ANNEX A

List of Consultees for AWI(Scotland) Act 2000, Part 4

Chief Executives of Local Authorities

Chief Executives of Health Boards and NHS Trusts

Directors of Social Work and Housing Departments

The Scottish Commission for the Regulation of Care

The Scottish Social Services Council

Office of the Public Guardian

CoSLA and ADSW Scotland

Scottish Federation of Housing Associations

Registered Independent and Voluntary Sector Care Establishments

Voluntary Sector organisations providing services, support and advice to the Elderly, those with Mental Health or Learning Disability difficulties, and to Carers

Representative organisations for Medical Practitioners, Staff, Managers and Care Home Providers

The Scottish Law Commission

The Law Society for Scotland

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ANNEX B

Specific Issues for Consultees to Consider under AWI(Scotland) Act 2000, Part 4

Draft Regulations

Regulation 2 - is the draft certificate at Schedule 1, for certifying incapacity under Part 4 by a medical practitioner, clearly understood, and asks for the relevant information?

Regulation 3 - is the draft certificate at Schedule 2, for the purposes of dispensing with the need to intimate to the resident the purposes of a medical examination under Part 4, clearly understood, and asks for the relevant information? Do consultees agree that this is a necessary provision and, to minimise the potential impact on the resident, that there should be only one certificate jointly signed by 2 medical practitioners? Does this ensure independent opinions are given? For those residents whose incapacity is partly caused by a mental disorder, do consultees envisage practical difficulties in requiring one of the 2 medical practitioners to be approved for the purposes of section 20 of the Mental Health(Scotland) Act 1984?

Regulation 4 - baring in mind the Acts principles, views are sought on whether the present draft financial values to be prescribed would create difficulties in the efficient and effective management of a resident's finances?

Draft Codes of Practice

Has the overall context, and separate roles and responsibilities been satisfactorily explained?

Medical practitioner fees - do consultees have views on the costs of examinations to determine incapacity being met from the individual's estate?

Appendices - Appendix 1 is to be prescribed by Regulation 2(see above)

Appendix 2 is to be prescribed by Regulation 3(see above)

Appendix 3 an example of the form to be issued by the appropriate Supervisory body to the authorised manager of an establishment giving authority to manage a resident's finances. This form too is provided in the Codes for information and to assist uniformity, and it is not to be prescribed within the Regulations. Supervisory bodies may choose to adapt/devise their own forms. Is its inclusion within the Codes helpful or confusing?

Appendix 3 provides an example of the form of words to be submitted by the Manager of an establishment to the appropriate Supervisory body to seek authority to manage a resident's finances. While it provided in the Codes for information and to assist uniformity, it is not to be a prescribed form within the Regulations, and Managers may choose to adapt/devise their own forms. Is its inclusion within the Codes helpful or confusing?

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SCOTTISH STATUTORY INSTRUMENTS

2003 No.

ADULTS WITH INCAPACITY

The Adults with Incapacity (Management of Residents' Finances) (Scotland) Regulations 2003

Made	*2003*
Laid before the Scottish Parliament	*2003*
Coming into force	*1st April 2003*

The Scottish Ministers, in exercise of the powers conferred by sections 37(2) and (9), 39(3), 41(d) and 86(2) of the Adults with Incapacity (Scotland) Act 2000([a]), and of all other powers enabling them in that behalf, hereby make the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Adults with Incapacity (Management of Residents' Finances) (Scotland) Regulations 2003 and shall come into force on 1st April 2003.

(2) In these Regulations–

(a) "the Act" means the Adults with Incapacity (Scotland) Act 2000; and

(b) "financial year" means a period beginning on 1st April in one year and ending on 31st March in the following year.

Certificate of incapability of managing affairs

2. For the purposes of section 37(2) of the Act, a certificate to the effect that a resident of an authorised establishment is incapable in relation to decisions as to, or of safeguarding his or her interest in, any of the resident's affairs shall be in the form set out in Schedule 1 to these Regulations.

Evidence to be taken into account under section 37(8) of the Act

3.—(1) For the purposes of section 37(8) of the Act, the evidence which the supervisory body shall take into account in considering an application for a direction that the managers of an authorised establishment need not make intimation to the resident in accordance with

([a]) 2000 asp 4. See section 87(1) for the definition of "prescribed".

section 37(3) or take any action under section 37(4) shall be two medical certificates in the form set out in Schedule 2 to these Regulations.

(3) In any case in which the resident's incapability is wholly or partly by reason of mental disorder, at least one of the medical practitioners must be a practitioner approved for the purposes of section 20 of the Mental Health (Scotland) Act 1984([a]) as having special experience in the diagnosis or treatment of mental disorder.

(2) Such medical certificates shall be prepared by two medical practitioners who have each examined the resident separately.

Value of matter for the purposes of section 39

4. For the purposes of section 39(3) of the Act, the matters which may be managed without the consent of the supervisory body are–

(a) in the case of any matter under section 39(1)(d) of the Act (disposal of moveable property other than money), any such disposal where the total value of the property does not exceed £250;

(b) in any other case, any matter which does not exceed £5,000 in total in any financial year.

Placing funds to earn interest

5. For the purposes of section 41(d) of the Act (investment for interest of funds held), the sum prescribed is £500.

A member of the Scottish Executive

St Andrew's House,
Edinburgh

2003

([a]) 1984 c.36.

Regulation 2

SCHEDULE 1

Adults with Incapacity (Scotland) Act 2000 (“the Act”)

Certificate of incapability in relation to decisions as to, or safeguarding interest in, resident’s affairs.

I …………………………………….. (full name)

of ……………………………………………………………………………………………….

…………………………………………………….…… (professional address)

have examined the following resident on …../…../….. (date) in my capacity as ……………

………………………………………………………………………………………………….. *.

……………………………………………………………… (resident’s name)

of ……………………………………………………………………………………………

……………………………………………………………………………………………

………………………. (authorised establishment where resident lives)

…./…./…. (resident’s date of birth).

I am of the opinion that he/she is incapable in relation to:

- decisions as to**
- safeguarding his/her interests in **

any of the affairs referred to in section 39 of the Act.

This is because of:

- mental disorder**
- inability to communicate because of physical disability**

………………………………………………………………………………………………..

………………………………………………………………………………………………..

………………………………………………………………………………………………..

……………………………………………………………………………………………….

(brief description of reasons for mental disorder/inability to communicate).

I am not related to the resident or to any of the managers of the authorised establishment in which he/she resides, nor do I have any direct or indirect financial interest in the authorised establishment.

In assessing the capacity of the resident, I have observed the principles set out in section 1 of the Act.

……………………………(signed) …………………………(printed name)

…./…./…. (date)

* the person signing the certificate must be a medical practitioner; insert as appropriate eg GP, specialist in mental disorder.

** one of these must be deleted unless both apply.

Regulation 3(1)

SCHEDULE 2

Adults with Incapacity (Scotland) Act 2000 (“the Act”)

Certificate to inform decision whether to dispense with intimation under section 37(3) or action under section 37(4).

I ………………………………………………………… (full name)

of ……………………………………………………………………………………………

……………………………………………………… (professional address)

have examined the following resident on …./…./…. (date) in my capacity as

……………………………………………………………………………………………*

…………………………………………………………………………… (resident’s name)

of …………………………………………………………………………………………..

……………………………………………… (authorised establishment where resident lives)

…./…./…. (resident’s date of birth).

I am of the opinion that it would pose a serious risk to the health of the resident named above for them to be notified:

- that their capacity is to be medically examined under section 37(2) of the Act;
- of the result of that medical examination;
- that their affairs are to be managed under section 37 of the Act.**

The reason for this opinion is ………………………………………………………………..

…………………………………………………………………………………………….

…………………………………………………………………………………………….

…………………………………………………………………………………………….

(brief description of reason(s)).

I am not related to the resident or to any of the managers of the authorised establishment in which he/she resides, nor do I have any direct or indirect financial interest in the authorised establishment.

I am a medical practitioner approved by ………………………………… (approving body) for the purposes of section 20 of the Mental Health (Scotland) Act 1984 as having special experience in the diagnosis or treatment of mental disorder. (delete if inappropriate).

………………………….(signed) ……………………………….(printed name)

…./…./…. (date).

* the person signing the certificate must be a medical practitioner; insert as appropriate eg GP, specialist in mental disorder,

** If any alternative is inappropriate, please delete it.

THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 COMMENCEMENT NO *x* ORDER 2002
PART 4 – MANAGEMENT OF RESIDENTS' FINANCES: DRAFT REGULATORY IMPACT ASSESSMENT

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Introduction

1. This Regulatory Impact Assessment is provided to assist public consultation on proposals for implementing Part 4 of the Adults with Incapacity (Scotland) Act 2000. Part 4 of the AWI Act provides for the management of residents' finances in authorised establishments which are care homes in the local authority and independent sector, NHS and state hospitals, independent hospitals and private psychiatric hospitals, and in other services which may register specifically for this purpose (limited registration services).

2. This assessment considers the impact – both costs and benefits – of the requirements of Part 4, and of compliance with the Code of Practice, on the independent care home sector. It solely concerns the independent care home sector (i.e. private and voluntary run care homes).

Background

3. Under community care policy, an increasing number of people who are incapable of managing their own financial affairs now live in care homes. Others are cared for in long-stay hospitals, although their numbers are decreasing as community care provision increases. Some will already have arrangements in place for managing their financial affairs, but for many there is no one else to act on their behalf and their income and savings are not large enough to warrant the appointment of a financial guardian.

4. Part 4 of the Act therefore puts on a statutory basis the management by authorised establishments of the funds and moveable property of residents who are unable to carry out this function themselves. It also allows services such as those providing supported accommodation to seek registration for the sole purpose of managing residents' finances (limited registration services). Part 4 provides for a robust system of authorisation, control and regulation of these arrangements, all aimed at protecting the interests of the adults concerned.

5. Within the arrangements put in place by the Adults with Incapacity (Scotland) Act 2000, the scope for use of Part 4 is intended to be, and is, limited. Thus it does not apply where:

- a financial guardianship order is in force under part 6 of the Act;
- a relevant intervention order is in force under part 6 of the Act;
- there is a continuing attorney with relevant powers, and
- the individual's social security benefits are paid direct to a nominee, under Department of Work and Pension Appointeeship arrangements (Part 4 is intended to operate alongside DWP Appointees for a resident's other funds (i.e. those that are not DWP benefits).

The intention is that Part 4 should be used for people with relatively small sums of money who have no-one else to manage their financial affairs. Its operation is limited to managing maximum assets of *£5,000** a year, and authorised managers will have to get written permission from their supervisory body to manage individual payments exceeding *£250**. These limits will be set in Regulations approved by Parliament, and may be altered from time to time.(**subject to consultation)*

6. Part 4 will allow managers to buy items for residents' personal benefit and comfort – e.g. personal toiletries, clothes, items of furniture, holidays, and other items that are not part of the regular care service provided.

7. Managers may not charge residents directly for the management of their finances under Part 4, but the costs of operating Part 4 can be taken into account by establishments in setting contract prices. In practice, the scope for doing so will be limited given the national fee-setting environment, the report of Care Home Fee review group, and the recent agreement between the Scottish Executive and the Convention of Scottish Local Authorities on fees. Some care homes may need to operate this for a significant number of their residents, and the medical certificates required under Part 4 must be renewed every three years. Some homes may find that to operate this section of the Act as intended would result in a significant cost.

Establishments to which Part 4 applies

8. Part 4 of the Act provides for managers in authorised establishments to manage the finances of service users with incapacity. The services that are referred to in Part 4 of the Act, as amended by the Regulation of Care Act (Scotland) 2001, are:

(a) a health service hospital
(b) a state hospital
(c) an independent hospital or private psychiatric hospital
(d) a care home service; and
(e) a limited registration service.

9. Section 35(2) of the Act distinguishes between:

- 'unregistered establishments' that are supervised by Health Boards – (a) and (b) above.
- 'registered establishments', that are registered by the Scottish Commission for the Regulation of Care – (c), (d) and (e) above.

10. Together, registered and unregistered services are referred to as 'authorised establishments'.

11. A limited registration service is a service that provides accommodation and is not a care service which is otherwise required to register with the Commission. Examples are a sheltered or intensively supported housing project where the landlord is also the support provider. Housing support services, which are required to register with the Commission, are not eligible to register as Limited Registration Services.

Regulation

12. The Scottish Commission for the Regulation of Care will inspect establishments that are authorised to manage residents' financial affairs. It will ensure that when a resident's financial affairs are being managed, proper financial accounting and audit measures are in place and best practice recommended in the Codes of Practice is being followed.

13. Strict conditions apply to managing people's financial affairs to ensure their interests are fully safeguarded and that authorised managers are fit and proper people to carry out this role. The Care Commission will deal with matters in relation to Part 4 as part of the overall process of inspecting and regulating the activities of registered services.

Best Practice: Codes of Practice

14. Two statutory Codes of Practice underpin operation of part 4, and provide guidance on best practice for operating Part 4 of the Act:

- the **Code of Practice for Managers of Authorised Establishments** is intended to be read by the managers, proprietors and staff of care homes and hospitals, who are or who may become involved in overseeing the financial affairs of adults with incapacity. By following the Code, managers and staff can be sure they are following best practice.
- the **Code of Practice for Supervisory Bodies** mirrors the Code of Practice for Managers, but is written with the regulatory supervisor in mind.

15. The Codes are based on current knowledge and understanding of best practice, and will be kept under review by the Executive and revised from time to time. They are issued in draft for consultation along with this Regulatory Impact Assessment.

Options

16. It has long been recognised that existing law was failing to meet the welfare and financial needs of adults with incapacity. Consultation first began in 1991 when the Scottish Law Commission took up the matter with a discussion paper on Mentally Disabled Adults. The Commission subsequently published, in September 1995, its *Report on Incapable Adults*. The Scottish Office published, in February 1997, a further consultation paper *Managing the Finances and Welfare of Incapable Adults*. The outcome has been the Adults with Incapacity (Scotland) Act 2000, most of which had come into operation by 1 April 2002, except for Part 5 which was introduced on 1 July 2002, and part 4 scheduled for introduction on 1 April 2003.

17. In the meantime, managers of local authority and other residential homes have had to manage residents' funds without any appropriate statutory basis. Guidance in Circular No: CCD2/1999 *Protection of the Finances and Other Property of People Incapable of Managing Their Own Affairs* (October 1999) has provided an interim framework for management of residents' finances. Part 4 puts this on a statutory basis, supported by statutory Codes of Practice and enforced by the Scottish Commission for the Regulation of Care.

Numbers of care homes and residents

18. Figures in *Scottish Community Care Statistics 2001* show that at 31 March 2001 (the latest date for which figures are available) numbers were as follows:

Care homes in Scotland for older people, with mental health, or learning and physical disabilities

local authority	320	6,292 residents
private	353	5,240 residents
voluntary	947	8,955 residents
registered private nursing homes	502	20,046 residents
	2,122	

Note : these numbers relate to all adult care homes, but as paragraph 2 above explains, this RIA is only intended to assess the likely impact on the independent and voluntary sector

19. This source does not provide information about the numbers of people who are incapable of managing their own financial affairs. Research carried out in Edinburgh (*The Management of Finances and Welfare of Incapable Residents*: March 1998), however, found that 15% of residents in private homes and 21% of residents in voluntary homes had their financial affairs managed by the home.

If these figures are replicated across the country, it would suggest that there are around 3,800 residents in private homes, and around 1,100 residents in voluntary homes who are incapable of managing their own financial affairs, and whose financial affairs are being managed by their homes. It is possible many of these will relate only to the management of DWP personal allowances as the resident would have no other funds : Part 4 is not relevant to these.

20. All registered establishments will be expected to operate Part 4 if this is required for any individual (unless they opt out by giving notice to the Commission under section 35 of the Act, which will be noted on the Registration Certificate). It seems likely that most homes above will need to manage the financial affairs of incapable adults, and will therefore need to comply with Part 4, unless they opt out.

Costs

21. The procedures set out in the Code of Practice for Managers of Authorised Establishments represent best practice, and establishments already operating to these standards should not incur significant new costs. Even so, however, there will be the time involved in applying for medical examination, applying for certificates, liaising with GPs and social workers. Where establishments operate to lesser standards, costs will rise as they seek to meet the requirements of the Code of Practice. As paragraph 7 above mentions, there are the costs of the medical practitioners' fees which could be significant

22. Extra costs falling on authorised establishments need to be balanced against the assurance users, and their families, will have that their finances are being managed by others in their best interests, in accordance with good practice; and monitored by the Commission as part of its inspection process.

Impact on small businesses

23. This is set out in paragraphs 21 and 22 above.

Consultation

24. There has been extensive consultation on the Adults with Incapacity (Scotland) Act 2000. The draft regulations and Codes of Practice take the best provisions from the existing system, notably Circular No: CCD2/1999 *Protection of the Finances and Other Property of People Incapable of Managing Their Own Affairs* (October 1999). We have updated them according to experience and with consistency in mind. As has been the practice with previous consultations on the Act, and at different stages of the Regulation of Care Project, we are issuing these drafts for consultation to a wide range of contacts who will have different perspectives on what is proposed.

Enforcement, Sanctions and Monitoring

25. Managers and staff of care homes will be expected to manage the funds and moveable property of residents who are unable to carry out this function themselves, using the Code of Practice for Managers of Authorised Establishments. From 1 April 2002, the Scottish Commission for the Regulation of Care took on responsibility for inspection of all registered services to ensure continued compliance with the requirements and conditions of registration. In so doing, from 1 April 2003 it will use the Code of Practice for Supervisory Bodies.

Timetable

26. Part 4 of the Act will come into force from 1 April 2003.

Conclusion

27. For the reasons described above, it is considered that additional costs arising for the independent care home sector from implementation of Part 4 and of compliance with the Code of Practice will be justified by the benefit obtained. This benefit is that users, and their families, will have assurance that their finances are being managed by others in their best interests, in accordance with good practice, and subject to monitoring by the Commission as part of its inspection function.

DECLARATION

I have read the Regulatory Impact Assessment and I am satisfied that the balance between cost and benefit is the right one in the circumstances.

………………………………………………………A member of the Scottish Executive

………………………………………………………Date

Contact point: John Storey/Dave McLeod, Community Care Division 1, Scottish Executive, 0131 244 43704.

[121001]

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000:

PART 4 DRAFT CODE OF PRACTICE FOR MANAGERS OF AUTHORISED ESTABLISHMENTS

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1. INTRODUCTION

Who should read this Code?

1.1 This detailed Code of Practice is designed to be read by the managers, proprietors and staff of care homes and hospitals, who are or who may become involved in overseeing the financial affairs of adults with incapacity. It provides guidance and indicators of good practice and is complemented by a leaflet that sets out its provisions in an abbreviated form.

1.2 Those authorised establishments that are required to register with the Scottish Commission for the Regulation of Care (The Care Commission) after April 2002 will be assumed to be covered by the requirements of the Act unless they choose to opt out of being so. It is therefore important that every manager of a care home service considers carefully the matters dealt with in this Code.

1.3 All staff within NHS Scotland hospitals who are or who may be involved in managing the affairs of adults with incapacity should also acquaint themselves with the contents of this code.

1.4 It will also be of interest to managers, inspectors and health board staff within supervisory bodies who carry responsibility for authorising registered and unregistered care and hospital services to oversee the financial affairs of adults with incapacity. They will wish to refer also to the Supervisory Bodies Code, which shares many common areas with this Code.

1.5 It is important at this early stage in the code to emphasise that Part 4 is intended to apply to the relatively few residents who lack capacity and for whom all other alternative arrangements have been considered to be not suitable. Even when an individual is made subject to the provisions of the Act, the extent of the assets that are covered by the Act is very limited. In this context, whilst all managers should make themselves aware of the provisions of Part 4 of the Act, some may not require to be directly involved in carrying them out.

Layout and Structure of the Code

1.6 In setting out guidance on the various functions, responsibilities and processes set out in Part 4 of the Act, this Code seeks to take into account the wide range of settings within which managers may be working and the various systems that may exist for supporting them in fulfilling their responsibilities under the Act.

1.7 In particular, arrangements for fulfilling the requirements of Part 4 in small care homes are likely to be of a different order from those that will operate within a relatively large NHS Scotland hospital or independent healthcare setting.

1.8 Also, the supervisory context within which managers will be operating will vary between those registered services that are supervised by The Care Commission, and unregistered health services usually run by National Health Service Trusts that are supervised by NHS Boards. In recognition of these differences and where considered helpful, matters are dealt with in the Code under separate headings for registered and unregistered establishments.

The Act

1.9 The law of Scotland generally presumes that adults (those aged 16 or over) are legally capable of making personal decisions for themselves and managing their own affairs. That presumption can be overturned on evidence of impaired capacity. The Adults with Incapacity (Scotland) Act 2000, referred to in this code as 'the Act' sets out a new framework for regulating intervention in the affairs of adults who have or may have impaired capacity, in the circumstances covered by the Act (such an adult being referred to in the Act and in various places in this code as 'the adult'). The framework is underpinned by general principles and provides more flexibility than before to tailor interventions to the needs of particular cases.

1.10 Part 4 of the Act, to which this code of practice relates, provides for the management of residents' finances in authorised establishments, which are care homes in the local authority and independent sector, NHS and State hospitals, independent hospitals and private psychiatric hospitals, and in other services which may register for this purpose. The Act introduces a number of new and readily accessible forms of management in relation to financial matters. These should have the effect of limiting the situations in which it is necessary to use the powers detailed in Part 4. Arrangements under Part 4 should only be necessary after all other available options have been carefully considered and these have been found to be not suitable, by the multi-disciplinary care team and where no other appropriate person is available to act on the adult's behalf and it is in the interests of the adult.

Incapacity

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

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

1.13 For the purposes of the Act 'incapable' means incapable of:

acting; or

making decisions; or

communicating decisions; or

understanding decisions; or

retaining the memory of decisions;

1.14 In relation to any particular matter, by reason of mental disorder or inability to communicate because of physical disability. A person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or

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

The general principles (s1(4))

1.15 All decisions made on behalf of an adult with impaired capacity must observe the principles of the Act. These are:

Principle 1 – benefit

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

Principle 2 – minimum intervention

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

Principle 3 – take account of the wishes of the adult

1.15.3 In determining if an intervention is to be made, and if so, what intervention is to be made, account shall be taken of the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult.

NOTE: it is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained by any means whatsoever.

Principle 4 – consultation with relevant others

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

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

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

Principle 5 – encourage the adult to exercise whatever skills he or she has

1.15.5 Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act shall, in so far as it is reasonable or practicable to do so, encourage the adult to exercise whatever skills he or she has concerning property, financial affairs or personal welfare as the case may be, and to develop new such skills.

1.16 These principles are to be applied when a decision is being made to invoke the provisions of the Act and at the stage when a person's financial affairs are being managed.

1.17 In practical terms they require that every opportunity have been taken to explore and utilise all of the other options available for managing the affairs of adults with incapacity. Even when the provisions of the Act are invoked, they should only be used to authorise the least restrictive level of intervention on the basis of active and ongoing consultation with all informed and involved parties.

1.18 The general principles will be referred to throughout this code as they apply to the exercise by managers of their functions under the Act.

Limitation of liability

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

- acted reasonably and in good faith and in accordance with the general principles, or
- failed to act and the failure was reasonable and in good faith and in accordance with the general principles

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

1.21 Authorised managers may manage the financial affairs of residents whose total assets; including savings and income do not exceed £5,000 at any one time. The establishment should retain a balance of up to £250 in order to meet the possible day to purchase requirements of the resident. Assets exceeding £500 should be placed in an interest bearing account.

2. BACKGROUND

Purpose of this part

2.1 This part of the code outlines the previous guidance that has been available to inform the way in which the affairs of adults' with incapacity have been handled.

Previous Guidance

2.2 Following the publication in 1995 of the Scottish Law Commission's publication "Report on Incapable Adults" (Scots Law Com No 151, ISBN 0 10 129622 3), the Scottish Office issued a consultation paper in September 1997 "Managing the Finances and Welfare of Incapable Adults" which concerned arrangements for managing and protecting the finances, housing and property of people who were incapable of managing their own affairs as a result of "mental disorder". This resulted in the policy memorandum paper "Making the Right Moves", published in August 1999, and the subsequent guidance Circular No: CCD2/99 "Protection of the Finances and Other Property of People Incapable of Managing Their Own Affairs", issued in October 1999 by the Scottish Executive, and which provided interim guidance pending the enactment of the proposed new legislation.

2.3 The guidance was used to inform good practice in the management of finances of adults with incapacity across a range of care settings. It was recommended that the 1999 guidance be used in conjunction with the 1985 "Report of the Working Party on the Management of Incapax Patients' Funds" (ISBN 0 11 492452 X) called the "Crosby Report" This was intended to develop best practice pending the implementation of the Act and its associated Codes of Practice.

2.4 Previous regulation of residents' finances has offered a sound basis for practice and should continue to be viewed as a useful starting point in considering responsibilities under the Act. A wide range of previous legislation and government guidance has highlighted issues that continue to be relevant. The fitness of persons and establishments to undertake such functions has previously been a central issue in the Social Work (Scotland) Act 1968. The principles upon which this Code of Practice is based are set out clearly in Part One of the Act and these must inform all of the decisions and actions taken by authorised managers and the relevant supervisory bodies.

Part 4 and best practice.

2.5 Under community care policy, an increasing number of people who are incapable of managing their own financial affairs now live in care homes. Others are cared for in long-stay hospitals, although their numbers are decreasing as community care provision increases. Some will already have arrangements in place for managing their financial affairs, but for many there is no one else to act on their behalf and their income and savings are not large enough to warrant the appointment of a financial guardian.

2.6 Part 4 of the Act therefore puts on a statutory basis the management by authorised establishments of the funds and moveable property of residents who are unable to carry out this function themselves. It also allows services such as those providing supported accommodation to seek registration for the sole purpose of managing residents' finances (limited registration services). Part 4 provides for a robust system of authorisation, control and regulation of these arrangements, all aimed at protecting the interests of the adults concerned.

2.7 Within the arrangements put in place by the Adults with Incapacity (Scotland) Act 2000, the scope for use of Part 4 is intended to be, and is, limited. Thus it does not apply where:

- a financial guardianship order is in force under part 6 of the Act;

- a relevant intervention order is in force under part 6 of the Act;
- there is a continuing attorney with relevant powers, and
- the individual's social security benefits are paid direct to a nominee, under Department of Work and Pension Appointeeship arrangements (Part 4 is intended to operate alongside DWP Appointees for a resident's other funds (i.e. those that are not DWP benefits).

The intention is that Part 4 should be used for people with relatively small sums of money who have no-one else to manage their financial affairs. Its operation is limited to managing maximum assets of *£5,000** a year, and authorised managers will have to get written permission from their supervisory body to manage individual payments exceeding *£250**. These limits will be set in Regulations approved by Parliament, and may be altered from time to time.(**subject to consultation)*

2.7 The provisions of the Act are designed to regulate intervention in the affairs of adults who have impaired capacity on the basis of a number of key principles that are considered in detail below. In many respects they echo the principles and approach that was set out previously in the Crosby Report. As a general guide, any arrangements that have been developed on the basis of the principles and practices described in the Crosby Report will provide a useful basis from which to develop arrangements that meet the requirements of the Act.

2.8 The principles provide the basis upon which authorised managers should make any decision about the resident's financial affairs. The Act requires that it should be possible to evidence the effect of any decision and the basis upon which it was made through rigorous and robust systems for managing residents' finances and for being able to account for the manner in which they have been used.

2.9 In the course of registering care homes and other services, The Care Commission will require that equally rigorous and robust systems are in place with regard to the financial affairs of all residents who may require assistance with their financial affairs. This will be a much wider group than those covered by the Act.

2.10 All care homes, and some other types of supported accommodation settings, will in practical terms, have some level of involvement in the day to day management of residents finances.

2.11 In ensuring that the general quality of financial management arrangements in registered establishments are of a good standard, The Care Commission will create a context for handling the financial affairs of adults with incapacity.

2.12 It is unlikely that a care home that is registered under Part 4 of the Act will require to have in place systems and arrangements, relating to the management of the financial affairs of adults with incapacity, that are significantly more burdensome than those that it will be required to operate by The Care Commission, in respect of all other residents.

2.13 Action to invoke the powers of the Act should be taken only as and when the authorised manager, in agreement with the other members of the multi-disciplinary care team, considers it to be the most appropriate way to proceed, having considered all other possible courses of action.

2.14 In many cases, this will mean that existing practices perhaps where adults with incapacity are, with assistance, involved in arrangements that enable them to exercise an appropriate measure of influence and choice as to how their funds are spent, should continue. These arrangements will often have been in place for some time and will in many cases be an important aspect of the ongoing relationship that has built up between the resident and the staff that provide for their care and support needs.

2.15 There is no need for these type of arrangements to be ended and a more formal arrangement to be put in their place under the terms of the Act, where all concerned feel that they are the most appropriate way to proceed and that the best interests of the resident are being served. This however, places a significant burden of responsibility upon those involved, to satisfy themselves that everything is being handled correctly and are in the best interests of the resident.

2.16 Under the Act, authorised managers are the professionals who are empowered to decide whether a particular adult should be assessed as to whether they lack capacity and subsequently, whether an application should be made to enable their affairs to be managed under the provisions of the Act. However, in practice, authorised managers are only one of a wide range of care and support professionals who are involved in the multi-disciplinary care team that is jointly responsible for determining the needs of the individual resident and arranging for the necessary resources to be made available to meet them.

2.17 In this context, any decision regarding a resident's capacity and the measures that should be put in place to secure their best interests should be viewed as requiring to be made jointly, within the care planning and review process. Only after these discussions have taken place and any decisions have been reached will it fall to the authorised manager to take whatever action is necessary to enact the shared decision(s).

2.18 To this extent, employing the provisions of the Act could be seen as a step that should be taken only as a last resort. This implies that thorough consideration will be given to alternative arrangements, however unsuitable they may appear to be, to the authorised manager and the other professionals involved.

2.19 The Act makes it clear that a decision to invoke the provisions of the Act should be taken on the basis that it is considered to be the most appropriate course of action.

2.20 Equally however, where arrangements are considered to be unsuitable, perhaps where family members are failing to fulfil their responsibilities appropriately, managers and their multi–disciplinary colleagues, are entitled to take the view that intervention under the Act is the most appropriate course of action to take.

3. AUTHORISED ESTABLISHMENTS

Purpose of this part

3.1 This part of the code sets out the definition of an authorised establishment that is contained within the Act, as amended by the Regulation of Care (Scotland) Act 2001.

3.2 It explains the circumstances in which a care home establishment may opt out of the provisions of the Act and those under which an establishment that is otherwise not required to

register with The Care Commission may do so for the sole purpose of managing residents' finances.

Definition of an 'authorised establishment'

3.3 Part 4 of the Act refers to authorised 'establishments', a term which reflects a building-based description of the type of services that are to be registered and eligible to be authorised, under the Act. Similarly, the Act uses the terms 'resident' and 'patient' when describing the recipients of service.

3.4 In the Regulation of Care (Scotland) Act 2001, this terminology is largely replaced by the terms 'service' and 'service user' respectively. In order to clarify terms in the context of this code, the former terminology has been adopted in all cases.

3.5 Part 4 of the Act provides for managers in authorised establishments to manage the finances of residents with incapacity. The services that are referred to in Part 4 of the Act, as amended by the Regulation of Care (Scotland) Act 2001 are:

(a) an independent hospital or private psychiatric hospital
(b) a care home service and
(c) a limited registration service
(d) a health service hospital
(e) a state hospital

3.6 Section 35(2) of the Act distinguishes between 'registered establishments', that are registered by The Care Commission, and 'unregistered establishments' that are supervised by Health Boards. Of the above list (a), (b) and (c) above are registered services, and (d) and (e) are unregistered.

3.7 Together, registered and unregistered services are referred to as 'authorised establishments'.

Opting out of the provisions of Part 4

3.8 There is no obligation on care homes or independent services to manage residents' financial affairs and section 35(3) of the Act allows registered establishments to opt out of managing residents' finances upon application to The Care Commission. If the establishment chooses to do so, its registration will not include the power to manage residents' financial affairs under the provisions of the Act.

3.9 In this case, the service would still be subject to the registration requirements of The Care Commission, and remain liable to have in place a rigorous and robust system for handling the financial affairs of service users that is close to the requirements set out in Part 4 of the Act. Where suitable informal arrangements operate for individual residents who lack capacity to some extent, this will continue to mean that the manager is responsible, along with the resident and other members of the multi-disciplinary care team, for determining how funds should be spent and responsible for ensuring that appropriate records are maintained. In many cases, the managers' involvement may be limited to keeping residents' personal allowances in the home's safe, on behalf of individuals who request that they do so.

3.10 The matter of opting out of the provisions of Part 4 of the Act may be raised during the process of initial registration. In this case, The Care Commission will deal with the matter during the registration application process and in so doing will wish to satisfy itself that the managers and applicant understand the implications of opting out of the provisions of the Act for the care of residents and their potential well-being. The implications for residents as well as possible limitations on the scope of the service will be taken into account by The Care Commission as part of the registration process.

3.11 Where an establishment or service notifies the supervisory body of its intention to opt out of the provisions of Part 4 of the Act after having been registered, The Care Commission will again, wish to satisfy itself that the authorised managers and registration applicant understand the implications of opting out for the continuing care and well-being of residents.

3.12 If the establishment or service confirms their intention to opt out following discussions with The Care Commission, its registration will be changed accordingly and its authorisation to manage residents' financial affairs under the Act removed.

3.13 As stated earlier, the authorised establishment would still be subject to the registration requirements of The Care Commission and remain liable to have in place a rigorous and robust system for handling the financial affairs of residents that is close to the requirements set out in Part 4 of the Act. Managers must also ensure that staff are clear as to their continuing role in assisting residents to handle their financial affairs.

3.14 Any residents, or their carers, who have concerns about an establishment opting out of Part 4 should be able to discuss them with relevant parties including members of the multi-disciplinary team that is involved in planning and reviewing their care. In the event that previous or proposed informal arrangements are no longer considered adequate or appropriate, managers should establish suitable arrangements with the local authority or any other party with relevant powers under the Act, to enable the resident to be able to access their funds as and when they need to do so, on a day to day basis.

3.15 If and when a service chooses to opt out of the provisions of Part 4 of the Act, the managers must ensure that all current and future residents, and their carers/family, are made aware of this fact and that the full implications are discussed with them.

3.16 While the continuing potential for appropriate informal arrangements to be put in place should be made clear to residents and their carers/family, they should also be informed of the possibility that the local authority may seek guardianship powers, and that the practical arrangements for the resident's funds to be available for their use on a day to day basis may be more complicated.

3.17 In the event that a registered care service does opt out, responsibility falls in the first instance upon The Care Commission to act as the authorised manager, as detailed in the later section of this code 'Dealing with Revocations Opt-outs and Appeals'.

New form of limited registration

3.18 Some establishments that are otherwise not required to register with The Care Commission may seek registration under Section 36 of the Act, for the sole purpose of managing residents' finances.

3.19 To apply for limited registration, an establishment must provide accommodation and cannot provide care or support alone. Facilities that are managed by a housing provider or landlord that is also responsible for providing a support service, for example in a sheltered housing complex, would be eligible to apply. If however, the accommodation was managed by a housing provider, and the support was provided by a separate care or support agency, only the housing provider would be in a position to apply.

3.20 Many of newer models of care and support in the community that involve a housing provider or landlord providing accommodation to a care or support provider that is responsible for delivering often highly intensive packages of care to very vulnerable residents, may in practice fall outwith the provisions in Part 4 of the Act. In these cases it is unlikely that a landlord who did not support tenants directly would wish to become involved in providing a service under the provisions of Part 4 of the Act.

3.21 If a resident or tenant becomes incapable whilst living in a sheltered housing service or other facility that is otherwise not required to register with a supervisory body, the establishment may seek registration for the sole purpose of managing that resident's finances.

3.22 However, establishments that may be eligible to apply for limited registration need not wait for an actual situation to arise where a certificate of incapacity has been issued and the individual resident needs the manager(s) to manage their financial affairs. The manager may apply for registration as an authorised establishment at any time in order that an application may subsequently be made to manage the affairs of an individual resident or tenant, when the circumstances require it, subject to the requirements of the application process for a Certificate of Authority.

3.23 Applications under Section 36 of the Act will only be granted where the applicant can demonstrate to the supervisory body an understanding of the general principles set out in the Act and their implications for the management of the affairs of individual residents.

3.24 These establishments will be required to meet the same criteria as all other authorised establishments in relation to financial procedures, financial management and auditing practices.

3.25 In many cases, the housing support service that is provided for tenants will offer opportunities for staff to develop a supportive and caring relationship with the tenant such that an application under Section 36 of the Act may constitute an appropriate and helpful extension of their role.

3.26 Part 8 of the Regulation of Care Act (Scotland) 2001 also outlines limited registration services in respect of dealing with adults with incapacity.

4. SUPERVISORY BODIES

Purpose of this part

4.1 This part of the code sets out the definition of supervisory bodies in order to confirm for managers, the body that will exercise regulatory control over their role under the Act.

Definition of a supervisory body

4.2 The relevant supervisory bodies are referred to in the Act as amended by the Regulation of Care Act 2001. The supervisory body is The Care Commission in the case of:

- a care home
- an independent healthcare hospital or private psychiatric hospital
- a limited registration service under section 36 of the Act

The supervisory body is the NHS Board for the area in which the authorised establishment is situated in the case of:

- an NHS Scotland hospital

4.3 In the case of the State Hospital, it will be the State Hospital Board.

The role of the Scottish Commission for the Regulation of Care

4.4 The supervisory body is responsible for monitoring and reviewing the manner in which the management of residents' finances is being conducted by authorised managers.

4.5 In the case of The Care Commission, this work will be conducted alongside its other statutory registration and inspection activity. Care Commission officers will require to consider issues relating to authorised managers' responsibilities under the Act, as part of their day to day duties in dealing with registration applications, inspections and complaints about authorised establishments.

4.6 In addition, The Care Commission is responsible for ensuring that authorised managers undertake their responsibilities under the Act in a manner that is consistent with established best practice in care planning and review. It will be particularly concerned to ensure that managers consult on a regular basis and regarding any one-off significant matters, professional colleagues, informal carers and others with a significant interest in the resident concerned.

4.7 While the number and type of authorised establishments that will be required to register with The Care Commission is considerable, some will not involve the provision of accommodation as an integral part of the service. For those that do not provide accommodation, the service will not be eligible to apply for limited registration under s.36 of the Act.

The role of NHS Boards

4.8 In the case of NHS Boards, this work will be undertaken in a context where no other comparable or complementary supervisory function is in place. Protocols will be required to formalise a suitable supervisory arrangement.

4.9 In the majority of cases, NHS Boards will be supervising systems and arrangements that are a continuation of existing arrangements within NHS Boards and which were

established in accordance with the provisions of the Crosby Report. However suitable these are presently considered to be, they will be the subject of regular scrutiny, as detailed in the Part 4 Code of Practice for Supervisory Bodies. NHS Board officers should review all existing arrangements relating to matters covered by Part 4 of the Act in the first instance and in so doing, a future programme of oversight and scrutiny of authorised establishments should be devised and introduced.

4.10 Where a NHS Board fulfils the role both of a supervisor and a provider, necessary arrangements will be put in place to ensure an appropriate separation of functions. The Act places a number of new statutory powers and responsibilities upon supervisory bodies, and the conduct of these matters should be subject to specific and clear procedures which enable them to be recorded and accounted for.

4.11 To read more about the role and responsibilities of the Supervisory Body, see the Scottish Executive's "Code of Practice for Supervisory Bodies"

5. APPLYING AS AN ESTABLISHMENT FOR AUTHORISATION TO MANAGE RESIDENTS' FINANCIAL AFFAIRS

Purpose of this part

5.1 This part of the code considers arrangements for making an application to become an authorised establishment, the documentation that will be provided to establishments confirming their status and the process of renewal.

Applying for authorisation - registered establishments

5.2 Existing registered establishments that on 1 April 2002 transferred their registration to The Care Commission will have the procedures in relation to future management of funds under Part 4 of the Act inspected as part of their first post 1 April 2002 inspection.

5.3 Until that inspection takes place and their authorisation or opt out is confirmed, establishments should operate their systems for managing and monitoring residents financial affairs on the basis of the requirements that The Care Commission will place upon them in respect of all residents.

5.4 Any prospective registered care establishment that is applying to become a registered care service under the Regulation of Care(Scotland) Act 2001 will have the matter of its authorisation under the Act dealt with by The Care Commission as part of the application process.

5.5 Other establishments that provide accommodation and that are eligible to do so, may apply to The Care Commission for limited registration under section 36 of the Act, as read with section 8 of the Regulation of Care(Scotland) Act 2001, and if they do so, authorisation under the Act will be the only aspect of its affairs that are subject to scrutiny under the application and subsequent monitoring process.

5.6 The Care Commission will have in place criteria for determining the fitness of providers and managers of establishments requiring to register with The Care Commission.

Procedures and requirements relating to limited registration under the Act regarding the fitness of managers will also be developed (work in progress).

5.7 The Regulation of Care (Scotland) Act 2001 provides for the regulation of the social services workforce by establishing the Scottish Social Services Council (SSSC). The SSSC will regulate education and training of social service workers and raise standards through the publication of Codes of Conduct and Practice. For staff in registered establishments who are required to register with the SSSC, or equivalent body, their employer will be expected to demonstrate robust recruitment and selection procedures which take account of the requirement to be registered with the SSSC and the need to adhere to the Codes of Conduct.

5.8 The authorisation of a registered establishment under the Act will involve the manager of the registered establishment being named as the 'authorised manager'.

Applying for authorisation - unregistered establishments

5.9 Authorisation under the Act will take place as a result of the first inspection carried out by the NHS Board, after April 2003, subject to agreement upon any action that may be required at an earlier date, to address identified weaknesses in arrangements or practice.

5.10 In the meantime, NHS Scotland hospitals should continue with existing arrangements for the management of residents' funds, subject as they are to both internal and external audit.

5.11 In the case of NHS Trusts, and in a limited number of cases NHS Boards, the person in whose name the body is authorised under the Act will be determined on a basis to be agreed by the NHS Board. In most cases this will be the Director of Finance of the NHS Trust, or another senior manager with responsibility for financial matters.

5.12 NHS Boards will require to establish and formalise a suitable supervisory arrangement that provides for the scrutiny of both financial records and the care planning and review records that provide the all important context within which financial decisions should be taken.

5.13 Many NHS Boards and Trusts subject their patients' funds to periodic internal audit review, although the focus tends to be upon quantitative rather than qualitative indicators. It will be particularly important that other monitoring arrangements are introduced that are able to determine the extent to which decisions under the Act flow from consideration of the salient issues by the multi-disciplinary team that are engaged in planning and reviewing the residents overall care plan.

5.14 In the past, practice has tended to result in all residents, whether they lack capacity or not, being permitted to make use of the systems that exist for managing service users financial affairs. Every encouragement should be given to the majority of residents who are able to do so, to manage their financial affairs for themselves or for informal arrangements, involving friends or relatives, to be set up or to continue.

5.15 In just the same way, adults with incapacity need not be made subject to the provisions of the Act merely because they happen to be in an NHS Scotland hospital, provided they are able to exercise sufficient capacity in relation to their financial affairs. It will be particularly important in situations where the adult has shown indications that their

ability to manage their affairs is improving, that every effort is taken by staff to enable them to do so.

5.16 In the case of NHS Boards that fulfil the roles of both regulator and provider, the same requirements apply, subject to the additional requirement that the two functions should be transparently separate.

A record of authority for registered establishments

5.17 All registered establishments will have the details of their authorisation under the Act incorporated into the terms of their registration certificate with The Care Commission.

5.18 Where an authorised establishment chooses to opt out of the provisions of the Act, this will be noted on their registration certificate.

5.19 In the event that an authorised manager leaves a registered establishment to which their authorisation relates, the manager should notify The Care Commission in accordance with the requirements of their registration, in order that suitable interim arrangements can be made until such time as a new manager is appointed, registered and authorised under the Act.

5.20 Interim arrangements will usually involve the interim manager at the authorised establishment undertaking the role of authorised manager, subject to their being authorised to do so by The Care Commission.

'Notes of Authority' under the Act for unregistered establishments

5.21 All unregistered establishments will be issued with a formal Note of Authority by the NHS Board, setting out their power to manage residents' financial affairs under the Act.

5.22 In the event that an authorised manager leaves the authorised establishment to which their authorisation relates, the manager should notify the NHS Board in order that suitable interim arrangements can be made until such time as a new manager is appointed and authorised under the Act.

5.23 Interim arrangements will usually involve the interim manager at the establishment undertaking the role of authorised manager, subject to their being authorised to do so by the NHS Board.

Annual renewal and inspection relating to the power to manage

5.24 The continuing authorisation of a registered establishment under the Act is dependent upon the outcome of a scrutiny of arrangements that will take place at least annually that may be done in a variety of ways such as inspection, requiring records, audited accounts etc. Consideration of continuation of authorisation may take place during the general registration inspection procedure.

5.25 In the case of unregistered establishments, the Note of Authority will be subject to renewal on each anniversary of its first issue. NHS Boards will inform managers of the arrangements that they are required to have in place in order to satisfy the scrutiny of arrangements that will take place at least annually.

6. INCAPACITY AND THE PRINCIPLES OF INTERVENTION

The purpose of this part

6.1 This part of the code considers a number of issues that managers' must take into account when determining whether intervention under the Act may be necessary. It also sets out the practical implications of the principles of intervention for arrangements within establishments.

Considering the need for intervention under the Act

6.2 Part 4 of the Act can only be applied on behalf of adults whose main residence for the time being is an "authorised establishment". This can include where an adult is liable to be detained under the Mental Health (Scotland) Act 1984.

6.3 Many residents in authorised establishments will stay for short periods of time and will retain ownership or tenancy of a house or other dwelling that has been their home prior to admission. In this situation, even if they lack capacity, they would not fall within the provisions of Part 4 of the Act. However, their care manager and/or the manager of the care home should ensure that suitable arrangements are in place for the management of their financial affairs prior to or at the time of admission, and whatever informal assistance is appropriate to enable these arrangements to continue during their period of residence, should be afforded by staff.

6.4 Residents who remain for a longer period of time within an authorised establishment may also retain ownership of property in the community, or may continue to hold the tenancy of a dwelling that had previously been their home. In these cases, their situation will need to be considered carefully within the multi-disciplinary team that is responsible for their care, in order to determine whether there is any realistic prospect of their returning to live in the community.

6.5 If and when it is determined that they will not be able to return to live in the community, their main residence would become the authorised establishment and they would become eligible to be made subject to the provisions of Part 4 of the Act.

6.6 There are a number of arrangements that might be used to assist people who are incapable of managing their financial affairs. Care must be taken to ensure that the arrangement chosen is the one which best serves the interests of the adult in question.

6.7 For many people, there are relatives, friends or other individuals who are willing to act on the person's behalf. Inevitably this is not always the case, and for some individuals there are no suitable alternatives to the manager of the adult's main residence doing so.

Issues relating to incapacity

6.8 Incapacity as defined in the introduction to this code may arise because of mental illness, learning disability, dementia, or inability to communicate due to physical disability. It can also arise following an acquired brain injury or a stroke or, often on a temporary basis, because of functional psychosis. The incapacity of the adult may be permanent, or short term.

6.9 The extent and nature of capacity varies considerably and it should not be assumed that because individuals have a mental disorder or communication difficulty they are automatically incapable of managing their affairs. Managers and care staff should be mindful of diminishing, fluctuating and recovering capacity. Procedures should be developed to enable front line care /health staff to record and report any such variations to at risk individuals to a manager, who will then report the matter to the relevant person, e.g. medical practitioner or social worker.

6.10 Staff should encourage residents to play as active a role as possible in the management of their financial affairs. Action and responsibility should not be removed in a wholesale fashion and, in so far as it is reasonable and practicable, the adult should be encouraged to develop new skills in order to take part in the exercise of this responsibility.

6.11 This applies to residents who are not subject to the provisions of the Act just as much as it does to those who are. In most cases, informal arrangements will be sufficient to enable the resident to exercise meaningful choice and determination, along with a supportive and understanding member of staff, regarding the management of their financial affairs.

6.12 It will only be if and when staff or others involved in the lives of residents become concerned that these arrangements are not necessarily operating in the best interests of the resident and having considered all other options, including employing the services of an independent advocacy service, or in accordance with the principles that underpin the Act, that consideration should be given to applying for authority to manage their affairs.

6.13 All managers should be aware of the role of the public guardian, the local authority and the Mental Welfare Commission in relation to the Act.

6.14 Managers should ensure a process is in place where each resident's capacity to manage their finances is considered as part of the pre-admission assessment process, is reviewed on a regular basis, at least annually. Existing multi-disciplinary care planning and review arrangements should provide the principal means by which the care and support that is required by the resident is considered and resourced. In so doing, arrangements will ensure that the responsibility for determining an appropriate course of action under the Act is shared by all of the participants, and that the authorised manager in turn is supported in giving practical effect to these decisions.

6.15 Such an approach is illustrated in the following case study.

> 'Maureen, aged 34, has a learning difficulty and has been living in a registered establishment for 2 years. She previously lived in a long stay hospital for most of her teenage and adult life. While there, she had little opportunity to exercise money management skills, and although Maureen had developed many self help skills, she needed to have her financial affairs managed on her behalf. These arrangements for supporting her were transferred when she moved into the community.
>
> Maureen has no speech but has been developing signed communication and has experienced a range of opportunities to observe and participate in the use of money in real situations. When shopping, Maureen makes clear choices about what she wants (e.g. shopping for clothes), and now understands expressions like good value, bargain,

too expensive, and not worth it. More recently, Maureen has also been receiving college tuition in numeracy skills.

Maureen still requires support and advice to handle money (e.g. calculating correct change, planning how much money to save towards a holiday or put aside for bills). Maureen has visited the local bank and building society, and the process and purpose of opening an account has been carefully explained – something she is now keen to do.

Following multi-disciplinary discussion, it has been agreed that Maureen no longer requires her financial affairs to be managed for her, and that it will be in her 'best interests' to gradually take over responsibility of her financial affairs with the support of staff and the manager where she lives. This transitional process will be carefully planned and recorded, and the appropriate steps taken in terms of notification to The Care Commission.

While Maureen will be managing her own affairs once this process is completed, it is recognised that she will continue to need on-going support and advice, perhaps for several years.

Consequently, it is also agreed that appropriate recording systems should continue to be in place to record and monitor this on-going support, and that the multi-disciplinary care group each time it meets (every six months) will carefully review this area of support. Effectively, the position will have moved from one where Maureen has been a proxy or substitute 'decision maker', to a situation which could be described as 'supported decision making'.

Principles of intervention and their practical implications

6.16 The principles that must underpin all interventions under the Act are set out in the Introduction to this code of practice. For managers' of authorised establishments, there are a number of practical issues that relate to these principles that must be addressed in determining the manner in which care is provided and services arranged for adults with incapacity. These are:

- all decisions should reflect a person centred approach to planning and should be taken by whatever multi-disciplinary group is responsible for planning and reviewing the care and support that is provided for the resident. Decisions must take account of each individual's particular needs, preferences and their emotional attachment to particular items, as far as these can be ascertained.

6.17 In many cases, making positive use of the relationship that has built up over time between the resident and staff members is most likely to ensure that decisions are well informed and appropriate for each individual resident. In particular, it will be important that:

- the risk of conflicts of interest between the adult with incapacity and those charged with managing his or her affairs must be minimised to the extent that the need to consult with a wide range of relevant parties is fully addressed.

6.18 Managers should not benefit directly from any bank deals to do with administration of accounts. Also, a clear policy should be in place concerning gift giving, on behalf residents' whose financial affairs are being managed. This should cover giving to family members, friends' etc.

6.19 The most effective way of doing so is to base all decisions that are made on the adult's behalf on the views and opinions of the full multi-disciplinary care team. Authorised managers should not feel obliged to carry the full burden of responsibility for everything that is done under the Act, on behalf of the adult. Their role is to give practical effect to a shared decision reflecting the views of all of the professionals who are actively involved in dealing with the establishment, and who are able to provide an informed opinion that is based upon direct knowledge of the individual concerned.

6.20 All State and other entitlements and benefits to which the resident with incapacity is entitled should be claimed. This should include any aids, adaptations and necessary equipment. It may be appropriate to seek specialist advice from a benefits advice centre, or an Independent Financial Advisor.

6.21 Sufficient funds should be readily available to respond to the day-to-day needs and preferences of the resident.

6.22 The income of many residents will accumulate week by week as they are received from the benefits agency and elsewhere, and if they go unspent. In the case of residents with incapacity, the establishment may retain a balance of up to £250, in order to meet their possible day to day purchase requirements.

6.23 Such funds should be held separately from the funds of the care home or other establishment and, whether kept in a single named account or within an account allowing for residents funds to be pooled, it must be possible for the funds of individual residents to be tracked and for the allocation of their share of interest to be accounted for.

6.24 In so doing, it must be possible to ensure that the resident can benefit from all of the income and savings to which he or she is entitled.

6.25 It may prove to be more difficult to assist a resident to develop the capacity to manage their own affairs, when their funds are held in a pooled account. When it is agreed by the multi-disciplinary care team that a resident is likely to benefit from opportunities to develop their capacity, the authorised manager should ensure that an account is opened in their name in order that funds can be transferred as required, and the resident themself can be provided with opportunities to manage their funds directly.

6.26 In many cases where the power to manage an individual's affairs has been authorised, it will still be possible for the resident to manage some money for themselves, with appropriate support and assistance. The most common example is likely to be their weekly personal allowance.

6.27 All of the systems for formal management of the financial affairs of adults with incapacity should be subject to the requirements laid down by The Care Commission, or NHS Board, and open to scrutiny and spot check as part of the regular inspection procedures. Audit arrangements, as operated by the service, should be transparent and comprehensible.

6.28 Arrangements for the management, supervision and review of the affairs of a resident with incapacity should be recorded in the care plan and made available to all those with a legitimate interest. Copies of any certificates issued regarding the capacity of the resident, and Certificates of Authority from the supervisory body, should be kept with the care plan and should be considered as part of the regular case review process.

6.29 Reviews should involve all relevant parties, e.g. key worker, family, care manager etc. and the responsibilities of all the individuals and agencies involved should be recorded.

6.30 In practical terms, the focus for authorised managers should always be upon how the resident's funds might be used imaginatively to improve his or her quality of life on the basis of their known likes and dislikes. In seeking to achieve this objective, managers should consult on a regular basis with others involved with the resident and should take into account any particular interests or hobbies that the person was known to enjoy before their incapacity developed.

6.31 Similarly, when a resident who lacks capacity shows signs that they may be regaining some capacity to manage their financial affairs, engaging them in the process of choosing what activity or other interest to spend their money on, can be an effective means of positively encouraging and promoting their renewed capacity.

6.32 Residents whose funds are managed should, as far as is possible, be placed on equal terms with those who are able to manage their own affairs, or who have them managed by an independent advocacy service, and authorised staff should take a positive view of the likely benefits to be obtained from extra goods and services. In doing so, they should exercise on behalf of the resident the judgement and discretion that the person themselves might reasonably be expected to exercise if they were capable of doing so.

6.33 When the provisions of the Act are invoked, there should be very little difference apparent to those involved with the resident, regarding the adults involvement in making decisions, and the extent to which they are consulted about financial matters. The systems that are in place to record the basis for actions and how money is spent should be identical for <u>all</u> residents, whether subject to the provisions of the Act or not.

6.34 The funds of an adult with incapacity, including their weekly personal allowance, should not be used to fund services or items, which would normally be provided as part of the care package arranged to meet his or her needs. Items of equipment, which are essentially community care requirements, must not therefore be purchased from private funds. However, if the service that is to be provided by the care home or hospital is clearly set down in writing and communicated to all concerned, residents' own resources can and should be used to obtain desirable extras that would otherwise not be available.

7. MANAGERS APPLYING FOR AUTHORISATION TO MANAGE THE FINANCIAL AFFAIRS OF INDIVIDUAL RESIDENTS

Purpose of this part

7.1 This part of the code considers the preparatory work that the managers of authorised establishments, as part of the multi-disciplinary care team should undertake, prior to submitting an application, and associated issues concerning certificates of incapacity.

7.2 It covers the responsibilities of managers, as part of the multi-disciplinary care team responsible for managing a resident's financial affairs. It also deals with the issuing and processing of Certificates of Authority, and the basis upon which managers will be authorised to manage the financial affairs of individual residents.

What can be managed by authorised managers

7.3 Authorisation to manage finances and affairs on behalf of residents provides for:

- claiming, receiving, holding and spending any pension, benefit, allowance or other payment other than under the Social Security Contributions and Benefits Act 1992 (c.4) ;

- claiming, receiving, holding and spending any money to which a resident is entitled;

- holding any other moveable property to which the resident is entitled

- disposing of such moveable property.

- Moveable property is assets other than land or property: e.g. furniture, pictures, jewellery, bank accounts, shares.

7.4 Some authorised managers may already undertake responsibilities as a DWP appointee in respect of the benefits to which a particular resident is entitled. In so doing, they will have been required to establish that they have regular contact with the person concerned and that they take a 'whole person' approach to the person's welfare. They would not have been the subject of a detailed application process as would be the case were they to seek authorisation under the Act.

7.5 The provisions of Part 4 of the Act will not affect DWP appointeeship arrangements, but authorised managers should inform the relevant supervisory body of any such arrangements at the time that they seek authorisation or later, should the prospect emerge of their being appointed to this role.

7.6 While the two roles are not incompatible, the power to manage that is afforded to authorised managers under of Part 4 of the Act allows a manager to do everything that a DWP appointee can do, and more. In particular, authorisation under Part 4 enables managers to open accounts in the name of the resident and thereby ensure that the individual is able to earn interest on their savings.

7.7 In situations where informal arrangements continue to prove an appropriate basis for managing the financial affairs of an adult with incapacity, the role of DWP appointee is likely also to continue to provide a useful means of dealing with the practical day to day management of the residents modest benefit income.

7.8 In the event that an authorised service's power to manage is revoked, the supervisory body may notify the DWP accordingly, in order that they may, if they so wish, carry out their own inquiries.

7.9 When the power to manage is revoked and managers wish to apply for a DWP appointeeship in respect of specific residents, it will be particularly important that the multi-disciplinary team responsible for the person's care, is made aware of the situation and is supportive of the application, in each case. Just as the authorised manager is responsible for enacting the wishes of the multi-disciplinary care team under the provisions of the Act, so are they in the context of any alternative informal arrangements.

Initial steps in determining the need to manage residents' financial affairs

7.10 The manager of an authorised establishment may only manage a resident's finances if a medical practitioner has issued a certificate of incapacity (Appendix 1), the form of which is laid down in Regulations.

7.11 The medical practitioner issuing the certificate of incapacity must not be related to the resident or to any of the managers of the authorised establishment, nor should they have any direct or indirect financial interest in the establishment.

7.12 If a manager intends to request that an examination by a medical practitioner takes place or would be appropriate for this purpose, he must first satisfy himself beforehand that no other forms of lawful proxy decision making powers, in respect of the residents financial affairs are, or could be held by, another party.

7.13 In most cases, the Office of the Public Guardian will have the relevant information if it is not readily available from the adult, their carer, or relatives.

7.14 In addition to satisfying themselves about the position as regards existing legal powers in respect of the individual concerned, the issue of incapacity and related matters concerning arrangements to manage financial-related matters on the residents behalf should have been considered carefully by the multi-disciplinary care team. In many cases, alternative informal arrangements are likely to have been operating for some time.

7.15 Possible variations on these arrangements should be considered, and only if these have been discounted should the manager proceed to seek authorisation to manage the residents financial affairs under the provisions of Part 4. If the decision is taken to seek authorisation under the Act, the multi-disciplinary care team should also consider whether intimation to the person, of the intention to seek a medical assessment of their capacity and/or the intention to seek formal powers to manage their financial affairs, would pose a serious risk to the resident's health.

Consulting with other parties

7.16 In many cases, the manager will proceed directly to notify the resident and their nearest relative of his intention to request a medical examination. All other parties to the multi-disciplinary care team discussions should be aware of the plan to do so, but in the event that for some reason they may not be, the placing local authority and care manager should be formally notified.

7.17 Where intimation to both the resident and their nearest relative takes place, the manager should allow at least 15 working days to elapse between issuing the notification that an examination is to be requested, and the examination taking place.

7.18 This is to enable the resident and their nearest relative time to comment upon the proposed action. Where a significant delay does or could occur in the resident, or nearest relative reply, due account should be taken in the timing of any examination. Relatives should be informed that advice and guidance is available from the public guardian, the local authority and/or the Mental Welfare Commission.

7.19 Whatever the process or timescales involved, if either the resident or their nearest relative do not agree that an examination should be requested, the manager must ensure that their views and opinions are fully discussed and recorded before proceeding further. If, in the course of these discussions alternative means of dealing with the difficulties faced by resident are identified, perhaps for example a variation of existing informal arrangements that had not previously been discussed by the multi-disciplinary care team, every opportunity should be afforded to enable such options to be fully explored and their suitability considered further.

Non intimation to the resident

7.20 In the event that the multi-disciplinary care team, including the authorised manager, considers non-intimation to be the preferred course of action, the manager should advise the supervisory body accordingly.

7.21 The supervisory body will want to satisfy itself that this view has been discussed amongst the professionals and other parties who are concerned with the care of the resident. Having done so, it will direct the authorised manager to arrange for a medical examination to take place in order to establish whether intimation should occur, in accordance with regulations relating to section 37(9) of the Act.

7.22 These regulations require that 2 medical practitioners, one of whom may need to be a specialist in mental disorder, certify that intimation would pose a serious risk to the health of the individual concerned(Appendix 2). Should the first medical practitioner find that intimation would pose a risk to health, and if the second medical practitioner finds the same, then the second medical practitioner should go on to ascertain whether the person lacks capacity to manage their own financial affairs and if so, in what respect. This will ensure that the number of medical examinations will be kept to the necessary minimum.

7.23 The manager should notify the resident's nearest relative of his intention to seek the appropriate medical examinations to consider the matter of intimation, immediately after the supervisory body has directed him to do so. This will avoid any inappropriate disclosure regarding the proposed course of action to the resident themself.

7.24 Unless the nearest relative is involved in discussions with the authorised manager, about non intimation and more generally, the assumption of the power to manage before the medical examinations take place, they may be denied an opportunity to comment on the proposals, within a timescale that enables their views to have any practical influence upon events.

7.25 If medical approval is given for non-intimation, the process outlined above will mean that a Certificate of Incapacity may also have been signed by the second medical practitioner at the same time.

Notifying others when a certificate of incapacity is issued

7.26 When a certificate of incapacity is issued under section 37 of the Act, the manager must send a copy to the resident and the supervisory body within 5 working days. In addition, the manager must also notify the same two parties of his intention to manage the resident's affairs using a 'Notice of Intention to Manage the Financial Affairs of a Resident' (Appendix 3), and in so doing, he will be required to explain what other courses of action have been considered and why they were not considered appropriate - but see 7.27 below. In providing such an explanation, all of the general principles set out in the Act must be addressed and specific details provided as to the date, details and outcomes of any meetings or discussions with relevant parties.

7.27 In the event that the prior medical examinations result in approval for non-intimation, neither a copy of the certificate of incapacity, nor notification of the intention to manage their funds, should be sent to the resident.

7.28 Where intimation does take place, the authorised manager must submit a 'Notice of Intention to Manage the Financial Affairs of a Resident' (Appendix 3) to the resident, and to the supervisory body, which will consider the information provided in order to satisfy itself that all other courses of appropriate action have been considered, and that the proposed intervention is the most suitable in the circumstances.

Payment for medical examinations

7.29 The cost of the medical examinations will be met from the estate of the resident, regardless of whether intimation had been given as to the purpose and fact of their being undertaken.

Applying for a Certificate of Authority

7.30 Having notified the supervisory body of their intention to manage the resident's financial affairs, using the 'Notice of Intention to Manage the Financial Affairs of a Resident' (Appendix 3), the manager may not in practice do so, until a Certificate of Authority to manage the resident's funds has been issued to them by the supervisory body. The supervisory body, in the light of the information that must be included within the Certificate, will consider an application for a Certificate of Authority.

7.31 The application should therefore provide the following information:

- Nature of incapacity & copy of Certificate of Incapacity
- Alternative arrangements explored
- How the intervention will benefit the resident
- Proposed duration of the intervention.
- Proposed timing and arrangements for reviews
- Names and designation of authorised persons and their relationship to the resident (e.g. key worker)
- The identity of the fundholder and details of the account(s)

7.32 An application should also provide evidence that the account details and/or the descriptions of other sources of funds are accurate, and it should offer such proof as may be

available that the accounts and other funds are in fact the property of the resident in respect of whom the Certificate of Authority is to be made.

7.33 The supervisory body may consider it appropriate to arrange for the assistance of an independent advocacy service to be engaged where these are available, or to provide further opportunities for other interested parties to comment on the proposed intervention.

7.34 A period of 10 days would normally be allowed to elapse before the Certificate of Authority is issued in order to allow for any comments or representations from interested parties to be made. Where this occurs, an opportunity should be provided for the issues that are to be considered and addressed in a manner that is appropriate to the particular case.

7.35 By virtue of a certificate of incapacity having been issued, and following due consideration of all the information presented to it, the supervisory body may issue a signed Certificate of Authority to the authorised managers, that empowers the managers to open and withdraw money from specified accounts, and the fundholder of that account to release the funds.

7.36 The Certificate of Authority must specify:

- The accounts or other funds of the resident that are to be managed.
- The names of the persons specified in the application (the "authorised persons")
- The period of validity of the Certificate of Authority, which must not exceed that of the certificate of incapacity issued by the medical practitioner

[The precise arrangements and mechanisms for issuing certificates have yet to be determined by The Care Commission, and NHS Boards.]

7.37 The Certificate of Authority empowers the authorised persons to open accounts in the name of the resident, withdraw money from the accounts or sources of funds specified, and the fundholder to make payments accordingly. It will be for the authorised managers to establish suitable arrangements with the fundholder to allow for either the original certificate and/or copies to be accepted upon presentation. In general, it is likely that the fundholder will require the original Certificate to be made available to them and may wish to retain a copy of the Certificate.

7.38 If the resident does not have an interest bearing account and their assets exceed £500, the authorised manager should arrange for these assets to be placed in an interest bearing account where expenditure and interest earned is monitored appropriately. The power to manage under Part 4 of the Act enables the manager to open such an account in the name of the resident, once they have been authorised to manage the resident's affairs.

7.39 Authorised managers may manage the financial affairs of residents whose total assets, including savings and income, do not exceed £5000 at any one time. This sum is laid down in Regulations. When applying for a Certificate of Authority, the manager should therefore provide the supervisory body with such evidence as they are able to obtain of the scale of the assets that it is proposed to manage.

7.40 It is the authorised manager's responsibility to remain aware of any changes that occur relating to the resident's account(s), and to ensure that the resident's assets do not exceed £5000. Where the level of assets indicate that this may be likely, they should be particularly vigilant and advise the supervisory body accordingly in order to trigger the review earlier. Otherwise, the supervisory body will monitor the situation through an annual review.

7.41 In the event that the resident's assets do exceed £5000 and the supervisory body does not consider it appropriate to authorise managers to manage the funds, the local authority may seek a guardianship order, under which a level of delegated authority to the authorised establishment may be arranged.

Reviewing Certificates of Incapacity

7.42 In the normal course of multi-disciplinary care planning and review procedures, the Certificate of Incapacity should be reviewed at regular intervals within the context of ongoing arrangements to monitor care needs and adjust the resources that are available to meet them as required. In this way it will be viewed as an integral part of the individuals personal and social health and well being. In so doing, it will be important not only to consider whether current arrangements should continue, but also whether the way in which money has been spent best meets the requirements of the persons preferred lifestyle.

7.43 In addition however, if at any time the manager, a medical practitioner, or any other person having an interest in the resident's affairs, including the resident themself, believes that there has been a change in the condition or circumstances of the resident, or the resident's incapacity, they may request that a review of the Certificate of Incapacity takes place.

7.44 The resident's prevailing ability to manage aspects of their own financial affairs and/or their circumstances should be considered from the perspective of everyone involved, and if it appears that there are grounds for re-considering the appropriateness of the Certificate of Incapacity, particularly as it relates to specific areas of capacity, a medical practitioner must do so.

7.45 The review should preferably be undertaken by the medical practitioner who signed the certificate but, where this is not possible or they are no longer involved with the person, by a medical practitioner with an up to date knowledge of the resident.

7.46 When a Certificate of Incapacity is reviewed and consequently varied or revoked by the medical practitioner concerned, the Certificate of Authority issued by the supervisory body, to manage the resident's affairs will automatically fall to be varied or revoked also, and must be returned by the manager to the supervisory body within 3 working days.

7.47 Good practice as regards care planning and review should result in matters relating to the resident under the Act being kept under regular review. If for some reason this is not the case, and a significant period of time has elapsed since a review was held, each certificate of incapacity should be reviewed prior to the expiry date in order that proper arrangements can be made for a further certificate of incapacity to be requested by the manager, or for alternative arrangements to be put in place.

7.48 The certificate of incapacity expires three years after the date of issue. The supervisory body, and all involved with the resident, should be aware of this fact by virtue of their records and/or their involvement with the person concerned. In most cases, planning will have been underway for some time prior to the expiry date to ensure that appropriate action is taken to ensure that suitable arrangements are in place for the future.

Applying to vary a Certificate of Authority

7.49 Where details contained in the Certificate of Authority require to be changed, such as the named authorised persons or account details, the authorised manager must notify the supervisory body accordingly and submit a written request for variation along with the necessary evidence.

7.50 In the event that the authorised manager opens any new accounts on behalf a resident, the supervisory body should be notified to this effect as soon as possible thereafter.

7.51 The supervisory body will issue a new Certificate of Authority, when appropriate, within 5 working days of receipt of all of the necessary information and having due regard to the need to provide for comment to be received and addressed from interested parties.

7.52 In many cases, those involved in the multi-disciplinary team that oversees the residents care will be aware that a variation has been sought and any issues will have been raised with the manager before the application was made. In other cases, or perhaps where the variation is of a very minor nature, they may not be so aware. In either case, the supervisory body will afford interested individuals an opportunity to comment upon the proposed change.

Circumstances in which a Certificate of Authority may be revoked

7.53 When changes take place in the circumstances of a person in respect of whom a Certificate of Authority is in place, the implications for the continuation of the Certificate of Authority should be considered carefully by those concerned.

7.54 In some circumstances the need for a Certificate to be revoked will be clear, as for example in a case where a certificate of incapacity is revoked, as the period of the Certificate of Authority cannot exceed that of the certificate of incapacity. In other cases, the situation may not be so clear cut in which case the authorised manager should contact the supervisory body to discuss the matter.

7.55 To the extent that the authorised manager's role is to give practical effect to the views and decisions of the multi-disciplinary team concerned with a residents care, any concerns or issues that relate to the basis upon which or the manner in which the Certificate of Authority has been employed, should have been the subject of close and ongoing review within the broader care planning and review arrangements.

7.56 The overall care planning process is designed to reflect the changing needs and preferences of the resident and as such should take account of the picture that emerges from the information and knowledge of frontline care staff and others. In this context, any perceived changes in capacity or circumstances that might lead to a need for the certificate of incapacity or the Certificate of Authority to be reviewed, should be picked up and acted on

accordingly. By so doing, the prospect of the revocation of a Certificate of Authority, in circumstances that reflect concern on behalf of the supervisory body, about the way that a resident's affairs have been managed, should be reduced significantly.

7.57 However, all authorised establishments should develop clear procedures by which any concerns or comments from front line staff regarding changing capacity can be recorded and communicated effectively to the authorised manager, in order that they may take any necessary action.

7.58 Even in circumstances where effective care planning arrangements are in place, it may be necessary for the supervisory body to formally inquire into the circumstances concerning the continuation of a Certificate of Authority.

7.59 The fundholder must be notified of the revocation, and the supervisory body should ensure that an appropriate arrangement is in place to notify the fundholder(s) within two working days in order to avoid the possibility of unauthorised withdrawals taking place.

Payment of fees relating to Certificates of Authority

7.60 In the case of registered establishments, The Care Commission is empowered to charge a fee for issuing, varying, applying new conditions or cancellation of a Certificate.

7.61 NHS Boards are not so empowered in respect of unregistered establishments.

Matters requiring further written authority from the Supervisory Body

7.62 The power to manage under Part 4 of the Act is intended to be used only when it is considered to be the most appropriate course of action, and on the basis of the guiding principles set out in the introduction to this code. In this context, the Act provides for clear limits to be placed upon the scale of the assets that are to be managed by requiring that specific authority be sought by the authorised manager from the supervisory body, in respect of both the disposal of any assets and the overall size of the affairs which may be managed.

7.63 Once a Certificate of Authority has been issued, further written authority is required to:

(a) Dispose of residents' valuables or any moveable property. The manager must only undertake such disposal as is approved by the supervisory body. 'Moveable property' is anything other than land and buildings, e.g. furniture, pictures, jewellery, shares etc., and approval would be required for each separate transaction, the total value of which exceeds or is likely to exceed £250, which may relate to a single or a number of items depending upon the circumstances. This sum is laid down in Regulations.

(b) Manage matters with a greater value than £5000 within one financial year. This sum is laid down in Regulations. If it becomes apparent to the manager, after a Certificate of Authority has been issued or recently reviewed, that the resident's assets are or are likely to become greater than this within a short period of time, they should contact the supervisory body to discuss the appropriate course of action to take. The manager would be required to explain why the authorised establishment will best

manage these matters, the alternatives that have been considered, and why these have been rejected.

7.64 An example of where a supervisory body might be likely to authorise a higher figure is where there would be an anticipated expenditure in the next year, e.g. specialist bed, chair, other equipment which would bring the balance back down under the limit.

7.65 A written request for approval to sell residents' moveable objects should be submitted by the authorised manager, as should any written request to approve the management of estates whose value exceeds £5000, and no action may be taken regarding the matters set out in either request until written authorisation has been received by the supervisory body.

7.66 In the case of the disposal of valuables or moveable property, it will be important that the authorised manager can demonstrate that the monies so released are required to meet a particular need or to enable the adult to continue to have sufficient funds available to meet their day to day needs, rather than simply to benefit the individual's estate.

[The structure and level of decision making within The Care Commission, and Health Boards, for processing this information has yet to be decided.]

Possible uses for residents' money

7.67 Finding imaginative ways of benefiting residents who lack capacity, from their own resources and funds can pose particular challenges in determining the types of appropriate expenditure. Existing schemes for doing so have developed a number of interesting approaches, which help to establish an appropriate agenda for consideration by others. For example:

- Purchasing beneficial therapies such as aromatherapy
- Engaging a mobility assistant or supporter for a few hours a week to undertake befriending activities
- Meeting mobility requirements over and above those provided for by the establishment, or hospital
- The leasing or hiring of vehicles or equipment for specific residents
- The payment of reasonable expenses to selected volunteers undertaking activities on a one-to-one relationship with particular residents
- The payment of accommodation charges and travel costs for relatives, staff and volunteers who accompany residents on holiday

Further examples of appropriate ways in which residents' money may be spent are set out in Appendix 5.

7.68 While not all of the examples above may be considered appropriate in all circumstances, the list is intended to set out the range of types of arrangements that should at least be considered, when reviewing possible expenditure. Once again consideration of these and other options within a multi-disciplinary context should ensure a balanced and considered approach and one that is manifestly supported by a significant proportion of professionals involved.

7.69 Resident's funds may be used to contribute to the purchase of shared items, so long as each resident concerned will benefit from them. The authorised manager must ensure that this is the case and that due account is taken of the legal ownership of the goods to be bought, and how any subsequent asset disposal would be managed.

8. ONGOING ARRANGEMENTS TO MANAGE RESIDENTS' FINANCIAL AFFAIRS

Purpose of this part

8.1 This part of the code considers the need to indemnify residents against risk, and the arrangements that should be in place and the reports and financial statements that should be drawn up, when an adult moves. It also considers the importance of properly determining the basis for any continued involvement by a manager in the affairs of an adult, after they have moved.

Indemnifying the resident

8.2 Authorised managers must ensure that provision is in place for indemnifying residents against any loss attributable to :

Any act or omission on the part of the managers of the establishment in exercising the powers conferred by Part 4 of the Act, or of others for whom the managers are responsible, or attributable to any expenditure which is not of benefit to the resident, any breach of duty, misuse of funds or failure to act reasonably and in good faith on the part of the managers.

8.3 A current certificate of insurance relating to these matters must be submitted to the supervisory body as part of the application for authorisation to manage, and be re-submitted annually.

When a resident with incapacity moves

8.4 The decision that a resident should move or the expressed desire on their behalf to do so, and the associated arrangements that require to be made will in most cases have been the subject of detailed and lengthy consideration by the multi-disciplinary team that is responsible for overseeing the person's care. The resident themself as well as any relatives or informal carers, will have been central to the discussions and will be fully aware and supportive of what is being contemplated. Matters relating to the residents capacity to manage their own financial affairs should form an important element of the factors that are considered in determining a suitable onward move, and in preparing to support the resident once they have done so.

8.5 There are many reasons why it may be necessary or appropriate to consider a move. For instance, the need for a move may relate to a resident having recovered from a stroke, having acquired a brain injury or having experienced a psychotic episode relating to schizophrenia or depression.

8.6 In the event that the resident moves on to another registered establishment or into the care of a local authority, discussions will have been held with the managers and the resident themselves will have visited or received detailed information about the facility to which it is

proposed they should move. If their move is associated with an improvement in their ability to manage their own financial affairs, this will have been considered by the multi-disciplinary care team and possibly, both the certificate of incapacity and the practical arrangements for involving them in taking control of their own affairs, amended accordingly.

8.7 The authorised manager must notify the supervisory body within 14 days, or sooner where practicable, if a resident whose financial affairs they are authorised to manage, is no longer staying in the authorised establishment as their main residence, as stated in section 44 of the Act.

8.8 If the registered establishment to which they are proposing to move has chosen to opt out of the provisions of Part 4 of the Act, or in the event that the resident is not moving onto another registered facility nor into the care of the local authority, and yet they continue to lack the capacity to manage their own financial affairs, the authorised manager must notify the local authority for the area to which it is believed they will be moving. Ideally this should take place as soon as possible. It is probable that the authority will want to consider whether or what form of lawful proxy decision making, such as an intervention order of financial guardianship, might be appropriate in the circumstances, and make application to the sheriff court, accordingly.

Managers' continued involvement after residence ceases

8.9 When a resident moves out of an authorised establishment, or ceases to be incapable, the managers of the establishment may continue to manage his affairs for up to 3 months, until other arrangements are made.

8.10 The need for an authorised manager to continue their role in this way should have been considered by the multi-disciplinary team overseeing the residents care planning and agreed as representing the most appropriate course of action in the particular circumstances of each resident. It is most likely to be necessary when a resident who continues to lack capacity is not moving on into another authorised establishment, or into the care of the local authority.

8.11 In this case, it may provide a suitable basis upon which to determine the suitability of any new arrangements, or to provide support while the relevant local authority considers the next most appropriate course of action.

8.12 In the case of residents who have regained capacity, and where the authorised manager does retain the power to manage their financial affairs for a period of time after they have moved out, this may represent a useful, short term measure that enables them to regain access to their funds without disrupting the availability of necessary day to day funds. Appropriate support could also include arranging for the local authority social work services, Citizen's Advice Bureau, or an independent advocacy service, to offer assistance to the person.

8.13 Throughout any period of continued involvement in the affairs of someone who continues to lack capacity after residence ceases, it will be particularly important that discussions take place with those who may or are likely to become involved in any future multi-disciplinary group that that is responsible for overseeing care planning and review for the particular resident.

8.14 At the end of this period, the manager must prepare a statement and give a copy to the resident if they have regained capacity, and any other person the resident wishes informed who may be involved in the management of their funds. In this case, the adult would need to give permission to the manager to share this information.

Financial Statements

8.15 Authorised managers are required to prepare financial statements in the course of managing residents' financial affairs. Such statements should include the following details:

- an opening balance
- the date of all credits and debits
- the amount of the transaction
- a running balance
- a closing balance
- a narrative that explains the source of the credit/ purpose of the debit
- each transaction over £10 signed for by a member of staff.
- notes from the last review

8.16 A second staff signature should be provided where possible. In larger institutions, there will usually be sufficient staff on duty to enable this requirement to be met. In smaller units, this will not always be the case and local guidance should make it clear to staff how they should deal with this situation.

8.17 Authorised managers must prepare financial statements in the following circumstances:

- Where the resident ceases to be incapable of managing their affairs. The statement must cover the period of intervention up to the date that the resident formally regains capacity. A copy of the statement must be given to the resident.

- Where the resident moves from one authorised establishment to another. The statement must cover the period up to the date of transfer and a copy must be sent to the manager of the other establishment (except where the resident has ceased to be incapable).

- Where the resident leaves an authorised establishment but is not moving to another, which may, for example be the case where an adult moves into a tenancy in the community and yet is not considered to be capable of managing their own financial affairs. The statement must cover the period up to the date when managers cease to manage their financial affairs. A copy must be given to the person who appears to the manager to be the person who will be managing the resident's financial affairs. This matter should be discussed in the multi-disciplinary review including all relevant parties, where consideration could also be given to the potential role of the local authority under the Act, for example to assess the need for financial guardianship or intervention order or possibly to explore intromission of funds by a third party

8.18 All statements must be prepared in such a way as to reflect a clear picture of the level and nature of personal expenditure on items for the resident's own use.

9. THE REGULATORY CONTEXT AND THE POWERS OF SUPERVISORY BODIES

Purpose of this part

9.1 This part of the code considers the responsibility of supervisory bodies to inquire about any problems that may arise or complaints that may be made concerning managers' actions under Part 4 of the Act.

9.2 It considers the different approaches that may be required in respect of registered and unregistered establishments.

Conducting inquiries - The Care Commission

9.3 The Regulation of Care (Scotland) Act 2001 incorporates significant powers relating to The Care Commission which extend to all Adults with Incapacity–related matters, including those concerning limited registration. These include not only powers to revoke and cancel registration, but also to impose conditions. It is within this context that the conduct of inquiries concerning the Act in registered establishments should be viewed.

9.4 Further details about The Care Commission's regulatory powers are set out in sections 10 to 20 of the Regulation of Care (Scotland) Act 2001.

9.5 In the normal course of their duties, officers of The Care Commission may encounter problems or issues that have some bearing upon the suitability of the arrangements by which authorised managers are fulfilling their responsibilities under the Act. In most cases, these matters will appropriately be dealt with through discussion and the introduction of agreed changes to practice. Where necessary, officers may require changes to be introduced under the statutory powers that are available to them.

9.6 Where these efforts do not produce the required changes in matters relating to the management of residents' financial affairs or where further action is considered necessary, consideration can also be given by The Care Commission to revoking the power to manage under the Act.

[In doing so various policy/enforcement procedures will require to be followed. These are being drawn up in respect of The Care Commission and will encompass enforcement of Part 4.]

9.7 The specific statutory power to revoke the power to manage is the only course of action that is available to The Care Commission in respect of registered facilities, in circumstances where the conduct of the authorised managers is considered to be unacceptable. This being the case, any decision not to invoke this power, where circumstances suggest that it would be appropriate were other statutory powers not available, must be clearly documented and explained to the managers.

[The arrangements for such decisions to be made within "The Care Commission" have yet to be determined.]

Conducting inquiries – NHS Boards

9.8 Arrangements under Part 4 of the Act within facilities operated by NHS Trusts and in a limited number of cases NHS Boards, will be subject to monitoring by a number of means.

9.9 In most cases, internal audit undertake periodic checks as part of their regular audit programme. This audit however, is unlikely to address qualitative aspects of practice as it relates to the Act, concerning the working relationship between financial systems and care planning.

9.10 The latter aspects of the operation of provisions under Part 4 will represent a new focus of supervisory activity within the health sector, and as such will require that staff who are directly involved in managing and working under the arrangements that are made, receive appropriate training and support in their role.

9.11 In the course of their duties, NHS Board officers may encounter problems or issues that have some bearing upon the suitability of the arrangements by which managers are fulfilling their responsibilities under the Act.

9.12 In most cases, these matters will appropriately be dealt with through discussion and by the introduction of agreed changes to practice and procedures. Where this is not achieved, further action to achieve change may be required under the 'Performance Assessment and Accountability Framework (PAAF) arrangements.

Dealing with complaints – The Care Commission

9.13 The supervisory body from a number of sources may receive complaints regarding the manner in which an authorised manager, or person(s) named in a Certificate of Authority, is managing resident's financial affairs. Whether received verbally or in writing, the nature of the complaint should be set out in a written record.

9.14 The Care Commission has implemented its own complaints procedures, which take into account Part 4.

9.15 However, in some cases, it may be appropriate to place requirements upon the authorised managers to change practices in the service, on the basis of The Care Commission's other statutory powers. Where these measures do not produce the required changes in matters relating to the management of residents' financial affairs, the supervisory body may consider whether revoking the power to manage under the Act is necessary.

9.16 In cases where The Care Commission invokes its other statutory powers to require changes in practice, it should be noted that the specific statutory power to revoke the power to manage is the only course of action that is available to the supervisory body in circumstances where the conduct of the authorised managers is considered to be unacceptable. This being the case, any decision not to invoke this power, where circumstances suggest that it would be appropriate, were other statutory powers not available or agreement on future action reached, must be explicitly acknowledged and explained.

9.17 In considering the need for revocation, a record will be compiled on behalf of The Care Commission and the process outlined above concerning inquiries, applied in this instance also.

Dealing with complaints – NHS Boards

9.18 The NHS Board may receive complaints regarding the manner in which an authorised manager, or person (s) named in a Certificate of Authority, are managing residents' financial affairs. Whether it is received verbally or in writing, the nature of the complaint should be set out in a written record.

9.19 Health Boards will implement their own complaint procedures that will take into account Part 4. Those procedures relating to NHS Boards will be addressed more fully in this guidance at a later date.

9.20 In the case of unregistered establishments the NHS Board will seek to secure the authorised managers' positive co-operation with an appropriate plan of action. Where this does not prove possible or the outcome is unsatisfactory, the supervisory body may consider whether revoking the power to manage is necessary.

9.21 It should be noted that the specific statutory power to revoke the power to manage is the only course of action that is available to the supervisory body under the Act, in circumstances where the conduct of the authorised managers is considered to be unacceptable. This being the case, any decision not to invoke this power, where circumstances suggest that it would be appropriate, were other statutory powers not available or agreement on future action reached, must be explicitly acknowledged and explained.

9.22 In considering the need for revocation, a record will be compiled on behalf of the NHS Board and the process outlined above concerning inquiries, applied in this instance also.

The Care Commission - revoking the power to manage, or limited registration

9.23 When the Care Commission has decided to revoke the power to manage or in the case of a limited registration service, its registration, the authorised managers will be notified accordingly in writing. The notice should set out:

- The reasons for the decision to revoke
- The effective date of revocation
- Arrangements for contact between the establishment and the supervisory body regarding the latter's role as 'authorised manager' pending the transfer of this power to another person or authority
- Details of the representation and appeals procedure
- A contact name, telephone number and address for all future communications with the supervisory body in its supervisory role
- Signature of the designated person within the Care Commission

9.24 Action under any other statutory power that results in the de-registration of an establishment will automatically require the revocation of the power to manage, and the return of the note of authority.

9.25 Appropriate steps will be taken by the Care Commission to secure the return of the registration document, and the record of authority under the Act contained within it, in order that the power to manage can be practically removed. In addition, steps will be taken by the Care Commission to secure all current Certificates of Authority, and to notify fundholder(s) accordingly.

9.26 Any decisions made by the Care Commission can be the subject of representations in accordance with appropriate internal appeals arrangements as well as subsequent appeals to the sheriff. The period within which an appeal to the sheriff may be made is 14 days from the date the decision is intimated to the party making the appeal. Rules of court set out the form of appeal and the procedure for dealing with it.

9.27 The decision of the sheriff is final.

NHS Boards – revoking the power to manage

The supervisory body acting as authorised manager

9.28 Where the power to manage has been revoked, the supervisory body is required to take over management of the resident's affairs within 14 days of the revocation. Similarly, where a registered service has decided to opt out of the provisions of the Act, the supervisory body is required to take over management of the resident's affairs within 14 days. In doing so, it must comply with the same requirements that are imposed on managers of authorised establishments.

9.29 In the case of registered establishments, the Care Commission will have a continuing role on the basis of its other statutory powers. It will therefore be appropriate for the officer fulfilling the role of an authorised manager in terms of the Act not to be involved in the ongoing inspection and supervision of the establishment.

9.30 In the case of <u>all</u> authorised establishments however, the officer fulfilling the role of authorised manager in terms of the Act should have no other involvement with the establishment under the terms of the Act.

9.31 Where the inspection officer, or NHS Board officer, acting as authorised manager needs to make application for approval to sell moveable objects, to manage the estate should its value exceed the prescribed limit, or for a Certificate of Authority, such applications should be made to the Care Commission, or the NHS Board, as appropriate. It will take into account the need for separation between decisions related to individual residents' monies, and where decision making sits in regard to the establishment. The supervisory body must transfer the management of the resident's affairs within 3 months to another appropriate establishment, authority or person (who may be the resident). The task of transferring this responsibility will require the supervisory body to consult with the resident, their nearest relative, any other person with an expressed interest in their affairs, and the relevant local authority.

9.32 In the event that no other party is prepared to do so, it will fall upon the local authority to apply for an intervention order or guardianship order under the provisions of Part 6 of the Act.

10. TRANSITIONAL MATTERS?

11. APPENDICES

APPENDIX 1

Regulation 2

SCHEDULE 1

Adults with Incapacity (Scotland) Act 2000 (“the Act”)

Certificate of incapability in relation to decisions as to, or safeguarding interest in, resident’s affairs.

I …………………………………….. (full name)

of ……………………………………………………………………………………………….

……………………………………………………….……… (professional address)

have examined the following resident on …../…../….. (date) in my capacity as ……………

……………………………………………………………………………………………….. *.

……………………………………………………………… (resident’s name)

of ………………………………………………………………………………………………

………………………………………………………………………………………………

………………………. (authorised establishment where resident lives)

…./…./…. (resident’s date of birth).

I am of the opinion that he/she is incapable in relation to:

- decisions as to**
- safeguarding his/her interests in **

any of the affairs referred to in section 39 of the Act.

This is because of:

- mental disorder**
- inability to communicate because of physical disability**

………………………………………………………………………………………………..
………………………………………………………………………………………………..
……………………………………………………………………………………………….
(brief description of reasons for mental disorder/inability to communicate).

I am not related to the resident or to any of the managers of the authorised establishment in which he/she resides, nor do I have any direct or indirect financial interest in the authorised establishment.

In assessing the capacity of the resident, I have observed the principles set out in section 1 of the Act.

……………………………(signed) …………………………(printed name)

…./…./…. (date)

* the person signing the certificate must be a medical practitioner; insert as appropriate e.g. GP, specialist in mental disorder.

** one of these must be deleted unless both apply.

APPENDIX 2

Regulation 3(1)

SCHEDULE 2

Adults with Incapacity (Scotland) Act 2000 (“the Act”)

Certificate to inform decision whether to dispense with intimation under section 37(3) or action under section 37(4).

I ………………………………………………………. (full name)

of …………………………………………………………………………………………….

…………………………………………………. (professional address)

have examined the following resident on …./…./…. (date) in my capacity as

……………………………………………………………………………………………*

…………………………………………………………………………. (resident’s name)

of ……………………………………………………………………………………………..

………………………………………………. (authorised establishment where resident lives)

…./…./…. (resident’s date of birth).

I am of the opinion that it would pose a serious risk to the health of the resident named above for them to be notified:

- that their capacity is to be medically examined under section 37(2) of the Act;
- of the result of that medical examination;
- that their affairs are to be managed under section 37 of the Act.**

The reason for this opinion is ………………………………………………………..

…………………………………………………………………………………………….

…………………………………………………………………………………………….

…………………………………………………………………………………………….

(brief description of reason(s)).

I am not related to the resident or to any of the managers of the authorised establishment in which he/she resides, nor do I have any direct or indirect financial interest in the authorised establishment.

I am a medical practitioner approved by ………………………………… (approving body) for the purposes of section 20 of the Mental Health (Scotland) Act 1984 as having special experience in the diagnosis or treatment of mental disorder. (delete if inappropriate).

………………………….(signed) ……………………………….(printed name)

…./…./…. (date).

* the person signing the certificate must be a medical practitioner; insert as appropriate e.g. GP, specialist in mental disorder,

** If any alternative is inappropriate, please delete it.

APPENDIX 3

Adults with Incapacity(Scotland) Act 2000("the Act")

PART 4
NOTICE OF INTENTION TO MANAGE THE FINANCIAL AFFAIRS OF A RESIDENT

To be completed by the Manager of the Authorised Establishment and submitted to the relevant Supervisory Body together(if appropriate) with a Signed Medical Certificate of Capacity.

This notice must include the following details relating to the resident:

Name
date of birth
address
details of those people consulted
details of what alternative actions have been considered and why they are deemed inappropriate
indication of whether intimation to the adult would pose a serious risk to the health of the resident

I do / do not consider that intimation would pose a serious risk to the health of the resident and I request / do not request that a direction be issued not to disclose relevant matters.

APPENDIX 4

Adults with Incapacity (Scotland) Act 2000("the Act")

PART 4 SECTION 42
CERTIFICATE OF AUTHORITY

As issued by the Supervisory Body
Scottish Commission for the Regulation of Care
NHS Board

DETAILS OF THIS CERTIFICATE SHOULD INCLUDE THE NAME, DATE OF BIRTH AND RESIDENCE OF THE RESIDENT AND THE NAME OF THE AUTHORISED MANAGER PLUS THE FOLLOWING:

Specify accounts or other funds of the resident
name the persons specified in the application (the "authorised persons")
specify the period of validity of the certificate

APPENDIX 5

SOME EXAMPLES OF GOODS AND SERVICES PURCHASED THROUGH THE USE OF PERSONAL FUNDS OF ADULTS WITH INCAPACITY

Personal Services
Hairdressing
Services of a private chiropodist
Manicure
Facials
Barbers
Massage and sauna
Provision of private dry cleaning
Provision of someone to read and talk to Service users, or take them out on a one to one basis

Recreation
Music tapes
Photography, such as professionally taken photographs
Subscriptions to magazines/ newspapers
Television, hi-fi and video
Records, tapes and video tapes
Books, games and magazines (including Braille, large print etc.)
Computer games
Entertainers
Hobbies
Membership of community clubs
Jigsaws

Arts and Crafts
Sewing equipment
Dressmaking materials
Knitting, including knitting machines
Painting, drawing
Equipment for the cultivation of indoor plants
Material & tools for model making kits
Fees for evening classes

Pets
Tropical fish and fish tanks

Outings
- Purchase of tickets for outings to cinemas, theatres and recreation centres
- Visits to relatives
- Entertaining relatives and friends
- Shopping trips
- Visits to circus

Personal Possessions

- Pot plants, fresh flowers and containers
- Personal ornaments and pictures
- Items of furniture
- Toiletries and make-up
- Rugs, curtains and clocks
- Powered wheelchairs
- Continental quilts
- Electric blankets
- Writing materials
- PC, typewriter
- Non NHS spectacles and lenses
- Jewellery
- Clothing
- Special personal equipment e.g. portable foot spa
- Electric shavers, toothbrushes, hairdryers and blankets

Consumables

- Carry out foods
- Special items; e.g. birthday cakes
- Snacks
- Confectionery
- Soft drinks
- Cigars, snuff

Funeral Expenses

- Insurance policies to cover funeral expenses

Miscellaneous

- Outings on birthdays, anniversaries and other special occasions
- Purchase of holidays or weekend breaks
- Subscription to joint purchases such as bird tables, fish tanks, pets and pet food, veterinary services
- Specialist equipment – chairs, mattresses, beds, specialist hearing aids etc.

APPENDIX 6

GLOSSARY

Manager:

- The Health Board in relation to an NHS Scotland hospital.
- The State Hospital Management Committee (if appointed) or; the Health Board, Special Health Board, NHS Trust, CSA for the Scottish Health Service or person appointed by them to manage, as applicable.
- The person(s) carrying on the hospital, in relation to a hospital registered under Part IV of the Mental Health (Scotland) Act 1984
- The person who is identified under Section 7(2)(b) of the Regulation of Care Act (Scotland) 2001 in the application for registration of the establishment
- If an application is made under section 27A(1) of that Act, the local authority or any person appointed by the local authority to manage the establishment
- Anyone identified in pursuance of regulations under section 24(7)(j) of that Act

Primary carer
A paid carer who carries the principal responsibility for providing direct care to the resident and for monitoring the overall care that the person actually receives

Resident:
An adult whose main residence for the time being is the authorised establishment, or who is liable to be detained under the Mental Health (Scotland) Act 1984

Guardian:
(includes Guardians appointed under the law of any other country to act for an adult during his incapacity shall be entitled to act for the adult if the guardianship is recognised by the law in Scotland.)

Continuing attorney:
(includes a person appointed by the law of any country or granted powers relating to the granters property or financial affairs)

Fundholder:
The person or organisation holding funds on behalf of the adult.

Moveable Property:
Assets other than land or buildings e.g. furniture, pictures, jewelry, bank accounts, shares

[121001]

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000:

PART 4 DRAFT CODE OF PRACTICE FOR SUPERVISORY BODIES

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1. INTRODUCTION

Who should read this Code?

1.1 This detailed Code of Practice is designed to be read by staff of the supervisory bodies (Scottish Commission for Regulation of Care (the Care Commission); NHS Boards; and State Hospital Board(s)) that carry responsibility for authorising care homes, private psychiatric and independent hospitals, NHS hospitals and to oversee the financial affairs of adults with incapacity. All staff within the Care Commission, and NHS Scotland hospitals, who are or who may be involved in managing the affairs of adults with incapacity should therefore acquaint themselves fully with the contents of this code.

1.2 It will also be of interest to managers of such authorised establishments who are required to work with the appropriate supervisory body in fulfilling their responsibilities under the Adults with Incapacity (Scotland) Act 2000, hereafter referred to as 'the Act', and who have been provided with a separate Code of Practice for Managers of Authorised Establishments (Managers' Code).

1.3 Those of the above services that are required to register with the Care Commission, will be assumed to be covered by the requirements of the Act unless they choose to opt out of being so. It is therefore important that every manager of a care home, and any other relevant service, acquaints themselves the matters dealt with in this Code, and also that of the Managers' Code. Both provide guidance and indicators of good practice and are complemented by a leaflet which sets out the provisions in an abbreviated form.

1.4 It is important at this early stage to emphasise that Part 4 is intended to apply to the relatively few residents who lack capacity and for whom all other alternative arrangements have been considered and found to be unsuitable. Even when an individual is made subject to the provisions of the Act, the extent of the assets that are covered by the Act is very limited. In this context, while all managers, Care Commission officers, and NHS Board staff in supervisory bodies, should be conversant with the provisions of Part 4 of the Act, it is important to bear in mind that they may not require to be applied in every situation concerning an adult with incapacity.

Layout and Structure of the Code

1.5 In setting out guidance on the various functions, responsibilities and processes set out in Part 4 of the Act, this Code seeks to take into account the wide range of settings within which staff and managers may be working, and of the various systems that may exist for supporting them in fulfilling their responsibilities under the Act.

1.6 In particular, arrangements for fulfilling the requirements of Part 4 in small care homes are likely to be of a different order from those that will operate within a relatively large NHS Scotland hospital, or independent healthcare setting. Also, the supervisory context within which managers will be operating will vary between those services that are supervised by the Care Commission, and those services, usually run by National Health Service Trusts, that are supervised by NHS Boards.

1.7 In recognition of these differences and where considered helpful, matters are dealt with in the Code under separate headings for registered and unregistered establishments.

The Act

1.8 The law of Scotland generally presumes that adults (those aged 16 or over) are legally capable of making personal decisions for themselves and managing their own affairs. That presumption can be overturned on evidence of impaired capacity. The Act, which received Royal Assent in May 2000, sets out a new framework for regulating intervention in the affairs of adults who have or may have impaired capacity, in the circumstances covered by the Act (such an adult being referred to in the Act and in various places in this code as 'the adult'). The framework is underpinned by general principles and provides more flexibility than before to tailor interventions to the needs of particular cases.

1.9 Part 4 of the Act concerns the management of residents' finances in authorised establishments which are care homes in the local authority and independent sector, NHS and State hospitals, independent hospitals and private psychiatric hospitals, and in other services which may register for this purpose, and these new arrangements are scheduled to come into force on 1 April 2003. This Code of Practice will therefore supercede Circular No: CCD2/1999, and NHS MEL (1999)25.

1.10 The Act introduces a number of new and readily accessible means of management in relation to financial matters. These should have the effect of limiting the situations in which it is necessary to use the powers detailed in Part 4. Arrangements under Part 4 should only be necessary after all other available options have been carefully considered and these have been found to be unsuitable by the multi-disciplinary care team, and where no other appropriate person is available to act on the adult's behalf, and it is in the interests of the adult.

Incapacity

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

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

1.13 For the purposes of the Act 'incapable' means incapable of:

acting; or

making decisions; or

communicating decisions; or

understanding decisions; or

retaining the memory of decisions;

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

1.14 A person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise). No person shall be treated as suffering from mental disorder by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs.

The general principles (s1(4))

1.15 All decisions made on behalf of an adult with impaired capacity must observe the principles of the Act. These are:

Principle 1 – benefit

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

Principle 2 – minimum intervention

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

Principle 3 – take account of the wishes of the adult

1.18 In determining if an intervention is to be made, and if so, what intervention is to be made, account shall be taken of the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult.

NOTE : that it is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained by any means whatsoever.

Principle 4 – consultation with relevant others

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

the nearest relative and primary carer of the adult;

any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention;

any person whom the sheriff has directed should be consulted; and

any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible.

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

Principle 5 – encourage the adult to exercise whatever skills he or she has

1.20 Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act shall, in so far as it is reasonable or practicable to do so, encourage the adult to exercise whatever skills he or she has concerning property, financial affairs or personal welfare as the case may be, and to develop new such skills.

1.21 These principles are to be applied whether a decision is being made to invoke the provisions of the Act, or at a later stage when a person's financial affairs are being managed. In practical terms they require that every opportunity has been taken to explore and utilise all of the other options available for managing the affairs of adults with, or who may have, incapacity.

1.22 Even when the provisions of the Act are invoked, they should only be used to authorise the least restrictive level of intervention on the basis of active and ongoing consultation with all informed and involved parties.

1.23 The general principles will be referred to throughout this code as they apply to the exercise by supervisory bodies of their functions under the Act.

Limitation of liability

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

acted reasonably and in good faith and in accordance with the general principles, or failed to act and the failure was reasonable and in good faith and in accordance with the general principles

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

1.26 Authorised managers may manage the financial affairs of residents whose total assets; including savings and income do not exceed £5,000 at any one time. The establishment may retain a balance of up to £250 in order to meet the possible day to day purchase requirements of the resident. Assets exceeding £500 should be placed in an interest bearing account.

2. BACKGROUND

Purpose of this part

2.1 This part of the code outlines the previous guidance that has been available to inform the way in which the affairs of adults with incapacity have been handled and refers to other, regulatory practice guidance that is relevant to the role of supervisory bodies under the Act.

Previous Guidance

2.2 Following the publication in 1995 of the Scottish Law Commission's publication "Report on Incapable Adults" (Scots Law Com No 151, ISBN 0 10 129622 3), the Scottish Office issued a consultation paper in September 1997 "Managing the Finances and Welfare of Incapable Adults" which concerned arrangements for managing and protecting the finances, housing and property of people who were incapable of managing their own affairs as a result of "mental disorder". This resulted in the policy memorandum paper "Making the Right Moves", published in August 1999, and the subsequent guidance Circular No: CCD2/99 "Protection of the Finances and Other Property of People Incapable of Managing Their Own Affairs", issued in October 1999 by the Scottish Executive, and which provided interim guidance pending the enactment of the proposed new legislation.

2.3 The guidance was used to inform good practice in the management of finances of adults with incapacity across a range of care settings. It was recommended that the 1999 guidance be used in conjunction with the 1985 "Report of the Working Party on the Management of Incapax Patients' Funds" (ISBN 0 11 492452 X), called the "Crosby Report". This was intended to develop best practice pending the implementation of the Act and its associated Codes of Practice.

2.4 Previous regulation of residents' finances has offered a sound basis for practice and should continue to be viewed as a useful starting point in considering responsibilities under the Act. A wide range of previous legislation and government guidance has highlighted issues that continue to be relevant. The fitness of persons and establishments to undertake such functions has previously been a central issue in the Social Work (Scotland) Act 1968. The principles upon which this Code of Practice is based are set out clearly in Part One of the Act and these must inform all of the decisions and actions taken by authorised managers and the relevant supervisory bodies.

Part 4 and best Practice

2.5 Under community care policy, an increasing number of people who are incapable of managing their own financial affairs now live in care homes. Others are cared for in long-stay hospitals, although their numbers are decreasing as community care provision increases. Some will already have arrangements in place for managing their financial affairs, but for many there is no one else to act on their behalf and their income and savings are not large enough to warrant the appointment of a financial guardian.

2.6 Part 4 of the Act therefore puts on a statutory basis the management by authorised establishments of the funds and moveable property of residents who are unable to carry out this function themselves. It also allows services such as those providing supported accommodation to seek registration for the sole purpose of managing residents' finances

(limited registration services). Part 4 provides for a robust system of authorisation, control and regulation of these arrangements, all aimed at protecting the interests of the adults concerned.

2.7 Within the arrangements put in place by the Adults with Incapacity (Scotland) Act 2000, the scope for use of Part 4 is intended to be, and is, limited. Thus it does not apply where:

- a financial guardianship order is in force under part 6 of the Act;
- a relevant intervention order is in force under part 6 of the Act;
- there is a continuing attorney with relevant powers, and
- the individual's social security benefits are paid direct to a nominee, under Department of Work and Pension Appointeeship arrangements (Part 4 is intended to operate alongside DWP Appointees for a resident's other funds (i.e. those that are not DWP benefits).

2.8 The intention is that Part 4 should be used for people with relatively small sums of money who have no-one else to manage their financial affairs. Its operation is limited to managing maximum assets of £5,000* a year, and authorised managers will have to get written permission from their supervisory body to manage individual payments exceeding £250*. These limits will be set in Regulations approved by Parliament, and may be altered from time to time.(**subject to consultation*).

2.9 The provisions of the Act are designed to regulate intervention in the affairs of adults who have or may have impaired capacity on the basis of a number of key principles that are considered in detail below. In many respects they echo the principles and approach that was set out in the Crosby Report. As a general guide, any arrangements that have been developed on the basis of the principles and practices described in the Crosby Report will provide a very useful basis from which to develop arrangements that meet the requirements of the Act. The principles provide the basis upon which authorised managers should make any decision about a resident's financial affairs.

2.10 In practical terms, the Act requires that it should be possible to evidence the effect of any decision and the basis upon which it was made through rigorous and robust systems for managing residents' finances, and for being able to account for the manner in which they have been used.

2.11 In the course of registering care homes and other establishments, the Care Commission will require that equally rigorous and robust systems are in place with regard to the financial affairs of <u>all</u> residents who may require assistance with their financial affairs. This will be a much wider group than those covered by the Act. In practice, all care homes, and some other types of supported accommodation settings, will have some level of involvement in the day to day management of residents' finances.

2.12 In ensuring that the general quality of financial management arrangements in registered services are of a good standard, the Care Commission will create a context for handling the financial affairs of adults with incapacity. It is unlikely that a care home that is registered under Part 4 of the Act will require to have in place systems and arrangements relating to the management of the financial affairs of adults with incapacity, that are

significantly more burdensome than those that will be required to operate, by the Care Commission, in respect of all other residents.

2.13 The Act makes it clear that a decision to invoke the provisions of the Act should be taken on the basis that it is considered to be the most appropriate course of action. Action to invoke the powers of the Act should be taken only as and when the authorised manager, in agreement with the other members of the multi-disciplinary care team, considers it to be the most appropriate way to proceed, having considered all other possible courses of action.

2.14 In many cases, this will mean that existing practices perhaps where adults with limited capacity are, with assistance, involved in arrangements that enable them to exercise a measure of influence and choice as to how their funds are spent, should continue. These arrangements will often have been in place for some time and will in many cases be an important aspect of the ongoing relationship that builds and maintains trust between the resident and the staff that provide their care and support needs.

2.15 There is no need for these types of arrangements to be ended and a more formal arrangements to be put in their place under the terms of the Act, where all concerned feel that they are the most appropriate way to proceed and that the best interests of the resident are being served. This however, places a significant burden of responsibility upon those involved, both to satisfy themselves that matters are being handled appropriately, and to ensure these are consistent with the expressed wishes of the resident.

2.16 Under the Act, authorised managers are the professionals who are empowered to decide whether a particular adult should be assessed as to whether they lack capacity and subsequently, whether their affairs should be managed under the provisions of the Act. However, in practice, authorised managers are but one of a wide range of care and support professionals who are involved in the multi-disciplinary team that is jointly responsible for determining the care needs of the individual resident, and arranging for the necessary resources to be made available to meet them.

2.17 In this context, any decision regarding a resident's capacity and the measures that should be put in place to secure their best interests should be viewed as requiring to be made jointly, within the care planning and review process. Only after these discussions have taken place and any decisions have been reached will it fall to the authorised manager to take whatever action is necessary to enact the shared decision(s).

2.18 To this extent, employing the provisions of the Act could be seen as a step that should be taken only as a last resort. This implies that thorough consideration will be given to alternative arrangements, however unsuitable they may appear to be to the authorised manager and the other professionals involved.

2.19 Equally however, where arrangements are considered to be unsuitable, perhaps where family members are failing to fulfil their responsibilities appropriately, managers and their multi–disciplinary colleagues, are entitled to take the view that intervention under the Act is the most appropriate course of action to take.

Regulatory Context

2.20 In April 2002, the Regulation of Care (Scotland) Act 2001 introduced a new regulatory system for social care and independent healthcare services to replace the range of previous regulatory legislation for these sectors, including Sections 60 to 68 of the Social Work (Scotland) Act 1968; the Nursing Homes Registration (Scotland) Act 1938; and Part IV of the Mental Health (Scotland) Act 1984.

2.21 The new system builds upon the changes to regulation of social care services made by circular SW/9/90 and aims to achieve Scottish Ministers' policy for regulation set out in the policy position papers "The Way Forward for Care" and "Regulating the Independent Healthcare Sector". The policy objectives set out in these papers was for a system of regulation that should be:- focused on the people using services; based on the quality of life the services enable people to experience; independent - no interest in service provision; consistent; and integrated and should meet the Better Regulation Taskforce principles of good regulation - Transparency; Accountability; Proportionality; Consistency; and Targeting.

2.22 The new legislation as well as providing new regulatory powers: - expanded the net services to be regulated; set up two new bodies - the Scottish Commission for Regulation of Care (Care Commission) to regulate the services, and the Scottish Social Services Council to regulate the social services workforce; and required Scottish Ministers to prepare, with consultation, and issue National Care Standards that the Care Commission must take into account in all its decisions under the Regulation of Care (Scotland) Act 2001.

2.23 The Care Commission has been established and became operational on 1 April 2002. Prior to April 2002, Scottish Ministers issued 19 sets of National Care Standards of which 17 cover social care services and 2 cover independent healthcare services. Standards for further independent healthcare services will be developed.

2.24 The appropriate supervisory body will be expected to comply with this Code, and may be required to explain any divergence from the Code in a court of law.

3. AUTHORISED ESTABLISHMENTS

Purpose of this part

3.1 This part of the code sets out the definition of an authorised establishment that is contained within the Act, as amended by the Regulation of Care (Scotland) Act 2001.

3.2 It explains the circumstances in which a care home establishment may opt out of the provisions of the Act and those under which an establishment that is otherwise not required to register with the Scottish Commission for the Regulation of Care, may do so for the sole purpose of managing residents' finances.

Definition of an 'authorised establishment'

3.3 Part 4 of the Act refers to authorised 'establishments', a term which reflects a building-based description of the type of services that are to be registered and eligible to be authorised, under the Act. Similarly, the Act uses the terms 'resident' and 'patient' when describing the recipients of service.

3.4 In the Regulation of Care (Scotland) Act 2001, this terminology is largely replaced by the terms ‘service’ and ‘service user’ respectively. In order to help clarify terms in the context of this code, the former terminology has been adopted in all cases.

3.5 While the Regulation of Care Act (Scotland) 2001 defines a much wider range of registered services, those that can be authorised in relation to Part 4 of the Act, as amended by the Regulation of Care Act (Scotland) 2001 are:

(a) an independent hospital or private psychiatric hospital
(b) a care home service, and
c) a limited registration service
d) a health service hospital
e) a state hospital

3.6 Section 35(2) of the Act distinguishes between ‘registered establishments’ that are registered by The Care Commission, and 'unregistered establishments’ which are supervised by Health Boards. Of the above list, (a), (b) and (c) are registered services, and (d) and (e) are unregistered. Together, registered and unregistered establishments are referred to as ‘authorised establishments’.

Opting out of the provisions of Part 4

3.7 There is no obligation on care homes or independent services to manage residents’ financial affairs, and section 35(3) of the Act allows registered establishments to opt out of managing residents’ finances upon application to the supervisory body for these establishments i.e. the Care Commission. If the establishment or service chooses to do so, its registration will not include the power to manage residents’ financial affairs.

3.8 In this case, the service would still be subject to the registration requirements of the Care Commission, and remain liable to have in place a rigorous and robust system for handling any financial affairs of residents in general that is close to the requirements set out in part 4 of the Act. Where suitable informal arrangements operate for individual residents who lack capacity to some extent, this will continue to mean that the manager is responsible, along with the resident and other members of the multi-disciplinary care team, for determining how funds should be spent, and for ensuring that appropriate records are maintained. In many cases, the managers’ involvement may be limited to keeping residents’ personal allowances in the establishments safe, on behalf of individuals who have requested this service.

3.9 The matter of opting out of the provisions of Part 4 of the Act may be raised during the process of initial registration. In this case, the Care Commission will deal with the matter during the registration application process and in so doing will wish to satisfy itself that the managers and applicant understand the implications of opting out of the provisions of the Act for the care of residents and their potential well-being. The implications for residents as well as possible limitations on the scope of the establishment, will be taken into account by the Care Commission as part of the registration process.

3.10 Where an establishment or service notifies the Care Commission of its intention to opt out of the provisions of Part 4 of the Act after having been registered, the Care Commission

will again wish to satisfy itself that the authorised managers and registration applicant understand the implications of opting out for the continuing care and well-being of residents.

3.11 If the establishment or service confirms their intention to opt out following discussions with the Care Commission, its registration will be changed accordingly and its power to manage residents' financial affairs under the Act removed.

3.12 As stated earlier, the service would still be subject to the registration requirements of The Care Commission and remain liable to have in place a rigorous and robust system for handling the financial affairs of residents that is close to the requirements set out in Part 4 of the Act. Managers must also ensure that staff are clear as to their continuing role in assisting residents to handle their financial affairs.

3.13 Residents, or their carers, who have concerns about an establishment opting out of Part 4 should be able to discuss them with relevant parties, including with members of the multi-disciplinary team that is involved in planning and reviewing their care. In the event that previous or proposed informal arrangements are no longer considered adequate or appropriate, managers should establish suitable arrangements with the local authority or any other party with relevant powers under the Act, to enable the resident to access their funds as and when they need to do so, on a day to day basis.

3.14 If, and when, a service chooses to opt out of the provisions of Part 4 of the Act, the managers must ensure that all current and future residents, and their carers, are made aware of this fact and that the full implications are discussed with them.

3.15 While the continuing potential for appropriate informal arrangements to be put in place should be made clear to residents and their carers/family, they should also be informed of the possibility that the local authority may seek guardianship powers, and that the practical arrangements for the residents funds to be available for their use on a day to day basis may be more complicated.

3.16 In the event that a registered care service does opt out, responsibility falls in the first instance upon the Care Commission to act as the authorised manager, as detailed in the later section of this code at "Revocations Opt-outs and Appeals".

New form of limited registration

3.17 Some establishments that are otherwise not required to register with the Care Commission may seek registration under Section 36 of the Act, for the sole purpose of managing the residents' finances.

3.18 To apply for limited registration, an establishment must provide accommodation and cannot provide care alone. Facilities that are managed by a housing provider or landlord that is also responsible for providing a support service, for example in a sheltered housing complex, would be eligible to apply. If however, the accommodation was managed by a housing provider, and the support was provided by a separate care or support agency, only the housing provider would be in a position to apply.

3.19 Many of newer models of care and support in the community that involve a housing provider or landlord providing accommodation to a care or support provider that is

responsible for delivering often highly intensive packages of care to very vulnerable residents, may in practice fall outwith the provisions of the Act. In these cases it is unlikely that a landlord who did not support tenants directly would wish to become involved in providing a service under the provisions of Part 4 of the Act.

3.20 If a resident or tenant becomes incapable whilst living in a home or other facility that is otherwise not required to register with a supervisory body, the establishment may seek registration for the sole purpose of managing the resident's finances.

3.21 However, establishments that may be eligible to apply for limited registration need not wait for an actual situation to arise where a medical certificate of incapacity has been issued and the individual resident needs the manager(s) to manage their financial affairs. The manager may apply for registration as an authorised establishment at any time in order that an application may subsequently be made to manage the affairs of an individual resident or tenant, when the circumstances require it, subject to the requirements of the application process for a Certificate of Authority.

3.22 Applications under Section 36 of the Act will only be granted where the applicant can demonstrate to the supervisory body, an understanding of the general principles set out in the Act and their implications for the management of the affairs of individual residents. These establishments will be required to meet the same criteria as all other authorised establishments in relation to financial procedures, financial management and auditing practices.

3.23 In many cases the housing support service that is provided for tenants will offer opportunities for staff to develop a supportive and caring relationship with the tenant such that an application under Section 36 of the Act may constitute an appropriate and helpful extension of their role.

3.24 Part 8 of the Regulation of Care(Scotland) Act 2001 also outlines limited registration services in respect of dealing with adults with incapacity.

4. SUPERVISORY BODIES

Purpose of this part

4.1 This part of the code sets out the definition of supervisory bodies contained in the Act. It considers the general arrangements that will need to be in place in order that these bodies can properly fulfil their responsibilities, and considers suitable arrangements for ensuring that all relevant staff within these organisations are properly informed about the provisions of the Act.

Definition of a supervisory body

4.2 The relevant supervisory bodies are referred to in the Act, but in the terms set out in The Regulation of Care (Scotland) Act 2001, the supervisory body is the Care Commission in the case of:

- a care home;
- an independent healthcare hospital or private psychiatric hospital;
- a limited registration establishment under section 36 of the Act.

4.3 The supervisory body is the NHS Board for the area in which the authorised establishment is situated, in the case of:

- a NHS Scotland hospital.

4.4 In the case of the State Hospital, it will be the State Hospital Board.

The role of the Scottish Commission for the Regulation of Care

4.5 The supervisory body is responsible for monitoring and reviewing the manner in which the management of residents' affairs is being conducted by authorised managers.

4.6 In the case of the Care Commission, this work will be conducted alongside its other statutory registration and inspection activity. Care Commission officers will require to consider issues relating to authorised managers' responsibilities under the Act, as part of their day to day duties in dealing with registration applications, inspections and complaints about establishments.

4.7 In addition, the Care Commission is responsible for ensuring that authorised managers undertake their responsibilities under the Act in a manner that is consistent with established best practice in care planning and review. It will be particularly concerned to ensure that managers consult on a regular basis and regarding any one-off significant matters, professional colleagues, carers, and others with a significant interest in the resident concerned.

4.8 While the number and type of establishments that will be required to register with The Care Commission is considerable, many will not involve the provision of accommodation as an integral part of the establishment. For those that do not provide accommodation, the establishment will not be eligible to apply for limited registration under section 36 of the Act.

4.9 The retention and management of information relating to Part 4 of the Act will form an important part of the responsibilities of supervisory bodies. The arrangements that are put in place by each supervisory body to record, retain, vary and dispose of data must be compatible one to another whilst being in compliance with Data Protection Act 1998 requirements.

The role of NHS Boards

4.10 In the case of NHS Boards, this work will be undertaken in a context where no other comparable or complementary supervisory function is in place. Protocols will be required to formalise a suitable supervisory arrangement.

4.11 In the majority of cases, NHS Boards will be supervising systems and arrangements that are a continuation of existing arrangements within Health Trusts and which were established in accordance with the provisions of the Crosby Report. However suitable these are considered to be, they will be the subject of regular scrutiny, as set out in this Code, and n the Part 4 Code of Practice for Managers. NHS Board officers should review all existing arrangements relating to matters covered by Part 4 of the Act in the first instance and in so

doing, a future programme of oversight and scrutiny of authorised services should be devised and introduced.

4.12 Where an NHS Board fulfils the role both of a supervisor and a provider, necessary arrangements will be put in place to ensure an appropriate separation of functions.

4.13 The Act does therefore place a number of new statutory powers and responsibilities upon supervisory bodies, and the conduct of these matters should be subject to specific and clear procedures which enable them to be recorded and accounted for.

4.14 The retention and management of information relating to Part 4 of the Act will form an important part of the responsibilities of supervisory bodies. The arrangements that are put in place by each supervisory body to record, retain, vary and dispose of data must be compatible one to another whilst being in compliance with Data Protection Act requirements.

Disseminating information concerning Part 4 of the Act

4.15 Each supervisory body should design and disseminate information, leaflets and web-based material to inform their staff and the managers of authorised establishments regarding the provisions of Part 4 of the Act.

4.16 Supervisory bodies should develop and implement a staff training and development plan that is specifically designed to address the particular requirements of the Act as it relates to their role and responsibilities.

4.17 All appropriate staff within supervisory bodies should be afforded appropriate access to a copy of this Code of Practice and where necessary, they should be issued with their own copy of the Code.

4.18 During the early months following implementation of Part 4, appropriate staff may require to develop specific knowledge and expertise in the provisions of the Act. The Care Commission, and NHS Boards, will put structures in place to ensure appropriate sharing of knowledge and experience relating to the application and enforcement of matters under the Act.

5. AUTHORISING SERVICES TO MANAGE RESIDENTS' FINANCIAL AFFAIRS

Purpose of this part

5.1 This part of the code considers the necessary arrangements for dealing with applications to become an authorised establishment, the documentation that will be provided to establishments confirming their status and the process of renewal.

Dealing with applications for authorisation - registered establishments

5.2 Existing registered establishments that on 1 April 2002 transferred their registration to The Scottish Commission for the Regulation of Care will have the procedures in relation to future management of funds under Part 4 of the Act inspected as part of their first post 1 April 2002 inspection.

5.3 Until that inspection takes place and their authorisation or opt out is confirmed, establishments should operate their systems for managing and monitoring residents' financial affairs, on the basis of the requirements that the Care Commission will place upon them in respect of all residents.

5.4 Any prospective registered care establishment that is applying to become a registered establishment will have the matter of its authorisation under the Act dealt with by the Care Commission as part of the application process.

5.5 Other establishments that provide accommodation and that are eligible to do so, may apply to the Care Commission for limited registration under section 36 of the Act, as read with section 8 of the Regulation of Care(Scotland) Act 2001, and if they do so, authorisation under the Act will be the only aspect of its affairs that are subject to scrutiny under the application and subsequent monitoring process.

5.6 The Care Commission will have in place criteria for determining the fitness of providers and managers of establishments requiring to register with the Commission. Procedures and requirements relating to limited registration under the Act regarding the fitness of managers will also be developed (work in progress).

5.7 The Regulation of Care (Scotland) Act 2001 also provides for the regulation of the social services workforce by establishing the Scottish Social Services Council (SSSC), which is now established. The SSSC regulates education and training of social service workers and raise standards through the publication of Codes of Conduct and Practice. For staff in registered establishments who are required to register with the SSSC, or equivalent body, their employer will be expected to demonstrate robust recruitment and selection procedures which take account of the requirement to be registered with the SSSC, and the need to adhere to the Codes of Conduct.

5.8 The authorisation of a registered service under the Act will involve the manager of the registered establishment being named as the ‘authorised manager’.

Dealing with applications for authorisation - unregistered establishments

5.9 Authorisation under the Act will take place as a result of the first inspection carried out by the NHS Board, after April 2003, subject to agreement upon any action that may be required at an earlier date, to address identified weaknesses in arrangements or practice.

5.10 In the meantime, NHS Scotland hospitals should continue with existing arrangements for the management of residents’ funds, subject as they are to both internal and external audit.

5.11 In the case of NHS Trusts and in a limited number of cases NHS Boards, the person in whose name the body is authorised under the Act will be determined on a basis to be agreed by the NHS Board. In most cases this will be the Director of Finance of the NHS Trust, or another senior manager with responsibility for financial matters.

5.12 NHS Boards will establish and formalise a suitable supervisory arrangement that provides for the scrutiny of both financial records and the care planning and review records that provide the all important context within which financial decisions should be taken

5.13 Many NHS Boards and Trusts subject their patients' funds to periodic internal audit review, although that focus tends to be upon quantitative rather than qualitative indicators. It will be particularly important that other monitoring arrangements are introduced that are able to determine the extent to which decisions under the Act flow from consideration of the salient issues by the multi-disciplinary team that are engaged in planning and reviewing the residents overall care plan.

5.14 In the past, practice has tended to result in all residents, whether they lack capacity or not, being permitted to make use of the systems that exist for managing residents financial affairs. Every encouragement should be given to the majority of residents who are able to do so, to manage their financial affairs for themselves or for informal arrangements, involving friends or relatives, to be set up or to continue.

5.15 In just the same way, adults with incapacity need not be made subject to the provisions of the Act, merely because they happen to be in an NHS Scotland hospital, provided they are able to exercise sufficient capacity in relation to their financial affairs. It will be particularly important in situations where the adult has shown indications that their ability to manage their affairs is improving, that every effort is taken by staff to enable them to do so.

5.16 In the case of NHS Boards that fulfil the roles of both regulator and provider, the same requirements apply, subject to the additional requirement that the two functions should be transparently separate.

Determining the 'fitness' of managers'

5.17 The Care Commission will have in place criteria for determining the 'fitness' of providers and managers of establishments requiring to register with the Commission. Procedures and requirements relating to limited registration under the Act regarding the fitness of authorised managers will also be developed.

5.18 As previously indicated, the Regulation of Care (Scotland) Act 2001 provides for the regulation of the social services workforce by establishing the Scottish Social Services Council (SSSC). For staff in registered establishments who are required to register with the SSSC, or equivalent body, their employer will be expected to demonstrate robust recruitment and selection procedures which take account of the requirement to be registered with the SSSC, and the need to adhere to the Codes of Conduct.

5.19 In the case of unregistered establishments, the NHS Board will establish an application procedure that provides for arrangements concerning the management of residents' financial affairs to be subject to scrutiny and approval, in a similar manner.

A record of authority for registered establishments

5.20 All registered establishments will have the details of their authorisation under the Act incorporated into the terms of their registration certificate with the Care Commission.

5.21 Where an authorised establishment chooses to opt out of the provisions of the Act, this will be noted on their registration certificate.

5.22 In the event that an authorised manager leaves a registered establishment to which their authorisation relates, the manager should notify the Care Commission in accordance with the requirements of their registration, in order that suitable interim arrangements can be made until such time as a new manager is appointed, registered and authorised under the Act.

5.23 Interim arrangements will usually involve the interim manager at the establishment undertaking the role of authorised manager, subject to their being authorised to do so by the Care Commission.

'Notes of Authority' for unregistered establishments

5.24 All unregistered establishments will be issued with a formal Note of Authority by the NHS Board, setting out their power to manage residents' financial affairs under the Act.

5.25 As for registered establishments, in the event that an authorised manager leaves the authorised service to which their authorisation relates, the manager should notify the NHS Board in order that suitable interim arrangements can be made until such time as a new manager is appointed and authorised under the Act.

5.26 Interim arrangements will usually involve the interim manager at the authorised establishment undertaking the role of authorised manager, subject to their being authorised to do so by the NHS Board.

Annual renewal and inspection relating to the power to manage

5.27 The continuing authorisation of a registered establishment under the Act is dependent upon the outcome of a scrutiny of arrangements that will take place at least annually that may be done in a variety of ways such as inspection, requiring records, audited accounts etc. Consideration of continuation may take place during the general registration inspection procedure.

5.28 In the case of unregistered establishments, the Note of Authority will be subject to renewal on each anniversary of its first issue. NHS Boards will inform managers of the arrangements that they are required to have in place in order to satisfy the scrutiny of arrangements that will take place at least annually.

6. AUTHORISING MANAGERS TO MANAGE THE FINANCIAL AFFAIRS OF INDIVIDUAL RESIDENTS

Purpose of this part

6.1 This part of the code deals with the issuing and processing of Certificates of Authority, and the basis upon which supervisory bodies authorise managers, as part of the multi-disciplinary care team responsible for managing the financial affairs of individual residents.

6.2 It also considers the preparatory work that the managers of authorised establishments, as part of the multi-disciplinary care team, should have undertaken, prior to submitting an application and associated issues concerning medical certificates of incapacity.

Context of Supervisory bodies' role

6.3 In addition to the duty to authorise services under Part 4 of the Act, as dealt with under an earlier section above, supervisory bodies also authorise named managers to manage the financial affairs of individual residents.

6.4 Before a supervisory body becomes involved in doing so, the authorised manager is required to fulfil his/her obligations under the Act in determining that his/her intervention is required, regarding the individual person in question.

6.5 When the supervisory body comes to undertake its role in considering applications for authority to act, and to approve practical arrangements to manage a resident's financial affairs, it will have to be satisfied that the preparatory process and actions by the authorised manager were consistent with the principles underpinning the Act.

6.6 It is important therefore to be clear about the context within which supervisory bodies exercise their oversight of authorised managers regarding the management of the financial affairs of individual residents.

What can be managed by 'authorised managers'?

6.7 Authorisation to manage finances and affairs on behalf of residents provides for:

- claiming, receiving, holding and spending any pension, benefit, allowance or other payment other than under the Social Security Contributions and Benefits Act 1992 (c.4) ;

- claiming, receiving, holding and spending any money to which a resident is entitled;

- holding any other moveable property to which the resident is entitled

- disposing of such moveable property.

Note: Moveable property is assets other than land or property: e.g. furniture, pictures, jewellery, bank accounts, shares.

6.8 Some authorised managers may already undertake responsibilities as a Department of Work and Pensions (DWP) appointee in respect of the benefits to which a particular resident is entitled. In so doing, they will have been required to establish that they have regular contact with the person concerned and that they take a 'whole person' approach to the person's welfare. They would not have been the subject of a detailed application process as would be the case were they to seek authorisation under the Act.

6.9 The provisions of Part 4 of the Act will not affect DWP appointeeship arrangements, but authorised managers should inform the relevant supervisory body of any such arrangements at the time that they seek authorisation or later, should the prospect emerge, of their being appointed to this role.

6.10 While the two roles are not incompatible, the power to manage that is afforded to authorised managers under of Part 4 of the Act allows a manager to do everything that a DWP appointee can do, and more. In particular, authorisation under Part 4 enables managers to open accounts in the name of the resident and thereby ensure that they are able to earn interest on their savings.

6.11 In situations where informal arrangements continue to prove an appropriate basis for managing the financial affairs of a resident with incapacity, the role of DWP appointee is likely also to continue to provide a useful means of dealing with the practical day to day management of the residents modest benefit income.

6.12 In the event that an authorised establishment's power to manage is revoked, the supervisory body may notify the DWP accordingly, in order that they may, if they so wish, carry out their own inquiries.

6.13 When the power to manage is revoked and managers wish to apply for a DWP appointeeship in respect of specific residents, it will be particularly important that the multi-disciplinary team responsible for the adult's care is apprised of the situation and is supportive of the application, in each case.

6.14 Just as the authorised manager is responsible for enacting the wishes of the multi-disciplinary care team under the provisions of the Act, so are they in the context of any alternative informal arrangements.

Initial steps in determining the need to manage residents' financial affairs

6.15 The manager of an authorised establishment may only manage a resident's finances if a medical practitioner has issued a medical certificate of incapacity (Appendix 1), the form of which is laid down in Regulations.

6.16 The medical practitioner issuing the medical certificate of incapacity must not be related to the resident or to any of the managers of the authorised establishment, nor should they have any direct or indirect financial interest in the establishment.

6.17 If a manager intends to request that an examination by a medical practitioner takes place or would be appropriate for this purpose, they must first satisfy themself that no other forms of lawful proxy decision making powers, in respect of the residents' financial affairs, are, or could be held by, another party.

6.18 In most cases, the Office of the Public Guardian will have the relevant information if it is not readily available from the adult, their carer or relatives.

6.19 In addition to satisfying themselves about the position as regards existing legal powers in respect of the individual concerned, the issue of incapacity and related matters concerning arrangements to manage financial-related matters on the residents behalf should have been considered carefully by the multi-disciplinary care team. In many cases, alternative informal arrangements are likely to have been operating for some time. Possible variations on these arrangements should be considered, and only if these have been discounted should the manager proceed to seek authorisation to manage the residents financial affairs under the provisions of Part 4.

6.20 If the decision is taken to seek authorisation under the Act, the multi-disciplinary care team will be expected by the supervisory body to have also considered whether intimation to the person, of the intention to seek a medical assessment of their capacity and/or the intention to seek formal powers to manage their financial affairs, would pose a serious risk to the resident's health.

Consulting with other parties

6.21 In many cases, the manager will proceed directly to notify the resident and their nearest relative of the intention to request a medical examination. All other parties to the multi-disciplinary care team discussions should be aware of the intention to do so, but in the event that for some reason they may not be, the placing local authority and care manager should be formally notified.

6.22 Where intimation to both the resident and their nearest relative takes place, the manager should allow at least 15 working days to elapse between issuing the notification that an examination is to be requested, and the examination taking place. This is to enable the resident and their nearest relative time to comment upon the proposed action. Where a significant delay does or could occur in the resident, or nearest relative being able to reply, due account should be taken in the timing of any examination. Relatives should be informed that advice and guidance is available from the public guardian, the local authority and/or the Mental Welfare Commission.

6.23 Whatever the process or timescales involved, if either the resident or the nearest relative do not agree that an examination should be requested, the manager must ensure that their views and opinions are fully discussed and recorded before proceeding further. If, in the course of these discussions alternative means of dealing with the difficulties faced by the resident are identified, perhaps for example a variation of existing informal arrangements that had not previously been discussed by the multi-disciplinary care team, every opportunity should be afforded to enable such options to be fully explored and their suitability considered further.

Non intimation to the resident

6.24 In the event that the multi-disciplinary care team, including the authorised manager, considers non-intimation to be the preferred course of action, the manager should advise the supervisory body accordingly.

6.25 The supervisory body will want to satisfy itself that this view has been discussed amongst the professionals and other parties who are concerned with the care of the resident. Having done so, it will direct the authorised manager to arrange for a medical examination to take place in order to establish whether intimation should occur, in accordance with regulations relating to section 37(9) of the Act.

6.26 These regulations require that 2 medical practitioners, one of whom may need to be a specialist in mental disorder, certify that intimation would pose a serious risk to the health of the individual concerned(Appendix 2). Should the first medical practitioner find that intimation would pose a risk to health, and if the second medical practitioner agree with this view, then the second medical practitioner should go on to ascertain whether the person lacks

capacity to manage their own financial affairs and if so, in what respect. This will ensure that the number of medical examinations will be kept to the necessary minimum.

6.27 The manager should notify the resident's nearest relative of his intention to seek the appropriate medical examinations to consider the matter of intimation, immediately after the supervisory body has directed him to do so. This will avoid any inappropriate disclosure regarding the proposed course of action to the resident themself.

6.28 Unless the nearest relative is involved in discussions with the authorised manager about non intimation and more generally, the assumption of the power to manage before the medical examinations take place, they may be denied an opportunity to comment on the proposals, within a timescale that enables their views to have any practical influence upon events.

6.29 If medical approval is given for non-intimation, the process outlined above will mean that a Certificate of Incapacity may also have been signed by the second medical practitioner at the same time.

Notifying others when a medical certificate of incapacity is issued

6.30 When a medical certificate of incapacity is issued under section 37 of the Act, the manager must send a copy to the resident and the supervisory body within 5 working days. In addition, the manager must also notify the same two parties of their intention to manage the resident's affairs and in so doing explain what other courses of action have been considered and why they were not considered appropriate - but see the next paragraph. In providing such an explanation, all of the general principles set out in the Act must be addressed and specific details provided as to the date, details and outcomes of any meetings or discussions with relevant parties.

6.31 In the event that the prior medical examinations result in approval for non-intimation, neither a copy of the certificate of incapacity, nor notification of the intention to manage their funds, should be sent to the resident.

6.32 Having considered the information submitted by the authorised manager, the supervisory body must satisfy itself that all other courses of appropriate action have been considered, and that the proposed intervention is the most suitable in the circumstances.

6.33 It may be appropriate to arrange for the assistance of an independent advocacy service to be engaged where these are available, or to provide further opportunities for other interested parties to comment on the proposed intervention.

6.34 Having notified the supervisory body of their intention to manage the resident's financial affairs, the manager may not in practice do so, until a Certificate of Authority to manage the resident's affairs has been issued by the supervisory body.

6.35 A period of 10 days would normally be allowed to elapse before the Certificate of Authority is issued in order to allow for any comments or representations from interested parties to be made. Where this occurs, an opportunity should be provided for the issues that are raised to be considered and addressed in a manner that is appropriate to the particular case.

Payment for medical examinations

6.36 The cost of the medical examinations under section 37 of the Act will be met from the estate of the resident, regardless of whether intimation had been given as to the purpose and fact of their being undertaken. Where appropriate, supervisory bodies should ensure that residents and/or their informal carers are made aware of this from the outset.

Reviewing medical certificates of incapacity

6.37 In the normal course of multi-disciplinary care planning and review procedures, the Certificate of Incapacity should be reviewed at regular intervals within the context of ongoing arrangements to monitor care needs and adjust the resources that are available to meet them as required. In this way it will be viewed as an integral part of the individual's personal and social health and wellbeing. In so doing, it will be important not only to consider whether current arrangements should continue, but also whether the way in which funds spent best meet the requirements of the persons preferred lifestyle.

6.38 In addition however, if at any time the manager, the medical practitioner, or any other person having an interest in the resident's affairs, including the resident themself, believes that there has been a change in the condition or circumstances of the resident or the resident's incapacity, they may request that a review of the Certificate of Incapacity takes place.

6.39 The resident's prevailing ability to manage aspects of their own financial affairs and/or their circumstances should be considered from the perspective of everyone involved, and if it appears that there are grounds for re-considering the appropriateness of the certificate of incapacity, particularly as it relates to specific areas of capacity, the Medical Practitioner must do so.

6.40 The review should preferably be undertaken by the medical practitioner who signed the certificate, but where this is not possible or they are no longer involved with the person, by a medical practitioner with an up-to-date knowledge of the resident.

6.41 When a Certificate of Incapacity is reviewed and consequently varied or revoked by the medical practitioner concerned, the Certificate of Authority issued by the supervisory body to manage the resident's affairs will automatically fall to be varied or revoked also, and must be returned by the manager to the supervisory body within 3 working days.

6.42 Good practice as regards care planning and review should result in matters relating to the resident under the Act being kept under regular review. If for some reason this is not the case, and a significant period of time has elapsed since a review was held, each certificate of incapacity should be reviewed prior to the expiry date in order that proper arrangements can be made for a further Certificate of Incapacity to be requested by the manager, or for alternative arrangements to be put in place.

6.43 The Certificate of Incapacity under section 37 of the Act expires three years after the date of issue. The supervisory body, and all involved with the resident, should be aware of this fact by virtue of their records and/or their involvement with the person concerned. In most cases, planning will have been underway for some time prior to the expiry date to ensure that appropriate action is taken to put in place suitable arrangements for the future.

Applications for a Certificate of Authority

6.44 Once an authorised manager has notified the supervisory body of their intention to manage a resident's financial affairs using the Notice of Intention to Manage the Financial Affairs of a Resident (Appendix 3), and by virtue of a certificate of incapacity having been issued, the supervisory body may issue a signed Certificate of Authority (Appendix 4) to the authorised managers, that empowers the managers to withdraw money from specified accounts and the fundholder of that account to release the funds.

6.45 The supervisory body, mindful of the information that must be included within the Certificate of Authority, will consider an application for a Certificate. The application should therefore provide the following information:

- Nature of incapacity & copy of Certificate of Incapacity
- Alternative arrangements explored
- How the intervention will benefit the resident
- Proposed duration of the intervention.
- Proposed timing and arrangements for review
- Names and designations of authorised persons and their relationship to resident (e.g. key worker)
- The identity of the fundholder and details of the account(s)

6.46 An application should also provide evidence that the account details and/or the descriptions of other sources of funds are accurate, and it should offer such proof as may be available that the accounts and other funds are in fact the property of the resident in respect of whom the Certificate of Authority is to be made.

6.47 Authorised managers may manage the financial affairs of service users whose total assets, including savings and income, do not exceed £5000 at any one time. This sum is laid down in Regulations. When applying for a Certificate of Authority, the manager should therefore provide the supervisory body with such evidence as they are able to obtain of the scale of the assets that it is proposed to manage.

6.48 It is the authorised manager's responsibility to remain aware of any changes that occur relating to the resident's account(s), and to ensure that the resident's assets do not exceed £5000. Where the level of assets at the start of the financial year indicate that this may be likely, the authorised manager should be particularly vigilant and advise the supervisory body accordingly in order to trigger the review earlier. Otherwise, the supervisory body will monitor the situation through an annual review.

6.49 In the event that the resident's assets do exceed £5000 and the supervisory body does not consider it appropriate to authorise managers to manage the funds, the local authority may seek a guardianship order, under which a level of delegated authority to the authorised establishment may be arranged

Issuing a Certificate of Authority

6.50 The Certificate of Authority must specify:

- The accounts or other funds of the resident that are to be managed.

- The names of the persons specified in the application (the "authorised persons")

- The period of validity of the Certificate of Authority, which must not exceed that of the medical certificate of incapacity issued by the medical practitioner

[The precise arrangements and mechanisms for issuing certificates have yet to be determined by the Care Commission, and NHS Boards.]

6.51 It will be for the authorised managers to establish suitable arrangements with the fundholder to allow for either the original certificate and/or copies to be accepted upon presentation. In general, it is likely that the fundholders will require the original Certificate to be made available to them and may wish to retain a copy of the Certificate.

6.52 The supervisory body should inform the fundholder of the issue of the Certificate of Authority, the names of the authorised persons, the account(s) and the period covered by the Certificate. Only one copy of the Certificate should be issued to the authorised managers by the supervisory body, though there may be more than one authorised person named on the Certificate.

6.53 If the resident does not have an interest bearing account and their assets exceed £500, the authorised manager should arrange for these assets to be placed in an interest bearing account where expenditure and interest earned is monitored appropriately. The power to manage under Part 4 of the Act enables the manager to open such an account in the name of the resident once they have been authorised to manage the resident's affairs.

6.54 In this event, the manager should consult with the supervisory body regarding whether such a course of action, immediately after a new Certificate of Authority has been issued, would require them to go back to apply for a variation.

Varying a Certificate of Authority

6.55 Where details contained in the Certificate of Authority require to be changed, such as the named authorised persons or the account details, the authorised manager must notify the supervisory body accordingly and submit a written request for variation along with the necessary evidence.

6.56 In the event that the authorised manager opens any new account on behalf of a resident, the supervisory body should be notified to this effect as soon as possible thereafter.

6.57 Upon receiving the application to vary the Certificate, the supervisory body, or NHS Board officer, should satisfy themselves as to the need for a variation and review the evidence provided.

[The decision to vary a Certificate of Authority will be taken at a level of authority within the Care Commission, and NHS Boards, that has yet to be determined.]

6.58 The supervisory body will issue a new Certificate of Authority, when appropriate, within 5 working days of receipt of all of the necessary information, and having due regard to the need to provide for comment to be received and addressed from interested parties.

6.59 In many cases, those involved in the multi-disciplinary team that oversees the resident's care will be aware that a variation has been sought, and any issues will have been raised with the manager before the application was made. In other cases, or perhaps where the variation is of a very minor nature, they may not be so aware. In either case, the supervisory body will afford interested individuals an opportunity to comment upon the proposed change.

Revoking a Certificate of Authority

6.60 When information is received by the Care Commission, or NHS Board officer, concerning changes in the circumstances of a person in respect of whom a Certificate of Authority is in place, the implications for the continuation of the Certificate of Authority should be considered.

6.61 In some circumstances the need to revoke a Certificate will be clear, as for example in a case where a medical certificate of incapacity has been revoked, as the period of the Certificate of Authority cannot exceed that of the medical certificate of incapacity. In other cases, the situation may not be so clear cut and the Care Commission, or NHS Board officer, should contact the relevant parties for any additional information deemed necessary to inform a decision, and to discuss and agree a decision in accordance with the management procedures which apply within each body.

6.62 To the extent that the authorised manager’s role is to give practical effect to the views and decisions of the multi-disciplinary team concerned with a residents care, any concerns or issues that relate to the basis upon which or the manner in which the Certificate of Authority has been employed, should have been the subject of close and ongoing review within the broader care planning and review arrangements.

6.63 The overall care planning process is designed to reflect the changing needs and preferences of the resident and as such should take account of the picture that emerges from the information and knowledge of frontline care staff and others. In this context, any perceived changes in capacity or circumstances that might lead to a need for the certificate of incapacity or the Certificate of Authority to be reviewed, should be picked up and acted on accordingly. By so doing, the prospect of the revocation of a Certificate of Authority, in circumstances that reflect concern on behalf of the supervisory body, about the way that a resident's affairs have been managed, should be reduced significantly.

6.64 However, all authorised establishments should develop clear procedures by which any concerns or comments from front line staff regarding changing capacity can be recorded and communicated effectively to the authorised manager, in order that they may take any necessary action.

6.65 Even in circumstances where effective care planning arrangements are in place, it may be necessary for the supervisory body to formally inquire into the circumstances concerning the continuation of a Certificate of Authority.

[A suitable record, and in appropriate circumstances a full report, setting out the basis for any revocation should be produced in accordance with procedures for the Care Commission, and NHS Boards, that have yet to be finalised.]

[The decision to revoke a Certificate of Authority will be taken at a level of authority within the Care Commission, and NHS Boards, that has yet to be determined.]

6.66 The fundholder must be notified of the revocation, and the supervisory body should ensure that an appropriate arrangement is in place to notify the fundholder(s) within two working days in order to avoid the possibility of unauthorised withdrawals taking place.

Payment of fees relating to Certificates of Authority

6.67 In the case of registered services, the Care Commission is empowered to charge a fee for issuing, varying, applying new conditions or cancelling a certificate.

6.68 NHS Boards are not so empowered in respect of unregistered establishments.

Matters requiring further written authority from the supervisory body

6.69 The power to manage under Part 4 of the Act is intended to be used only when it is considered to be the most appropriate course of action, and on the basis of the guiding principles set out in the introduction to this code. In this context, the Act provides for clear limits to be placed upon the scale of the assets that are to be managed by requiring that specific authority be sought from the supervisory body, by the authorised manager, in respect of both the disposal of any assets and the overall level of the affairs, which may be managed.

6.70 Once a Certificate of Authority has been issued, further written authority is therefore required to:

a) Dispose of a resident's valuables or any moveable property. The manager must only undertake such disposal as is approved by the supervisory body. ‘Moveable property’ is anything other than land and buildings, e.g. furniture, pictures, jewellery, shares etc., and approval would be required for each separate transaction the total value of which exceeds or is likely to exceed £250, which may relate to a single or a number of items depending upon the circumstances. This sum is laid down in Regulations.

b) Manage matters with a greater value than £5000 within one financial year. If it becomes apparent to the manager, after a Certificate of Authority has been issued or recently reviewed, that the resident’s assets are or are likely to become greater than this within a short period of time, they should contact the supervisory body to discuss the appropriate course of action to take. The manager would be required to explain why the authorised establishment will best manage these matters, the alternatives that have been considered, and why these have been rejected.

[The structure and level of decision making within the Care Commission, and NHS Boards, for processing this information has yet to be decided.]

6.71 An example of where a supervisory body might be likely to authorise a higher figure is where there would be an anticipated expenditure in the next year, e.g. specialist bed, chair, other equipment which would bring the balance back down under the limit.

6.72 Details concerning the request for the approval of the sale of a resident's moveable objects should be compiled, as should details concerning a request to approve the management of estates whose value exceeds £5000. In both cases, written authorisation should be issued by the supervisory body, to the applicant, setting out the terms of any authorisation that is granted.

6.73 In the case of the disposal of valuables or moveable property, it will be important that the authorised manager can demonstrate that the monies so released are required to meet a particular need or to enable the adult to continue to have sufficient funds available to meet their day to day needs, rather than simply to benefit the individual’s estate.

Possible uses for residents' money

6.74 Finding imaginative ways of benefiting residents who lack capacity, from their own resources and funds can pose particular challenges, in determining the limits of appropriate expenditure. Existing schemes for doing so have developed a number of interesting approaches, which help to establish an appropriate agenda for consideration by others. For example:

- Purchasing beneficial therapies such as aromatherapy;
- Engaging a mobility assistant or supporter for a few hours a week to undertake befriending activities;
- Meeting mobility requirements over and above those provided for by the establishment or hospital;
- The leasing or hiring of vehicles or equipment for specific residents;
- The payment of reasonable expenses to selected volunteers undertaking activities on a one-to-one relationship with particular residents;
- The payment of accommodation charges and travel costs for relatives, staff and volunteers who accompany residents on holiday

6.75 Further examples of appropriate ways in which residents’ money may be spent are set out in Appendix 5.

6.76 While not all of the examples above may be considered appropriate in all circumstances, the list is intended to set out the range of types of arrangements that should at least be considered, when reviewing possible expenditure. Once again, consideration of these and other options within a multi-disciplinary care context should ensure a balanced and considered approach, and one that is manifestly supported by a significant proportion of professionals involved.

6.77 Resident’s funds may be used to contribute to the purchase of shared items, so long as each resident concerned will benefit from them. The authorised manager must ensure that this is the case, and the supervisory body must ensure that the manager has also taken account of the legal ownership of the goods to be bought, and how any subsequent asset disposal would be managed.

7. MONITORING ARRANGEMENTS TO MANAGE RESIDENTS' FINANCIAL AFFAIRS

Purpose of this part

7.1 This part of the code considers both general and detailed aspects and issues concerning the arrangements to manage residents' affairs that should be monitored by supervisory bodies, and in particular the reports and financial statements that should be drawn up when an adult moves.

7.2 It also considers the importance of monitoring any continued involvement by a manager, in the affairs of an adult, after they have moved.

Indemnifying the resident

7.3 The supervisory body must ensure that proper provision is in place for indemnifying residents against any loss attributable to:

> *Any act or omission on the part of the managers of the establishment in exercising the powers conferred by Part 4 of the Act, or of others for whom the managers are responsible, or attributable to any expenditure which is not of benefit to the resident, any breach of duty, misuse of funds or failure to act reasonably and in good faith on the part of the managers.*

7.4 A current certificate of insurance relating to these matters must be submitted to the supervisory body as part of the application for authorisation to manage, and be re-submitted annually.

Issues relating to incapacity

7.5 The supervisory body should satisfy itself that the authorised manager and the staff involved in fulfilling the provisions of the Act are aware of the general issues set out below.

7.6 Incapacity as defined in the introduction to this code may arise because of mental illness; learning disability; dementia or inability to communicate due to physical disability. It can also arise following an acquired brain injury or a stroke, or, often on a temporary basis, because of functional psychosis. The incapacity of the adult may be permanent or short term.

7.7 The extent and nature of capacity varies considerably and it should not be assumed that because individuals have a mental disorder or communication difficulty they are automatically incapable of managing their affairs. Managers and care staff should be mindful of diminishing, fluctuating and recovering capacity. Procedures should be developed to enable front line care/health staff to record and report any such variations to a manager, who will then report the matter to the relevant person, e.g. medical practitioner or social worker.

7.8 Staff should encourage residents to play as active a role as possible in the management of their financial affairs. Action and responsibility should not be removed in a wholesale fashion and, in so far as it is reasonable and practicable to do so, the adult should be encouraged to develop new skills in order to take part in the exercise of this responsibility.

7.9 This applies to residents who are not subject to the provisions of the Act just as much as it does to those who are. In most cases, informal arrangements will be sufficient to enable the resident to exercise meaningful choice and determination, along with a supportive and understanding member of staff, regarding the management of their financial affairs.

7.10 It will only be if and when staff or others involved in the lives of residents, become concerned that these arrangements are not necessarily operating in the best interests of the resident, and having considered all other options including employing an independent advocacy service, or in accordance with the principles that underpin the Act, that consideration should be given to applying for authority to manage their affairs.

7.11 Managers should ensure a process is in place where each resident's capacity to manage their finances is considered as part of the pre-admission assessment process and is reviewed on a regular basis but at any rate, not less than annually.

7.12 Existing multi-disciplinary care planning and review arrangements should provide the principal means by which the care and support that is required by the resident is considered and resourced. In so doing, arrangements will ensure that the responsibility for determining an appropriate course of action under the Act is shared by all of the participants and that the authorised manager in turn, is supported in giving practical effect to these decisions.

Principles of intervention and their practical implications

7.13 The principles that must underpin all interventions under the Act are set out in the Introduction to this code of practice. For managers' of authorised establishments, there are a number of practical issues that relate to these principles that must be addressed in determining the manner in which care is provided and services arranged for adults with an incapacity. These are:

- all decisions should reflect a person-centred approach to planning and should be taken by whatever multi-disciplinary group is responsible for planning and reviewing the care and support that is provided for the resident. Decisions must take account of each individual's particular needs, preferences and their emotional attachment to particular items, as far as these can be ascertained.

7.14 In many cases, making positive use of the relationship that has built up over time between the resident and staff members is most likely to ensure that decisions are well informed and appropriate for each individual resident. In particular, it will be important that:

- the risk of conflicts of interest between the adult with incapacity and those charged with managing his or her affairs must be minimised to the extent that the need to consult with a wide range of relevant parties is fully addressed.

7.15 A clear policy should therefore be in place concerning gift giving, on behalf of residents whose financial affairs are being managed. This should cover giving to family members, friends etc.

7.16 The most effective way of doing so is to base all decisions that are made on the adult's behalf on the views and opinions of the full multi-disciplinary care team. Authorised managers should not feel obliged to carry the full burden of responsibility for everything that

is done under the Act, on behalf of the adult. Their role is to give practical effect to a shared decision reflecting the views of all of the professionals who are actively involved in dealing with the establishment, and who are able to provide an informed opinion that is based upon direct knowledge of the individual concerned.

7.17 All State and other entitlements and benefits to which the resident with incapacity is entitled should be claimed. This should include any aids, adaptations and necessary equipment. It may be appropriate to seek specialist advice from a benefits advice centre, or an Independent Financial Advisor.

7.18 Sufficient funds should be readily available to respond to the day-to-day needs and preferences of the resident.

7.19 The income of many residents will accumulate week by week as they are received from the benefits agency and elsewhere, and if they go unspent. In the case of residents with incapacity, the establishment should retain a balance of up to £250 in order to meet their possible day to day purchase requirements. Beyond this, savings should be transferred into their interest bearing account(s).

7.20 Such funds should be held separately from the funds of the care home or other establishment and, whether kept in a single named account or within an account allowing for residents funds to be pooled, it must be possible for the funds of an individual resident to be tracked, and for the allocation of their share of interest to be accounted for. In so doing, it must be possible to ensure that the resident can benefit from all of the income and savings to which he or she is entitled.

7.21 It may prove to be more difficult to assist a resident to develop the capacity to manage their own affairs, when their funds are held in a pooled account. When it is agreed by the multi-disciplinary care team that a resident is likely to benefit from opportunities to develop their capacity, the authorised manager should ensure that an account is opened in their name in order that funds can be transferred as required, and the resident themselves can be provided with opportunities to manage their funds directly.

7.22 In many cases where the power to manage has been authorised, it will still be possible for the resident to manage some money for themselves, with appropriate support and assistance. The most common example is likely to be their weekly personal allowance.

7.23 All of the formal systems for managing the financial affairs of adults with incapacity should be subject to the requirements laid down by the Care Commission, or the NHS Board, and open to scrutiny and spot check as part of the regular inspection procedures. Audit arrangements, as operated by the establishment, should be transparent and comprehensible.

7.24 Arrangements for the management, supervision and review of the affairs of a resident with incapacity should be recorded in the care plan and made available to all those with a legitimate interest. Any certificates issued regarding the capacity of the resident, and Certificates of Authority from the supervisory body, should be kept with the care plan and should be considered as part of the regular case review process.

7.25 Reviews should involve all relevant parties, e.g. key worker, family, care manager etc. and the responsibilities of all the individuals and agencies involved should be recorded.

7.26 In practical terms the focus for authorised managers should always be upon how the resident's funds might be used imaginatively to improve his or her quality of life on the basis of their known likes and dislikes. In seeking to achieve this objective, managers should consult on a regular basis with others involved with the person and should take into account any particular interests or hobbies that the person was known to enjoy before their incapacity developed.

7.27 Similarly, when a resident who lacks capacity shows signs that they may be regaining some capacity to manage their financial affairs, engaging them in the process of choosing what activity or other interest to spend their money on, can be an effective means of positively encouraging and promoting their renewed capacity.

7.28 Residents whose funds are managed should as far as possible, be placed on equal terms with those who are able to manage their own affairs, and authorised staff should take a positive view of the likely benefits to be obtained from extra goods and services. In doing so, they should exercise on behalf of the resident the judgement and discretion that the person themselves might reasonably be expected to exercise if they were capable of doing so.

7.29 When the provisions of the Act are invoked, there should be very little difference apparent to those involved with the resident, regarding the persons involvement in making decisions and the extent to which they are consulted about financial matters. The systems that are in place to record the basis for actions and how money is spent, should be identical for all residents, whether subject to the provisions of the Act or not.

7.30 The funds of an adult with incapacity, including their weekly personal allowance, should not be used to fund services or items which would normally be provided as part of the care package arranged to meet his or her needs. Items of equipment, which are essentially community care requirements, must not therefore be purchased from private funds. However, if the service that is to be provided by the establishment, is clearly set down in writing and communicated to all concerned, residents' own resources can and should be used to obtain desirable extras that would otherwise not be immediately available.

When a resident with incapacity moves

7.31 The decision that a resident should move or the expressed desire on their behalf to do so, and the associated arrangements that require to be made will in most cases have been the subject of detailed and lengthy consideration by the multi-disciplinary team that is responsible for overseeing the resident's care. The resident themself as well as any relatives or informal carers, will have been central to the discussions and will be fully aware and supportive of what is being contemplated. Matters relating to the resident's capacity to manage their own financial affairs should form an important element of the factors that are considered in determining a suitable onward move, and in preparing to support the resident once they have done so.

7.32 There are many reasons why it may be necessary or appropriate to consider a move. For instance, the need for a move may relate to a resident having recovered from a stroke, having acquired a brain injury, or having experienced a psychotic episode relating to schizophrenia or depression.

7.33 In the event that the resident moves on to another registered establishment or into the care of a local authority, discussions will have been held with the managers, and the resident themself will have visited or received detailed information about the facility to which it is proposed they should move. If their move is associated with an improvement in their ability to manage their own financial affairs, this will have been considered by the multi-disciplinary care team and possibly, both the certificate of incapacity and the practical arrangements for involving them in taking control of their own affairs, amended accordingly.

7.34 The authorised manager must notify the supervisory body within 14 days, or sooner where practicable, if a resident whose financial affairs they are authorised to manage is no longer staying in the authorised establishment as their main residence, as stated in section 44 of the Act.

7.35 If the registered establishment to which they are proposing to move has chosen to opt out of the provisions of Part 4 of the Act, or in the event that the resident is not moving onto another registered facility nor into the care of the local authority, and yet they continue to lack the capacity to manage their own financial affairs, the authorised manager must notify the local authority for the area to which it is believed they will be moving. Ideally, this should take place as soon as possible. It is probable that the local authority will want to consider whether or what form of lawful proxy decision making, such as an intervention order of financial guardianship, might be appropriate in the circumstances, and make application to the sheriff court, accordingly.

Managers' continued involvement after residence ceases

7.36 When a resident moves out of an authorised establishment, or ceases to be incapable, the managers' of the establishment may continue to manage the resident's affairs for up to 3 months, until other arrangements are made.

7.37 The need for an authorised manager to continue their role in this way should have been considered by the multi-disciplinary team overseeing the resident's care planning and agreed as representing the most appropriate course of action in the particular circumstances of that individual. It is most likely to be necessary when a resident who continues to lack capacity is not moving on into another authorised establishment or into the care of the local authority.

7.38 In this case, it may provide a suitable basis upon which to determine the suitability of any new arrangements, or to provide support whilst the relevant local authority considers the next most appropriate course of action.

7.39 In the case of resident's who have regained capacity and where the authorised manager does retain the power to manage their financial affairs for a period of time after they have moved out, this may represent a useful, short term measure that enables them to regain access to their funds without disrupting the availability of necessary day to day funds. Appropriate support could also include arranging for the local authority social work services, Citizen's Advice Scotland, or an independent advocacy service, to offer assistance to the person.

7.40 Throughout any period of continued involvement in the affairs of someone who continues to lack capacity after residence ceases, it will be particularly important that

discussions take place with those who may or are likely to become involved in any future multi-disciplinary group that is responsible for overseeing care planning and review for the particular resident.

7.41 At the end of this period, the manager must prepare a statement and give a copy to the resident if they have regained capacity, and to any other person the resident wishes informed who may be involved in the management of their funds. In this case, the adult would need to give permission to the manager to share this information.

Financial Statements

7.42 Authorised managers are required to prepare financial statements in the course of managing residents' financial affairs. The supervisory body should require that such statements include the following details:

- an opening balance
- the date of all credits and debits
- the amount of the transaction
- a running balance
- a closing balance
- a narrative that explains the source of the credit/ purpose of the debit
- each transaction over £10 signed for by a member of staff.
- notes from last review

7.43 A second staff signature should be provided where possible. In larger institutions, there will usually be sufficient staff on duty to enable this requirement to be met. In smaller units, this will not always be the case and local guidance should make it clear to staff how they should deal with this situation.

7.44 Through its ongoing monitoring of an establishment, the supervisory body must ensure that statements are prepared in the following circumstances:

- Where the resident ceases to be incapable of managing their affairs. The statement must cover the period of intervention up to the date that the resident formally regains capacity. A copy of the statement must be given to the resident.

- Where the resident moves from one authorised establishment to another. The statement must cover the period up to the date of transfer, and a copy sent to the manager of the other establishment (except where the resident has ceased to be incapable).

- Where the resident leaves an authorised establishment but is not moving to another, which may, for example be the case where an adult moves into a tenancy in the community and is not considered to be capable of managing their own financial affairs. The statement must cover the period up to the date when the authorised managers' cease to manage the resident's financial affairs. A copy must be given to the person who appears to the authorised managers' to be the person who will be managing the resident's financial affairs. This matter should be discussed in the multi-disciplinary review including all relevant parties, where

consideration could also be given to the potential role of the local authority under the Act, for example to assess the need for financial guardianship or intervention order, or possibly to explore intromission of funds by a third party

7.45 All statements must be prepared in such a way as to reflect a clear picture of the level and nature of personal expenditure on items for the resident's own use.

8. CONDUCTING INQUIRIES AND DEALING WITH COMPLAINTS

Purpose of this part

8.1 This part of the code considers the responsibility of supervisory bodies to inquire about any problems that may arise or complaints that may be made, concerning managers' actions under Part 4 of the Act.

8.2 It considers the different approaches that may be required in respect of registered and unregistered establishments.

Conducting inquiries - The Care Commission

8.3 The Regulation of Care (Scotland) Act 2001 incorporates significant powers relating to the Care Commission which extend to all Adults with Incapacity-related matters, including those concerning limited registration. These include not only powers to revoke and cancel registration, but also to impose conditions. It is within this context that the conduct of inquiries concerning the Act in registered establishments should be viewed.

8.4 Further details about the Care Commission's regulatory powers are set out in sections 10 to 20 of the Regulation of Care (Scotland) Act 2001.

8.5 In the normal course of their duties, officers of the Care Commission may encounter problems or issues that have some bearing upon the suitability of the arrangements by which authorised managers are fulfilling their responsibilities under the Act. In most cases, these matters will appropriately be dealt with through discussion and the introduction of agreed changes to practice. Where necessary, officers may require changes to be introduced under the statutory powers that are available to them.

8.6 Where these efforts do not produce the required changes in matters relating to the management of residents' financial affairs or where further action is considered necessary, consideration can also be given by the Care Commission to revoking the power to manage under the Act.

[In doing so, various policy/enforcement procedures will require to be followed. These are being drawn up in respect of the Care Commission and will encompass enforcement of Part 4.]

8.7 The specific statutory power to revoke the power to manage is the only course of action that is available to the Care Commission in respect of registered facilities, in circumstances where the conduct of the authorised managers is considered to be unacceptable. This being the case, any decision not to invoke this power, where

circumstances suggest that it would be appropriate were other statutory powers not available, must be clearly documented and explained to the managers.

[The arrangements for such decisions to be made within the Care Commission have yet to be determined.]

Conducting inquiries – NHS Boards

8.8 Arrangements under Part 4 of the Act within facilities operated by NHS Trusts and in a limited number of cases NHS Boards, will be subject to monitoring through various means.

8.9 In most cases, internal audit subjects the patients' funds to periodic review as part of their regular audit programme. This audit however, is unlikely to address qualitative aspects of practice as it relates to the Act, concerning the working relationship between financial systems and care planning.

8.10 The latter aspects of the operation of provisions under Part 4 will represent a new focus of supervisory activity within the health sector, and as such will require that staff who are directly involved in managing and working under the arrangements that are made, receive appropriate training and support in their role.

8.11 In the course of their duties, NHS Board officers may encounter problems or issues that have some bearing upon the suitability of the arrangements by which authorised managers are fulfilling their responsibilities under the Act.

8.12 In most cases, these matters will appropriately be dealt with through discussion and by the introduction of agreed changes to practice and procedures. Where this is not achieved, further action to achieve change may be required under the ‘Performance Assessment and Accountability Framework (PAAF) arrangements.

8.13 Where these efforts do not produce the required changes in matters relating to the management of residents’ financial affairs, or where further action is considered necessary, consideration can also be given by NHS Boards to revoke the power to manage under the Act.

8.14 In doing so, various policy/enforcement procedures will require to be established and followed.

8.15 The specific statutory power to revoke the power to manage is the only course of action that is available to NHS Boards in respect of unregistered facilities, in circumstances where the conduct of the authorised managers is considered to be unacceptable. This being the case, any decision not to invoke this power, where circumstances suggest that it would be appropriate were other statutory powers available, must be clearly documented and explained to the managers.

[The detailed arrangements for such decisions to be made within NHS Boards have yet to be determined.]

Dealing with complaints – The Care Commission

8.16 The Care Commission may receive complaints regarding the manner in which an authorised manager, or person(s) named in a Certificate of Authority, is managing a resident's financial affairs. Whether received verbally or in writing, the nature of the complaint should be set out in a written record.

8.17 The Care Commission has implemented its own complaints procedures which take into account Part 4.

8.18 However, in some cases, it may be appropriate to place requirements upon the authorised managers to change practices in the establishment, on the basis of the Care Commission's other statutory powers. Where these measures do not produce the required changes in matters relating to the management of residents' financial affairs, the supervisory body may consider whether revoking the power to manage under the Act is necessary.

8.19 In cases where the Care Commission invokes its other statutory powers to require changes in practice, it should be noted that the specific statutory power to revoke the power to manage is the only course of action that is available to the supervisory body in circumstances where the conduct of the authorised managers is considered to be unacceptable. This being the case, any decision not to invoke this power, where circumstances suggest that it would be appropriate, were other statutory powers available or agreement on future action reached, must be explicitly acknowledged and explained.

8.20 In considering the need for revocation, a record will be compiled on behalf of the Care Commission and the process outlined above concerning inquiries, applied in this instance also.

Dealing with complaints – NHS Boards

8.21 The NHS Board may receive complaints regarding the manner in which an authorised manager, or person(s) named in a Certificate of Authority, are managing a resident's financial affairs. Whether received verbally or in writing, the nature of the complaint should be set out in a written record. There are already in place well-established NHS complaints procedures.

8.22 In the case of unregistered establishments, the NHS Board will seek to secure the authorised managers' positive co-operation with an appropriate plan of action. Where this does not prove possible or the outcome is unsatisfactory, the supervisory body may consider whether revoking the power to manage is necessary.

8.23 It should be noted that the specific statutory power to revoke the power to manage is the only course of action that is available to the supervisory body under the Act, in circumstances where the conduct of the authorised managers is considered to be unacceptable. This being the case, any decision not to invoke this power, where circumstances suggest that it would be appropriate, were other statutory powers available or agreement on future action reached, must be explicitly acknowledged and explained.

8.24 In considering the need for revocation, a record will be compiled on behalf of the NHS Board and the process outlined above concerning Inquiries, applied in this instance also.

9. REVOCATIONS, OPT- OUTS AND APPEALS

Purpose of this part

9.1 This part of the code considers the means by which the power to manage, or in the case of a limited registration establishment, its registration, under adults with incapacity is revoked.

9.2 It outlines the responsibility of supervisory bodies to act in the capacity of authorised manager, in order that the financial affairs of the individual are managed appropriately after revocation, or in the event of an opt-out.

9.3 It also considers arrangements for ensuring the proper accountability of supervisory bodies when acting in this capacity.

The Care Commission - How to revoke the power to manage, or limited registration

9.4 When the Care Commission has decided to revoke the power to manage, or in the case of a limited registration establishment, cancel its registration, they should notify the authorised managers accordingly in writing. The notice should set out:

- The reasons for the decision to revoke the power to manage or cancel registration;
- The effective date of revocation or cancellation;
- Arrangements for contact between the establishment and the supervisory body regarding the latter's role as 'authorised manager' pending the transfer of this power to another person or authority;
- Details of the appeals procedure;
- A contact name, telephone number and address for all future communications with the supervisory body in its supervisory role;
- Signature of a designated /person within the Care Commission; [level of authority yet to be decided by the Care Commission].

9.5 Action by the Care Commission under any other statutory power that results in the de-registration of an establishment will automatically require the revocation of the power to manage, and the return of the registration document that contains its record of authority under the Act, in order that the power to manage can be practically removed.

9.6 Steps should be taken to secure the return of the note of authority and registration document, in order that the power to manage can be practically removed. In addition, all current Certificates of Authority should be secured and fundholders notified accordingly.

9.7 Any decisions made by the Care Commission can be the subject of representations in accordance with appropriate internal appeals arrangements as well as subsequent appeals to the sheriff. The period within which an appeal to the sheriff may be made is 21 days from the date the decision is intimated to the party making the appeal. Rules of court set out the form of appeal and the procedure for dealing with it.

9.8 The decision of the sheriff is final.

NHS Boards – how to revoke the power to manage

The supervisory body acting as authorised manager

9.9 Where the power to manage has been revoked, the supervisory body is required to take over management of the resident's affairs within 14 days of the revocation. Similarly, where a registered establishment has decided to opt out of the provisions of the Act, the supervisory body is required to take over management of the resident's affairs within 14 days. In doing so, it must comply with the same requirements that are imposed on managers of authorised establishments.

9.10 In these circumstances, the decisions and actions of the supervisory body must be managed and recorded separately from its previous actions and involvement with the particular authorised establishment, in its role as a supervisory body, and in respect of the Care Commission, its other statutory powers.

9.11 In the case of registered establishments, the Care Commission will have a continuing role on the basis of its other statutory powers. It will therefore be appropriate for the officer fulfilling the role of authorised manager in terms of the Act not to be involved in the ongoing inspection and supervision of the establishment.

9.12 In the case of all authorised establishments however, the officer fulfilling the role of authorised manager in terms of the Act should have no other involvement with the establishment under the terms of the Act.

9.13 Where the inspection officer, or NHS Board officer, acting as authorised manager, needs to make application for approval to sell moveable objects, or to manage the estate should its value exceed the prescribed limit, or for a Certificate of Authority, such applications should be made to the Care Commission. The Care Commission will take into account the need for separation between decisions related to individual residents' monies, and where decision making sits in regard to the establishment.

9.14 The supervisory body must transfer the management of the resident's affairs within 3 months, to another appropriate establishment, authority or person (who may be the resident). The task of transferring this responsibility will require the supervisory body to consult with the resident, their nearest relative, any other person with an expressed interest in their affairs, and the relevant local authority.

9.15 In the event that no other party is prepared to do so, it will fall upon the Local Authority to apply for an intervention order under the provisions of Part 6 of the Act.

Handling complaints regarding the supervisory body acting as authorised manager

9.16 Arrangements should be in place to ensure that any complaints as to the supervisory body's conduct in its role as authorised manager, are dealt with by a process which is specifically for this purpose, and that is suitably separate from the means by which complaints concerning its role as a supervisory body are investigated.

Annulment of revocations

9.17 If at any time during its continuing involvement with the establishment in the context of its other statutory role, the supervisory body becomes satisfied that the circumstances that led to the revocation no longer apply, it may annul the revocation.

9.18 In this event the adults with incapacity note of authority, or registration document, and all Certificates of Authority, will require to be re-issued by the supervisory body, following confirmation that all details included on the certificates are correct.

10. INFORMATION MANAGEMENT

Purpose of this part

10.1 This part of the code considers the detail that should be included in the registers that supervisory bodies are required by the Act to keep, concerning authorised establishments.

10.2 It also outlines other information that it will be necessary for supervisory bodies to manage in order that they are able to inform and advise various professional bodies, relatives and residents about the information that is held regarding named individuals.

Registers

10.3 Supervisory Bodies are required to maintain a register of the establishments for which they have responsibility under the Act. Frequent access to this information will be required by a wide range of staff and members of the public. In addition, details contained in the various registers and records will frequently require to be changed and the resulting variations or revocations notified to relevant parties within prescribed time limits.

10.4 In respect of the Care Commission, basic information concerning registered establishments will be held on the appropriate registers. Additional information for the purposes of the Act will be required in respect of:

A. POWER TO MANAGE - FULL REGISTRATION

the name, address, contact, and personal details of the authorised managers for each establishment

B. REGISTRATION OPT OUT

the name, address, contact, and personal details of the authorised manager for each establishment, and type of service offered by each separate registered establishment that has chosen to opt out of the provisions of Part 4 of the Act under Section 35(3).

C. POWER TO MANAGE - LIMITED REGISTRATION

the name, address, contact, and personal details of the authorised manager for each establishment, and type of service offered by each separate registered establishment that has been granted the power to manage residents' financial affairs under Section 36 of the Act.

10.5 In respect of NHS Boards, registers should set out the following information:

D. POWER TO MANAGE - UNREGISTERED SERVICES

the name, address, contact, and personal details of the authorised manager for each establishment, and type of service offered by each separate unregistered establishment.

10.6 All registers should be set up and maintained in electronic form. They must be capable of transferring data and sharing access to data between registers, and should be established according to a common protocol as regards the inputting, storage, retrieval, access and disposal of data. All records will be subject to the provisions of the Data Protection Act 1998.

Records and Reports

10.7 Each supervisory body is required to establish policies and procedures regarding the management of information, records and reports concerning actions under Part 4 of the Act. In all cases, any intervention or communication concerning oversight of an authorised manager under the Act should be the subject of a record which enables the actions of the supervisory body to be transparent, and for it to be held appropriately accountable for its actions.

10.8 Section 28 of the Regulation of Care (Scotland) Act 2001 relates to registers, applications for registration and content of certificates, but not records of the Care Commission in general. The Care Commission will wish to take into account Part 4 when considering IT requirements and recording of information.

10.9 In the case of NHS Boards acting as a supervisory body, each should introduce practices that ensure a suitably transparent record of its actions in the context of its responsibilities under the Act. In addition, a means of storing all records, reports and correspondence concerning individual residents in respect of whom a Certificate of Authority has been issued, should be established.

10.10 The details that should be stored by each supervisory body in respect of each resident for whom a Certificate of Authority has been issued are:

- the name, age and gender of the resident.

10.11 For each Certificate issued:

- The formally recorded number of each Certificate issued;
- The name, address and contact details of the establishment where the person is resident;
- The period of validity of the certificate, the date of issue and the date of expiry;
- Details of the specified accounts and other funds;
- Names of the authorised persons on the Certificate;
- The date and details of each variation made to the Certificate;
- The date of revocation, if appropriate;

- The period of validity of the medical certificate of authority, the date of issue and the date of expiry, relating to each particular Certificate of Authority.

11. TRANSITIONAL MATTERS?

APPENDICES

APPENDIX 1

Regulation 2

SCHEDULE 1

Adults with Incapacity (Scotland) Act 2000 (“the Act”)

Certificate of incapability in relation to decisions as to, or safeguarding interest in, resident’s affairs.

I …………………………………….. (full name)

of ……………………………………………………………………………………………….

…………………………………………………………….…… (professional address)

have examined the following resident on …../…../….. (date) in my capacity as ……………

……………………………………………………………………………………………….. *.

…………………………………………………………………… (resident’s name)

of ………………………………………………………………………………………….

…………………………………………………………………………………………….

………………………. (authorised establishment where resident lives)

…./…./…. (resident’s date of birth).

I am of the opinion that he/she is incapable in relation to:

- decisions as to**
- safeguarding his/her interests in **

any of the affairs referred to in section 39 of the Act.

This is because of:

- mental disorder**
- inability to communicate because of physical disability**

………………………………………………………………………………………………..
………………………………………………………………………………………………..
……………………………………………………………………………………………….
(brief description of reasons for mental disorder/inability to communicate).

I am not related to the resident or to any of the managers of the authorised establishment in which he/she resides, nor do I have any direct or indirect financial interest in the authorised establishment.

In assessing the capacity of the resident, I have observed the principles set out in section 1 of the Act.

……………………………(signed)   …………………………(printed name)

…./…./….   (date)

* the person signing the certificate must be a medical practitioner; insert as appropriate e.g. GP, specialist in mental disorder.

** one of these must be deleted unless both apply.

APPENDIX 2

Regulation 3(1)

SCHEDULE 2

Adults with Incapacity (Scotland) Act 2000 (“the Act”)

Certificate to inform decision whether to dispense with intimation under section 37(3) or action under section 37(4).

I …………………………………………………………. (full name)

of ……………………………………………………………………………………………….

……………………………………………………. (professional address)

have examined the following resident on …./…./…. (date) in my capacity as

………………………………………………………………………………………………*

…………………………………………………………………………. (resident’s name)

of ………………………………………………………………………………………..

………………………………………………. (authorised establishment where resident lives)

…./…./…. (resident’s date of birth).

I am of the opinion that it would pose a serious risk to the health of the resident named above for them to be notified:

- that their capacity is to be medically examined under section 37(2) of the Act;
- of the result of that medical examination;
- that their affairs are to be managed under section 37 of the Act.**

The reason for this opinion is ………………………………………………………..

……………………………………………………………………………………………….

……………………………………………………………………………………………….

……………………………………………………………………………………………….

(brief description of reason(s)).

I am not related to the resident or to any of the managers of the authorised establishment in which he/she resides, nor do I have any direct or indirect financial interest in the authorised establishment.

I am a medical practitioner approved by ………………………………… (approving body) for the purposes of section 20 of the Mental Health (Scotland) Act 1984 as having special experience in the diagnosis or treatment of mental disorder. (delete if inappropriate).

………………………….(signed)   ……………………………….(printed name)

…./…./…. (date).

* the person signing the certificate must be a medical practitioner; insert as appropriate e.g. GP, specialist in mental disorder,

** If any alternative is inappropriate, please delete it.

APPENDIX 3

Adults with Incapacity(Scotland) Act 2000("the Act")

PART 4

NOTICE OF INTENTION TO MANAGE THE FINANCIAL AFFAIRS OF A RESIDENT

To be completed by the Manager of the Authorised Establishment and submitted to the relevant Supervisory Body together(if appropriate) with a Signed Medical Certificate of Capacity.

This notice must include the following details relating to the resident:

Name
date of birth
address
details of those people consulted
details of what alternative actions have been considered and why they are deemed inappropriate
indication of whether intimation to the adult would pose a serious risk to the health of the resident

I do / do not consider that intimation would pose a serious risk to the health of the resident and I request / do not request that a direction be issued not to disclose relevant matters.

APPENDIX 4

Adults with Incapacity (Scotland) Act 2000("the Act")

PART 4 SECTION 42
CERTIFICATE OF AUTHORITY

As issued by the Supervisory Body
Scottish Commission for the Regulation of Care
NHS Board

DETAILS OF THIS CERTIFICATE SHOULD INCLUDE THE NAME, DATE OF BIRTH AND RESIDENCE OF THE RESIDENT AND THE NAME OF THE AUTHORISED MANAGER PLUS THE FOLLOWING:

Specify accounts or other funds of the resident
name the persons specified in the application (the "authorised persons")
specify the period of validity of the certificate

APPENDIX 5

SOME EXAMPLES OF GOODS AND SERVICES PURCHASED THROUGH THE USE OF PERSONAL FUNDS OF ADULTS WITH INCAPACITY

Personal Services
Hairdressing
Services of a private chiropodist
Manicure
Facials
Barbers
Massage and sauna
Provision of private dry cleaning
Provision of someone to read and talk to Service users, or take them out on a one to one basis

Recreation
Music tapes
Photography, such as professionally taken photographs
Subscriptions to magazines/ newspapers
Television, hi-fi and video
Records, tapes and video tapes
Books, games and magazines (including Braille, large print etc.)
Computer games
Entertainers
Hobbies
Membership of community clubs
Jigsaws

Arts and Crafts
Sewing equipment
Dressmaking materials
Knitting, including knitting machines
Painting, drawing
Equipment for the cultivation of indoor plants
Material & tools for model making kits
Fees for evening classes

Pets
Tropical fish and fish tanks

Outings
- Purchase of tickets for outings to cinemas, theatres and recreation centres
- Visits to relatives
- Entertaining relatives and friends
- Shopping trips
- Visits to circus

Personal Possessions
- Pot plants, fresh flowers and containers
- Personal ornaments and pictures
- Items of furniture
- Toiletries and make-up
- Rugs, curtains and clocks
- Powered wheelchairs
- Continental quilts
- Electric blankets
- Writing materials
- PC, typewriter
- Non NHS spectacles and lenses
- Jewellery
- Clothing
- Special personal equipment e.g. portable foot spa
- Electric shavers, toothbrushes, hairdryers and blankets

Consumables
- Carry out foods
- Special items; e.g. birthday cakes
- Snacks
- Confectionery
- Soft drinks
- Cigars, snuff

Funeral Expenses
- Insurance policies to cover funeral expenses

Miscellaneous
- Outings on birthdays, anniversaries and other special occasions
- Purchase of holidays or weekend breaks
- Subscription to joint purchases such as bird tables, fish tanks, pets and pet food, veterinary services
- Specialist equipment – chairs, mattresses, beds, specialist hearing aids etc.

APPENDIX 6

GLOSSARY

Manager:
- The Health Board in relation to an NHS Scotland hospital.
- The State Hospital Management Committee (if appointed) or; the Health Board, Special Health Board, NHS Trust, CSA for the Scottish Health Service or person appointed by them to manage, as applicable.
- The person(s) carrying on the hospital, in relation to a hospital registered under Part IV of the Mental Health (Scotland) Act 1984
- The person who is identified under Section 7(2)(b) of the Regulation of Care Act (Scotland) 2001 in the application for registration of the establishment
- If an application is made under section 27A(1) of that Act, the local authority or any person appointed by the local authority to manage the establishment
- Anyone identified in pursuance of regulations under section 24(7)(j) of that Act

Primary carer
A paid carer who carries the principal responsibility for providing direct care to the resident and for monitoring the overall care that the person actually receives

Resident:
An adult whose main residence for the time being is the authorised establishment, or who is liable to be detained under the Mental Health (Scotland) Act 1984

Guardian:
(includes Guardians appointed under the law of any other country to act for an adult during his incapacity shall be entitled to act for the adult if the guardianship is recognised by the law in Scotland.)

Continuing attorney:
(includes a person appointed by the law of any country or granted powers relating to the granters property or financial affairs)

Fundholder:
The person or organisation holding funds on behalf of the adult.

Moveable Property:
Assets other than land or buildings e.g. furniture, pictures, jewelry, bank accounts, shares