

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

BRIEFING PAPER FOR LOCAL AUTHORITY ELECTED MEMBERS

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1. Introduction

1.1 The **Adults with Incapacity (Scotland) Act 2000** (the 2000 Act) was one of the first major pieces of legislation passed by The Scottish Parliament. The Act replaces and modernises legislation. It changes the system for safeguarding the welfare, and managing the finances and property of adults (aged 16 or over) who lack the capacity to make some or all decisions for themselves because of mental disorder or inability to communicate by any means. It allows other people to make decisions or take action on behalf of these adults, subject to safeguards.

1.2 At the time that the policy statement (Making the Right Moves) was issued in August 1999, it was estimated that 100,000 people in Scotland would be helped by the legislation. Among these will be:

- People who have never had capacity to make decisions about their own affairs, for example some people with learning disabilities;
- People who lose capacity temporarily or permanently through accident or illness, for example people who suffer from Alzheimer's disease, certain mental or physical illnesses, head injuries or stroke; and
- People who are unable to communicate decisions.

1.3 Most importantly for local authority elected members, the 2000 Act places fundamental and potentially far reaching new statutory responsibilities on local authorities.

2. New statutory duties for local authorities

2.1 The Act places clear new responsibilities on local authorities in respect of information and advice giving, investigation and the protection of the finances, property and personal welfare of adults with incapacity. The following list outlines the new responsibilities of local authorities in implementing and responding to this legislation:

- Taking forward financial and welfare intervention and guardianship orders where they are needed and no one else is making an application;
- Supervising guardians appointed with functions related to the personal welfare of an adult;

- Receiving and investigating complaints relating to the way in which welfare attorneys, welfare guardians or persons authorised in relation to welfare intervention orders carry out their functions under the Act;
- Investigating any circumstances made known to them in which the personal welfare of an adult seems to be at risk;
- Supervising a welfare attorney by order of the Sheriff Court;
- Consulting the public Guardian and the Mental Welfare Commission on cases or matters where there is or appears to be a common interest; and
- Managing the funds of some adults with incapacity who are resident in local authority care homes.

2.2 One million pounds per annum has been allocated to local authorities to enable them to meet these statutory demands.

3. The implications for local authorities

3.1 The basic tasks, as outlined above, relate to facilitating the use of the Act by adults and their families, investigating concerning situations and/or complaints, taking action under the Act as required, supervising welfare guardians, and , at times, welfare attorneys and managing the funds of some residents with incapacity in care homes.

3.2 The following are some of the implications of the Act for local authorities and matters to which they will have to turn their attention:

- The advisability of establishing, where they do not already exist, Joint Agency Implementation and Monitoring Groups;
- Developing a training strategy which ensures that each member of staff has access to appropriate and adequate information and advice;
- Ensuring training strategies embrace joint training initiatives;
- Devising procedures and protocols which facilitate the departmental response to the new legislative duties and which

address formally the duties to supervise, investigate, manage and review individual cases;

- Constructing administrative systems and support which ensure an efficient response to these new duties and record all local authority actions arising as a consequence of this legislation;
- Reviewing assessment and care management processes and paperwork to ensure that they are sensitive to the need for local authorities to screen all clients for diminishing capacity, partial capacity and recovering capacity to manage personal welfare and financial issues where this is an issue;
- Reviewing current departmental administrative and operational procedures in care homes, day care facilities and community care teams for the handling and management of funds of adults who lack capacity to do so themselves;
- Reviewing the resourcing, deployment and training of the department's Mental Health Officers to ensure they can respond adequately to their expanded role under the legislation;
- Arranging adequate financial advice and guidance to enable local authority staff to meet their statutory obligations to take forward applications for financial intervention and guardianship orders where necessary; and
- Arranging adequate legal advice and guidance for local authority staff to assist in framing and taking forward applications under the Act as well as considering other legal issues which arise in implementation.

4. Implementation

4.1 The Act is being implemented in stages. Part 6 of the Act, which introduced the major new statutory duties on local authorities in respect of intervention and guardianship orders, came into effect on 1 April 2002. Part 4 of the Act relating to the management of the funds of adults with incapacity in care homes will come into effect on 1 April 2003.

5. Codes of practice

5.1 Codes of Practice and Regulations have come into effect at the same time as the relevant provisions of the Act. The Annex lists the various Codes and Regulations and the Scottish Executive website where they can be accessed. The most important and relevant Code of Practice of interest to elected members will be the Code of Practice for Local Authorities Exercising Functions Under The Act.

6. Training Packs for local authority staff

6.1 In 2001 a series of seminars organised on behalf of the Scottish Executive by ENABLE in partnership with Alzheimer Scotland Action on Dementia was held throughout the country. On 16 July 2001 a report was issued containing a synopsis of the four seminars. The Scottish Executive's website at www.scotland.gov.uk/justice/incapacity contains a copy of this report. Following these seminars, ADSW approached the Social Work Services Inspectorate of the Scottish Executive (SWSI) requesting more focussed, in-depth material directed at local authority staff. They felt such material was essential to help authorities respond to their new legislative responsibilities. In conjunction with ADSW, a specification for the production of training materials was agreed. The contract was awarded subsequently to The Robert Gordon University to develop these materials under the guidance of an Advisory Group of members from ADSW, local authorities, NHS (Scotland) and the Scottish Executive. This paper is part of this material which has been developed. The training material comprises the following:

- Workbook and Guidance Pack 1 for Social and Healthcare Staff, with separate trainers' guide;
- Workbook and Guidance Pack 2 for Assessment and Care Management Staff and separate trainers' guide;
- Workbook and Guidance Pack 3 for Mental Health Officers and separate trainers' guide; and
- Implementation guide for senior managers.

6.2 This material can be viewed in full at:
www.scotland.gov.uk/socialwork/swsi

6.3 A series of launching events introducing this material is set to take place later in the spring. Copies of all the above material will be made available to each local authority. It will also be made available electronically.

7. Conclusion

7.1 Iain Gray as Deputy Minister for Community Care, in winding up the third stage debate on the Adults with Incapacity (Scotland) Bill on 29 March 2000 said that,

‘... history will show that this Parliament, in its first major policy legislation, is serving the interests not of the powerful, not of the vociferous, not of the partisan, but of those who, up to now, have been voiceless and vulnerable. We can all - everyone of us - be proud of that...’.

7.2 Local authorities will be at the heart of the implementation of this innovative legislation. They have an enhanced role in the protection of these adults who may be vulnerable due to incapacity. As local authority councillors you will play a crucial part in helping to create the environment where local authorities can respond actively to these new challenges.

Annex 1 – Adults with Incapacity (Scotland) Act 2000

Overview of main provisions

The Act changes the system for safeguarding the welfare, and managing the finances and property, of adults (aged 16 or over) who lack the capacity to take some or all decisions for themselves because of mental disorder or inability to communicate by any means. It allows other people to make decisions on behalf of these adults, subject to safeguards.

General principles

All decisions made on behalf of an adult with impaired capacity must:

- Benefit the adult;
- Take account of the adult's wishes and the wishes of the nearest relative or primary carer, and any guardian or attorney;
- Restrict the adult's freedom as little as possible while still achieving the desired benefit; and
- Encourage the adult to use existing skills or develop new skills.

Under the Act a number of different agencies are involved in supervising those who take decisions on behalf of the adult.

- The Public Guardian has a supervisory role and keeps registers of attorneys, people who can access an adult's funds, guardians and intervention orders;
- Local authorities look after the welfare of adults who lack capacity; and
- The Mental Welfare Commission protects the interests of adults who lack capacity as a result of mental disorder.

Power of Attorney

Individuals can arrange for their welfare to be safeguarded and their affairs to be properly managed in future, should their capacity deteriorate. They can do this by giving another person (who could be a relative, carer, professional person or trusted friend) power of attorney to look after some or all of their property and financial affairs and/or to make specified decisions about their personal welfare, including medical treatment.

All continuing and welfare powers of attorney granted from 2 April 2001 will need to be registered with the Public Guardian to be effective.

Access to the adult's funds

Individuals (normally relatives or carers) can apply to the Public Guardian to gain access to the funds of an adult incapable of managing those funds. This applies to funds held in, for example, a bank or building society account in the sole name of the adult.

The Act also includes provisions to allow access to a joint account to continue where one account holder has become incapable of managing the funds. These provisions will come into effect on 2 April 2001.

Funds of residents in care establishments

Authorised care establishments can manage a limited amount of the funds and property of residents who are unable to do this themselves. This will come into effect on 1 April 2003.

Medical treatment and research

The Act allows treatment to be given to safeguard or promote the physical or mental health of an adult who is unable to consent. Special provisions apply where others such as attorneys have been appointed under the Act with powers relating to medical treatment.

Where there is disagreement a second medical opinion can be sought. Cases can also be referred to the Court of Session in certain circumstances. The Act also permits research involving an adult incapable of giving consent but only under strict guidelines.

These provisions will come into effect on 1 July 2002.

Intervention and guardianship orders

Individuals can apply to their local Sheriff Court for:

- An intervention order where a one-off decision or short term help is required (for example selling property or signing a document)
- A guardianship order, which may be more appropriate where the continuous management of affairs or the safeguarding of welfare is required

Local authorities or any person claiming an interest in the adult's affairs may make applications for intervention and guardianship orders. Local authorities, in fact, have a statutory duty to apply for financial and/or welfare **intervention and guardianship orders** where they are necessary and no-one else is making an application. It is essential that all local authority staff are aware of this new duty.

Codes of practice and regulations

Codes of practice and regulations will come into effect at the same time as the relevant provisions of the Act.

The codes of practice are for those people and organisations that have functions given to them by the Act. The codes will provide guidance on the legislation itself and offer further practical information.