

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

IMPLEMENTATION GUIDE FOR SENIOR MANAGEMENT

Foreword

The Adults with Incapacity (Scotland) Act 2000 will be fully implemented by 2003. This will improve the way in which welfare, financial and medical decisions are taken on behalf of adults who cannot act on their own behalf.

I am pleased that the Social Work Services Inspectorate, through the production of these training workbooks, is able to respond to a request from the Association of Directors of Social Work for focussed and in-depth material.

There are a number of packs, each designed to address the different levels of knowledge and skills that different interests will require. There is also a trainers' guide to assist those who intend to run related courses.

I am grateful to all those who helped us to complete this work. Particular thanks goes to the Advisory Group who assisted in developing the product. Thanks must also go to the staff team at Robert Gordon University. Mike Lowit's contribution is especially appreciated.



Chief Social Work Inspector
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NB All the terms which appear in bold are explained in the glossary

1. Introduction

1.1 This guidance pack is written mindful that many managers will not have a great deal of time to commit to learning about the Adults with Incapacity (Scotland) Act 2000 (referred to below as the 2000 Act). You, however, may have deduced from the weight of paper in your hands that it has not been possible to explain the complexities of the Act in a few words. The glossary of terms and a brief guide to the Act included in the Annex will be helpful in giving you a basic overview of the Act. They will not be detailed sufficiently to explain the critical importance of the Act or the complexity of the local authority's role in it.

1.2 The guide is directed at senior managers with the intention that they may circulate it as appropriate within the management structure of the local authority. It has an implicit relevance for other policy shifts within service provision, particularly the Joint Future agenda. The 2000 Act relies heavily on interdisciplinary working and where the following discussion refers to the specific responsibilities of the local authority or specified staff within it, managers of multi-disciplinary teams will have to recognise the different responsibilities of staff from different employer bases.

1.3 The guide is intended to develop your awareness of the purpose and impact of the Act. In this, issues will be flagged up that will have relevance to the range of policies and procedures that each local authority will have to develop. It is, however, beyond the scope of the guide to begin to devise even a template for these policies and procedures, which will be markedly different for each area of Scotland, depending upon the needs of the adults in it, and the structure and resourcing of services locally.

Why this guide is important to local authority senior management staff

1.4 The Adults with Incapacity (Scotland) Act 2000 introduces significant new and potentially wide-ranging statutory duties upon local authorities in respect of the management of the property, finances and personal welfare of adults with incapacity. These new duties include:

- Receiving and investigating any complaints relating to the way welfare attorneys, guardians or persons authorised under **intervention orders** carry out their duties;

- Investigating any circumstances in which the personal welfare of an adult seems to be at risk;
- Making application for welfare and/or **financial intervention orders** and **guardianship orders** where they are necessary and no-one else is taking this forward;
- Providing **guardians, welfare attorneys** or anyone authorised under an **intervention order**, when requested to do so, with information and advice in connection with the performance of their functions in relation to personal welfare under this Act; and
- Consulting the Public Guardian and the Mental Welfare Commission on cases or matters relating to the exercise of functions under the Act where there is, or appears to be, a common interest.

1.5 It must be emphasised that these are all new statutory responsibilities. Local authorities are very familiar with shouldering statutory responsibilities in relation to the personal welfare of individuals and are experienced in the use of the authority of legislation in operating in the difficult area where the dual responsibilities of care and control coexist. This legislation, however, not only extends these duties in relation to the welfare of adults but it adds new duties in respect of protecting the property and finances of adults who lack the capacity to look after their own interests and who have not made other arrangements.

1.6 The Act also introduces new formal arrangements for managers of care homes to manage the funds of adults with incapacity as well as new arrangements for **intromitting with the funds** of adults with incapacity.

1.7 The new law addresses gaps in previous areas of legislation and details the new arrangements for responding to adults in these circumstances. Senior managers of local authorities are advised to review all informal arrangements for responding to the financial affairs and personal welfare needs of adults who appear to have impaired capacity. These may have arisen due to the gaps in previous legislation and it now may now be advisable to determine whether it would be appropriate to make use of the new legislation. Maintaining the status quo might well lead to certain actions or inactions on the part of local authorities being subject to legal challenge.

1.8 By way of brevity, the pack does not address details of numerous key concepts in any detail such as the function of **powers of attorney, guardianship and intervention orders**. As the 2000 Act imposes a crucial duty on the Chief Social Work Officer (CSWO) in report writing for application and renewal of certain **guardianship and intervention orders**, this issue is addressed in the **guardianship** section of the guidance. Should you consider it likely that you will be preparing the Chief Social Work Officer's report for application to the sheriff, you are advised to read this section closely.

1.9 If you feel the need to develop a deeper understanding of these and other related issues you should refer to them in the Training Pack for Assessment and Care Management Staff (Pack 2) and the pack for Mental Health Officers (MHOs) (Pack 3). Look for the footnote in the text where you will be directed to specific sections in these Packs.

2. Codes of Practice

2.1 The Act requires the Scottish Executive to make Codes of Practice available under Section 13. The Codes are an important guide for managers, administrators and practitioners, setting the law in a broader context. In particular, the code for local authorities is an important reference document for managers. The broad purpose of the guide is to enable you to devise and implement a package of policies, procedures and systems for your local authority to meet its obligations under the 2000 Act and it is essential that this is informed by reference to the Code of Practice.

2.2 As with the Code of Practice for the Mental Health (Scotland) Act 1984 (the 1984 Act), while the Codes for the 2000 Act are not law in themselves, legal consequences may well develop from failing to use them. You are advised to refer to the appropriate Codes of Practice relevant to each use of the Act, whether you are engaging in practice or devising policy.

2.3 As a sound understanding of the purpose of the Act is necessary in order to understand its significance and scope, this guide discusses the concept of incapacity, its relationship to the principles of the Act and the general scope and purpose of the legislation. This is addressed before exploring more closely the business of how it will affect managers of local authority services.

3. Incapacity

3.1 The following is a very brief discussion. It is intended to impress upon you the wide scope of the Act, the far-reaching implications of it for service users and the potential implications for local authority resources.¹

3.2 The term incapacity broadly refers to any condition in which an adult is not capable of acting, making decisions, communicating decisions, understanding decisions or retaining the memory of decisions by reason of mental disorder or physical disability.

3.3 Mental disorder is as defined in the 1984 Act with some qualification. It refers to mental illness (including personality disorder) or mental handicap (sic).

3.4 The reference to physical disability is qualified. It must result in a total inability to communicate that cannot be overcome by human or mechanical aid. This split between mental disorder and physical disability is an important one. In the reports required for application to the Sheriff Court for **intervention orders** and **guardianship orders**, adults whose incapacity is caused by mental disorder come into the orbit of MHO practice and those with physical disability require reports by the Chief Social Work Officer (CSWO).

3.5 The term adult relates to people over the age of 16 years.

3.6 The general definition of incapacity in Section 1 (6) becomes refined for the specific purposes of each type of intervention under the Act. In general, an adult may be considered to have incapacity if they are not capable of managing aspects of property, financial affairs and/or personal welfare. Incapacity as defined in the 2000 Act is not an all-encompassing condition. Only rarely would one expect to encounter an adult with total incapacity. It may be more helpful to view incapacity as impaired capacity with this impairment relating to specific actions or decisions required in respect of finances, property and/or personal welfare. Incapacity may be a life-long condition. It may be acquired during the course of life. It may be permanent, or it may be transitory or recurring.

¹ For a full discussion of the concept you are directed to the section relating to it in Pack 2, for assessment and care management staff.

3.7 The Act covers management of these affairs of adults with incapacity resulting from a very wide range of conditions. The following list is by no means comprehensive but is illustrative of this range:

- Mental illnesses such as depression, bi-polar affective disorders, schizophrenia and personality disorders;
- Dementia;
- Learning difficulties;
- Autism;
- Head injuries;
- Substance abuse related brain damage; and
- Physical disability resulting in an inability to communicate.

3.8 This is not to say that everyone who experiences any of these conditions will be assessed as having incapacity for the purposes of the 2000 Act. Incapacity may only be deduced in relation to specific decisions or actions which the adult is not capable of making. The Scottish Executive's original estimate of the number of adults in Scotland who might fall into the orbit of the Act was approximately 100,000 people.

The impact of incapacity upon services

3.9 The above list suggests that we should not be narrow in our thinking of how people already involved in local authority services may require intervention under the Act. Assessment and care management processes will become a major screen for the identification of needs that might best be met through intervention under the 2000 Act. There will be a significant number of people who receive services through Criminal Justice services and Children and Families services who will also come within the scope of the Act. For example, some children with disabilities who are about to become 16 will come into this frame of reference.

3.10 Using assessment and care management processes as a screen for incapacity is a crucial aspect of any comprehensive strategy for a local authority in responding to its duties under the Act. The local

authority's policies, procedures and electronic systems for tracking and recording assessments, reviews and case closures should address routinely the need to assess capacity. This screening process should extend beyond the role of assessment and care management staff to social work officers in all areas of the authority's remit. This will include direct care staff. Together they would form part of a chain of referral up to MHOs who will be the experts in assessment of capacity where mental disorder is the causal factor, and the Chief Social Work Officer (or delegated specialist staff) for physical disability.²

3.11 You will realise upon reading this material that the Act will involve local authorities in working with people who would not otherwise come to their attention. For example, the local authority will now have a remit potentially with anyone subject to **powers of attorney**. The local authority will also have to make **financial intervention and guardianship orders** where needed and where no-one else is doing so.

3.12 The 2000 Act will have major implications for the purchasing and provision of services and the setting of service level agreements. In this regard, you are advised to note and flag up issues of importance to administrators from your reading of this guide.

3.13 There will be a need to develop systems for identifying, assessing, monitoring, tracking and investigating the circumstances of adults with incapacity in a wide range of situations. There is a need to think creatively and comprehensively about these issues. This is one of the many challenges that the Act poses to managers and administrators.

3.14 The Mental Welfare Commission's inquiry into the care of Mrs K, aged 90 (MWC Annual Report 2000-2001), sets out a range of recommendations relating to care management, statutory assessment and care homes that must be taken into account by local authorities. Amongst these is recommendation (e), that 'Social Work Departments and other organisations responsible for assessments should consider using some standard protocols, alongside interviews, to assist the assessment of risk and its management, for people with dementia.'

The above recommendation was proposed in the report of an inquiry into the inadequate assessment of risk and the subsequent application and administration of a **guardianship order** under the 1984 Act. This should

² This screening process in identifying and responding to the local authority's duties under the Act is a thread that runs through the training packs in this series. To better understand it you are directed to read selected points of Pack 2, for assessment and care management staff.

now be read in the light of the 2000 Act to encompass all adults with incapacity. All local authorities will have to review protocols and procedures for MHO practice in the light of the 2000 Act.

4. The general principles of the Act

4.1 As a manager you may well be familiar with the principles of the Children (Scotland) Act 1995. This model of integration of principles in law and the powers and duties is one that is developed in the 2000 Act. The principles, set out in Section 1 of the Act, are not a consideration to be tagged on after all other considerations. The Act gives a clear indication that no action committed by anyone authorised under it may be considered as legally competent unless it is in accordance with the principles.

4.2 These principles are:

- Section 1(2) the person authorising any intervention must be satisfied that it will benefit the adult and that such benefit cannot be reasonably achieved without the intervention;
- Section 1(3) such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention;
- Section 1(4) in determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of;
 - a) present and past wishes and feelings of the adult as 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;
 - b) views of the nearest relative and primary carer of the adult, insofar as it is reasonable and practicable to do so;
 - c) (i) views of any **continuing attorney, welfare attorney or guardian** who has powers relating to the proposed intervention; and

(ii) any person whom the sheriff has directed to be consulted and the views of any person appearing to have an interest in the welfare of the adult; and

- Section 1(5) Any **guardian, continuing attorney or welfare attorney** acting under the Act must encourage the adult to use existing skills and to develop new skills where possible in respect of managing their property and finances and making decisions about their personal welfare.

4.3 This interactive dynamic between the principles, the assessment of capacity and the powers authorising others to decide or act on the adult's behalf is crucial to practice arising from the Act. This is another core theme in each of the packs.³

4.4 Section 82, which deals with limitation of liability incurred by those operating under the Act states that 'no liability shall be incurred...for any breach of duty of care or fiduciary duty owed to the adult if...(the person):

- a) acted reasonably and in good faith and in accordance with the general principles...: or
- b) failed to act and the failure was reasonable and in good faith and in accordance with the said general principles.

4.5 This enforces the seriousness of checking that there is an interaction between the principles of the Act, assessment, and actions under the Act.

4.6 It will be important that you ensure all policies, procedures and systems to manage practice under the Act, take account of the underlying principles of the Act.

5. Interventions under the Act

5.1 The above discussion refers to a range of means by which the Act authorises and empowers other people to make decisions and take action on behalf of an adult with incapacity. The following is a brief guide to the range of these powers. In this discussion, passing

³ For a full understanding of it you are directed to read the section of the Pack 2 for assessment and care management staff dedicated to the Principles of the Act.

reference will be made to some of the implications that these powers may have for managers, administrators and the development of policies, procedures and administrative systems to support its implementation.⁴

5.2 The discussion of how these powers relate to the duties of the local authority is a complex one in which much cross-referencing of aspects of the Act is required. To better follow this, a bullet point checklist titled 'Tracking the local authority's responsibilities through the Act' is included in the section headed 'the local authority'.

Continuing and welfare powers of attorney

5.3 The Act revises **powers of attorney** as they existed under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Under the 2000 Act any adult who has the capacity to do so may grant **powers of attorney**, investing authority in an identified proxy (or proxies) who would begin to exercise these powers should the granter become incapable within the meaning of the Act. It is a provision which anyone can make against the eventuality of losing capacity in key areas of their life. The powers are divided into **continuing powers of attorney**, relating to property and financial affairs, and **welfare powers of attorney**, relating to the personal welfare of adults.

5.4 There were many **powers of attorney** in active existence from the 1990 Act and before, mostly relating to the management of property and finances of adults. When Part 2 of the 2000 Act was implemented in April 2002, these powers transferred to the framework of the Act. This means that any actions taken in relation to these powers now have to be in keeping with the principles of the 2000 Act. The Office of the Public Guardian, which has a responsibility to register any **welfare and/or continuing powers of attorney powers**, will notify the local authority of the existence of **welfare powers of attorney** in their area.

5.5 The local authority must have systems for tracking the **welfare attorneys** of which they are notified by the Public Guardian. Ideally, it should be possible to cross reference with existing departmental data bases. It must be remembered, however, that just because a **welfare power of attorney** has been registered with the Public Guardian and notified to the local authority, this does not mean that it has yet taken effect, as the adult grants this while capax. The local authority must also decide whom it will direct to supervise these **attorneys** when requested

⁴ For a more detailed understanding of any of these powers, you are directed to the discussion under the respective headings in Pack 2, for assessment and care management staff.

to do so by the Court; how regularly they will be supervised, and how they will be supervised in accordance with the principles.

5.6 There are two important links to be made between this supervisory role and other duties of the local authority:

- (i) Under Section 10 (3) (b) the local authority has a duty to provide advice and information to **welfare attorneys**. The Code of Practice for Local Authorities suggests that this duty should be considered in regard to people considering granting **power of attorney** as well as people who are **attorneys** already. It further suggests that local authorities should prepare advice leaflets to disseminate information to the public.
- (ii) Under Section 10 (1) (c) there is a duty to investigate complaints relating to the exercise of the functions of **welfare attorneys** amongst others. This investigatory duty relates to a duty to work in conjunction with the Public Guardian (in relation to continuing powers) and the Mental Welfare Commission (in relation to welfare powers and mentally disordered adults).

5.7 This in turn relates to a significant duty the Act imposes upon local authorities to apply for **intervention and guardianship orders** where they perceive need and no other application is being made. An adult might be in such need where subject to **welfare powers of attorney** which were exercised improperly to the detriment of the adult.⁵

Intromission with funds

5.8 Part 3 of the 2000 Act sets out the power to gain access to an adult's funds by **intromission** with bank and savings accounts. The Power to Intromit is specifically not made available to officers of the local authority. Applications under this Section of the Act require a counter-signature from a member of a prescribed class. MHOs are members of such a class and may be called upon from time to time to perform this function. Local authorities will need to provide guidance to staff in carrying out this responsibility.

⁵ To fully understand the local authority's duties to investigate and the duties to apply for orders – Section 53 (3) and 58 (2) – you are advised to read the relevant sections of the guide for Assessment and Care Management staff (Pack2). You are also directed to the relevant parts of the Code of Practice for local authorities, identifiable in the Annex.

5.9 The registration and supervision of persons authorised to **intromit** with Funds is largely the responsibility of the Public Guardian. It is likely that staff would come across adults with incapacity where family members would be able to use this provision of the Act to the benefit of the adult. It is also possible that staff may come across those who are abusing this power. They will have to know to whom to turn in both circumstances.

Management of residents' finances

5.10 Part 4 of the Act which comes into effect in April 2003, creates a major new role for care home managers. Section 35, already amended by the Regulation of Care (Scotland) Act 2001, details how 'authorised establishments' may manage the financial affairs and moveable property of specific residents who have been subject to a certificate from a medical practitioner declaring that they are incapable of managing these affairs on their own. Such establishments then come under the oversight of the 'supervisory body', which, in the case of the local authority, is the Care Commission.

5.11 The Care Commission will receive certificates for specified residents; notify the resident of the intent to manage his/her affairs; inspect related records; receive complaints; make investigations; and where necessary, revoke the authorisation of any establishment. This last action would be open to appeal.

5.12 The main duties and functions of the establishment are:

- Claiming, receiving, holding and spending any pension, benefit, allowance or other payment other than under the Social Security Contribution and Benefits Act (1992). This Act relates to income-related benefits;
- Claiming, receiving, holding and spending any money to which a resident is entitled;
- Managing the affairs in a way that upholds the principles of the Act;
- Keeping records of all transactions, reflecting the principles, review and management of affairs;

- Complying with any requirements of the Care Commission ;
- Producing records on request by the resident, his/her nearest relative or the Care Commission;
- Spending money on items or services which are of benefit to the resident;
- Making proper provision for indemnifying residents against any loss attributable to any act or omission on the part of the managers of the establishment or any breach of duty, misuse of funds or failure to act in good faith by them;
- Keeping the funds of the resident separate from the funds of the establishment; and
- Not spending money on items or services which are provided by the establishment to or for the resident as part of its normal service.

5.13 There is a need for each establishment in the local authority to devise its specific response to Part 4, out of a specialised knowledge of its residents. There is also a need for the local authority to devise a set of policies, procedures and administrative arrangements that ensure all establishments are meeting the authority's responsibilities in respect of Part 4 in a consistent manner. Systems for monitoring these procedures will need to be set in place as well.

5.14 The duties of an authorised establishment are not unlike those of a hospital under Section 94 of the 1984 Act, in conjunction with the policy set out for the management of funds of patients who lacked the capacity to do so themselves. In this it may well be that colleagues in management and administration in health have expertise in devising systems to manage and record the holding of finances and property which may be of interest to local authorities.⁶

Medical treatment

⁶ For broad understanding of Part 4 of the Act, you are directed to Part 2 of the guide to Pack 1 in this series. The relevant sections of the Code of Practice for local authorities and the Code of Practice for Managers of Authorised Establishments. The Care Commission will also be producing its own guidance for authorised establishments under its supervisory jurisdiction.

5.15 This Section allows for a medical practitioner to treat an adult who is not capable of giving consent to treatment. The detailed discussion of this part of the Act is outlined in Pack 3 in this series for MHOs. MHOs will need to understand the dividing line between the authority to treat under the 2000 Act, the MHO role in assessment for detention and treatment of mental disorder under the 1984 Act, and the emerging framework for treatment under the current review of Mental Health Law. It will be of interest, however, to all staff working across community care services who may encounter service users who lack the capacity to give informed consent to proposed medical treatment.

5.16 Another impact that this may have upon local authorities is where a medical practitioner is treating an adult by authority of a certificate issued under Section 47 of the 2000 Act. In this case, the doctor may have directed local authority care staff to give medication authorised under that section. The responsibility is largely the doctor's, although they can direct staff members to administer all or part of the treatment on their behalf. Staff authorised to give the treatment will need to know the limitations of that authority. It does not, for instance, authorise the use of force or detention. Any action taken as a consequence of authority granted under the Act must also take account of the principles of the Act.

5.17 This part of the 2000 Act also discusses research that involves adults who may not have the capacity to agree to becoming involved in it.⁷

Intervention and guardianship orders

5.18 While the role of the Chief Social Work Officer (CSWO) is discussed below, a detailed discussion of the application and report writing process is not. This is because it will only involve the Chief Social Work Officer. Managers requiring further understanding of this process are advised to work through the sections on MHO/Chief Social Work Officer as report writer and/or applicant in **intervention and guardianship orders** in both the pack for MHOs and the pack for Assessment and Care Management Staff.

5.19 Part 6 of the Act is one of the most important for local authorities because many of the duties outlined in Section 10 (the Functions of the Local Authority) and Section 12 (investigations) direct local authorities to make applications for **intervention and guardianship orders** where

⁷ For further reading, see the relevant section of pack 3 for Mental Health Officers.

they find that such an order is necessary and where no-one else has made, or is likely to make, an order.

5.20 **Intervention and guardianship orders** are both granted by application to the sheriff. **Intervention orders** authorise the person named in the order to make any specific one-off decisions or take specific actions on behalf of the adult where the adult lacks the capacity to do so themselves. The authority may be in regard to property, financial affairs or personal welfare.

5.21 **Guardianship orders** authorise the person(s) named as **guardian(s)** to exercise designated powers that relate specifically to property, financial affairs or personal welfare or to any combination of these. While an application for an **intervention order** would argue for the necessity of a specific time-limited action or decision, or a set of actions and/or decisions, a **guardianship** application would set out an argument for a range of powers from within a virtually open ended menu of powers reflecting the scope of human need.

5.22 The process of application for these orders is virtually the same. **Intervention orders** are not renewable, being limited by the amount of time it takes to complete the task authorised in the order. **Guardianship** is renewable. It runs for a period of up to three years or longer as required, in the first instance, and then for renewable periods of five years or longer. The sheriff, however, may vary the duration upon making or renewing the order (up to an indefinite period). The sheriff has power to treat an application for a **guardianship order** as though it were an application for an **intervention order** and can make interim or ancillary orders, or vary the powers in an order at any point, upon application by anyone declaring an interest in the adult.

5.23 The role of the local authority in this is complex. It is best understood by considering two distinct axes to **intervention** and **guardianship orders**:

1. The cause of the incapacity i.e. mental disorder or inability to communicate through physical impairment; and
2. The area of the adult's life affected by incapacity ie property, finances and/or personal welfare.

5.24 There are two distinct roles in applying for an order;

1. That of the applicant who may be anyone declaring an interest including the adult themselves, or the local authority; and
2. That of the writer of reports required as part of the application. Each application must include the following:
 - Two independent reports by medical practitioners, much like the medical recommendations for **guardianship** under the 1984 Act (one of which where the incapacity is caused by mental disorder must be written by a medical practitioner approved for the purposes of Section 20 of the 1984 Act as having special experience in the diagnosis or treatment of mental disorder);
 - A report by an MHO, where the incapacity is caused by mental disorder; or
 - A report by the Chief Social Work Officer, where it is caused by an inability of the adult to communicate.

5.25 As with all activity that relates to the role of MHO under the 1984 Act, this is not a role that may be delegated. The MHO's assessment is autonomous. The Chief Social Work Officer must sign their own report when required and must own responsibility for its contents. It may, however, be that they wish to delegate the report writing responsibilities to another social work officer of the local authority.

5.26 Consideration should be given to the creation of policy and procedure identifying who, in what circumstances, should assist the Chief Social Work Officer in report writing. It may be that attention will need to be paid to developing specialist expertise in this area where none exists in an authority.

5.27 Where the application relates to property or financial affairs of the adult alone, the specific report from the MHO/Chief Social Work Officer is not required, but a report is required by a person with sufficient knowledge to make such a report. The Code of Practice envisages such a person being a lawyer or other professional. The MHO/Chief Social Work Officer's report, therefore, is only required in regard to applications relating to personal welfare.

5.28 Local authorities should pay particular attention to those new statutory responsibilities which relate to the making of applications for **intervention and guardianship orders** where they are necessary and no application has been made or is likely to be made, especially where these relate to the protection of an adult's property or financial affairs. The task for the local authority in taking forward such applications includes framing the actual summary application and the powers to be sought, including a report, based on an interview and assessment of the adult, by a person who has sufficient knowledge to make such a report, and determining who is a suitable person to act as proxy (the **financial guardian** or person to be given powers under the **intervention order**). This may present problems where no relatives, friends or family solicitors or accountants are able or willing to take on such responsibilities.

5.29 It is essential that local authorities have in place the systems to ensure that key staff are able to access relevant financial advice regarding these matters. Authorities must also ensure that arrangements have been made for accessing suitable persons to act as proxies in respect of **financial intervention and guardianship orders**, bearing in mind that while the local authority may act as the proxy in relation to **financial intervention orders** if they so choose, they cannot act as **financial guardians** and will have to make arrangements for securing external input in these situations.

5.30 With reference to the roles of report writing and applicant, the Act clearly separates out the roles by naming the MHO and Chief Social Work Officer as report writers, while placing the responsibility for application on the local authority. While anyone may apply, these sections state that a duty is upon the local authority to make the application where no-one else has done or will do so.

5.31 Where the local authority is the applicant, it may be best to maintain the distinction between the role of the applicant and that of the report writer. This would allow for the report writer to function and be seen as functioning independently to the applicant. This is not a legal requirement, however, as the Act is silent on this matter.

5.32 Applications for **intervention and guardianship orders** will be made by way of a summary application. (See sample applications in Annex in pack 3). Some authorities may take the view that these are best drafted and presented in court by the authority's legal section. Others may see this as the role of the care manager or, in certain cases due to workforce restraints, Mental Health Officers.

5.33 There will be a clear relationship in some cases between the local authority's duties to supervise existing **welfare guardians**, making investigations of complaints in relation to the personal welfare of adults, working closely with the Public Guardian and the Mental Welfare Commission in relation to investigations and making applications for adults in need. The model proposed in this series of packs suggests that home care, day care and direct care staff in care homes, along with other related staff of the local authority, such as housing officers, will be in crucial positions to screen individuals for problems associated with incapacity in which the Act may need to be used. They need to know where to refer any concerns that they may have about an adult in need because of incapacity. Staff should be aware of the appropriate line manager or social work officer with specialist knowledge of the Act to approach in such circumstances.

5.34 Assessment and care management staff, as well as investigating such referrals, will act as screens in the routine process of assessment of need and reviews of care plans. Where they have concern that an adult may be adversely affected by incapacity and may benefit from an order, staff will need to be able to refer to an MHO in the case of mental disorder, or the Chief Social Work Officer or staff designated to carry out the functions of the Chief Social Work Officer for these purposes in the case of physical disability. The Act gives a 30 day period for this process. Within this period the MHO or Chief Social Work Officer will have to prepare their report and the person identified by the local authority as the applicant will need to obtain the 2 medical reports and co-ordinate the application.

Potential uptake of guardianship

5.35 It may be that the majority of applications will come from the local authority and that the majority of **guardians** will be the local authority if the pattern developed in usage of **guardianship** under the 1984 Act continues. It is intended, however, that this legislation be much more accessible to the public and it is possible that applications from outwith local authorities will form a significant percentage of all such cases. There is the real potential, in any case, for a substantial rise in the use of **guardianship** in the longer term.

5.36 Regarding the use of **guardianship**, the table under the heading 'Guardianship Cases by Local Authority' below, shows a very uneven pattern of use under the 1984 Act. Some of this relates to the difficulties

that some Islands Councils have experienced where they do not have their own resident Section 20 registered doctor. On the other hand, it raises questions about how those areas with little or no use of **guardianship** resolved the issues of an adult's lack of compliance and/or consent to key aspects of care plans which had to be put in place to safeguard the adult.

5.37 Clearly this is a complex area involving delicate issues of professional judgement as to when use of the law is necessary. In some places, however, a culture may have developed of using informal solutions to address the problems posed by lack of decision making capacity in vulnerable adults. As the 1984 Act had no clearly articulated principles, more rigid and limited powers, and contributed along with related legislation to a more patchy and piecemeal approach to the management of financial affairs and property, it is easy to see how these informal solutions could have developed. Managers and practitioners will need to pay close attention to the development of case law under the Act.

5.38 The 2000 Act, with its set of principles and the wide range of investigative and protective duties that it imposes upon local authorities, will bring a responsibility to these agencies that they have traditionally had in respect of child protection.

5.39 The 2000 Act brings clarity to the legal issues surrounding the management and protection of the finances, property and personal welfare of adults with incapacity which has not existed previously. It will be essential for all local authorities to review the informal arrangements which have evolved over time to provide practical responses to the shortcomings of previous legislation to see that such practices remain competent given the existence of the new legislation and its governing principles. It is the responsibility of managers of local authorities to put in place a set of clearly articulated policies that will ensure that proper and legal solutions are operated. Such policies should facilitate the supervisory, investigative and screening processes described above. They should outline the roles and duties in the application process. The Code of Practice for Local Authorities suggests close working with the local authority legal services or legal team will be fundamental to this process.

Suitability of guardian

5.40 As anyone with an interest may apply for an order, provided the sheriff accepts that they do so out of a genuine interest in the adult, in

keeping with the principles of the Act, so may anyone deemed as suitable by the local authority be appointed as **guardian** (or **intervener**) by the sheriff. The report by the MHO or Chief Social Work Officer must speak to the general suitability of the application and the suitability of the person proposed as the **guardian** where it is not the local authority itself that is proposed as **guardian**.

5.41 Required reports are completed on prescribed forms which are included in the annex to Pack 3 for MHOs.

5.42 Where the **guardian** is to be the local authority, it must identify a named officer to implement the order on its behalf (Section 64 (9)). The local authority may not be the **guardian** in respect of any powers relating to financial affairs and property. Where the local authority is the applicant for **financial guardianship**, it will have to identify an independent person (e.g. a relative, carer, professional such as a lawyer or accountant, or a service provider from the independent sector) to be the **guardian** for these powers.

Transfer of guardianship orders from the Mental Health (Scotland) Act 1984 to the 2000 Act

5.43 Section 88 and Schedule 4 of the 2000 Act create provision for continuation of pre-existing curators bonis, tutors dative and at law, **powers of attorney** and **guardianship orders**. All **powers of attorney** that were in existence before the 2000 Act became powers within the framework of the Act on 01/04/01, when Part 2 of the Act was implemented. Upon implementation of Part 6 of the Act (01/04/02) all curators bonis of adults over 16 became **guardians** in relation to property and financial affairs. All tutors dative to adults became **guardians** invested with the powers granted to the tutor by the court; all tutors-at-law became **guardians** with powers in relation to property and financial affairs and personal welfare. **Guardianship** under the 1984 Act became **welfare guardianship** under the 2000 Act, their powers extending only to those of access, attendance and residence. Local authorities have a duty under the Act to supervise all **welfare guardians**.

5.44 Because of the high number of **guardianship orders** held by local authorities under the 1984 Act, this section concentrates upon **guardianship**. Under its duty to supervise **guardians** in the exercise of their duties in relation to personal welfare, managers should not overlook their responsibility to have systems for tracking both the relevant orders

that were transferred from tutors dative and tutors at law, and those 1984 orders that transferred to the 2000 Act, especially where the **guardian** was not the local authority.

5.45 As of 1 April 2002, all 1984 Act **guardianship** cases were transferred to 2000 Act **welfare guardianship** with the three powers of access, attendance and residence granted under the 1984 Act. This process is automatic and the **guardianship** transferred lasts for as long as it had been approved or renewed prior to 1 April 2002. Once transferred, best practice would be to consider whether the powers should be adjusted to meet the needs of the adult. This would be in keeping with the principles of the Act.

5.46 Once transferred to **guardianship** under the 2000 Act renewals will have to be by way of a new application under the 2000 Act procedures. It will be essential to tailor the powers sought to those areas in which the adult lacks the capacity to make decisions or take actions to safeguard their personal welfare. Consideration will have to be given to the length of time for which you will be seeking to have the **guardianship** approved. While this would normally be for three years, it could be for any period which fits the circumstances, provided you can convince the sheriff that what you are requesting is in keeping with the principles of the Act. The sheriff can grant the **guardianship** for any length of time seen fit. The sheriff can also make an interim order while, for instance, ordering further interviews and reports and could also treat the application as if it were an application for an **intervention order**.

5.47 Local authorities will have to have systems in place to identify those **guardianship** cases transferred to 2000 Act **welfare guardianship** and to ensure that they are properly assessed within the appropriate time-frame to allow applications for renewal under the 2000 Act to go forward where necessary. It will be the duty of local authorities to determine whether an application for renewal is necessary, bearing in mind their duty to act where necessary.

5.48 All powers of tutor-at-law and tutor dative became **guardianship orders** with powers to manage property, financial affairs and personal welfare of the adult as specified in the original court order. Local authorities will have been notified in all such cases as they have a duty under the 2000 Act to supervise **welfare guardians**. All offices of curator bonis have become **guardianship orders** relating to financial affairs and property. Departmental procedures will need to set out the expectations the local authority will have of guardians which cover such

matters as recording of exercise of duties, visiting of the adult and visiting by the supervising local authority officer.

5.49 The following table from the Mental Welfare Commission Annual Report for 2000-2001 gives an indication of the scale of the use of 1984 Act **guardianship**. This may be a baseline from which further growth can be anticipated. The figures also highlight the variation in the use of **guardianship** by local authorities, an issue highlighted by the Commission which bears even closer examination with the advent of the 2000 Act.

6. Guardianship cases by local authority

	Number at 31-03-00	Approved 00 – 01	Discharged 00 – 01	Number at 31-03-01	Rate per 100,000 Local Authority Population 16 Years and over
Highland	34	18	9	43	26
Fife	18	17	8	27	10
Falkirk	10	5	4	11	9
Aberdeen City	11	16	13	14	8
East Lothian	5	2	1	6	8
Glasgow City	33	27	19	41	8
West Dunbartonshire	4	2	0	6	8
East Dunbartonshire	5	2	2	5	7
Perth & Kinross	9	1	2	8	7
West Lothian	5	6	3	8	7
Border (Scottish)	4	3	1	6	6
Dumfries & Galloway	4	3	0	7	6
Edinburgh City	15	17	9	23	6
Stirling	4	1	1	4	6
Angus	3	3	1	5	5
Clackmannanshire	1	1	0	2	5
Dundee City	7	3	4	6	5
Midlothian	8	1	6	3	5
South Ayrshire	1	6	2	5	5
Aberdeenshire	4	6	3	7	4
North Lanarkshire	6	9	5	10	4
East Ayrshire	1	2	0	3	3
East Renfrewshire	1	1	0	2	3
Renfrewshire	3	1	0	4	3
North Ayrshire	1	2	1	2	2
South Lanarkshire	4	2	2	4	2
Argyll & Bute	1	1	1	1	1
Inverclyde	0	1	0	1	1
Moray	0	1	0	1	1
Orkney Islands	0	0	0	0	0
Shetland Islands	0	0	0	0	0
Western Isles	0	0	0	0	0
Totals	202	160	96	266	5

7. The sheriff

7.1 The functions and powers of the sheriff are detailed primarily in Section 3 and Section 20 of the Act. In addition to understanding the role of sheriffs in relation to applications under the Act, it is important for managers to put in place procedures for responding to orders made by the sheriff in which a **welfare attorney** is subject to supervision of the local authority.

7.2 It is very important in developing workable procedures under the Act to work in conjunction with the local authority's legal team and the local Sheriff Court to ensure that local authority policies and procedures mesh with those of the local court.

8. The Public Guardian

8.1 The Office of the Public Guardian was created by the 2000 Act. It has a supervisory role and keeps registers of attorneys, people who can access an adult's funds, **guardians** and **intervention orders**.

8.2 The Office has both investigative and supervisory functions generally confined to property and financial affairs of adults. It receives and investigates complaints relating to the exercise of powers in relation to financial and property affairs, and it has a duty to give advice and information should a person authorised under an **intervention** or **guardianship order** (with powers relating to finances or property), a **continuing attorney** or a **withdrawer of funds** request it. These terms are clarified in discussion later in the pack.

8.3 The contact address of the Public Guardian is given in the Annex.

9. The Mental Welfare Commission

9.1 The Mental Welfare Commission is charged with a role similar to its role in relation to **guardianship** under the 1984 Act. It therefore only has a function under the 2000 Act in relation to general oversight of adults whose incapacity is caused by or relates to a mental disorder. This role extends to investigatory powers in relation to those exercising welfare powers. As the Code of Practice for Local Authorities Exercising Functions under the Act suggests, these powers are only likely to be used where the Commission is dissatisfied with the outcome of an investigation by the local authority. The Commission brings to the 2000

Act the same function relative to second opinion doctors as it has in the 1984 Act.

9.2 The contact address of the Commission is given in the Annex.

9.3 The Act places a duty on local authorities, the Mental Welfare Commission and the Public Guardian's Office to consult each other on matters in which there is, or appears to be, a common interest. Because of this and the overlapping responsibilities the Act places on each in relation to investigative and supervisory duties, managers are advised to have regard to mechanisms that will facilitate close working relationships with both agencies. This should be reflected in their policies and procedures, both of which should establish clear lines of communication at various levels between local authorities and these respective agencies.

10. The local authority

Tracking the local authority's responsibilities through the Act

10.1 The following identifies the major duties and functions of the local authority across the Act.

- 1) Section 10 (1) (a) sets out the local authority's duty to supervise **welfare guardians**, the Public Guardian, and Mental Welfare Commission to keep lists.
- 2) Section 10 (1) (b) requires the local authority to consult with the Public Guardian and the Mental Welfare Commission on cases or matters where there is a mutual interest.
- 3) Section 10 (1) (c) gives the local authority the responsibility to receive and investigate any complaints concerning the exercise of functions relating to personal welfare by **welfare attorneys**, **guardians** or persons authorised under **intervention orders**.
- 4) Section 10 (1) (d) is the duty to investigate any circumstances made known to the local authority in which the personal welfare of the adult appears to be at risk.
- 5) Section 12 sets out the duty of the local authority, the Public Guardian and the Mental Welfare Commission to provide each other with information and assistance to facilitate investigations. It

also gives the local authority the power to take such steps as may be necessary, including the making of an application to the sheriff, to safeguard the property, financial affairs or personal welfare of the adult.

6) Part 4 of the Act relates to the management of residents' finances in authorised establishments. All local authority care homes for adults are likely to be authorised establishments. Supervision of the management of residents' finances will be the responsibility of the Care Commission.

7) Section 40 (2) places a duty on the Care Commission to make regular enquiries as to how managers of authorised establishments are carrying out the management of adults' affairs.

8) Section 40 (3) gives the Care Commission authority to investigate any complaint received about the manner in which the managers of an authorised establishment are managing residents' affairs.

9) Section 41 outlines the duties and functions of local authority managers running authorised establishments in respect of the management of residents' finances.

10) Section 45 relates to appeals and revocation of the managers of an authorised establishment authority to manage residents' affairs.

11) Section 53 relates to **intervention orders**:

a) Section 53 (3) relates to the duty for local authorities to apply for **intervention orders** where necessary and where no-one else is making an application.

b) Section 53 (4) makes it a requirement that the MHO or Chief Social Work Officer provides reports for applications for **intervention orders**.

12) Section 57 relates to **guardianship orders**:

a) Section 57 (2) makes it a duty for local authorities to apply for **guardianship orders** where necessary and no-one else is making an application.

b) Section 57 (3) (b) (i) requires reports from the MHO or Chief Social Work Officer for **guardianship** applications.

c) Section 57 (3) (b) (ii) makes it the responsibility of the MHO or Chief Social Work Officer to check the suitability of the proposed **guardian** where the application relates to the personal welfare of the adult.

d) Section 57 (4), establishes that where the applicant is not the local authority, the applicant must notify the local authority of the application, giving 21 days for the appropriate officer (MHO or Chief Social Work Officer) to submit reports.

13) Section 57 (7) imposes a duty upon the Sheriff Clerk to notify the Public Guardian of any orders made by the sheriff. The Public Guardian in turn has a duty to notify the local authority in which the adult ordinarily resides.

14) Section 60 (2) imposes the same duty upon the local authority in regard to renewals of **guardianship orders** as it has under Section 57 (2). The duty to apply for renewal of **guardianship** where it is necessary and no one else is making an application to the sheriff for renewal.

15) Section 64 outlines the functions and duties of the **guardian**. These will be the aspects of the order that the local authority must supervise where they are not the **guardian**, and the duties and functions they must carry out.

16) Section 64 (8) makes it a duty for any interim **guardian** appointed by the Court to report to the Chief Social Work Officer every month as to the exercise of the powers.

17) Section 64 (9) gives the local authority 7 working days after the appointment of the Chief Social Work Officer as **guardian** in which to notify the adult, the Public Guardian and, in the case of mental disorder, the Mental Welfare Commission, of the name of the officer responsible for carrying out the functions and duties of **guardian**.

- 18) Section 65 imposes a duty upon the **guardian** to keep records of the exercise of their powers. This record will form a key document in the supervision of **welfare guardians**.
- 19) Section 70 grants the power to make an application to the sheriff where any decision of a **welfare guardian** is not complied with by the adult or any other person. The sheriff on receipt of the application can make an order ordaining that the named person implement the decision of the **guardian**, or may grant an order authorising a constable to enter premises, apprehend the adult and remove the adult to a place designated by the **guardian**.
- 20) Section 73 (3) outlines the local authority's power to recall a **guardianship order** where the grounds are no longer met or where it is no longer in the adult's interests to be subject to such an order. Where the local authority is **guardian** they cannot recall the order but must apply to the Mental Welfare Commission or the Sheriff Court. This can be appealed to the Sheriff Court.
- 21) Section 74 allows for anyone, including the local authority, to apply to the sheriff to have the powers contained in an order varied.
- 22) Section 82 limits liability when action which was taken or failed to be taken by those authorised under the Act was done reasonably, in good faith and in keeping with the principles.
- 23) Section 84 allows for **guardianship** and **intervention orders** to be a disposal available to Courts under Section 58 of the Criminal Procedure (Scotland) Act 1995. This will have implications for supervision of non-local authority **guardians** and for the management of orders where the Chief Social Work Officer is the **guardian**. It is essential the Criminal Justice staff are aware of this potential disposal, when it might be appropriate, and how it can be put in place.
- 24) Section 88 and Schedule 4 detail the continuation of pre-existing powers into the 2000 Act.

11. Checklist of some major action points for senior managers

11.1 Given the complexity of the law, the variety of actions which may involve local authority staff and the new statutory responsibilities it introduces, it will be essential that clear administrative systems and managerial procedures are put in place to ensure the local authority's responsibilities are properly and reliably carried out. The following list outlines some of the main tasks for managers:

- There is a need to establish administrative systems to ensure that all actions under the Act are accurately recorded and tracked.
- Managerial and supervision arrangements need to ensure all actions under the Act take full account of its principles.
- There is a need to develop multi-agency protocols for implementation of the Act.
- Development of strategic and operational linkages and protocols with the Public Guardian, the Mental Welfare Commission and the Care Commission needs to be addressed.
- Procedures for assessment and care management both at the initial as well as the review stages need to address issues of the adult's capacity to manage affairs relating to property, finance and personal welfare.
- Reviews of people in long-term care need to address the issue of diminishing and recovering capacity and the implications for use of the Act.
- Administrative procedures need to provide sufficient notice of renewal dates for **guardianship orders**.
- Administrative procedures must ensure that the local authority carries out its duties in terms of notification of the relevant parties at various points in the use of the Act. This involves close attention to detail.
- Procedures must ensure that all input from local authority staff which relates to the exercise of powers under the Act is properly recorded on the adult's case file.

- Clear, auditable accounting procedures need to be in place in local authority care homes in relation to the management of the funds of adults with incapacity under Part 4 of the Act.
- Administrative procedures re complaints and investigation under the Act should record the origin of the complaint on investigation, its nature, action taken and outcomes.
- Clear protocols addressing working relationship across boundaries with other departments in the authority (eg Legal and Administration) need to be established.
- Arrangements must be made for staff to access adequate legal and financial guidance to implement the Act and take forward applications as necessary.
- Arrangements will need to be made for securing external parties to act as **financial guardians** and **interveners** as necessary.
- Training strategies should be reviewed and audited annually to ensure all staff have access to appropriate information, training and guidance. Joint training initiatives should be included in the strategy. The need for continuing training to respond to the issues which arise out of the implementation of the Act should be addressed as well, including refresher training for MHOs.
- 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 must be reviewed to ensure they are in keeping with the 2000 Act and its principles.

12. Staff training

12.1 All authorities will need to develop a comprehensive training strategy which addresses the opportunity for joint training with health and independent sector colleagues. For local authorities to meet their responsibilities under the Act, they will need to offer training to staff in a wide diversity of positions throughout the organisation. The packs in this series are offered to facilitate this process. However, it is up to each

authority to think creatively as to how they might wish to use these packs to implement their own training strategies.

12.2 One relatively economical means of ensuring a comprehensive flow of training to all relevant departments is to consider cascade training. In this, key managers brief key personnel in the line-management system and they take on the responsibility to implement the packs in this series with all the relevant staff within their remit.

12.3 It is also important to consider that the Act will tax the resources of the local authority MHOs. If an authority is to meet its responsibilities, the 2000 Act will require many authorities to revisit the structure and resourcing of MHO services, bearing in mind that Section 9 (1) of the 1984 Act states that 'A local authority shall appoint a sufficient number of persons for the purpose of discharging in relation to their functions of Mental Health Officer...'

12.4 Given that MHO training requires applicants to hold the PQ1 qualification and that most programmes run for at least a year, it will require forward planning and discussion with your local programme to respond effectively to additional demands which might fall from this Act.

Resourcing the training

12.5 The decision of how to use these packs will rest with the section charged with training in your authority. Staff, however, must be given the time and resources to get the most out of them. If it is used by distance learning, it will take no less time than it will to implement it in a training session. If it is used in a training session, the two-day model must be backed by preparation time (pre-course reading).

13. Conclusion

13.1 This is a new and major piece of legislation that should transform the previously piecemeal and relatively unsatisfactory framework for meeting the needs of tens of thousands of vulnerable adults with incapacity throughout Scotland. As with all legislation, it is only as good as the various agents who have the power to make it work. As a manager in local authority social work, you are amongst the people who will be in a key position to ensure the Act is implemented as intended.

ANNEX 1 - Adults with Incapacity (Scotland) Act 2000

Overview of main provisions

Introduction

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.

Under the Act, the main ways that other people can make decisions for an adult with impaired capacity are:

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 came into effect on 2 April 2001.

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 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.

ANNEX 2 – Resource List

Legislation

The Adults with Incapacity (Scotland) Act 2000 can be viewed on the HMSO web-site: www.hmso.gov.uk or purchased from the Stationery Office – www.hmso.gov.uk and can be downloaded from the Scottish Executive’s website, as can the **Explanatory Notes** www.scotland.gov.uk/justice/incapacity/
Guidance from the Office of the Public Guardian can be downloaded from www.publicguardian-scotland.gov.uk/

Regulations

The Adults With Incapacity (Scotland) Act 2000 (Commencement No. 1) Order 2001 (SSI No.81)

The Adults with Incapacity (Public Guardian’s Fees) (Scotland) Regulations 2001 (SSI No.75)

The Adults with Incapacity (Certificates from Medical Practitioners) (Accounts and Funds) (Scotland) Regulations 2001(SSI No.76)

The Adults with Incapacity (Supervision of Welfare Attorneys by Local Authorities) (Scotland) Regulations 2001(SSI No. 77)

The Adults with Incapacity (Countersignatories of Applications for Authority to Intromit) (Scotland) Regulations 2001(SSI No.78)

The Adults with Incapacity (Evidence in Relation to Dispensing with Intimation or Notification) (Scotland) Regulations 2001 (SSI No.79)

The Adults with Incapacity (Certificates in Relation to Powers of Attorney) (Scotland) Regulations 2001(SSI No. 80)

The Civil Legal Aid (Scotland) Amendment Regulations 2001 (SSI 2001 No.82).

The Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Regulations 2002 (S.S.I. 2002/95)

The Adults with Incapacity (Reports in Relation to Guardianship and Intervention Orders) (Scotland) Regulations 2002 (S.S.I. 2002/96)

The Adults with Incapacity (Recall of Welfare Guardians' Powers)
(Scotland) Regulations 2002(S.S.I. 2002/97)

The Adults with Incapacity (Non-compliance with Decisions of Welfare
Guardians) (Scotland) Regulations 2002 (S.S.I. 2002/98)

Civil Legal Aid (Scotland) Amendment Regulations 2002 (S.S.I. 2002/88)

Copies of the Act, Explanatory Notes and Regulations are available
from:

Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
Tel 0870 606 5566
Fax 0870 606 5588
www.scotland-legislation.hmsso.gov.uk/

Codes of Practice

Code of Practice for local authorities exercising functions under the Act

Code of Practice for persons authorised under part 3 to access funds of
an adult

Code of Practice for **continuing and welfare attorneys**

Code of Practice for persons authorised under **intervention orders** and
guardianship

Code of Practice for persons authorised to carry out medical treatment
or research

Awaiting publication

Code of Practice for managers of authorised establishments

Code of Practice for supervisory bodies

The Codes of Practice are available from the following address:

Scottish Executive
Justice Department
Civil Law Division
Floor 2 West (Rear)
St Andrew's House
Regent Road
Edinburgh EH1 3DG
Tel 0131 244 2193

Alternatively all documents may be downloaded from the website
www.scotland.gov.uk/justice/incapacity/

Forms

The forms required to accompany an application for an **intervention** or **guardianship order** are schedules to the Adults with Incapacity (Reports in Relation to Guardianship and **intervention orders**) (Scotland) Regulations 2002. Details of the forms are as follows:

- AWI [1] Report of incapacity to accompany application for **guardianship**, renewal of guardianship or an **intervention order**
- AWI [2] Mental Health Officer's report to accompany application for **guardianship** relating to personal welfare
- AWI [3] Mental Health Officer's report to accompany application for renewal of **guardianship** relating to personal welfare
- AWI [4] Mental Health Officer's report to accompany application for an **intervention order** relating to personal welfare
- AWI [5] Chief Social Work Officer's report to accompany an application for **guardianship** relating to personal welfare
- AWI [6] Chief Social Work Officer's report to accompany an application for renewal of **guardianship** relating to personal welfare
- AWI [7] Chief Social Work Officer's report to accompany an application for an **intervention order** relating to personal welfare

These forms are available electronically from the website at www.scotland.gov.uk/justice/incapacity. This facility allows the text boxes in the forms to be expanded as necessary. If you have difficulty accessing the forms please telephone 0131 244 2193.

The forms for applying to the local authority or the Mental Welfare Commission for recall of welfare powers of a **guardian** are schedules to the Adults with Incapacity (Recall of Guardian's Powers) (Scotland) Regulations 2002. Details of the forms are as follows:

AWI[11]	Application to Mental Welfare Commission for recall of powers of a guardian relating to personal welfare
AWI[12]	Application to local authority for recall of powers of a guardian relating to personal welfare
AWI[13]	Medical report of capacity to accompany an application to Mental Welfare Commission or local authority for recall of powers of a guardian relating to personal welfare
AWI[14]	Intimation by Mental Welfare Commission of application or intention to recall powers of a guardian relating to personal welfare
AWI[15]	Intimation by local authority of application or intention to recall powers of a guardian relating to personal welfare
AWI[16]	Intimation by Mental Welfare Commission of proposal to refuse an application for recall of powers of a guardian relating to personal welfare
AWI[17]	Intimation by local authority of proposal to refuse an application for recall of powers of a guardian relating to personal welfare
AWI[18]	Decision by Mental Welfare Commission on recall of powers of a guardian relation to personal welfare
AWI[19]	Decision by local authority on recall of powers of a guardian relation to personal welfare

These forms are available electronically from the website at www.scotland.gov.uk/justice/incapacity. This facility allows the text boxes in the forms to be expanded as necessary. If you have difficulty accessing the forms please telephone 0131 244 2193.

Training resource pack

The Scottish Executive commissioned a series of training seminars organised by ENABLE and ASAD in Spring 2001. A training resource pack produced for seminar participants is available on the Scottish Executive's website at www.scotland.gov.uk/justice/incapacity

The pack includes the following materials:

Section 1

- Introduction to the Act
- Principles and definitions
- Concept of capacity and assessing incapacity

Section 2

- Welfare interventions

Section 3

- Financial interventions

Section 4

- Roles and responsibilities of organisations and individuals

Reading

Astell A.J, Wilkinson H.A (2001) Adults with Incapacity (Scotland) Act 2000: A survey of Scottish professionals. University of Abertay Dundee.

Scottish Executive (2000) The same as you? A review of services for people with learning disabilities.

Jacques A, Jackson G (2000) Understanding Dementia. Churchill Livingstone.

McKay C, and Patrick H, The Community Care Maze – the law and your rights to community care in Scotland. ENABLE and Scottish Association for Mental Health. Now out of print but available in libraries.

Child Poverty Action Group (2001) Paying for Care Handbook. 2nd Edition.

The Law Society and British Medical Association (1995) Assessment of Mental Capacity. Guidance for Doctors and Lawyers.

The British Medical Association (1999) Withholding and Withdrawing Life-prolonging Medical Treatment. Guidance for Decision Making

Scottish Executive (2001) New Directions. Report on the Review of the Mental Health (Scotland) Act 1984. (Millan Report).

Baumhover L.A, Beall S C (1996) Abuse, Neglect and Exploitation of Older Persons, Strategies for Assessment and Intervention. Jessica Kingsley.

The Inquiry into the care of Mrs K aged 90, The Mental Welfare Commission, November 2001

Useful addresses

Statutory authorities under the Act

The Office of the Public Guardian
Hadrian House
Callander Business Park
Falkirk FK1 1XR
Tel: 01324 678300
www.publicguardian-scotland.gov.uk/

The Mental Welfare Commission for
Scotland
Argyle House
3 Lady Lawson Street
Edinburgh EH3 9SH
Tel: 0131 222 6111
www.mwc.scot.org.uk

Scottish Court Service
Hayweight House
23 Lauriston Street
Edinburgh EH3
Tel. 0131 229 9200
www.scotcourts.gov.uk

Contacts on specific issues

The Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh EH3 7YR
Tel: 0131 226 7411
www.lawscot.org.uk

Legal Aid
Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh EH3 7RN
Tel: 0131 226 7061
www.slab.org.uk

Advocacy 2000
134 Ferry Road
Edinburgh EH6 4PQ
Tel: 0131 554 7878

Criminal Injuries Compensation Board
Tay House
300 Bath Street
Glasgow G2 4LN
Tel: 0141 331 2726
www.cica.gov.uk

Other useful contacts

ASCS – Advice Service Capability Scotland
11 Ellersly Road
Edinburgh
EH12 6HY
Textphone/Minicom 0131 346 2529

Age Concern Scotland
113 Rose Street
Edinburgh EH2 3DT
Tel: 0131 220 3345

Alzheimer Scotland-Action on Dementia
22 Drumsheugh Gardens
Edinburgh EH3 7RN
Tel: 24hr freephone Helpline 0808 808 3000
www.alzscot.org

Carers UK
3rd Floor
91 Mitchell Street
Glasgow G1 3LN
Tel: 0141 221 9141

Citizens Advice Bureau
Address in your local phone book or from
Citizens Advice Scotland
26 George Street
Edinburgh
Tel. 0131 667 0156
www.cas.org.uk

ENABLE
6TH Floor
7 Buchanan Street
Glasgow G1 3HL
Tel. 0141 226 4541

Sense Scotland
5th Floor
45 Finnieston Street
Glasgow G3 8JU
Tel: 0141 564 2444
www.sensescotland.org.uk

Royal College of Speech and Language
Therapists
2 White Hart Yard
London SE1 1NX
Tel: 020 7378 1200

Scottish Association for Mental Health
Cumbrae House
15 Carlton court
Glasgow G5 9JP
Tel: 0141 568 7000
Www.samh.org.uk

Scottish Executive

Health Department
Community Care Division
Branch 3
Area 3ER
St Andrew's House
Regent Road
Edinburgh EH1 3DG
Tel: 0131 244 5389

Health Department
Community Care Inspectorate
Area 3ER
St Andrew's House
Regent Road
Edinburgh EH1 3DG
Tel: 0131 244 3752

Justice Department
Civil Law Division
Area 2WR
St Andrew's House
Regent Road
Edinburgh EH11 3DG
Tel: 0131 244 4212

Health Department
Public Health Division
Area 3E
St Andrew's House
Regent Road
Edinburgh EH1 1DG
Tel: 0131 244 2545

ANNEX 3 - Adults With Incapacity (Scotland) Act 2000

Part of the Act	Type of Intervention		Previous Consent Required by Adult	Who can Intervene?					
	Welfare	Property/ financial		Relative/ Friend/Carer/ Neighbour	Lawyer	Officer of Local Authority	Other Professionals eg CPN, Care Staff, Hospital	Doctor	Medical Certificate/ Report Required
2	Welfare Attorney	Continuing Attorney	Yes	Yes	(Certifies ability to understand) Yes	Cannot intervene	No	(Certifies ability to understand)	Not Statutory
3 ⁸		Intromission with funds	No	Yes	(Counter signature) can act as withdrawer but unpaid.	Cannot intervene (MHO can countersign)	No (Nurses may countersign)	(Counter signature)	Yes
4		Management of residents' finances	No	No	No	Care Home Manager	Care Home and Hospital Managers	No	Yes
5	Authority to Treat		No	A person having an interest can appeal	As Proxy ⁹ can object or consent	As Proxy can object or consent	As Proxy can object or consent	Yes	Yes
6	Intervention Order	Intervention Order	No	Yes	Yes	Yes (also report)	Could make application	No	Yes
6	Guardianship Order	Guardianship Order	No	Yes	Yes (also report) (Finance only)	Yes (welfare only) (also report)	Could make application	No	Yes

⁸ Under Part 3 'Intromission with Funds' countersigning relates to a declaration in the application form that the applicant is a 'fit and proper person to intromit with funds' (Section 26(1)(c))

⁹ Proxy means a person appointed under the Act to act for an adult with incapacity, to include welfare and continuing attorneys, guardians and persons authorised under intervention orders

ANNEX 4 – Glossary

The following is an explanation of terms that occur in the text.

Adult	Refers to a person over the age of 16 years. It is usually a reference to an adult with incapacity.
Attorney	Is a person who has been selected by an adult while still capable of exercising informed choice, to grant powers which take effect when the granter becomes incapable. Powers of attorney are separated in the 2000 Act into continuing powers (which deal with financial affairs of the adult) and welfare powers (which deal with the personal welfare of the adult).
Care Manager	Is the term used to refer to Social Work Officers who have specific duties in the assessment of need and the management of packages of care for people under the NHS and Community Care Act 1990.
Care Plan	This term is used generically in the text to cover all personal care plans which result from a multidisciplinary assessment of needs. The term must be read in context but can refer as well to treatment plans and/or nursing care plans for those in receipt of health care services.
Chief Social Work Officer	Is the most senior Social Work Officer in a local authority line management structure. It is the person with responsibility for the delivery of social work services in a local authority.
Curator Bonis	Is a power to manage the estate of a person who is not capable of doing. For any person over the age of 16, as of April 2002, this power has become financial guardianship under the framework of the 2000 Act.

Direct Care Staff	This refers to all staff who are providing care on an employed basis. This includes such posts as care staff in care homes, home care staff and day care staff.
Duty of Care	Is a duty to exercise due skill and care in exercising powers one has been given in relation to another person.
Granter	Is the term used for a person who grants Power of Attorney to another.
Guardian	Means a person appointed by the sheriff to set or make decisions for an adult under Part 6 of the Act. A financial guardian means a guardian with financial powers. A welfare guardian means a guardian with welfare powers. Guardianship under the Mental Health (Scotland) Act 1984 no longer exists with the implementation of Part 6 of the 2000 Act in April 2002.
Intervention Order	Means an order made by the sheriff, under Part 6 of the Act that something should be done, or a decision made, on behalf of an adult.
Intromission	To intromit means to 'deal with' the funds of an adult with incapacity as outlined in Part 3 of the Act.
Liability	In reference to Section 82, 'limitation of liability', means that the person liable is legally responsible for their actions or failure to act. It implies that a person who is liable may face legal action in either Civil or Criminal Court as a result of actions or failure to act if they failed to do so reasonably, with due care and in accordance with the principles of the Act.
Local authority	Is the term used in legislation to refer to any local government or Island Council in Scotland. By implication, it refers to the local authority's duties

in relation to social work services as discussed in this text.

MHO	Mental Health Officer is the term given by the Mental Health (Scotland) Act 1984, to specially trained social workers appointed by their employing local authority to perform specific duties relating to detention in hospital and guardianship of people with mental disorder. The new roles that the 2000 Act gives to MHOs are explained throughout the text.
Proxy	Is the term used to describe any person authorised to make decisions or to take action on behalf of an adult whose capacity has become impaired.
Social Work Officer	Is the term used in this text and by the Codes of Practice 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.' (The Code of Practice for Local Authorities, 2001, Scottish Executive/Astron.)
Tutor Dative and Tutor-at-Law	Are people appointed by the Court to exercise powers, manage aspects of an adults' welfare and, occasionally, to manage short-term aspects of financial affairs. As of April 2002, these powers have become Guardianship Orders under the framework of the 2000 Act.