissatisfied with the outcome of an investigation by a local authority. The MWC's supervisory and investigative role is discussed in more detail in chapters 8 and 9 of this code. For further details consult the MWC website at: www.mwcscot.org.uk.

Local authorities

1.21 The functions of local authorities under the 2000 Act are set out in Chapter 2 and good practice in relation to carrying out specific functions is provided in the body of this code.

PROCEDURES AND POWERS OF THE SHERIFF COURT AND COURT OF SESSION

1.22 The courts will always be involved in authorising local authorities to supervise proxies, or undertake the functions of proxies themselves. There follows a description of the general procedures that apply, and the powers of the courts under part 1 of the 2000 Act. The description of sheriffs' detailed powers with respect to attorneys, intervention orders and guardianship will be found in later parts of the code. It's very important for officers involved in applying the 2000 Act, including legal staff of a local authority, to be familiar with the legal procedures that have to be followed under the 2000 Act and the powers that are available to the courts.

Applications and other proceedings and appeals (section 2 of the 2000 Act)

1.23 An application to the sheriff under the 2000 Act shall be made by summary application.

1.24 If the applicant disagrees with the sheriff's decision, there is a right of appeal to the sheriff principal. The sheriff principal will consider the appeal and may allow it to be taken forward to the Court of Session. Sheriff Court Rules are in place to cover such applications.

Sheriff's powers to make consequential or ancillary orders (section 3 of the 2000 Act)

1.25 In an application or other proceedings under the 2000 Act, the sheriff may make such consequential or ancillary order, provision or direction as he or she considers appropriate.

1.26 Without prejudice to the generality of the sheriff's powers, the sheriff may:

- make any order granted by him/her subject to such conditions and restrictions as appear to him/her to be appropriate. Such conditions and restrictions can be varied on the application of the person authorised under the order; the adult; or any person entitled to apply for the order;
- order that any reports relating to the person who is the subject of the application or proceedings be lodged with the court or that the person be assessed or interviewed and that a report of such an assessment or interview be lodged;
- make such further inquiry or call for further information as appears to him/her to be appropriate;
- make such interim order as appears to him/her to be appropriate pending the disposal of the application or proceedings.

1.27 On an application by any person (including the adult him/herself) claiming an interest in the property, financial affairs or personal welfare of an adult, the sheriff may give such directions to any person exercising:

- functions conferred by the 2000 Act; or
- functions of a like nature conferred by the law of any country,

as to the exercise of those functions and the taking of decisions or action in relation to the adult as seem to him/her to be appropriate.

Appointment of safeguarder (Part 1 section 3 (4) to (5))

1.28 In an application or any other proceedings under the 2000 Act, the sheriff:

- shall consider whether it is necessary to appoint a person for the purpose of safeguarding the interests of the adult who is the subject of the application or proceedings. (The safeguarder's role is to represent the interests of the adult. This includes advising the sheriff of the adult's views so far as it is possible to ascertain them.); and

- If the sheriff does not think it appropriate for one safeguarder to act both to protect the adult's interests and to advise the sheriff of the adult's views, he or she may appoint a another person to inform the court about the adult's views.

Independent Advocacy

1.29 The 2000 Act makes provision that sheriffs must take account of the views expressed on behalf of the adult by a person providing independent advocacy services in any proceedings under the 2000 Act.

Displacement of nearest relative

1.30 Under section 4(1) of the 2000 Act it is possible for an adult to apply to the sheriff to have the nearest relative displaced, or to have information withheld from the nearest relative. The 2000 Act allows any other person with an interest in the welfare of the adult to apply to displace the nearest relative and the sheriff court also has the power to do so. The sheriff may nominate another relative to take the place of the nearest relative or may order that no-one shall exercise the functions of nearest relative. Such applications cannot be made in advance of any incapacity. It also provides that a sheriff court may make an order different to the one applied for, e.g. naming a different person from the person specified in the application.

Directions that intimation to the adult is not required

1.31 Under section 11, where intimation or notification to the adult would normally be required, and the court considers that the intimation or notification would be likely to pose a serious risk to the health of the adult the court may direct that such intimation or notification shall not be given. Under Sheriff Court Rules evidence from two medical practitioners is required.

Appointment of an interim guardian

1.32 Under section 57(5), the sheriff may, on an application being made to him, at any time before the disposal of the application for a guardianship order, make an order for the appointment of an interim guardian. Interim guardianship can be for a period of 3 months, up to a maximum of six months, where this is appropriate in the circumstances of the case, or until the appointment of a guardian whichever is sooner.

Granting an application for guardianship

1.33 Under section 58(1), where the sheriff is satisfied that:

- the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable; and
- no other means provided by or under the 2000 Act would be sufficient to enable the adult's interests to be safeguarded or promoted,

he or she may grant the application.

1.34 Under section 58(4), where the sheriff grants the application he/she shall make a guardianship order appointing the individual or office holder nominated in the application to be the guardian of the adult. This can be for any period including an indefinite period, but 3 years is mentioned in the section. Therefore if a period other than 3 years is wanted, the applicant will have to make a case for this.

Having regard to previous orders

1.35 Under section 58(2), the sheriff must have regard to any intervention order or guardianship order which may have been previously made in relation to the adult, and to any order varying, or ancillary, to such an order.

Possible reduction to intervention order

1.36 Under section 58(3), where the sheriff is satisfied that an intervention order would be sufficient to meet the purpose for which guardianship is sought, he/she can make an intervention order instead of a guardianship order. It should be noted that the sheriff does not have the reverse power i.e. to change an intervention order to a guardianship order where he/she feels the powers requested are inadequate. The applicant would need to start the application process again.

Authorising the supervision of proxies

1.37 The courts can authorise local authorities to supervise welfare attorneys and welfare interveners.

Replacement or removal of a guardian by the sheriff

1.38 Under section 71 of the 2000 Act, the sheriff, on an application made to him/her by an adult subject to guardianship or by any other person claiming an interest in the adult's property, financial affairs or personal welfare, may:

- replace a guardian by an individual or office holder nominated in the application if he or she is satisfied, in relation to an individual that he or she is suitable for appointment;
- remove a guardian from office if he or she is satisfied:
  - that there is a substitute guardian who is prepared to act as guardian; or
  - in a case where there are joint guardians, that the remaining guardian; or
  - guardians are prepared to continue to act; or
- recall a guardianship order or otherwise terminate a guardianship if he or she is satisfied:
  - that the grounds for appointment of a guardian are no longer fulfilled; or
  - that the interests of the adult in his or her property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship.

Intervention orders and guardianship in criminal proceedings

1.39 Guardianship and intervention orders may be made by the criminal court as a disposal for those who have been found guilty of committing an offence under amendments made by the 2000 Act to the Criminal Procedure (Scotland) Act 1995 (the 1995 Act). The evidence required for making such an order will be the same as under the 2000 Act, i.e. it will be made for the protection of the individual's personal welfare and will require 2 medical certificates and a report from an Mental Health Officer (MHO) or the Chief Social Work Officer (CSWO). However, an order cannot be made under the 1995 Act if there is already one in place with the same powers under the 2000 Act. (For further details see chapter 6 paras 6.77-80.)

Chapter 2

FUNCTIONS OF LOCAL AUTHORITIES UNDER THE 2000 ACT

SUMMARY OF LOCAL AUTHORITIES FUNCTIONS (BY SECTION OF THE 2000 ACT)

2.1 The 2000 Act confers a wide range of functions on local authorities. These functions are summarised as follows:

Under section 10

To supervise guardians and attorneys

To supervise a guardian appointed with functions relating to the personal welfare of an adult in the exercise of those functions. To supervise a welfare attorney where ordered to do so by the sheriff. The supervisory functions of local authorities under the 2000 Act are dealt with in detail in chapter 8 of this code.

To investigate circumstances where personal welfare of adult seems to be at risk

To investigate any circumstances made known to them in which the personal welfare of an adult seems to be at risk. This is an express statutory protective function for local authorities. (See chapter 9.)

To provide information and advice to proxies with welfare powers

The local authority has a general duty to provide information and advice to those exercising welfare functions under the 2000 Act, i.e. attorneys, guardians and interveners, when requested to do so. Although not specifically required by the 2000 Act it would be good practice for the local authority to provide information and advice (non-legal) to those who are not yet exercising such functions but are considering doing so either because an adult is already losing decision-making capacity; or appears to have lost the ability to make some or all decisions for him/herself or has never had full capacity to make decisions.

To investigate complaints in relation to those exercising welfare powers

To receive and investigate any complaints about the exercise of functions relating to the personal welfare of an adult made in relation to welfare attorneys, guardians or persons authorised under intervention orders. The investigation of complaints is a matter for local procedure. Special arrangements will be required for the separation of functions where it is an officer of the local authority who is the subject of the complaint or is the complainer. The investigative functions of local authorities under the 2000 Act are dealt with in detail in chapter 9 of this code.

To consult Public Guardian and MWC

To consult the Public Guardian and the MWC on cases or matters relating to the exercise of functions under the 2000 Act in which there is, or appears to be, a common interest.

Under section 53 of the 2000 Act

To apply for an intervention order where necessary and no-one else is doing so.

Where it appears to the local authority that an intervention order is necessary for the protection of the property, financial affairs or personal welfare of an adult, and that no application has been made or is likely to be made for such an order, the local authority is obliged to apply for an intervention order.

The local authority's duty to apply for an intervention order is dealt with in detail in chapter 6 of this code.

Under section 57(2)

To apply for guardianship order where no other means would be sufficient to safeguard the adult's interests - where it appears to a local authority that:

- an adult is incapable in relation to decisions about, or of acting to safeguard or promote his/her interests in, his/her property, financial affairs or personal welfare, and is likely to continue to be so incapable; and
- no other means provided by the 2000 Act would be sufficient to enable these interests to be safeguarded or promoted; and
- no application has been made or is likely to be made for a guardianship order; and
- a guardianship order is necessary for the protection of the property, financial affairs or personal welfare of the adult,

the local authority must apply for a guardianship order. Guidance on applying for and operating a guardianship order is provided in chapter 6 of this code.

'Other means' includes consideration of all relevant protective measures, statutory and non-statutory (see chapter 4).

Under section 57(3)

To provide reports to the sheriff relevant to applications for intervention orders or guardianship orders relating to personal welfare

The requirements for reports to be lodged in the court in relation to applications for intervention orders and guardianship are the same. Where the application relates to the welfare of a person whose impaired capacity is due to a mental disorder, the reports must include a report in prescribed form from the MHO. But where the person's welfare is in jeopardy because of his/her inability to communicate, the report must be made by the CSWO, who can delegate to a social work officer.

The function of the local authorities in providing relevant reports are dealt with in chapter 6 (where the local authority makes the application) and chapter 7 in relation to private applications. In particular, where someone other than the local authority applies for welfare guardianship, he/she must give notice of the application to the CSWO who must arrange for a report to the applicant within 21 days of the notice. This time limit is important.

Under section 59(1) and (2)

To act as welfare guardian where no-one else is applying to do so:

- where the guardianship order is to relate only to the personal welfare of the adult, the CSWO of the local authority may be appointed as guardian;
- where the guardianship order is to relate to the property and financial affairs and to the personal welfare of the adult and joint guardians are to be appointed, the CSWO of the local authority may be appointed guardian in relation only to the personal welfare of the adult.

These provisions, together with the local authority's duty to apply for guardianship where no-one else is doing so, effectively place a duty on the CSWO to become guardian if no other means of safeguarding welfare is appropriate.

Good practice in carrying out the functions of welfare guardian is set out in the chapter 6.

Under section 73(3)

To recall the personal welfare powers of a guardian

The local authority may recall the personal welfare powers of a guardian, at their own instance or on the application of any person claiming an interest, if it appears that:

- the grounds for appointment of a guardian with such powers are no longer fulfilled; or
- the interests of the adult in his or her personal welfare can be satisfactorily safeguarded; or
- promoted otherwise than by guardianship.

The local authority's functions in relation to recall of guardianship are set out in chapter 6 of this code.

Under section 76

To arrange for transfers of guardianship where adult changes habitual residence

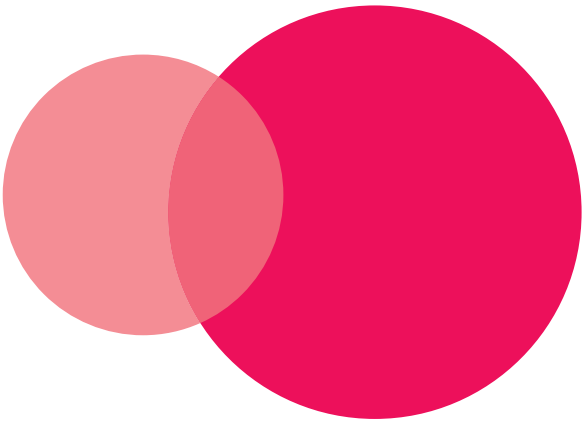
Where the CSWO of a particular local authority is the guardian, and an adult changes habitual residence to the area of another local authority, the CSWO of the first local authority must notify the CSWO of the second local authority. The CSWO of the second local authority becomes guardian on receipt of the notification and must make the appropriate notifications.

JURISDICTION OF LOCAL AUTHORITIES UNDER THE 2000 ACT

2.2 The jurisdiction of the local authority under the 2000 Act covers the adults habitually resident in the area of that local authority. The only exception to this is the duty under section 10(1) (d) to investigate circumstances in which the welfare of an adult appears to be at risk. This applies to any adult present in the local authority's area.

In such a case, current local rules or guidance should be followed, bearing in mind that the duty to provide a service precedes the need to obtain payment. If the adult is normally resident in the area of another local authority it will be essential for the local authority dealing with the case to contact and liaise with that authority.

2.3 These functions build on the general welfare and protective function of local authorities. They provide a set of tools by which welfare and protective functions can be more systematically and successfully carried out where mental incapacity is an issue in a particular case.



Chapter 3

INFORMATION, AWARENESS AND TRAINING FOR LOCAL AUTHORITY OFFICERS

POSSIBLE ROUTES OF CONTACT WITH AN ADULT WITH IMPAIRED CAPACITY

3.1 Problems arising from a person's impaired capacity to make some or all decisions for him/herself may come to the attention of the local authority for a variety of reasons. As a result, a wide range of officers may be the initial contact with the individual. It may not be evident to the officer who first has contact with the person whether or not he/she falls within the scope of the 2000 Act.

POSSIBLE FIRST LINE CONTACTS

3.2 Possible first line contacts with an adult who might fall within the scope of the 2000 Act therefore include officers:

- supporting those with learning difficulties. These could include anyone working in educational establishments, residential establishments or in the community working with young adults or those about to reach the age of 16;
- working with adults having mental illness;
- working with older people;
- assisting those in or leaving hospital;

- providing community care;
- dealing with substance abuse issues;
- dealing with housing and homelessness;
- dealing with child protection, where the condition of an adult in the household is an issue for the child;
- dealing with complaints from the public about the behaviour of neighbours or people on the streets;
- dealing with offenders in prison or in the community;
- receiving calls from the police or members of the public concerned about particular individuals or households;
- dealing with debt incurred by adults, including debt to the local authority itself.

3.3 Other first line contacts could be medical practitioners, community based nursing staff and other national Health Service (NHS) staff, the legal profession or the criminal courts.

WHO NEEDS TO BE AWARE OF THE 2000 ACT?

3.4 Given the wide range of local authority staff who might be the first point of contact with an adult who might fall under the 2000 Act, it would be impracticable for the authority to train every such officer fully in the requirements of the 2000 Act. It is however desirable that every officer who might be the first point of contact with the public has some awareness of the 2000 Act's existence and the leading role of social work services staff in its application so that they can make appropriate referrals.

3.5 It is desirable in addition that all social work officers as potential first line contacts should have general awareness of:

- the existence of the 2000 Act and the interventions available;
- the principles;
- the existence of this code of practice as a document to which they can refer for detailed guidance.

3.6 Local authorities should consider the best means of ensuring that ongoing and up-date information and training is cascaded within the local authority.

INFORMATION FOR NON SOCIAL WORK STAFF

3.7 In the case of non-social work staff, the local authority at corporate level should consider what training might be most suitable and should obtain the advice and input of social work services staff on this. Methods that might be considered are:

- Using an internal circular, or series of circulars, to alert all officers having dealings with the public to the existence of the 2000 Act, to its broad purposes, and to the responsibilities of social work officers with regard to its implementation and where to go for further information and help.
- The Scottish Government has produced a web based general leaflet about the 2000 Act 'A short guide to the Act'; also a DVD 'Making Decisions – Your Rights' in two versions, one for people with dementia and the other for people with a learning disability (for use with individuals or small groups by support workers or family members).
- Using any Intranet or other web-based facilities by the local authority to inform staff generally of the 2000 Act's existence and the details of local duty social work contact numbers.
- Including information about the 2000 Act and the key contact points within the authority in any induction training for new officers, and in ongoing training for existing officers.

TRAINING AND INFORMATION FOR SOCIAL WORK OFFICERS

3.8 All social work officers working in adult services/mental health/older peoples services/learning disability services/children and family teams (for transitional ages) and criminal justice teams should be aware of the main provisions of the 2000 Act; and its possible relevance to the casework for which they are responsible.

3.9 These social work officers should be aware of the rules for determining whether their local authority has jurisdiction for an adult who falls or may fall under the 2000 Act (see chapter 2 paragraph 2.2). Jurisdiction follows habitual residence, except in the case of an adult whose personal welfare may be at risk. In the latter case, the local authority for the area where the adult happens to be would be responsible for investigating the circumstances but liability for payment for any services would fall on the local authority in whose area the adult normally resides.

3.10 As appropriate, all social work officers should be aware of the names and contact details of officers who have special expertise in the 2000 Act.

3.11 They should also know where to access a copy of each of the codes of practice. These are on the website http://www.scotland.gov.uk/topics/justice/civil/awi.

The local authority may wish to ensure that social work officers have access to paper copies or a link from the local authority's own intranet.

OFFICERS INVOLVED IN ASSESSMENT AND CARE MANAGEMENT

3.12 Officers involved in assessment and care management will require particular training in the 2000 Act.

Essential components of this training are:

- to develop an understanding of local authorities' responsibilities, and the range of measures available under the 2000 Act;
- how consideration of the 2000 Act fits into assessment and care management – familiarity with this code;
- a clear understanding of the principles of the 2000 Act and how they should be implemented in the assessment and care management process (with particular reference to chapter 4 of this code);
- a clear understanding of the role of other statutory agencies with regard to the 2000 Act, particularly the Public Guardian, the MWC and the local sheriff court; and clear guidance on liaison with these bodies, including contact details;
- an understanding of the court process and time-scales;
- development of competencies and knowledge in relation to communication/decision making (maximising potential for giving consent) and assessing capacity under the 2000 Act; (see Scottish Government, 'Adults with Incapacity Act – Communication and Assessing Capacity. A guide for social work and health care officers'. For details see Annex 2.
- an understanding of the role of MHOs in case conferences/reviews;
- a clear understanding of the rights of carers under the 2000 Act (i.e. family/friends/other unpaid supporters);

- understanding and differentiating between the powers which local authorities have to intervene under section 13ZA of the 1968 Act, the 2000 Act, 2003 Act and the 2007 Act; and the appropriate application of these powers in specific circumstances.

3.13 In addition to training, it would be good practice to hold regular discussion within teams to share experience and develop practice. A clear point of reference needs to be identified to which team members can go for advice and support on practice issues arising. A number of local authorities have appointed an AWI lead officer who performs this function and ensures that staff are kept up to date on changes and good practice.

MENTAL HEALTH OFFICERS

3.14 All MHOs must be registered as qualified social workers, have a minimum of two years post-qualifying experience and have completed an approved course of mental health officer training.[1] They have functions under the 2000 Act, in particular a role in assessment and report writing in relation to applications for welfare intervention orders and guardianship where the person has a mental disorder. Their training and expertise will also be relevant to a range of functions under the 2000 Act where incapacity is caused by a mental disorder. For example, in some authorities MHOs are routinely invited to case conferences where the capacity of the adult is an issue. Experience in some local authorities suggests that the early involvement of an MHO helps considerably to speed up the assessment and decision-making process.

3.15 Local authority finance and legal officers will also require familiarity with the 2000 Act and special training on legal and financial aspects.

A MULTI-DISCIPLINARY APPROACH

3.16 A multi-agency and multi-disciplinary approach to awareness raising, training and implementation is desirable both within the local authority and among different bodies, including specialist voluntary organisations, in a particular area. Where there are established procedures for local authorities acting in conjunction with the NHS, it will be necessary to ensure that these are consistent with the principles of the 2000 Act, for example, the Care Programme Approach and discharge planning protocols, palliative care and any procedures for integrated Single Shared Assessment and Care Management.

1 Mental Health (Care and Treatment) (Scotland) Act 2003, s32(2)(b); 2003 Act (Requirements for appointment as mental health officers) Direction 2005; 2003 Act (Requirements for continuing appointment as mental health officers) Direction 2006.

Chapter 4

THE PROVISION OF COMMUNITY CARE SERVICES FOR ADULTS WITH INCAPACITY

ASSESSMENT, CARE PLANNING AND DECIDING HOW TO PROCEED

4.1 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.

4.2 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).

4.3 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 procedure.[2] The adult will have a needs assessment (which includes consideration of risk and vulnerability, care options and capacity issues).

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

4.4 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 2003 Act could be appropriate. For example, where the person's refusal of treatment for mental disorder puts the person at risk to themselves or others.

4.5 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 OPG 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] Where the person has a welfare guardian, the supervising officer will have role in consulting the guardian and the adult.

4.6 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 there are concerns about the ability or intention of the proxy to safeguard the adult's welfare – see chapter 9). 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.

3 Where there is disagreement between the proxy and the local authority with regard to the provision of services and this relates to concerns about how the proxy is exercising his/her functions then the local authority has the power to investigate.

4.7 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, named person, proxies (with powers other than those relevant here). In many cases the involvement of a MHO would be extremely helpful.

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

- **Preparatory meeting** – the care manager or other member of the community care/discharge team should meet with the adult, his or her independent advocate (if he or she has one), and his or her carer to discuss the possible steps that might be taken. The carer should be regarded as a key partner in care[4] 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 his or her own decision, through providing information in an accessible format and using appropriate communication tools. A guide to assessing capacity has been prepared by the Scottish Government and should be referred to conjunction with this guidance. It is available at: http://www.scotland.gov.uk/topics/justice/civil/awi.

It might also be appropriate to consider if the adult could benefit from support, possibly from an independent advocate (if he/she does not 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.

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.

- **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 decision-making in question, from a suitably experienced health care professional. This might be, 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.
- **Multi-disciplinary review** – the process, however conducted, should take the following points into account:
  - 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.
  - 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.**

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

APPLYING THE PRINCIPLES

4.10 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 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/decisions will be of **most benefit** to the adult;
- which actions/decisions will be the **least restrictive** in terms of the adult's freedom and consistent with the benefit to be achieved;
- 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;
- the **views of relevant others** (as far as is practical), in the life of the adult to assess whether there is agreement or disagreement on the proposed care intervention. This will include his/her 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 2003 Act.[5]

Assessment of needs and risks

4.11 **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 him or herself is resisting help.

Deprivation of liberty

4.12 Consideration must be given as to whether the proposed care intervention would amount to a 'deprivation of liberty' under Article 5, European Convention on Human Rights (ECHR). Factors to consider in assessing whether a person is or is likely to be deprived of his or her liberty are set out in Annex A (part of Annex 1). Guidance is also available from the MWC (autumn 2008). 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.

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.

Assessment of financial management arrangements

4.13 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. Please note that local authorities have a duty to apply for a financial intervention under the 2000 Act (guardianship or access to funds as appropriate).

Recording decisions and informing interested parties

4.14 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
- 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.

4.15 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.

4.16 **People who have a right to be consulted about an intervention under the 2000 Act are:**

- the nearest relative, and including same sex and opposite sex cohabitants of at least 6 months standing in the same status as 'spouse';
- named person;
- the adult's primary carer;
- any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention;
- any person whom the sheriff has directed to be consulted; and
- any relevant others in the life of the adult who have an interest in his/her welfare or the proposed intervention.

It is only necessary to consult these people in so far as it is reasonable and practicable to do so. There would have to be justifiable reason for not doing so, for example, they have gone on holiday and left no means of contact.

The officer should try to ascertain from the adult, from family members, friends, neighbours and professionals involved if there are any relevant others who should be contacted. If so, the officer should make reasonable attempts to contact them in person or in writing.

Monitoring and review

4.17 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 his or her 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 and in particular whether the person is or is likely to be deprived of their liberty in terms of Article 5, ECHR.

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

SUMMARY

4.18 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.

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.

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

- 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.

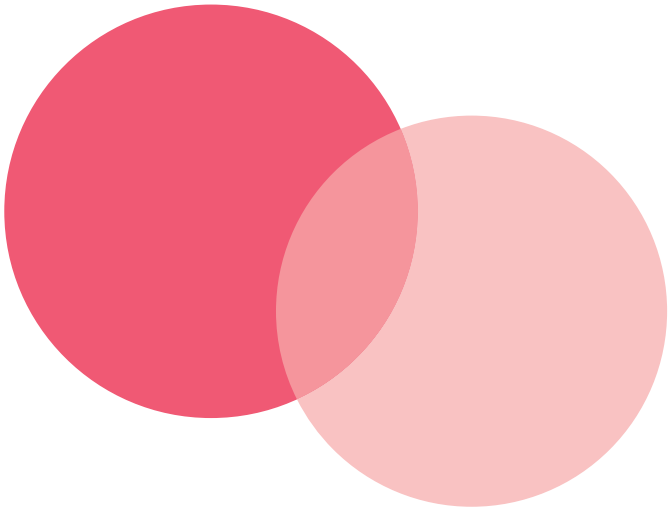
In addition to these features, indicators that a care intervention under the 2000 Act may be appropriate would be:

- 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 his or her own welfare and there is such a disagreement, the matter should be placed before the court for a decision.**

SEEKING DIRECTIONS WHERE THERE IS A DISPUTE ABOUT AN ADULT'S CAPACITY

4.20 The sheriff has powers under section 3(2)(b) to order that any reports relating to the person who is the subject of the application or proceedings be lodged with the court or that the person be assessed or interviewed and that a report of such assessment or interview be lodged. This could be a way of resolving any dispute with carers or relatives about an adult's capacity.

4.21 A local authority carrying out any of the functions conferred on it under the 2000 Act and summarised in chapter 2 of this code can make an application for directions in a case where a dispute emerges as to an adult's capacity. Such an application could ask the sheriff to rule that a medical assessment of the adult's capacity be undertaken.



Chapter 5

INTERVENTION ORDERS AND GUARDIANSHIP – AN OVERVIEW

WHAT ARE INTERVENTION AND GUARDIANSHIP ORDERS?

5.1 Intervention and guardianship orders provide legal authority for someone to make decisions and to act on behalf of a person with impaired capacity, in order to safeguard and promote his or her interests. The powers granted under an order may relate to the person's welfare, health, money or property. Anyone with an interest in the person – a carer, family member, friend including the local authority, can apply to the sheriff court to become a welfare and/or financial guardian or intervener. For full details see the Code of Practice for persons authorised under intervention orders and guardians.

Intervention orders

5.2 Intervention orders can be used where the need for action is time-limited or to deal with one-off decisions or single issue concerning the adult's property, finance or personal welfare. Local authorities can be financial interveners where there is an assessed need and there is no one else to act.

Section 53(5) provides that an intervention order may:

(a) direct the taking of any action specified in the order;

(b) authorise the person nominated in the application to take such action or make such decision in relation to the property, financial affairs or personal welfare of the adult as specified in the order.

An intervention order could be suitable for:

- signing a legal document such as a tenancy agreement; or termination of a tenancy agreement;
- selling a property and invest net proceeds in adult's account;
- freezing an adult's assets or funds in order to protect them while suspicions of exploitation are investigated by the Public Guardian;
- buying a home more suitable to the adult's needs;
- selling the adult's home (but the welfare aspects of moving the adult to different accommodation would be better dealt with through welfare guardianship);
- making a compensation claim and lodging funds in adult's account;
- dealing with the adult's interest in a legacy;
- taking legal action to protect the adult's interests;
- setting up a trust;
- selling moveable property held by the adult to obtain necessary income, e.g. jewellery, paintings, antiques;
- winding up the adult's business affairs;
- requiring the adult to attend hospital for specific medical treatment or assessment (for treatment other than for the mental disorder).

Special provisions where an intervention order covers acquisition or disposal of dwelling house

5.3 Section 53(6) makes special provision in relation to an intervention order which directs the acquisition of accommodation for, or the disposal of, any accommodation used for the time being as a dwelling house by, the adult. In such a case the consent of the Public Guardian is required with regard to consideration of the price paid or obtained before the accommodation is acquired or disposed of.

5.4 This provision will be particularly relevant in the case of a local authority which seeks to sell an adult's house in order to move the adult into residential accommodation; or acquire a specially adapted house for the adult in place of his or her current home. The intervention order could be used to deal with the property and financial aspects of the transaction.

Guardianship

5.5 Guardianship is likely to be more suitable where: there are one or more key issues to be dealt with; where the need for continuing intervention in the person's affairs is likely; and where flexibility is needed to respond to new situations without having to go back repeatedly to the court.

5.6 Section 57(1) of the 2000 Act provides that an application for a guardianship order may be made by: any person (including the adult him/herself) claiming an interest in the personal welfare, financial affairs or property of the adult; and the local authority.

5.7 The need for guardianship is governed by the grounds set out in section 58(1) of the 2000 Act. These are that:

- the adult is incapable in relation to decisions about, or of acting to safeguard or promote his/her interests in his or her property, financial affairs or personal welfare, and is likely to continue to be so incapable; and
- no other means provided by or under the 2000 Act would be sufficient to enable the person's interests in his/her property, financial affairs or personal welfare to be safeguarded or promoted.

5.8 An application for guardianship must specify the range of powers sought in the guardianship order. The principles must be satisfied for each power sought. The 2000 Act allows wide flexibility. Section 64(1) makes some general provisions. In particular, an order appointing a guardian may confer on him/her power to:

- deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;
- deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;
- pursue or defend an action of declarator of nullity of marriage, or of divorce or separation in the name of the adult;

- manage the property or financial affairs of the adult, or such parts of them as may be specified in the order;
- authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.

5.9 A guardian shall (unless prohibited by an order of the sheriff, and subject to any conditions or restrictions specified in such an order) have power by virtue of the appointment to act as the adult's legal representative in relation to any matter within the scope of the power conferred by the guardianship order.

5.10 A guardian with powers over property and financial affairs shall, subject to certain restrictions, be entitled to use the capital and income of the adult's estate for the purpose of purchasing assets, services or accommodation so as to enhance the adult's quality of life.

Matters which may not be authorised under an intervention or guardianship order

5.11 Under section 53(14) read with section 64(2), an intervention order or guardianship order may not authorise:

- placing the adult in hospital for the treatment of mental disorder against his or her will; or consent to any form of treatment under Part 5 of the 2000 Act or 2003 Act;
- consent to any form of medical treatment which is a prescribed exception to the general authority to treat under The Adults with Incapacity (Specified Medical Treatment) (Scotland) Regulations 2002 made under section 48(2) of the 2000 Act.

A guardian may not be given powers to consent to marriage on behalf of an adult or to make a will.

5.12 Other statutes or rules of law may preclude a guardian from exercising certain powers. For example the law on applications to acquire or renounce UK nationality require the adult him/herself to be of 'full capacity', which is normally interpreted as meaning that the adult must have some understanding of the meaning and effect of such an application.

WHICH POWERS TO SEEK - APPLYING THE PRINCIPLES

5.13 Applying the principles will help to clarify what powers are needed to meet the circumstances of the individual and the type of intervention under the 2000 Act that will be most appropriate. The **principles** should be applied to the framing of the order. In particular:

- The precise order sought should **benefit** the adult and there should be no reasonable way of achieving the benefit without the intervention. The applicant must be able to demonstrate that alternatives have been considered and give reasons for rejecting them.
- The precise order sought should be the **least restrictive option** in relation to the freedom of the adult, consistent with the purpose of the intervention.
- Account must be taken of the **adult's past and present wishes and feelings**. These must be ascertained in whatever way is appropriate and practicable in relation to the particular individual.
- The applicant must be able to explain the steps which have been taken to ascertain the past and present wishes and feelings of the person about the order being sought and any possible alternatives, and report what these are. The person will be able to challenge this aspect of the application, as will relatives or anyone else with an interest in the welfare of the individual.
- It will be particularly important to be clear about the sources of evidence for the person's past wishes and feelings. Where the adult cannot communicate present wishes and feelings despite every effort being made, undue reliance must not be placed on information from one or a restricted number of relatives and associates but, if possible, a spectrum of views should be obtained.
- Account must be taken of the **views of the nearest relative, primary carer, named person and of any other proxy and anyone else the sheriff has directed should be consulted, and any other person having an interest in the welfare of the adult or the proposed intervention**, in so far as it is reasonable and practicable to do so.

- The process of assessment and care management should already have indicated who needs to be consulted to comply with this principle. The application should make clear who the relevant people are – the forms for reports require them to be listed. The applicant will need to be ready to explain to the sheriff what views these consultees expressed and how they have been taken into account in determining the need for the application.
- A welfare guardian must support the individual to maintain his/her existing skills and encourage the development of new skills as far as possible. A person authorised under an intervention order does **not** under the principles have to encourage the adult to exercise or acquire skills, although it would be good practice to do so. An intervention order should not be sought if the adult would have been capable of taking the necessary decision or action with appropriate support.

Effect of intervention or guardianship order

5.14 Sections 53(9) and 67 respectively provide for the effect of the appointment and transactions of an intervener and guardian, i.e. that anything done under an order shall have the same effect as if done by the adult if he/she had the capacity to do so.

5.15 Under section 67(1), the adult shall have no legal capacity to enter into any transaction which is within the scope of the guardian's powers unless the guardian has authorised the adult to carry out the transaction. Where a third party is aware that the guardian has authorised the transaction it will not be void even if the adult lacked capacity in relation to the transaction. The adult's legal capacity in respect of matters not covered by the guardianship order is unaffected.

5.16 Under sections 31(4)(a) and 31(4)(b) the authority of a withdrawer of funds under part 3 comes to an end on the granting of an intervention or guardianship order relating to the funds or account in question.

5.17 Under section 46(1)(a) and section 46(1)(b) managers of an authorised establishment may not manage the funds of a resident under part 4 of the 2000 Act, if an intervention or guardianship order has been granted in relation to the same matter.

5.18 Under section 49(1) a medical practitioner may not exercise the general authority to treat conferred under section 47(2) if there is an outstanding application for an intervention or guardianship order in relation to the same matter; and under section 50(2) the general authority to treat does not apply where the consent of a guardian with powers in relation to the medical treatment could reasonably and practicably be obtained.

CIRCUMSTANCES IN WHICH A LOCAL AUTHORITY MAY RECOMMEND AN APPLICATION FOR AN INTERVENTION OR GUARDIANSHIP ORDER

Identification of need through assessment and care management

5.19 A local authority's involvement in applications for an intervention or guardianship order will normally stem from assessment and care management procedures and will normally relate to a personal welfare need which has been identified through those procedures. (In the case of a private application for an order dealing purely with property and financial matters there might be no local authority involvement since there is no need for a social work report to support such an application.) However, the circumstances involving the disposal of property almost always means there is money to manage and therefore both welfare and financial guardianship may be an appropriate recommendation. A financial intervention order may be appropriate, for example, to obtain information or to sign for or dispose of a tenancy.

5.20 It could also stem from the involvement of the offender team with the adult. In certain circumstances the court may make a guardianship order or an intervention order (see chapter 1 paragraph 1.39).

5.21 Where a review of the adult's personal welfare suggests that the adult's lack of capacity to deal with financial or property matters is impinging on his/her welfare, the local authority should consider whether a financial intervention under the 2000 Act would be desirable to deal with these financial or property matters. A local authority must seek the most appropriate means to deal with property and financial affairs where necessary and where no-one else is doing so (see section 53(3) of the 2000 Act).

MAKING AN APPLICATION FOR AN INTERVENTION OR GUARDIANSHIP ORDER

5.22 The process for applying for an intervention or guardianship order is identical. A 'summary application' (section 2(2) 2000 Act) is made to the sheriff court in the area where the adult resides accompanied by two medical reports and a 'suitability' report. Where the application requests welfare powers the local authority is required to provide a suitability report by an MHO (where the cause of incapacity relates to a mental disorder) or the CSWO where incapacity is due to a physical condition. Where the application is for financial powers only there is no duty on the local authority to provide a report for a private applicant. Reports required supporting application for an order:

- **two medical reports** based on an assessment of the capacity of the person in relation to the decision-making powers requested. Where incapacity is by reason of mental disorder one of the reports must be by a relevant medical practitioner, usually an approved medical practitioner under s22 of the 2003 Act. The other usually from the person's own general medical practitioner;
- a **suitability report** containing an opinion on:
  - the general appropriateness of the order sought in relation to the needs of the adult;
  - the suitability of the applicant.

Time-scale for reports

5.23 The summary application and accompanying reports must be lodged with the sheriff clerk within 30 days of the completion of the assessments. However, at the discretion of the sheriff, a medical report may be valid even where the medical examination of the adult has been carried out more than 30 days previously, provided that the sheriff is satisfied that there has been no change in circumstances relevant to the report since the examination was carried out.

Registration and notification of intervention and guardianship orders

5.24 Under sections 53(10) and 58(7)the sheriff clerk must send a copy of the order to the Public Guardian who must register it. The Public Guardian must notify the adult (unless the court has directed notification not to be given under section 11 of the 2000 Act) and the local authority of the order. He/she must also notify the MWC where the adult's incapacity is due to mental disorder (rather than inability to communicate) and the intervention order relates to the adult's personal welfare. The guardian (if necessary after finding caution or other form of security) may then start to exercise his/her powers.

Where the CSWO is guardian - see chapter 6 for details.

Liability and protection for third parties acting in good faith

5.25 For details see chapter 1 paragraph 1.15.

RECALL OR REMOVAL OF A GUARDIAN BY A SHERIFF

5.26 Under section 71 of the 2000 Act, the sheriff, on application by the adult subject to guardianship, the local authority or any other person claiming an interest in the adult's affairs may:

- replace a guardian by an individual or office holder nominated in the application if he/she is satisfied, in relation to the individual that she/she is suitable for appointment;
- remove a guardian from office if he/she is satisfied that:
  - there is a substitute guardian who is prepared to act as guardian; or
  - in the case where there is are joint guardians, that the remaining guardian/s are prepared to continue to act; or
- recall a guardianship order or other wise terminate a guardianship if he/she is satisfied that:
  - the grounds for the appointment of a guardian are no longer fulfilled; or
  - that the interests of the adult in his/her property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship.

Chapter 6

THE LOCAL AUTHORITY AS INTERVENER OR GUARDIAN

DUTY OF LOCAL AUTHORITY TO APPLY - INTERVENTION ORDER

6.1 Section 53(3) provides that where it appears to the local authority that;

(a) the adult is incapable as mentioned in section 53(1); and

(b) no application has been made or is likely to be made for an order under this section in relation to the decision to which the application under this section relates; and

(c) an intervention order is necessary for the protection of the property, financial affairs or personal welfare of the adult,

they shall apply for an intervention order under this section.

Responsibility within the local authority for seeking an intervention order

6.2 The need for an intervention order under the 2000 Act is likely to emerge as a result of normal assessment and care management procedures, whether prompted by an investigation under section 10 or the 2000 Act or otherwise.

6.3 Unlike guardianship, responsibility for seeking an intervention order is not allocated to the CSWO. However, the intention to seek an intervention order must be agreed with line management and the resource implications identified.

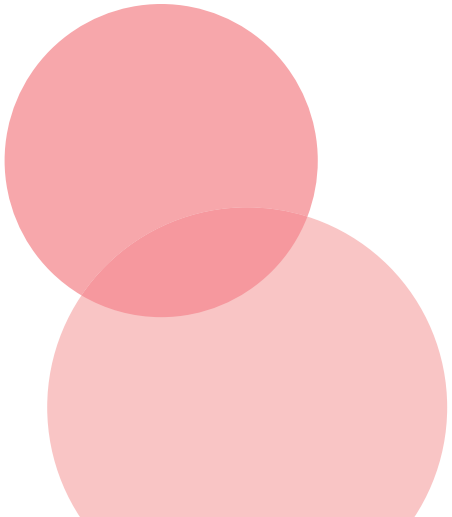
6.4 A person authorised under an intervention order will always be a named individual. This could be someone involved with the adult who has agreed to be named in the application, such as a relative or friend or a professional person. It could also be a named officer of a voluntary body.

6.5 Where no-one else is willing or suitable to be authorised, it is implicit in the 2000 Act that an officer of the local authority must be nominated in the application. An officer of the local authority can use this means to protect an adult's property and financial affairs as well as personal welfare.

6.6 An intervention order could not be used, however, as a way for a local authority to enforce a debt owed by the adult, unless it can be demonstrated that this would benefit the adult. For example if the adult owes rent, and would become homeless if this is not paid, it might be an appropriate use of an intervention order to get the rent paid.

6.7 Normally, responsibility for seeking an intervention order will lie with officers involved in assessment and care management. However, their use may develop among offender teams for example; and children and families teams where there is a one off or ongoing but focussed issue concerning a particular adult family member.

6.8 Where an officer is considering recommending an intervention order, the local authority legal team should be consulted. A proposal to seek an order to deal with an aspect of the person's property or financial affairs, such as the sale of the person's home to pay for residential care, should also be sent to the local authority finance department.



WHERE A LOCAL AUTHORITY OFFICE IS AUTHORISED UNDER AND INTERVENTION ORDER

Protection of property

6.9 Where a local authority is granted the power under an intervention order to protect property, it must ensure that appropriate and sensible precautions are taken including turning off gas, water and electricity, removing perishable foodstuffs and securing the property. It should not be normal practice to arrange for windows and doors to be shuttered or to change locks unless there are compelling reasons for doing so. In all cases, careful consideration should be given to the benefits or otherwise of involving relatives and neighbours in securing and protecting property.

6.10 Where officers intend entering a property when the adult is not present, the police, the client, relatives and the relevant housing authority or landlord and insurance companies, if known, should be notified. All local authorities should already have in place procedures for staff to follow when entering a property of an individual who is not present. Social work staff should keep a written inventory of any items which are removed from the property for safe keeping, either by staff or relatives, and decide when a full inventory of all property should be made.

Intervention order relating to heritable property

6.11 Where an order relates to heritable property, the person authorised under the order must immediately apply to the Keeper of the Registers of Scotland for recording of the interlocutor containing the order in the General Register of Sasines or, as the case may be, for registering of it in the Land Register of Scotland. This is an important safeguard for third parties who may become involved in any transaction concerning the property. **Where an officer of the local authority is authorised under the intervention order, this matter should be attended to by the local authority legal team.**

6.12 An application for registration must contain:

- the name and address of the person authorised under the order;
- a statement that the person authorised under the order has powers relating to each property specified in the order;
- a copy of the interlocutor.

6.13 If the Keeper has registered the interests in the General Register of Sasines, he will send an endorsed interlocutor to the applicant. If the Keeper has registered the interests in the Land Register, he will send the applicant an updated Land Certificate. The person authorised under the order shall send the endorsed interlocutor or, as the case may be, the updated Land Certificate or an office copy thereof to the Public Guardian who shall enter the particulars in his register of persons authorised under intervention orders.

6.14 Under section 53(6) a person authorised under an order to acquire or dispose of accommodation for the use of the adult must first obtain the consent of the OPG to the price he/she proposes to pay for, or accept for, the accommodation.

6.15 Other circumstances where an intervention order may be used by a local authority are to obtain confidential information (e.g. financial details) or to sign for or dispose of tenancies.

Make a plan to implement the order

6.16 It would be good practice for the person who is authorised under an order, to draw up a plan to implement the order, specifying when action will start, when it will be completed, and what steps have to be taken in between. For example, in order to sell an adult's home it will be necessary to plan a timetable for advertising the property, receiving offers, consulting the Public Guardian, accepting an offer and concluding the transaction.

GUARDIANSHIP ORDERS - DUTY OF THE LOCAL AUTHORITY TO APPLY

6.17 Section 57(2) of the 2000 Act provides that where it appears to the local authority that:

- an adult is incapable in relation to decisions about, or of acting to safeguard or promote his or her interests in his or her property, financial affairs or personal welfare, and is likely to continue to be so incapable; and
- no other means provided by or under the 2000 Act would be sufficient to enable the adult's interests in his or her property, financial affairs or personal welfare to be safeguarded or promoted; and

- no application for guardianship has been made or is likely to be made; and
- a guardianship order is necessary for the protection of the property, financial affairs and/or personal welfare of the adult,

they shall apply under this section for an order.

RESPONSIBILITY WITHIN THE LOCAL AUTHORITY FOR GUARDIANSHIP

6.18 Although formally the CSWO becomes the welfare guardian, responsibility for carrying out the duties of a welfare guardian will lie with social work officers.

6.19 Under section 64(6) the duties of a guardian may be delegated. Under section 64(9) where the chief social work officer of the local authority has been appointed guardian he/she shall, not less than 7 working days after his/her appointment, notify the adult and (where the adult's incapacity is due to mental disorder) the MWC, of the name of the officer responsible at any time for carrying out the functions and duties of guardian.

6.20 Where it has already been decided by the sheriff under section 11 that intimation or notification to the adult would be likely to pose a serious risk to the health of the adult, then notification to the adult is not required.

FINANCIAL INTERVENTIONS AND THE ROLE OF LOCAL AUTHORITY

6.21 Although local authority involvement in guardianship is largely confined to welfare guardianship, for completeness, the legal provisions affecting applications for guardianship over property and financial affairs are also covered below where relevant to an application made by the local authority. However, the needs assessment should take full account of adult's needs in terms of financial management, and the type of intervention most appropriate to meeting the need, e.g. DWP appointeeship where the person's only income is from state benefits; the access to funds scheme where the adult is in receipt of income other than or in addition to benefits but the management of funds remains simple; financial guardianship where the adult owns assets and or property that require more complex management.

6.22 The local authority has a duty to apply for financial guardianship under the 2000 Act in respect of property and financial affairs where this is necessary to protect the adult's affairs and non-one else is applying.

6.23 In these circumstances the local authority will need to work closely with relatives and friends and others to see if someone is prepared to be nominated to act. The local authority is not allowed to exercise powers of guardianship in respect of property and financial affairs. If no one else is willing or able to act, the local authority can nominate a suitable person, such as a solicitor or accountant.

6.24 The 2000 Act does give local authorities the power to nominate themselves as financial interveners (but not as financial guardians) where appropriate.

6.25 The 2000 Act enables organisations, including local authorities, to apply to the OPG to access funds on behalf of an adult, where necessary, unless someone else has been authorised to do so. In many cases the Access to Funds scheme will be the least restrictive intervention available to meet the financial management needs of the adult (see Code of Practice for individuals and organisations authorised under the Access to Funds Scheme).

WHEN URGENT ACTION IS NEEDED

6.26 The 2000 Act does not deal expressly with urgency. In particular, there is no provision to expedite applications for intervention orders or guardianship, including interim guardianship, in case of urgency. An application for an interim order may be heard and granted by a sheriff within a few days if the need is very pressing, however this still requires a full summary application with reports.

6.27 The local authority may therefore need to take action under other provisions, in order to safeguard a vulnerable adult potentially at risk of harm, that is, under the 2007 Act, or where the person has a mental disorder and is unable to consent, by using their powers under the 2003 Act.

TAKING ACCOUNT OF CHANGING NEEDS

6.28 In seeking a guardianship order, the local authority should consider current and foreseeable needs. When the 2000 Act was introduced the indicative initial period for guardianship was 3 years or for a period decided by the sheriff, depending on the potential for the adult's capacity to change over time. However the number of guardianship orders granted for an indefinite period has increased considerably. It would be good practice for the suitability report to indicate a period at which a review would be appropriate to the individual. The adult's capacity could deteriorate or improve. **Local authorities should ensure that they hold an internal review of their own guardianships annually.**

APPLYING FOR AN ORDER - REPORTS REQUIRED

Incapacity reports

6.29 Under section 57(3)(a) reports, in prescribed form, of an examination and assessment of the adult carried out not more than 30 days before the lodging of the application by at least two medical practitioners one of whom, in a case where the incapacity is by reason of mental disorder, must be a medical practitioner approved by Ministers for the purpose (i.e. medical practitioners approved under section 22 of the 2003 Act. **Sheriffs can use their discretion in accepting medical reports which are older than 30 days where there has been no change in circumstances since examination was carried our relevant to the matters covered in the report.** However, an extension should only be sought in exceptional circumstances. The 30 day time scale should be adhered to whenever possible to keep matters progressing for the benefit of the adult.

Reports on the appropriateness of the order sought

6.30 Where the application relates to the personal welfare of the adult, a report is required 57(3)(b) in prescribed form, from the MHO, or in a case where the adult's personal welfare is in jeopardy only because of the inability of the adult to communicate, from the CSWO (who may delegate preparation of the report to a suitably qualified officer, but who must sign the report).

6.31 The report must contain the author's opinion as to the general appropriateness of the order sought. As indicated above, this section of the report should cover the question of how the author has arrived at his/her conclusions and should cover any conflicts of interest identified. The report should demonstrate that the author has applied the principles

and has considered whether there were less restrictive alternatives that could have achieved the benefit sought. The section on alternatives considered could also, if appropriate, be used to cover any counter proposals which are being made by others with an interest in the adult's affairs.

6.32 The suitability of the CSWO does not need to be explained as the criteria apply only to individual guardians.

Dealing with conflict of interest

- **Between the local authority and the adult**

6.33 In deciding to apply for guardianship or an intervention order the local authority should be aware of, and should be ready to address in reports, any possible conflict of interests. Conflicts of interest may arise because of the role of the local authority in both safeguarding welfare and providing services.

6.34 The person carrying out the suitability assessment may identify a conflict of interest between the local authority and the adult.

Example: the local authority may be owed money by the adult, but an order is being sought to spend the adult's money on his/her own needs.

6.35 The issue is not a new one and can already arise in the course of assessment and care management. The key to dealing with potential conflicts is to apply the principles and where appropriate to seek an independent view on the way forward, possibly in the form of orders, provisions or directions from the sheriff under section 3 of the 2000 Act.

6.36 The report writer should be clear about the local authority's position as both care provider and having responsibility to protect and safeguard the adult. Guidance may need to be sought from a senior social work officer, or occasionally at a higher level within the local authority, on balancing these roles. Ultimately it will be a judicial matter to resolve any conflict between the local authority's responsibility to provide services and the role of its officers as proxies for any particular adult.

- **Between the local authority and others with an interest in the affairs of the adult**

6.37 Sometimes the local authority will take one view of the person's needs, but the others with an interest take a different view. This could arise where, for example, the local authority believes that the relatives do not have the skills to exercise guardianship but they believe they can manage. The nearest relative and relevant others should be informed of their right to object to the local authority application.

Applications relating only to financial or property matters

6.38 Under section 57(3)(c) where the application relates only to the property or financial affairs of the adult, a report, in prescribed form, is required, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application, **by a person who has sufficient knowledge** to make a report as to:

- the general appropriateness of the order sought;
- the suitability of the individual nominated in the application.

6.39 The suitability (schedule 8) report does not therefore need to be made by a MHO or the CSWO but could be made by an independent professional such as a solicitor or accountant. **The completion of a suitability report is necessary even where the CSWO is applying for a financial guardianship order and nominating a solicitor and where a named officer of the local authority is seeking authorisation under an intervention order.** Local operational procedure should provide guidance to determine 'whether a person with sufficient knowledge' to complete the schedule 8 report would need to be, for example, the person's care manager, or finance staff, depending on the complexity of the order sought and extent of the affairs to be dealt with.

Involving the individual and relevant others (see chapter 4)

6.40 Where it has been agreed that the local authority needs to apply for a formal intervention under the 2000 Act, certain procedures have to be followed.

6.41 It will be normal practice for the adult and relevant others to have been involved as far as possible in discussions and decisions leading up to the application. The care manager will normally explain the application process and the rights of the person and others under the 2000 Act.

He/she should be given information about independent sources of help e.g. independent advocacy service, CAB or specialist voluntary organisation such as Alzheimer Scotland or ENABLE; or he/she may wish to seek legal advice and representation in relation to the court proceedings that will be involved.

6.42 In accord with principle 3, the adult should be assisted to communicate his/her views and wishes as far as possible. The guide to communication and assessment for social work and health care staff may be helpful here. (See Annex 2.)

Time limits

6.43 As indicated above, the interview with the adult has to take place not more than 30 days before the lodging of the application. This time limit must be built into the timetable for the necessary preparation work. Managers will also need to bear in mind that the reports are substantial documents which require a good deal of investigation and consideration, and allow for this in planning the workload of MHOs and any others involved.

6.44 This deadline confirms the desirability of identifying the need for an order through assessment and care management procedures, and agreeing with others involved who should make the application and who should be nominated in the order.

Remuneration and expenses

6.45 Section 68(3) provides that the local authority shall meet the cost of any application which it makes in respect of welfare guardianship and shall not be entitled to recover the cost from the estate of the adult. However, in the case of an application for financial guardianship made by the local authority, it shall be entitled to reimbursement from the adult's estate. If there is a combined application, the sheriff shall apportion the cost as he/she thinks fit.

6.46 Where the CSWO is appointed welfare guardian, there is no entitlement to remuneration.

6.47 Section 68(2)(b) provides that where the CSWO is the guardian, outlays shall not include payment for items and services which would normally be provided free of charge by the local authority to a person who does not have a guardian.

ONCE THE APPLICATION IS GRANTED

Registration

6.48 Once the application for an order is granted the sheriff clerk will send a copy to the OPG who will register the particulars and notify the adult, the local authority and the MWC (where the adult's incapacity is a result of mental disorder). The guardian may then start to exercise his/her powers.

Where the CSWO is guardian, notification of the officer who will carry out functions

6.49 Where the CSWO has been appointed the local authority has 7 working days in which to notify the adult (unless the sheriff has decided it would pose a serious risk to the health of the adult to do so), the OPG and the MWC where appropriate, of the name of the officer responsible at any time for carrying out the functions and duties of guardian.

6.50 The 2000 Act does not specify which officer would be nominated to act as guardian. It would appropriate in most cases for the person to whom the role has been delegated to have a specified locus in the local authority's assessment and care management procedures. Care should be taken to make a distinction between providing services and other resources to the individual; and legal decision making and action on behalf of the person. Consideration needs to be given as to whether any potential conflict of interests would be best addressed by having a separation of functions between the care manager and the guardian.

Notification of report writer and legal team

6.51 The local authority should also ensure that the notification is sent to the officer who prepared the report that accompanied the application, who will be responsible for its safekeeping. It should also be copied to the local authority's legal team.

GUIDANCE ON EXERCISING THE FUNCTIONS OF WELFARE GUARDIAN

Ensuring officer exercising the functions of guardian, can be contacted

6.52 The guardian must ensure that the adult, the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, the primary carer, the named person, any other proxy and any other person relevant person, is readily able to contact him/her. The guardian should make available to all of these his/her full contact details, including any other names by which the guardian may be known, his/her preferred contact address, telephone number, fax and e-mail, emergency contact details and the name and contact details of any other person who can get a message to the guardian quickly.

6.53 Absence and out of hours cover arrangements must be made. The 2000 Act envisages one officer exercising the functions, but just as an individual guardian cannot be available 24 hours a day, so an officer exercising guardianship functions cannot be available personally at all times.

6.54 The guardian must warn those who have his/her contact details of any period when he/she will not be available and provide details of who to notify in the meantime.

Carrying out the care plan

6.55 The local authority as guardian, will have sought powers based on a review and assessment of the adult's personal welfare needs and a proposed care plan. As soon as the guardianship order is made, the guardian should take steps to ensure interventions which were envisaged in the application are carried out, assuming there has been no significant change in circumstances.

Hold regular review meetings

6.56 The guardian should ensure that he/she meets with the individual frequently and holds discussions regularly with relevant others. In particular, the guardian should keep in touch with the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, the primary carer, named person, any other proxy (such as a withdrawer, continuing attorney, financial guardian or person authorised under an intervention order). This should include the individual's care manager (where this person is not the guardian). The frequency of such review meetings will depend on the extent of the guardian's day to day contact with these individuals. However, a formal review might usefully be linked to supervision visits.

Monitor the adult's personal welfare

6.57 It is the guardian's responsibility to monitor the adult's personal welfare. Where there is a change in circumstances a case review will be needed in accordance with Assessment and Care Management Guidance.

6.58 Although a local authority welfare guardian has no financial powers, the guardian should check that the adult's finances remain under control, by regular liaison with anyone having such powers. The local authority may need to apply for a intervention under the 2000 Act if the lack of influence over the adult's financial affairs is impeding the welfare guardian in the exercise of his or her functions. The type of intervention sought will depend on the financial circumstances of the adult and the nature of the decision to be made e.g. DWP appointeeship or Access to Funds may be adequate but if management issues are more complex then a financial guardianship may be necessary.

Proactive exercise of guardianship

6.59 Welfare guardianship should be used proactively to promote the personal welfare of an adult. While the guardian must be ready to react to events, he/she should also seek opportunities to improve the person's welfare within the scope of his/her powers and in applying the principles. Guardianship allows a flexible response to changing circumstances.

Examples: it would allow a young person with learning difficulties to proceed towards increasing degrees of self-sufficiency and independence through tailored interventions encouraging education, training and personal development. It would allow someone with a brain injury to be gradually rehabilitated with progressively less intervention in his/her affairs as the rehabilitation progresses. Alternatively where someone's capacity is in decline, welfare guardianship could be used on a more intensive basis as the adult's condition deteriorates and more intervention is required.

6.60 As a matter of good practice, changes that may be required to guardianship should be sought at an early opportunity. Local authorities should not, for example, wait until the next regular review to initiate action, for example, to recall if guardianship is no longer needed.

NON-COMPLIANCE

6.61 Welfare guardianship carries with it a right to apply to the sheriff under section 70 of the 2000 Act for an order compelling the adult to comply with the decisions of the guardian. The sheriff may, on cause shown, disapply the intimation requirement and corresponding right to object within a prescribed period. The reason for this is that in urgent cases a delay of the prescribed 21 day period can prove detrimental to the welfare of the adult concerned. In a case where the welfare guardian has powers to determine where the adult should live, a sheriff can grant a warrant to a constable to enter premises, apprehend the adult, and take him or her to such place as the guardian may direct.

6.62 It is anticipated that the section 70 procedure will be used only occasionally by welfare guardians, for example to remove the person from an unsuitable place to one where the guardian has decided he/she should live. It represents a potentially substantial encroachment on the personal autonomy of an individual. Before making an order or granting a warrant, the sheriff would have to be satisfied that the principles in the 2000 Act were being met. There would have to be a positive benefit to the adult and the order or warrant would have to be the only reasonable way of achieving that benefit. In dealing with a habitual absconder a new warrant would be needed for each incident.

6.63 The desirability of varying or recalling a guardian's powers, or replacing a guardian, may be identified through day-to-day contact with the adult, or from regular supervision of a welfare guardian. Officers having contact of any kind with the person should therefore be alert to the possibility that changes may be required, particularly where the person's incapacity is not likely to be permanent.

SUPERVISION OF LOCAL AUTHORITY GUARDIANS

6.64 The 2000 Act does not exempt the local authority guardian from the requirements for supervision. Authorities should, therefore, ensure that the specific supervisory functions are carried out by the line manager responsible for supervision of the named individual who is carrying out the guardianship function.

6.65 The principles must be observed by anyone exercising functions under the 2000 Act and these apply as much to the supervision of local authority guardians as to other proxies. Therefore it would be good practice for the local authority to consult with the person about how he or she feels the guardianship is working. It might be helpful to seek the support of an independent advocacy officer where the person has no family or friends to assist.

6.66 The person's nearest relative, primary carer, named person or anyone else the sheriff has directed to be consulted about his/her personal welfare should also be given a regular opportunity to give their views about how the guardian is exercising his/her functions.

RENEWAL OF GUARDIANSHIP ORDER

6.67 The local authority has a duty to apply for renewal of guardianship where the criteria for guardianship still apply and no-one else is doing so.

6.68 A review of guardianship should be prompted before the expiry of an existing guardianship order, in accordance with the authority's review procedures. The OPG will issue a reminder to all guardians three months prior to the expiry of the existing guardianship order. Reminders will therefore provide a fall-back to ensure that renewal of the order is considered properly. However, normal review procedures should generally ensure that renewal is looked at earlier, to allow time to prepare a renewal application as appropriate.

6.69 The application may be dealt with by the sheriff on the basis of a Minute and written reports, without the need to hold a hearing in court. However, if the sheriff is not satisfied by the information provided, he/she can call for further reports or have a hearing.

6.70 The renewal process involves an application to the sheriff, accompanied by a medical report in prescribed form, of an examination and assessment carried out not more than 30 days prior to the lodging of the renewal application. If the incapacity is by reason of mental disorder, the report should come from a medical practitioner with experience in the relevant field.

6.71 For renewals of welfare guardianship the application must also be accompanied by a report provided by an MHO, or in cases of inability to communicate due to a physical condition, by the CSWO. The report will give an opinion as to the appropriateness of continuing the guardianship and the suitability of the applicant to continue.

6.72 For renewals of financial appointments, the application must be accompanied by a report by the Public Guardian giving an opinion on the conduct of the guardianship to date and the continuing suitability of the guardian.

PROCESS FOR RECALL OF WELFARE GUARDIANSHIP BY THE LOCAL AUTHORITY WHERE THE APPOINTMENT IS THE CSWO

6.73 Recall is appropriate where, for example, the adult has gained or regained capacity to manage the affairs covered by the guardianship order. The local authority and the MWC may recall the welfare powers of a guardian on the same grounds as those for recall by the sheriff.

6.74 The local authority is able to recall the guardianship at its own instance or on the application of another person. Where the local authority is recalling a guardianship where the Chief Social Work Officer is guardian, it must intimate the proposed recall to the MWC and PG, as well as to the adult, the nearest relative, named person and primary carer and anyone else who may have an interest. In these cases if any objections are received the local authority must remit the matter for determination by the sheriff.

NOTIFICATION OF CHANGE OF CIRCUMSTANCES

Change of address

6.75 If the adult changes address, the guardian is required by section 64(4) of the 2000 Act to notify the Public Guardian within 7 days.

TRANSFER TO A DIFFERENT LOCAL AUTHORITY AREA

6.76 Under section 76 of the 2000 Act, where an adult under local authority guardianship changes his/her habitual residence to take up residence within a different local authority area, the CSWO must inform the CSWO of the receiving authority. The receiving authority then has 7 days to notify the OPG, and in appropriate cases the MWC, of the transfer. Within a further 7 days the CSWO of the receiving authority must notify the adult (unless the sheriff has directed that intimation should not be given to the adult), the OPG, and where appropriate the MWC of the name of the officer responsible for carrying out the functions and duties of guardian.

Habitual residence for guardianship purposes should always be considered separately from issues of care management responsibility.

GUARDIANSHIP AND INTERVENTION ORDERS IN CRIMINAL PROCEEDINGS

6.77 Under the Criminal Procedure (Scotland) Act 1995 (the 1995 Act), a court may make an order placing an individual's personal welfare under the guardianship of such local authority or of such other person approved by a local authority as may be specified in the order. This order can only be made if there is no existing guardianship order with the same powers in place in respect of the offender.

6.78 The criminal courts will require the same reports as are required to accompany an application for guardianship or for an intervention order. The MHO may thus be required to report on the general appropriateness of the order sought, based on a recent interview and assessment of the adult. The court will also require to be satisfied that an individual nominated to be appointed as guardian is suitable for the position and is willing to be appointed. Alternatively, if the proposed guardian is the local authority, the court must be satisfied that the CSWO is willing to be appointed. The MHO's report will assist the criminal court in considering the powers that it is appropriate to confer on the welfare guardian and the period for which the guardianship order should be made.

6.79 Officers can notify the court if it is felt that a guardianship order would be appropriate via a social enquiry report.

6.80 Once the criminal court has appointed a welfare guardian under the 1995 Act, the guardianship order is treated in most ways as an order under the 2000 Act. The exception is that an order made by the criminal court may be appealed to that court as set out in section 60 of the 1995 Act. This appeal right is in addition to the options under the 2000 Act of applying to the sheriff court to have the guardianship order varied, the guardian's powers recalled or the guardian removed or replaced. It would also be possible for the local authority or the MWC to recall the powers of a welfare guardian that have been conferred by the criminal court.

Chapter 7

RESPONSIBILITIES OF LOCAL AUTHORITIES IN RELATION TO PRIVATE APPLICATIONS AND APPOINTMENTS

INFORMATION AND SUPPORT FOR CARERS

7.1 The question of when the 2000 Act should be invoked applies to private individuals as well as to local authorities. Whilst it is not a duty under the 2000 Act, local authority officers should be ready to provide information and advice (non-legal) about the 2000 Act in response to requests. This will be especially important where a carer is considering applying for an intervention or guardianship order with powers covering personal welfare. However, carers should also be recommended to seek independent advice, for example, from a local citizen's advice bureau, or specialist voluntary organisation.

7.2 Where a carer seeks information and advice and there has been no previous contact with social work it may be appropriate to offer a needs assessment for the person as well as an assessment of the carer's needs. The Community Care and Health (Scotland) Act 2002 amends the 1968 Act to give carers a right to have his or her care needs assessed by the local authority. It would be good practice to bring this assessment right to the notice of any carer providing a substantial amount of care. Where it is known that a family is thinking of applying for guardianship it would be good practice to recommend a case conference.

7.3 Local authorities have a duty to provide information and advice to private individuals who have been appointed as a guardian, intervener or attorney with welfare powers.

Information and advice for parents

7.4 Transitional arrangements for a young person with a mental disorder such as a learning disability, autism syndrome or acquired head injury should consider whether he/she would benefit from any of the provisions of the 2000 Act. The young person and his/her parents should be fully informed and involved in discussions. If a guardianship order is appropriate, it may be applied for in the 3 months prior to a person's sixteenth birthday. This is to avoid any gap in authority for a parent to act on behalf of the young person to make certain types of decision for him/herself. (For further details see Part 6 Code of Practice). The DVD 'Making decisions – your rights' produced by the Scottish Government is available in a version for people with a learning disability and their carers. It explains in simple terms how the 2000 Act can help and sets out the rights of the individual under the 2000 Act. The easy-read leaflet 'It's your decision' is also available – see Annex 4 for information on accessing Scottish Government publications.

Involving carers in the assessment and review process

7.5 Where the person is known to services, health or social care professionals may be aware of the changing needs of the person and call for a review. The care manager should, at an early stage in the process, involve carers and others with an interest in the welfare of the adult, and take their views into account (see chapter 4). Where the views of the person are at odds with a carer's views, the care manager's skills will be needed to reconcile different interests. Where the person needs support to express his/her views and wishes, it may be appropriate to seek the support of an independent advocate. As a result of the assessment process, the local authority may advise that an application for an order is necessary or that arrangements for services can be authorised under the 1968 Act (see chapter 4).

Where an order is needed - explaining what is involved

7.6 Where an application for an order under the 2000 Act is required, any person claiming an interest in the adult may apply to the sheriff court and nominate him/herself to be the guardian or intervener. Private individuals have the choice of making an application for joint guardianship, i.e. one or more persons may apply to be appointed. An order with both welfare and financial powers may be applied for, depending on the needs of the individual. Private individuals can make the application themselves or engage a solicitor. The Scottish Government publication 'Guardianship and Intervention Orders – making an application. A guide for carers' provides information on the process. Information about access to legal aid should be given – http://www.scotland.gov.uk/Topics/Justice/Civil/awi/.

7.7 In explaining the application process for an order, the carer should also be informed of the local authority's duty to provide the sheriff with a 'suitability' report on anyone proposed as a welfare guardian or intervener. Where it is an application by a private individual, the mental health/social work officer responsible is required to interview the applicant as well as the adult and state an opinion as to the appropriateness of the order sought, as well as the suitability of the proposed guardian. The person nominated in the application is allowed to see that part of the 'suitability' report which deals with his/her suitability. In addition the proposed guardian should be informed that when a welfare guardianship order is granted, the local authority has an ongoing duty to supervise the guardian or guardians (where more than one has been appointed), and to investigate any complaints that may arise about the way in which the guardianship is being operated.

7.8 If there is no carer or other person with an interest to make an application, which the local authority has assessed as being required, then the local authority has a duty to apply under section 57 of the 2000 Act (see chapter 6).

7.9 In certain circumstances, for example, where the local authority has initiated the action, it may be appropriate for the local authority to make the application and to ask relatives (or friends as appropriate) if they wish to be nominated as guardian. The 2000 Act allows this to happen. However the local authority can only go forward with the agreement of the individual/s who must understand and be able to fulfil the duties inherent in the role. There should be no undue pressure on the carer/s to make the application.

7.10 The reasons why a carer may not wish to be appointed as guardian may be many and varied, and again, he/she should not be put under undue pressure to take on this role.

7.11 However, where there is agreement that guardianship is needed and the carer or relevant others have given a commitment to making an application, a time-scale for making the application should be agreed at the same time.

Dealing with delays

7.12 Where a private individual delays making the agreed application it will be important to find out why. If there appears to be no good reason it may be helpful for the local care manager to write to the prospective applicant giving him/her a date (for example, two weeks hence) to confirm in writing what arrangements have been made to progress the application (requesting solicitor's name etc); also pointing out that if no confirmation is forthcoming an application will be made by the local authority.

The application process - private individuals

Notification to CSWO of intention to apply

7.13 Under section 57(4), where an applicant claims an interest in the personal welfare of the adult, and is not the local authority, he/she shall give notice to the CSWO of his/her intention to make an application under section 57, and the report by the MHO or as the case may be, the CSWO, must be prepared **within 21 days** of receiving this notice.

7.14 Because the time scale for submitting the report is short, it is essential that notification of the application is routed to the responsible officer as quickly as possible and internal instructions may help. The legal departments of some local authorities have found it helpful to write to local solicitors notifying them about best way to proceed and supplying a clear first line of contact within the authority (however this may not be feasible for larger authorities).

REPORTS ON THE APPROPRIATENESS OF THE ORDER SOUGHT AND THE SUITABILITY OF THE INDIVIDUAL NOMINATED TO EXERCISE GUARDIANSHIP OR INTERVENTION ORDER

Under section 57(3)

To provide reports to the sheriff relevant to applications for intervention orders or guardianship orders relating to personal welfare

7.15 Under the 2000 Act MHOs are given specific responsibility for reporting to the courts based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application for an intervention order or for welfare guardianship. This time limit is important (see chapter 5 for details). Where the adult's capacity to act or make the decision in hand is due to an inability to communicate due to a physical disability then the responsibility for providing a report lies with the CSWO, who can delegate to a social work officer. The requirements for reports to be lodged with the court in relation to applications for intervention orders and guardianship orders are the same.

The suitability report should:

- assess the appropriateness of the order applied for and the powers sought to meeting the needs of the person;
- assess the suitability of the applicant in relation to the powers sought.

USING THE PRINCIPLES TO ASSESS THE APPROPRIATENESS OF THE ORDER APPLIED FOR

7.16 The officer must **take into account the past wishes and feelings of the person** so far as they can be ascertained. Local authority files may record the past wishes of the person from earlier casework contacts. If not, it will be essential to try to ascertain the person's past wishes and feelings from those who know him/her. The officer should however guard against taking at face value everything that relatives or carers say about the adult's past wishes and feelings, in case these are being misrepresented.

7.17 In relation to every particular intervention that the officer is recommending he/she will also need to take account of the present wishes and feelings of the adult so far as they can be ascertained. In order to do this the officer may find it helpful to refer to the guide on communicating with the adult (see Annex 2). Non verbal signs and signals, such as whether the adult seems settled and happy in particular settings, such as a day centre, or residential home, should also be taken into account. Where a placement is being considered, the person should where possible be taken on a visit, so that his/her wishes and feelings about the placement can be ascertained at first hand.

7.18 The officer will also need to take account of the views of the nearest relative or anyone nominated by the sheriff to act in place of the nearest relative, primary carer and named person, in so far as it is reasonable and practicable to do so, and of anyone else with an interest in the welfare of the adult. The officer should take into account these views in the course of formulating the recommendations.

7.19 A welfare guardian, has responsibility for **encouraging the person to exercise residual capacity and acquire skills where possible**. The report should show how the recommendations would enable this to take place.

ASSESSING THE SUITABILITY OF THE APPLICANT

7.20 Section 59(3) and (4) set out criteria for determining the suitability of a proposed individual to be appointed guardian, these issues should be addressed in the report to the sheriff, i.e.:

- the individual is aware of the adult's circumstances and condition and of the needs arising from such circumstances and condition;
- the individual is aware of the functions of a guardian [this would include the ability of the individual to understand and apply the principles properly];
- accessibility of the applicant to the adult and to his primary carer;
- the ability of the individual to carry out the functions of guardian [this would include such issues as professional competence];
- any likely conflict of interest between the adult and the individual;
- any undue concentration of power which is likely to arise in the individual over the adult;

- any adverse effects which the appointment of the nominated person would have on the interests of the adult,

(and such other matters as appear to the sheriff to be appropriate).

7.21 It will be important for the officer preparing the suitability report to have discussed any potential conflict with the person seeking authorisation. The views of significant others should also be sought on the suitability of the applicant.

7.22 **The officer writing the suitability report should:**

- consult the adult, to find out, if possible whether the intervention is consistent with his or her wishes and feelings and assess whether there is any question of undue influence by the person seeking authorisation;
- check that the person to be nominated is acceptable to the adult and those concerned with his or her personal welfare. This will ensure that there are no surprises if the application is opposed by the adult or others;
- check that the person to be nominated in the application is willing to be nominated in the application for an intervention order or as welfare guardian;
- consult others with an interest in the adult's welfare about what they would think best for the adult, making sure that they are not influenced by conflicts of interest of their own.

This is essential information for the officer who will write the report on the appropriateness of the order sought and the suitability of the person nominated in the application.

DEALING WITH CONFLICT OF INTEREST

7.23 The local authority should be aware of, and should be ready to address in reports, any possible conflict of interest. Conflicts of interest will arise because of the close relationships that are likely to exist between the person and those seeking to intervene in his/her affairs; and because of the role of the local authority in both safeguarding welfare and providing services. The key to dealing with them is to apply the principles properly, and where appropriate to seek an independent view on the proper way forward, possibly in the form of orders, provisions or directions from the sheriff under section 3 of the 2000 Act. Conflict of interest and undue concentration of power are not to be taken to arise by reason only of the individual being a close relative of, or a person residing with, the adult.

Conflict of interest between the adult and the person seeking authorisation

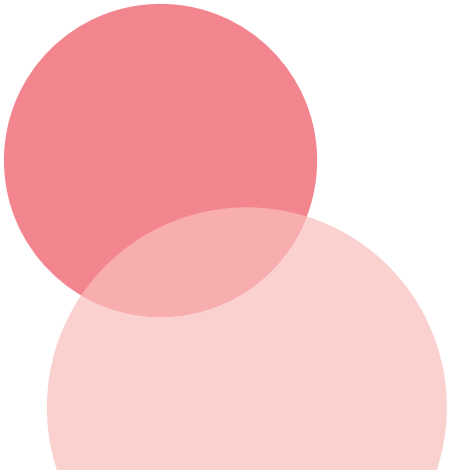
7.24 Where guardianship is being considered, there may be a conflict of interest between the adult and the proposed guardian. If the guardian is someone close to the adult in another capacity such as relative, or carer this could create a conflict of interest between the applicant's personal interests and the guardian's fiduciary duty to the adult. The guardian may for example stand to inherit money or property under the adult's will but the action required would involve expenditure that would erode this inheritance. The local authority is obliged to report on the suitability of the prospective applicant. It will be important therefore for the author of the report to have discussed this potential conflict with the proposed guardian and others involved so as to ensure that the guardian will indeed act in the person's interests.

7.25 It is quite reasonable and proper for a guardian sometimes to take action which would benefit both him/herself and the adult. For example, if the adult is elderly and frail, and his or her spouse (also elderly and frail) is the guardian and decides that both shall move into sheltered accommodation, this is likely to be of benefit to both.

7.26 The local authority has a duty to ensure that even where the person seeking authorisation will incidentally benefit, the application still complies with the principles.

7.27 The carer will often be best placed to be guardian, despite potential conflict of interest, because the carer knows the adult best and is well placed to determine the adult's benefit and take full account of his or her wishes and feelings.

7.28 The author of the report should also interview others with an interest in the adult's welfare about what they would think best for the adult, making sure that they are not influenced by conflicts of interest of their own.



Conflict between different persons with an interest in the adult's affairs

7.29 The local authority may become aware of the likelihood of conflict between the applicant and others with an interest in the adult's affairs, and may be approached by different parties to support their interests in the matter. In reporting to the court on the suitability of the applicant and the appropriateness of the order sought, the local authority may need to address the issue of opposition by others and reach a conclusion on whether to support the applicant.

7.30 As indicated above, the proper approach will lie in application of the principles to the conflict in question.

Conflict between the local authority and others with an interest in the adult's affairs

7.31 Sometimes the local authority will take one view of the adult's needs, but others with an interest will take a different view. This could arise where, for example, the local authority believes that the relatives do not have the skills to exercise guardianship but they believe they can manage, or where the authority believes that the intentions of the applicant will not be to the benefit of the adult. It could also arise where the local authority believes that one person would be better placed to become guardian than another person.

7.32 The report writer should assess whether objectors have a realistic alternative to the local authority's own proposals, irrespective of whether they have a vested interest in the adult's affairs. For example, if there are relatives who wish to care for the adult at home, it should be clear after proper investigation whether that is feasible and the least intervention necessary to benefit the adult.

7.33 If there is any suspicion that relatives or carers would, for example, be tempted to use their powers for their own benefit (including financial benefit) rather than that of the adult, this should be highlighted in the report, and reasons be given. Similarly if there is a suspicion that relatives or carers would use powers under the 2000 Act in an over-controlling way so as to restrict the freedom of the adult.

Possible courses of action

7.34 It may be that after consideration of all these factors the officer wishes to write an adverse report on the application. It is essential to discuss with a team leader, supervisor or senior social work officer any proposal to write an adverse report and to plan what alternative course of action the local authority might take to protect and safeguard the adult's interests.

If the officer is in doubt about the propriety of the order, or there is an expectation of challenge by other family members, there are various options open to the applicant or the local authority.

These include:

- applying to appear at the court to speak to concerns within the report;
- advising the sheriff to appoint a safeguarder or to make consequential or ancillary orders, or provisions or directions under section 3 of the 2000 Act;

For example, the local authority could ask the sheriff to order local authority supervision from the outset of the person authorised under the intervention order; or could suggest that limits be placed on the powers conferred under the order, which cannot be exceeded without some further supervisory or judicial procedure:

- recommending to the sheriff an alternative guardian;
- asking an independent solicitor to represent the interests of the adult in discussing the matter with the applicant and the local authority. Legal aid is available where the application is for welfare powers or a mix of welfare and financial powers;
- involving an independent advocate to support the adult to communicate his/her views. An independent advocate has a right to be heard by the sheriff;
- consulting the Public Guardian, where property and financial affairs are concerned;
- consulting the MWC where personal welfare matters are concerned.

7.35 In the last resort it may be necessary for the report by the MHO or the CSWO to oppose the application for guardianship by an individual and apply instead for the chief social work officer to be appointed. Where this is the case the MHO should notify the sheriff clerk of his/her intentions to ensure that the sheriff is aware and calls him/her to speak to any concerns identified within the report.

Consider need for additional safeguards - Police checks

7.36 Local procedures may prescribe, in certain circumstances, a check on whether the person nominated has any relevant criminal convictions.

Access to the report

7.37 Under Circular SWSI [1]/2000 Data Protection Act 1998: Guidance for Social Work Agencies, the person nominated in the application has a right of access to that part of the report which deals with his or her suitability.

Action on completion of the report

7.38 A report which contemplates legal action by the local authority, such as:

- an application for directions to be given by the sheriff under section 3(3) of the 2000 Act,

should be copied to the legal department to ensure necessary documentation for an application to court.

Reporting - time limits

7.39 A report by the MHO (or where incapacity is due to inability to communicate only, the chief social work officer) must be prepared within **21 days** of the date of the notice of the forthcoming application.

7.40 This deadline confirms the desirability of identifying the need for an order through assessment and care management procedures, and agreeing with others involved who should make the application and who should be nominated in the order.

Applications relating only to financial or property matters

7.41 The local authority has no responsibility to provide a suitability report where an application for an order with financial powers only is being made by an individual.

ONCE THE APPLICATION IS GRANTED

7.42 Once an application for an order is granted, the sheriff clerk will send a copy to the Public Guardian who will register the particulars and notify the adult (unless the court has directed notification not to be given under section 11), the local authority and the MWC (where the adult's incapacity is a result of mental disorder). The person authorised under the order may then take the decision or action authorised in the order.

7.43 The local authority should ensure that the notification is entered into the person's case file.

SUPERVISION OF PRIVATE WELFARE GUARDIANS

7.44 Local authorities have a duty to supervise private welfare guardians (see chapter 8 for details).

Chapter 8

SUPERVISION OF NON-LOCAL AUTHORITY PROXIES

LEGAL BACKGROUND

8.1 The 2000 Act requires local authorities to supervise all guardians with personal welfare functions in the exercise of those functions.

8.2 Regulations made under sections 10(3)(a) and 86(2) of the 2000 Act stipulate the intervals within which a local authority must arrange visits, except for the initial visit, to an adult with incapacity and to a welfare guardian. The initial visit must be made within three months, with subsequent visits made at intervals of not more than of 6 months of each other. Additional visits may be made at the discretion of supervisor.

8.3 Local authorities are required to supervise welfare attorneys and persons authorised under intervention orders that relate to personal welfare matters, but only where ordered to do so by the sheriff.

8.4 An application to the sheriff to order supervision of a welfare attorney may be made by any person claiming an interest in the personal welfare of the adult (see section 20(1)). It will be the responsibility of the Public Guardian to notify the local authority of the order (section 20(3)(b)(iii)).

8.5 There is no specific provision to order supervision of a person authorised under an intervention order. However this may be done by the sheriff under his/her general powers and is envisaged under section 10(3)(b)(i) of the 2000 Act.

SUPERVISION OF PROXIES WITH JOINT FINANCIAL AND WELFARE POWERS

8.6 Guardians and those authorised under intervention orders with powers relating to property or financial affairs are routinely supervised under the 2000 Act by the Public Guardian. The Public Guardian may also be ordered under section 20(2)(a) of the 2000 Act to supervise continuing attorneys, that is those with powers relating to property or financial affairs. Many guardians and attorneys under the 2000 Act will have both financial and welfare powers. The local authority and the Public Guardian may therefore both be required to supervise the same individual. Alternatively, there may be supervision by each authority of two or more proxies to the same adult. In either set of circumstances, it will be essential for the OPG and local authority to liaise with each other over matters of common interest. For example, the authorities should liaise about plans for the sale of an adult's house linked to planning for the adult's future place of residence.

8.7 It will also be helpful for local authorities to put in place procedures for managing disputes between different proxies and between proxies and the local authority in exercise of its functions.

SUPERVISION OF PRIVATE WELFARE GUARDIANS

8.8 In many cases, the guardian will be a relative or carer of the adult. The guardian will not necessarily reside with the adult. It is possible that a private guardian will live in a different local authority area to the adult. The responsibility for supervision in this case lies with the adult's home local authority, although that local authority may wish to request the guardian's home authority to carry out certain specific tasks such as visiting the guardian.

8.9 Supervision is intended to ensure that proxies are carrying out their functions properly. It should focus specifically on potential problems that might require action by the local authority. Supervision of individual guardians should relate to the particular circumstances of that case within the context of general local authority guidance and procedures. Where joint welfare guardians have been appointed the local authority is expected to provide supervision for each person appointed.

8.10 Supervision of guardians with welfare powers should be routine, of help to the guardian and not over burdensome. Supervisors should ideally be staff who already know the guardian and adult.

SUPERVISION OF WELFARE ATTORNEYS

8.11 Attorneys, like guardians and others, have a duty to abide by the principles. If the local authority is concerned that an attorney with welfare powers is not acting to in accordance with the principles and disagrees with the proposed actions of the attorney, it can apply to the sheriff for a direction for the welfare attorney to be supervised. It is advisable to seek advice from the legal department. As a last resort, the local authority can apply for welfare guardianship itself. This may also be the necessary where the attorney either lacks the power or is having difficulty exercising the power e.g. to move their relative to a care home, because the adult is resisting.

The purposes of supervision of proxies by authorities are:

- To ensure generally that the proxy is exercising powers in such a way that person's interests are being safeguarded and promoted in line with the principles. This is important because the person is unlikely to be able to complain effectively if the proxy is not acting appropriately. The adult's interests are defined in the 2000 Act by the principles set out in section 1.
- To assess the impact of any significant changes in circumstances on the person's welfare and the management of guardianship.
- To identify whether a guardianship order continues to be necessary at the end of the period for which it has been made and whether it should be renewed, recalled or the powers varied. This should be the outcome of ongoing needs assessment and review. If changes are necessary then appropriate and timely action should be taken in advance of period for review by the court.
- To confirm that the criteria for suitability to be appointed as guardian at section 59 of the 2000 Act are still met. Supervision should be used to check, for example, that the guardian is maintaining satisfactory personal contact with the adult, through visits, phone calls or other means appropriate to the adult's circumstances.
- To identify if an application should be made to the sheriff for a joint or substitute guardian to be appointed.

- To identify if an application should be made to the sheriff for the guardian's powers to be varied, or for any ancillary order, for example imposing conditions or restrictions on the guardianship order, to be imposed or varied.
- To identify any potential need for the guardian to be replaced or removed, or the intervention order to be revoked, or the welfare attorney to be removed or have his or her powers modified.
- To identify if an application should be made for other orders under the 2000 Act about the exercise of their powers by proxies. For example the sheriff may order a welfare attorney to report to him or her under section 20(2)(d). The sheriff has general powers at section 3 to make consequential or ancillary orders or directions, impose conditions on orders granted, and call for further information.

ROLE OF THE MWC

8.12 In addition to the local authority supervision responsibilities, the MWC also has responsibility under the Act to exercise protective functions in respect of individuals subject to intervention or guardianship order relating to personal welfare. The MWC scrutinises all intervention and guardianship applications and where not visiting directly corresponds with the adult and/or guardian to explain their role and to ask that the guardian advise the MWC on any change of circumstances or concerns they may have. Visiting the adult is at the discretion of the MWC. The MWC would also investigate any complaints relating to the exercise of functions relating to the personal welfare of the adult similar to those requirements of the local authority. The MWC expects that the local authority respond to complaints in the first instance.

DIRECTIONS TO A PROXY

8.13 The 2000 Act does not allow a local authority to issue a direction to a welfare guardian or other proxy. Such a direction to a guardian can only be made by the sheriff under section 3(3) of the 2000 Act, on an application by anyone, including the adult, claiming an interest in the adult's affairs. This need not be made at the time of initial application for guardianship but could be made at a later date. A local authority would be entitled to apply to the sheriff for such a direction if it considered that supervision of a guardian was not sufficient to ensure that the guardian was carrying out his or her functions in a satisfactory way; or if the guardian was encountering significant obstacles such as conflicts of interest.

SUPERVISION REGULATIONS

8.14 Regulations specify the form that supervision of welfare attorneys should take.

Visiting

8.15 The local authority must arrange for every adult who is subject to welfare guardianship and his or her guardian to be visited within three months of the order being granted, and subsequently at intervals not exceeding 6 months. Visits may be made more frequently at the discretion of the local authority.

8.16 Where the local authority is supervising a person authorised under an intervention order or a welfare attorney, the local authority should arrange for the adult and the proxy to be visited at a frequency to be determined by the sheriff, or if no such period is determined, at least once a month for the duration of a period to be determined by the sheriff. This is based on the presumption that supervision has only been ordered because of serious concerns about the operation of the attorney or intervener.

8.17 A specific purpose of visiting proxies is to enable the authority to inspect the records that all proxies are required to keep under the 2000 Act:

- section 21 for attorneys;
- section 54 for persons authorised under an intervention order;
- section 65 for guardians.

No format is prescribed for records, but guidance is given to proxies in the relevant codes of practice. Welfare guardians are required to keep the following records.

Records to be kept by welfare guardians

8.18 Section 65 provides that a guardian shall keep records of the exercise of his or her powers. It would be good practice for a welfare guardian to keep on a file:

- a copy of the interlocutor containing the guardianship order;
- a written plan for implementing the order, based on the review of the adult's personal welfare which preceded the application;
- a note of all action actually take.

For example, this could include medical appointments attended by the adult following consent by the guardian to treatment, and the outcome of the treatment. If the guardian has power to determine where the adult should live, it could include a note of the homes or other institutions actually visited with the adult, an assessment of their suitability in terms of the adult's reaction and the views of others with an interest in the adult's affairs, the degree of self-respect and privacy which they would afford the adult, and the adequacy of the support that the adult would receive.

- the file should also include also include a record of any incidents affecting the adult's personal welfare such as accidents causing physical injury. It should cover changes in family structure or relationships; the adult starting or stopping education, training or work; any accommodation moves, etc.;
- any correspondence with medical practitioners, care home managers or others concerning the matters covered in the guardianship order;
- a note of every meeting held with the adult or others involved in decisions about his or her personal welfare;
- a note of issues discussed in supervision meetings;
- a note of each meeting held formally to review the implementation of the order;
- a note of any incidental expenses arising out of the order, with receipts, so that reimbursement can be claimed;
- a note to remind the guardian to apply (or in the case of a local authority guardian, to prompt the chief social work officer to apply) in good time for renewal of the order.

8.19 The local authority may arrange or contract with another body to carry out supervisory visits. As above, the local authority might ask another authority to visit on its behalf, for example where the guardian does not live in the same local government area as the adult. The authority should specify clearly in the contract to whom this authority has been delegated and what is expected of the person or body carrying out the supervisory visits on their behalf, and should so inform the proxy.

8.20 If appropriate, visits to the adult and the guardian may be combined, although consideration should be given to carrying out separate visits, for example where there appears to be conflict between the guardian and the adult.

8.21 Visits should normally be made by appointment, but in certain circumstances, it might be appropriate for an unannounced visit to be made, for example to gain a view of the adult's living circumstances. This is a matter for each authority to determine, within its own procedures. In cases allocated for care management, visits may be linked to the normal monthly review cycle.

8.22 Visits should be recorded so that it is clear that the purposes of supervision listed above are being fulfilled. For example, written comments should be made following each visit on the continuing suitability of the guardian and on whether the guardianship order requires variation or renewal or whether the guardian's powers should be recalled. In particular, relevant changes in the adult's circumstances should be recorded, such as major increases or decreases in the adult's resources.

8.23 Clear records should be kept where the outcome of a visit is the conclusion that action such as application to the sheriff is required, and the records should be in a format that ensures subsequent monitoring that the action is carried out.

8.24 Records should also note if any issues arise about the provision of services to the adult, to enable appropriate action to be taken, in conjunction with the adult's care manager or key worker.

Provision of information

8.25 The Regulations require attorneys under the supervision of the local authority and non-local authority welfare guardians to provide certain reports and other information about the welfare of the adult that the local authority may request from time to time.

8.26 The information provided by proxies should be recorded in such a way that any action required by the local authority as a consequence is identified clearly and can be monitored.

8.27 Local authority guidance on reporting might exempt proxies who live at a distance from the adult from reporting accidents and incidents, of which they might not routinely be aware. In these circumstances, the authority would need to rely on reporting by others, such as agencies providing care to the adult.

8.28 The Regulations on supervision do not extend to matters relating to reimbursement and remuneration of a guardian. The local authority should, however, make itself aware, through supervision, of circumstances in which a welfare guardian is receiving either reimbursement for reasonable outlays incurred in the exercise of their functions or, more unusually, remuneration for carrying out his or her functions.

Consultation

8.29 The principles must be observed by anyone exercising functions under the 2000 Act. It would be good practice, and be in line with the principles, for the local authority to consult the adult regularly on the performance by the proxy of his or her functions.

8.30 The adult's nearest relative, primary carer, named person or any other person whom the sheriff has directed to be consulted about the adult's personal welfare should also be given a regular opportunity to give his or her views about how the proxy is exercising his/her functions.

Seeking advice

8.31 The local authority has a responsibility to give a guardian information and advice on the exercise of welfare powers. This will usually happen in regular supervision meetings. However, if a new issue emerges in between such meetings, an individual welfare guardian should be able to contact his or her supervisor within the local authority for advice. Similarly, a local authority guardian should be able to speak to a senior social work officer, an MHO, or someone else with special expertise when required. The guardian should keep a note of any discussion with an officer who has given information and advice.

8.32 The MWC will have been notified of the welfare guardian's appointment by the OPG. The MWC can provide valuable advice to anyone exercising welfare powers in relation to an adult whose incapacity is due to mental disorder.

Chapter 9

INVESTIGATIONS

INVESTIGATION WHERE PERSONAL WELFARE OF AN ADULT APPEARS TO BE AT RISK

9.1 The duty of the local authority to investigate circumstances where the personal welfare of an adult appears to be at risk is a statutory function under the 2000 Act. This means that the assessment and care management functions of local authorities must be brought into play whenever it comes to their attention that an adult in this situation is within their geographical area. In cases which indicate that urgent action is needed to protect the person from harm, then action may be taken under the 2003 or the 2007 Act as appropriate.

9.2 The routes by which information about an adult whose personal welfare seems to be at risk may arrive have already been discussed in chapter 3. All first line contacts should be aware that such investigations are a matter for social work officers. Chapter 3 also discusses the need for first line contacts to have clear guidance to refer the matter to the duty team or as appropriate.

9.3 First line contacts should inform the person who has brought the adult's circumstances to their attention that the matter will be referred to the duty social work team.

9.4 It is essential that there is no delay in referral by any first line contact to the duty team. The duty team will need to consider all available information and consider which powers it will be appropriate to use before intervening. The procedure to follow should be made clear in local guidance.

Designation of investigating officers

9.5 The local authority may wish to designate certain officers as having the role of 'investigating officers'. An officer carrying out an investigation under the 2000 Act is referred to below as 'the investigating officer'. If a social work officer receives information that the personal welfare of an adult is at risk and is not an investigating officer, he or she should pass the information to an investigating officer immediately.

Liaison with the MWC

9.6 Investigation of circumstances where the personal welfare of an adult with a mental disorder appears to be at risk is a function which the local authority exercises in parallel with the MWC. It will be important to liaise with the MWC in order to avoid possible duplication and to share information. Which body would be most appropriate to take a lead should be discussed. In any case it is important to report significant incidents to the MWC. Such arrangements as to how the complaint is to be taken forward should be made clear to the adult and others involved. It is advised that the importance of liaising with the MWC is stressed in local guidance issued in relation to investigations under the 2000 Act.

Purpose of the investigation

9.7 The purpose of the investigation is to ascertain whether there is any need to take action either under the 2000 Act or otherwise to safeguard the personal welfare of the adult. This code deals with situations where the adult is found to have impaired capacity. It is possible that an investigation could find that the adult's capacity is not impaired in relation to the cause for concern, but is vulnerable for some other reason, for example physical infirmity or mental illness. The code does not deal with the action required where the adult is at risk for some other reason than incapacity as defined by the 2000 Act. In such circumstances, intervention under the 2007 Act or 2003 Act will need to be considered. Where an adult may lack capacity due to mental disorder an intervention under the 2003 Act may be appropriate. The duty social worker will need to make an assessment of which route will be most appropriate.

ACTION BY INVESTIGATING OFFICER/CARE MANAGER

9.8 The investigating officer will need to take the following action:

- begin by carrying out an initial assessment – in practice this may be sufficient to obtain enough information to resolve the concern;
- however, if it is necessary to carry out formal proceedings then the following action should be taken:
  - on preparation or receipt of a report requiring an investigation under section 10(1)(d) of the 2000 Act, the investigating officer should open a file and place the information initially received on file (although urgent action should obviously not be held up for this step);
  - obtain any information about the adult held by statutory authorities;
- visit the adult;

The investigating officer should prepare to visit the adult in order to obtain first hand information about the adult's circumstances. In cases where there is a fear of conflict with the adult or his/her carers or associates, the investigating officer should arrange to attend the visit with a colleague.

- take account of the views of significant others;

The principles require anyone exercising functions under the 2000 Act to take account of the views of the nearest relative, primary carer and named person of the adult, and any other person appearing to have an interest in the personal welfare of the adult, and any existing continuing or welfare attorney or guardian. The investigating officer will need to contact these people, if they exist, in the course of the investigation. However it is a matter of judgement whether they should be informed of the visit to the adult or invited to attend. It may be that in some cases there is evidence that the adult is at risk because of the actions of one or more people involved with him/her.

9.9 If it appears likely that access to the adult will be denied, the investigating officer should be alert to the possible need for action under the 2007 Act or the 2003 Act, as the 2000 Act does not itself confer powers to deal with urgent protection of adults.

Conduct of the visit

9.10 The main purpose of visiting the adult is to obtain information but it may be that the need for urgent action will emerge at the visit.

9.11 The officer should explain the purpose of the visit and what may happen as a result of the visit. The person should be given information about his or her rights.

Possible need for action outwith the 2000 Act

9.12 If the adult has capacity, but is at risk, the 2000 Act is not able to offer any assistance. The officer should consider what other social work or medical interventions can be offered and should follow local procedures with regard to adults in need of support and protection, i.e. on the use of the 2003 or 2007 Acts.

9.13 In cases where the 2003 Act appears to be relevant, the investigating officer should consult a MHO if he/she is not one, and liaise with appropriate medical practitioners.

POSSIBLE NEED FOR URGENT ACTION

9.14 Although the 2000 Act does not expressly provide for urgent action, the investigating officer may consider that an intervention order or interim guardianship should immediately be sought (see chapter 6 on intervention orders and guardianship).

9.15 Where it is considered that an interim order is required, the care manager will need to co-ordinate a case consultation to establish who will do what and to ensure that all the necessary steps to obtain the appropriate order or guardianship are taken. Where the person has a mental disorder, the 2003 Act would allow local authorities to seek an order for the immediate removal of the adult to a place of safety for a prescribed period. Where appropriate, local authorities should put in place arrangements to apply for an interim guardianship order within this abbreviated timescale. This will require liaison with local medical practitioners about the urgent provision of the necessary reports of incapacity to support the application.

INFORMATION TO BE OBTAINED IN THE COURSE OF AN INVESTIGATION

9.16 Where the person appears to lack capacity or is already subject to an intervention under the 2000 Act, the officer should enquire into the arrangements which are in place to intervene in personal welfare decisions on behalf of the adult. There are various possibilities and the following are not exhaustive:

- the adult's carer or relatives may be taking these decisions informally without any authorisation under the 2000 Act. It may be of benefit to the adult that they should seek formal authorisation in order to be subjected to supervision;
- there may be formal interventions in place under the 2000 Act which are working satisfactorily. It may be that the adult's welfare is not at risk but the circumstances have been misunderstood by whoever reported the case;
- there may be formal interventions in place under the 2000 Act, but the proxy or proxies may not be discharging their functions satisfactorily or at all;
- the individual may have assets and be trying to manage his/her own affairs and be vulnerable to financial exploitation with consequent risks to personal welfare;
- there may be no-one making any interventions in relation to the adult. For example the adult may live alone or have been rejected by family and friends; or may be destitute;
- there may be one or more proxies with financial powers, but no-one with welfare powers in relation to the adult;
- a proxy with financial powers may be abusing these by failing to use the adult's resources for his or her benefit;
- the nearest relative may be abusing his or her position in relation to the adult and it may be desirable to apply to the sheriff to have him or her displaced.

9.17 Any relatives or carers of the adult should be interviewed and their role in the adult's personal welfare and/or finances recorded. The adult's views should also be recorded, as above. The investigating officer should seek to gain as complete a picture as possible of the adult's personal circumstances and the welfare issues affecting him or her.

Obtaining information from other sources

9.18 Having visited the adult and obtained such information as is available about the person's circumstances, it may be necessary to supplement this information by following up leads emerging at the visit. For example, the person's welfare may be at risk because the normal primary carer is temporarily unavailable. The carer may have been taken into hospital and it may be necessary to contact the hospital authorities to check how long he/she will be unavailable.

9.19 The OPG may need to be contacted and asked to carry out an investigation into circumstances where the person's financial affairs or property appear to be at risk; or into a complaint against a proxy with powers over property and financial affairs.

9.20 Information about the adult's current wishes or feelings may need to be obtained outside the meeting. For example, the adult's children or other close relatives, GP, member of the clergy, solicitor, cultural or other associates might be contacted, and they may be able to provide information on the adult's past wishes and feelings.

REPORTING A POSSIBLE CRIMINAL OFFENCE

9.21 Under section 83 of the 2000 Act it is an offence for any person exercising powers under the 2000 Act relating to the personal welfare of an individual to ill-treat or wilfully neglect him/her. The offence is punishable on summary conviction to a fine not exceeding £5000 or a term of imprisonment not exceeding 6 months, and on indictment to a fine or a term of imprisonment not exceeding 2 years.

It may be necessary as a result of the investigation to report a suspected offence under the 2000 Act or any other offence to the police. Appropriate liaison procedures with the local police force will need to be put in place. The local authority legal department should be informed if a suspected offence is to be reported to the police.

9.22 The reporting of a suspected offence to the police should not hinder the local authority from taking any necessary action under the 2000 Act or otherwise to protect and safeguard an adult whose personal welfare may be at risk.

REPORTING THE OUTCOME OF THE INVESTIGATION

9.23 Once the investigation is completed the officer should prepare a report with recommendations. This should cover the topics in Annex 3, but should additionally discuss the factors which suggest that the adult's welfare is at risk and record whether a criminal offence has been or, in the opinion of the investigating officer, should be reported to the police.

9.24 The report should make recommendations and justify these.

Implementing the report

9.25 The process for implementing the report will normally form part of the local authority's care management procedures. Specific procedures relating to intervention orders and guardianship are explained in chapter 6.

Report outcome to MWC

9.26 The report and implementation plan should also be copied to the MWC where the adult's incapacity is due to mental disorder.

Completing file on investigation

9.27 A copy of the report should be placed on the file for the investigation, and a cross reference made to the casework file on which subsequent action in relation to the adult will be recorded.

INVESTIGATING COMPLAINTS AGAINST A PROXY

9.28 The local authority has the function of investigating any complaints received in relation to the exercise of welfare powers by proxies i.e. attorneys, guardians or interveners.

Possible sources of complaints

9.29 Complaints against the proxies may be received from a range of complainers. They may be received from, for example:

- adult him or herself;
- relative, carer, concerned neighbour or friend of the adult;
- professional such as the adult's medical practitioner, social work officer or community nurse;

- adult's employer or the manager of an establishment involved in educating or training the adult;
- manager of a residential home where the adult resides.

Complaints may come direct or may be referred on from the MWC.

Liaison with the MWC

9.30 The function of investigating complaints is also conferred on the MWC. However, the 2000 Act provides that the MWC will only carry out an investigation if it is not satisfied with the outcome of an investigation carried out by the local authority, or if the local authority has failed to investigate the complaint. It would therefore be good practice for the local authority to liaise with the MWC about the investigation of any complaint received so as to ensure that any special concerns of the MWC are taken into account from the outset. A report of the investigation will normally be sent to the MWC (see below).

Purpose of investigation

9.31 The duties of attorneys are set out in part 2 of the 2000 Act and in the code of practice for attorneys published by the Scottish Ministers under section 13 of the 2000 Act. The duties of guardians and persons authorised under intervention orders are set out in part 6 of the 2000 Act and in the code of practice for persons authorised under intervention orders and guardians published by the Scottish Ministers.

9.32 The purpose of investigating a complaint includes ascertaining whether:

- the proxy has exercised his or her functions under the 2000 Act properly so as to safeguard the adult's personal welfare;
- the proxy has adequate powers to safeguard the adult's personal welfare, or whether supplementary powers should be sought by the proxy or someone else.

9.33 Where the complaint concerns management of property or finances or concerns about these matters emerge during the course of the investigation it will be for the Public Guardian to investigate.

Possible outcomes of investigation

Where the proxy's powers are inadequate

9.34 If the alleged misconduct by the proxy is due only to inadequacy of powers, then the outcome may be a recommendation that the proxy or someone else should obtain additional powers. Depending on the need, this could be achieved by making changes to an existing guardianship order or applying for an intervention order.

Where misconduct is due to improper or inadequate exercise of existing powers

9.35 If a proxy has acted improperly or unwisely because of ignorance or lack of thought rather than deliberately, or because they were not advised adequately, it may be possible at the outset to provide the necessary information and support to ensure he or she continues in the correct manner.

9.36 If the alleged misconduct by the proxy is due to improper or inadequate exercise of his or her existing powers, with apparent deliberate intent, then a variety of outcomes are possible. These could include:

- application to the sheriff (section 3) for directions to be given to the proxy or someone else;
- application to the sheriff (section 20) to bring a welfare attorney under local authority supervision;
- in the case of a proxy already under local authority supervision, an increase in the intensity of supervision;
- application to the sheriff to curtail, modify or remove the proxy's powers or to appoint an additional proxy to share the powers;
- application to the sheriff for one or more intervention orders to supplement or replace existing orders which are not being properly implemented;
- application to the sheriff to remove a proxy's powers and replace the proxy by a welfare guardian or a different welfare guardian, who may be the CSWO;
- reporting the matter to the police.

Designation of complaints officers

9.37 The local authority should designate officers whose responsibility it is to investigate complaints against proxies. As officers of local authorities may also be involved in supervising attorneys, and will be involved in supervising guardians, and may also be exercising welfare guardianship or be authorised under an intervention order, there could be conflict of interest if the same officer is involved in complaints. It would therefore be good practice to designate as officers to investigate complaints, officers who are not already involved in supervision of proxies or authorised under an intervention order, or involved in the exercise of guardianship powers in relation to the same adult.

9.38 If separation of functions is difficult to achieve it would be an option in relation to adults whose incapacity is due to mental disorder to ask the MWC to carry out the investigation. The MWC could do this under section 9(1)(d) on the grounds that the local authority has failed to carry out the investigation.

Action on receipt of a complaint

9.39 All officers should be aware of the contact details of the designated complaints officers. This is so that if they receive a complaint, they can refer the complainer on to the appropriate complaints officer; and so that they can advise persons with an interest in the welfare of the adult of the right to, and the proper address to complain about a proxy.

Action by complaints officer

9.40 The complaints officer should study the details of the complaint, if received in writing. If received orally, the complaints officer should write down a report of the complaint as communicated to him or her. The complaints officer may need to contact the complainer to clarify details of the complaint at this stage.

9.41 The MWC should be informed of the nature of the complaint, as indicated above. The MWC should be asked at this stage to provide any information available to them on the adult and the activities of the proxy complained of.

9.42 As the OPG is responsible for registering all proxies, the Public Guardian should always be informed where there has been a complaint and the local authority intends to carry out an investigation. Where the proxy complained of has both personal welfare powers and power over the adult's property and financial affairs, the Public Guardian should also be informed of the nature of the complaint and asked for any relevant information. For example, it may be that a complaint which is apparently about welfare matters is really about an alleged misuse of the adult's property or finance. The Public Guardian may already be investigating the matter or may consider that she should do so.

Decision not to investigate a complaint

9.43 The complaints officer may take the view that the complaint should not be investigated by the local authority. This decision must be authorised by a team leader, supervisor or senior social work officer.

9.44 Any decision not to investigate a complaint should be communicated to the MWC and to the complainer. The complainer should be advised of the MWC's power to investigate if it is not satisfied with the outcome of a local authority investigation, where the complaint is genuinely about welfare powers. If the complaint turns out to be about property or financial powers, the complainer should be advised to contact the Public Guardian.

Decision to investigate a complaint

Inform the complainer

9.45 If the decision is to investigate the complaint, the complaints officer should so inform the complainer.

In case of urgency

9.46 If it appears that there could be urgency, in that the adult's personal welfare has been put at risk, the complaints officer should follow local procedures in relation to the 2007 Act.

Seek the proxy's explanation of the circumstances

9.47 The complaints officer should present the details of the complaint to the proxy and invite a response. This can be done orally or in writing. If there appears to be urgency, in the sense that the circumstances suggest the adult's welfare is or may be at risk, then an oral interview should be undertaken as soon as possible. Where there is an oral interview a record should be made of this which should be sent to the proxy, and placed on the file.

9.48 Ask to see the proxy's records of the exercise of his/her powers. Attorneys, persons authorised under intervention orders, and guardians are obliged to keep records of the exercise of their powers. The proxy complained of should be asked to let the complaints officer inspect these records.

Visit the adult

9.49 The complaints officer should arrange a meeting with the person to check his/her perceptions of the proxy's handling of his/her personal welfare. The adult should be invited to include relevant others in the meeting, but not the proxy or the complainer to avoid any unpleasant confrontations. If no one else is available to support the person then consideration should be given to involving an independent advocate.

Action in the event of non-co-operation by the proxy

9.50 Any proxy who is threatening to withhold access to the person with incapacity should be warned that he/she risks immediate application to the sheriff for removal of his/her powers. It would be possible for the complaints officer to apply to the sheriff for a direction to the proxy to allow access to the adult under section 3(3) of the 2000 Act. In such cases it will also be relevant to consider the use of powers under the 2007 Act or 2003 Act.

Conduct of the visit

9.51 It is essential to seek the adult's own views about the alleged misconduct in relation to his or/her personal welfare, if he/she can communicate these at all. This is in order to ascertain whether the proxy's alleged misconduct is related to failure to observe the need to take into account the person's past and present wishes and feelings. It may be that he/she can still express wishes and feelings which are in conflict or in agreement with the proxy's actions.

9.52 The proxy may argue that it would be damaging to the person's physical or mental health to be informed of the complaint. It would be possible for the complaints officer to visit the person without informing him/her of the complaint. However this would not be a desirable course of action.

9.53 If there is likely to be obstruction by the proxy or others, it may be desirable for the complaints officer to carry out the visit with a colleague.

9.54 The complaints officer should have prepared a list of questions and facts to be ascertained, relating to the alleged misconduct of the proxy.

9.55 At the visit, the complaints officer should:

- explain clearly that a complaint has been received against the named proxy;
- explain clearly the procedure being followed to investigate the complaint and the possible outcomes;
- explain what information he or she requires from the adult and others present to further the investigation;
- remind everyone that the adult's welfare is the central concern;
- explain that the 2000 Act provides that the local authority may take such steps, including the making an application to the sheriff, as seem to them to be necessary to safeguard the personal welfare of the adult, as a result of the investigation, but that the local authority would prefer to proceed with co-operation, rather than with compulsion if possible.

9.56 The complaints officer should request the adult's views on what might be done to improve or change the situation. However, the complaints officer should be on guard for any hints that the adult is unduly susceptible to the proxy's influence.

If the adult has communication difficulties which make it difficult, verbally, to find out his/her wishes and feelings, then other means appropriate to the needs of the individual must be explored. Annex 2 gives guidance on the steps that can be undertaken.

Seeking the views of relevant others

9.57 It will be important to gather the views of significant others with an interest in the personal welfare of the adult. This might be achieved either through a meeting or separate letters or phone calls.

Obtaining information from other sources

9.58 Having met the adult and obtained information about his/her circumstances, it may be necessary to supplement this information by following up leads emerging at the visit. For example, it may be suggested that someone else should be appointed as welfare guardian in addition to, or instead of, the person complained of; or that specific directions are sought from the sheriff to curtail or control the behaviour complained about.

9.59 Information about the adult's current and past wishes or feelings may need to be obtained outside the meeting. For example, the adult's children or other close relatives, friends, support worker, GP, solicitor might be contacted, and they may be able to provide information on the person's past and present views on the matters to be addressed.

Reporting a possible criminal offence

9.60 Under section 83 of the 2000 Act it is an offence for any person exercising powers under the 2000 Act relating to the personal welfare of an adult to ill-treat or wilfully neglect that adult. The offence is punishable on summary conviction to a fine not exceeding £5000 or a term of imprisonment not exceeding 6 months, and on indictment to a fine or a term of imprisonment not exceeding 2 years.

It may be necessary as a result of the investigation to report a suspected offence under the 2000 Act or any other offence to the police. Appropriate liaison procedures with the local police force will need to be put in place. The local authority legal department should be informed if a suspected offence is to be reported to the police.

9.61 The reporting of a suspected offence to the police should not hinder the local authority from taking any necessary action under the 2000 Act or otherwise to protect and safeguard an adult whose personal welfare may be at risk.

Reporting the outcome of the investigation

9.62 Once the investigation is completed the officer should prepare a report with recommendations. This should cover the topics in the Annex 3, an it will be essential to record the factors which are relevant to the complaint against the proxy and whether a criminal offence has been or, in the opinion of the investigating officer, should be reported to the police.

- The report should make a clear finding as to whether the complaint is upheld or not.
- The report should give reasons for this finding. For example it should identify any conflict of interest which affected the proxy in relation to the adult or in relation to others with an interest in the person's welfare. If others had malicious or misguided motives for the complaint this should be identified as it may be relevant to their future involvement in the person's affairs. Equally if the proxy has misused his/her powers, this should be clearly identified.
- If the proxy's misconduct was related primarily to the inadequacy of his or her powers to deal with the situations that arose, this should be identified. The proxy may be able to exercise additional powers competently if given them and properly supervised in their use.
- Whether or not the complaint is upheld, the report may make recommendations and will need to justify these.

Informing the proxy and the adult

9.63 The report should be sent to the proxy complained of and a meeting offered to explain and discuss the recommendations.

The report should be given to the adult to explain and discuss the recommendations. A face to face meeting will ensure that he/she receives the report and, in accordance with the principles, is enabled to understand its contents as far as possible and express his/her views.

9.64 A copy should also be sent to the complainer. If appropriate, the findings may be shared with others involved in the investigation. All parties should be reminded that the MWC also has power to investigate the complaint if not satisfied with the outcome of the local authority investigation (although the MWC does not have power to investigate simply because someone is else is dissatisfied).

Completing file on investigation

9.65 A copy of the report should be placed on the adult's and, where applicable, the proxy's file.

Report outcome to MWC

9.66 The report and implementation plan should be copied to the MWC where the adult's incapacity is due to mental disorder.

Copy report to Public Guardian

9.67 The report should be copied to the Public Guardian who will have registered the proxy's appointment.

Implementing the report

9.68 The process for implementing the report may involve an application to court to displace a proxy and put in place other arrangements for protecting and safeguarding the adult's personal welfare. The implementation of these other measures will normally form part of the local authority's care management procedures. Specific procedures relating to intervention orders and guardianship are explained in parts 5 and 6 of this code respectively.

Chapter 10

FOREIGN APPOINTEES AND RELATIONSHIPS WITH THE LAW OF OTHER COUNTRIES

POSITION OF FOREIGN GUARDIANS UNDER THE 2000 ACT

10.1 Many of the provisions of the 2000 Act apply to guardians or those holding similar offices appointed under the law of another country, including that of England, Wales and Northern Ireland. Such appointees will not, however, be required to have their powers registered by the Public Guardian and their appointments will not therefore be notified to the local authority where the adult lives. The local authority will nevertheless have certain investigative and powers in relation to foreign appointees as they have in relation to guardians appointed under the 2000 Act. Routine supervision of foreign welfare guardians by the local authority is not required by the 2000 Act, but complaints may be investigated and if necessary a local authority could apply to the sheriff to order supervision or to displace the foreign guardian.

10.2 The relationships between the legal systems of the UK, Germany, France, Switzerland and the Netherlands will in future be governed by the Hague Convention on the International Protection of Adults of January 2000, once the Convention comes into force. It was ratified by the UK in November 2003 and in Germany in April 2007 but needs to be ratified by France, Switzerland or the Netherlands before it can come into force. The provisions of the Convention are incorporated at Schedule 3 of the 2000 Act.

10.3 Schedule 3 of the 2000 Act also contains provision for the recognition of equivalent measures taken under the law of a country other than Scotland for the personal welfare or protection of property of an adult with incapacity. This is conditional on the jurisdiction of the authority of the other country being based on the adult's habitual residence there. Similarly in England and Wales the Mental Capacity Act 2005 provides that a protective measure taken in relation to an adult under the law of a country other than England and Wales is recognised there if it was taken on the ground that the adult is habitually resident in the other country. As a matter or practice, Scottish orders are generally recognised in Northern Ireland.

10.4 Where a guardian appointed under the law of another country requires advice on his or her authority in Scotland, or a guardian appointed in Scotland requires advice on his or her authority abroad, this should be sought from the Civil Law Division, St Andrew's House, Regent Road, Edinburgh EH1 3DG.

TRANSFERS OF GUARDIANSHIP WITHIN THE UK

10.5 The 2000 Act removes, through repeals in schedule 6, the provisions at sections 77 and 80 of the 1984 Act for the removal to England and Wales or Northern Ireland of people subject to guardianship in Scotland, and for their guardianship in the new jurisdiction. This is because the powers of guardians in Scotland under the 2000 Act may comprise any of a whole range of financial and welfare powers, and thus would not necessarily match the standard powers conferred on guardians elsewhere in the UK. Guardianship would have to be considered afresh by the courts in the other UK country, where an adult moves from Scotland. However, while the 2000 Act does not provide for transfers of guardianship of adults moving to other UK countries from Scotland, it should be noted that, under section 67(3), 'a guardian having powers relating to the personal welfare of an adult may exercise these powers in relation to the adult whether or not the adult is in Scotland at the time of the exercise of the powers'.

10.6 Where a local authority requires advice on any functions that it may have in relation to attorneys or guardians or similar appointed under the law of any other country, or on the authority in Scotland of such foreign appointees, this should be sought from the Civil Law Division, Tel. 0131 244 4827.

Annex 1

Justice Department

Civil Justice, Law Reform and International Division

St Andrew's House
Regent Road
Edinburgh EH1 3DG
DX: ED20 557 007

Telephone: 0131-244 4840

Fax: 0131-244 2195

jan.killeen@scotland.gsi.gov.uk

http://www.scotland.gov.uk

30 March 2007

CCD5/2007

To all: Directors of Social Work

Copied to:

Local Authority Chief Executives
COSLA
ADSW
Chief Executives of Health Boards
Mental Welfare Commission
Office of the Public Guardian
NHSScotland Central Legal Office
Scottish Law Commission
Law Society for Scotland
Royal College of Psychiatrists
British Medical Association
Care Commission
Alzheimer Scotland – Action on Dementia
ENABLE
Age Concern Scotland
Scottish Association for Mental Health
Scottish Coalition on Learning Disability
Carers Scotland
Princess Royal Trust for Carers
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**

Paul Cackette
Head of Civil Justice, Law Reform
and International Division
Justice Department

Adam Rennie
Head of Community Care Division
Health Department

ANNEX

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, ECHR.[8]

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.

8 Section 6 of the Human Rights Act 1998

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 2000 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.'[9]

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 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.

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

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 procedure.[10] 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.

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

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 care[11] 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 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.

11 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.

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 2003.[12]

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

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.**[13] 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;

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

- confirm what care package and or actions were agreed; and
- 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,[14] 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

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

- 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.

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:

- 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').[15] 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.

15 (2004) 40 EHRR 761

4 Another case in point is that *of H.M. v Switzerland*.[16] 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*[17] 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 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.

16 (2002) ECHR 157
17 2005 SCLR 613

- 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.

Annex 2

A GUIDE TO COMMUNICATING WITH THE PERSON WITH IMPAIRED CAPACITY

Principle 3 means the person's present and past feelings and wishes must be ascertained so far as possible. Some individuals will be able to express their wishes and feelings clearly, even although they would not be capable of taking the action or decision which you are considering. For example, the person may continue to have opinions about what he/she wants to do or buy without being able to carry out making the arrangements or carrying out the transaction personally.

The Scottish Government has prepared a tool for staff involved with the assessment process where the capacity of the individual is in question. 'Adults with Incapacity (Scotland) Act 2000: Communication and Assessing Capacity: a guide for social work and health care officers'. It supplements the code of practice for local authorities and is available to download at the Scottish Government website: http://www.scotland.gov.uk/Topics/Justice/Civil/awi/resources/publications/professional. It is a web publication only.

In communicating with the adult the following points may be helpful:

- take time to explain to the adult what decision requires to be made and what issues are involved;
- use simple language;
- choose a time of day when the adult is alert and ready for a discussion;
- choose a quiet location where interruptions are unlikely;
- use any aids which might be helpful, such as pictures or videos;
- where there are language or speech difficulties, seek assessment and support from a speech and language therapist;
- use appropriate visual aids or sign language for those with hearing difficulties;
- ensure that any mechanical devices such as hearing aids, or voice synthesiser, are used properly to assist communication;
- in extreme cases of communication difficulties, seek advice from a speech and language therapist including advice on what specialised assistance might be available;
- maximise the help of others who know the person and who are trusted by the him/her, for example relatives, friends, GP, social worker, the adult's named person, or member of the person's faith community, to help you to explain the matter and seek the person's views; but be careful to ensure that others are helping to communicate the person's views without imposing their own. (Their own views may also be important, but that is a separate matter.);
- use the services of an advocacy project which supplies volunteers or other staff to promote independently the rights, views and wishes of people who have difficulty in expressing these for themselves. For further information on advocacy services see Annex 4.
- If all efforts fail, be prepared to abandon the attempt, and try at another time (having reflected on what might help).

Annex 3

CHECKLIST OF TOPICS FOR REPORTS

The adult and people involved with him or her

1. The name, address, date of birth and other identifying details of the adult.

2. The name, address and other contact details of all those involved in the adult's day to day care.

3. For each person involved in the adult's care, what part the person plays. For non-professional persons, an assessment of any problems they face in providing care, e.g. transport, resources, caring skills, insight into the adult's condition.

4. The name and address of anyone with powers over the adult's property and financial affairs, and the nature of the powers. Or a statement that the adult is managing his or her own affairs.

The adult's capacity

5. A description of the adult's capacity in relation to financial, property or personal welfare decisions, highlighting the areas in which the adult lacks capacity, in the opinion of the author and others, as pointers for intervention or action. A copy of any medical certificate or report of incapacity should be attached. The cause of the adult's incapacity should be identified and a prognosis given as to whether it is a condition that will stay the same, deteriorate or improve.

6. Any communication difficulties affecting the adult and the steps which have been taken to achieve communication, including any key people who assisted with this.

Social work services history

7. Any previous interaction between the adult and social work services, for example through child welfare or protection; through mental health or through offender services.

8. The name and address of any social work officer providing community care services for the adult, including the author of the report; and any home help or other service provider involved in the adult's community care.

9. A record of any additional information or insight provided by any such service provider about the adult's welfare.

Others with an interest in the adult

10. The name and address of any relatives or friends with an interest in the adult's welfare, whether or not the adult has contact with them (e.g. parent or child).

11. The name and address of any relatives or friends with whom the adult maintains contact. The nature of the contact and how it assists the adult's welfare.

The adult's resources

12. If this can be ascertained, the extent of the adult's resources and where they are held, bearing in mind that there is no compulsion on the adult or anyone else to disclose this.

13. An assessment of whether the adult's funds are being used for his or her benefit.

14. Identification of any difficulties in accessing the adult's funds which are impacting on the adult's welfare.

15. Any possible issues of exploitation regarding the adult's property or finances.

16. Any anticipated increase in the complexity of the adult's affairs, suggesting a need for management arrangements in future.

Learning difficulties affecting the adult

17. A description of any learning difficulties affecting the adult and any training or employment options that might promote the adult's personal welfare, drawing on evidence from the adult's previous record or special educational needs or future needs assessment, if relatively recent.

Rehabilitation possibilities for the adult

18. To cover any rehabilitation of the adult which is being undertaken, for example occupational therapy, speech therapy, mobility development, retraining, with a view to improving the adult's welfare and capacity to take charge of his or her own affairs.

The adult's ability and motivation towards personal care

19. Issues such as whether the adult can keep him or herself clean and tidy; whether the adult can dress independently; difficulties in toileting, etc.;

20. Issues arising regarding the adult's nutrition and diet.

The adult's living conditions

21. A description of the adult's living conditions and an assessment of how satisfactory they are for present and likely future requirements.

22. The names of all those who live with the adult at the address and their relationship to the adult.

23. An indication of whether the adult owns his or her own home, or has occupancy rights in the matrimonial home, and any property issues that would arise should the adult have to move.

24. A description of any contacts made in regard to the adult's homelessness or need for renewal or change of tenancy, should that be an issue.

25. Any recommendation for the adult to move into residential care, with reasons.

The adult's medical condition and prognosis

26. The adult's medical condition, if that is an issue, and any prognosis with implications for future welfare needs, such as deteriorating physical or mental capacity; the need for particular treatment options to be considered, etc.

27. Any forthcoming or regular appointments which should be kept by the adult in relation to personal welfare matters such as visits to the hospital, dentist, chiropodist, etc.

The adult's personal circle and interests

28. The adult's social circle, recreational activities, cultural or religious affiliations etc, and any key people involved with the adult as a result of these activities or affiliations.

Issues around offending, addiction, challenging behaviour, etc.

29. A record of any issues facing the adult regarding challenging behaviour, addictions, offending behaviour, etc.

Professionals and organisations involved with the adult

30. The names, addresses and other contact details of any professional advisers with whom there are dealings over the adult's property, finances or personal welfare, such as occupational therapist, educator, psychologist, accountant or solicitor.

Key welfare decisions facing the adult in the future

31. A note of any key decisions not already covered, which may be required in the foreseeable future, including the financial implications of any such decisions.

Recommendations for intervention under the 2000 Act, if any

32. A note of the officer's recommendations, if any, for intervention by the local authority or others, with, in each case by an analysis of how the principles would support the recommendation.

Annex 4

USEFUL ADDRESSES AND PUBLICATIONS

Office of the Public Guardian (Scotland)
Hadrian House
Callendar Business Park
Callendar Road
Falkirk FK1 1XR

Enquiry line: 01324 678300

www.publicguardian-scotland.gov.uk

For information and advice about matters covered by the Act. The OPG's focus is primarily on financial matters. If they cannot assist directly with queries on other matters relating to adults with incapacity (e.g. welfare, health, care) they will point you to other agencies who will be able to help. The OPG does not provide legal advice. All OPG publications, including forms and guidance notes can be downloaded. Hard copies are available on request.

Mental Welfare Commission for Scotland
K Floor
Argyle House
3 Lady Lawson Street
Edinburgh EH3 9SH

0131 222 6111

www.mwcscot.org.uk

Helpline: 0800 389 6809

The Commission provides advice on welfare matters in relation to AWI and free good practice guides – see website for further information.

Scottish Government
Civil Law Division
Area 2 W
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Tel: 0131 244 3581

http://www.scotland.gov.uk/topics/justice/civil/awi

Adults with Incapacity Act Codes of Practice and other publications are listed on, and can be downloaded from, the website.

Local Authority

To contact your local authority on matters relating to welfare/personal care issues and the Act you should ask for the social work department or community services department at the local council offices in the area where the adult lives. The address is in the phone book.

Sheriff Courts

The address and telephone number of the local sheriff court where the adult lives will be in the telephone directory. You can also find details of the local sheriff court by accessing the Scottish Courts website, www.scotcourts.gov.uk/

Department for Work and Pensions

There is a free Benefit Enquiry Line for People with Disabilities on 0800 88 2200 (textphone users 0800 24 33 55). From the local authority you can also get details of the local welfare rights office that will give you advice and help with benefits. You will find useful information and guidance for disabled people and carers on the Department for Work and Pensions website – www.dwp.gov.uk

Care Commission
Headquarters
Compass House
11 Riverside Drive
Dundee DD1 4NY

01382 207100

www.carecommission.com

The Care Commission is an independent body which regulates care services in Scotland. It inspects and investigates complaints in relation to care homes; short break/respite care services; housing support; adult placement schemes; support services; care at home; nursing agencies; and hospice care. There are national care standards for all these services.

Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh
EH3 7YR

0131 226 7411

Client Relations Helpline: 0845 113 0018

www.lawscot.org.uk/Public-Information/

The Law Society is the governing body for solicitors. It provides information to the public on where to find and what to expect from solicitors. The Law Society's Client Relations Office has a legal responsibility to handle complaints against Scottish solicitors. To discuss a complaint, or if you need more information, contact the Client Relations Helpline.

Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh EH3 7SW

0131 226 7061

Legal Aid Helpline: 0845 122 8686

www.slab.org.uk

Provides advice and information on entitlement to legal aid for applications in relation to the Adults with Incapacity Act; and a list of solicitors registered for legal aid work.

Citizens Advice Bureau – you will find the address of your nearest CAB in your phone book or at www.cas.org.uk

Scottish Independent Advocacy Alliance
Melrose House
69a George Street
Edinburgh
EH2 2JG

0131 260 5380

www.siaa.org.uk

This website will provide a link to the Independent Advocacy Service Directory for Scotland.

Alzheimer Scotland – Action on Dementia
22 Drumsheugh Gardens
Edinburgh EH3 7RN

Office: 0131 243 1453

Freephone 24hr Dementia Helpline 0808 808 3000

www.alzscot.org

Provides a free guide for carers and people with dementia in Scotland: 'Dementia: Money and Legal Matters'. The website also provides information about the different kinds of powers of attorney and how to set them up. You can call the Dementia Helpline to arrange for a copy to be sent to you.

ENABLE
6th Floor
7 Buchanan Street
Glasgow G1 3HL

0141 226 4541

www.enable.org.uk

Supports people with learning disabilities of all ages by campaigning, providing information, legal advice, training and other services.

Capability Scotland – Advice Service
11 Ellersley Road
Edinburgh EH12 6HY

0131 313 5510

www.capability-scotland.org.uk

Provides advice and information and local services for people with a range of disabilities, their families and carers.

Scottish Association for Mental Health
Cumbrae House
15 Carlton Court
GLASGOW G5 9JP

Tel: 0141 568 7000

www.samh.org.uk

Provides information, legal advice and support to people with mental health issues.

SENSE Scotland
43 Middlesex Street
Kinning Park
Glasgow
G41 1EE

0141 429 0294

www.sensescotland.org.uk

Works with children and adults who have communication support needs because of deafblindness, sensory impairment, learning and physical disabilities.

PAMIS
Head Office
Springfield House
15/16 Springfield Road
University of Dundee
Dundee DD1 4JE

01382 385 154

www.dundee.ac.uk/pamis

PAMIS works with people with profound and multiple learning disabilities, their family carers and professionals who support them.

Headway Scotland

Tel. 0131 537 9481

www.headway.org.uk

Headway provides: support and help to people affected by brain injury through a network of local groups and branches; information and advice; carer support; and a range of services (which vary from area to area).

Chest, Heart and Stroke Scotland (CHSS)
65 North Castle Street
Edinburgh
EH2 3LT

0845 077 6000

www.chss.org.uk

e-mail adviceline@chss.org.uk

Adviceline: 0845 0776000

CHSS aims to improve the quality of life for people affected by chest, heart and stoke illness through medical research, advice and information and support in the community.

This document is also available on the Scottish Government website:
www.scotland.gov.uk

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