

**THE ADULTS WITH INCAPACITY (MANAGEMENT OF RESIDENTS' FINANCES) (SCOTLAND) REGULATIONS 2003**

**FINAL REGULATORY IMPACT ASSESSMENT**

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## **Introduction**

1. 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 private and voluntary 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). In this context, the finances that may be managed exclude benefit entitlements provided under Social Security legislation, and thus may only encompass the free assets which a resident may have or receive, such as private income and savings, stocks and shares etc.

2. The intention is that Part 4 should be used for residents 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 £10,000 in any financial year, and authorised managers will have to get written permission from their supervisory body to manage amounts above this limit, and for individual disposals of moveable property exceeding £100. These limits are set in Regulations approved by Parliament, and may be altered from time to time.

3. This assessment considers the impact – both costs and benefits – of the requirements of Part 4, and of compliance with the Codes of Practice, on the private and voluntary care home sector. It solely concerns the private and voluntary care home sector (i.e. private and voluntary run care homes), who are subject to the inspection and registration regime operated by the Care Commission.

## **Objective**

4. These Regulations require managers of authorised establishments, on or after 1 April 2003, to have first considered and then continuously apply the principles of the Adults with Incapacity (Scotland) Act 2000 in any intervention they plan to make, and subsequently enact, regarding the management of residents financial affairs where the residents are incapable of doing so themselves.

## **Risk Assessment**

5. The primary purpose of regulating intervention under Part 4 is to ensure that an adult with incapacity whose main residence is in an authorised establishment, their family, and/or primary carer, can be assured there are robust procedures in place to protect a resident's financial affairs, and that managers of such establishments wishing to manage the financial affairs have a lawful means of permitting their intervention in the financial affairs of a resident. Failure to comply with the requirements of Part 4 could lead to the revocation of an establishment's authority to manage residents' financial affairs, possible revocation of a registered establishment's registration, and legal action to recover misused funds.

## **Options**

6. Three options have been identified.

Option 1 - a service may opt-out of Part 4 by notifying the Care Commission it does not wish to be registered for the purposes of managing incapable residents' finances.

Option 2 - where another lawful intervention is already in place regarding the resident, or where the service may have identified another lawful intervention permitted under the Act, which is less restrictive for a resident than Part 4 management.

Option 3 - registration and authorisation to manage residents' financial affairs under Part 4 of the Act, requiring services to comply with the provisions of the Act, as supervised by the Care Commission in fulfilment of its regulatory role, and in compliance with the Code of Practice for Managers of Authorised Establishments.

### Option 1

7. The Scottish Parliament has decided that no private or voluntary care service should be forced to manage the financial affairs of a resident incapable of managing their own finances, and this option provides a means by which such a service may voluntarily opt out of being registered by the Care Commission for this purpose. This would mean that the service's registration document would not permit the management of incapable residents' financial affairs as provided for under Part 4; thus existing incapable residents, and any that may subsequently move into that service, would not have the financial management option by the care provider available to them.

### Option 2

8. Part 4 may not be used where another lawful intervention is already in place which permits the management of a resident's financial affairs. Examples would be where an existing Power of Attorney exists regarding the resident, or where a Trust arrangement has been established. There are also other interventions possible under the Act which may be used to manage an incapable resident's financial affairs, notably under parts 3 and 6. Section 1 of the Act requires that its principles governing any intervention in the affairs of an adult must be given effect to. In this context, the key tests to be applied are that any intervention must be a lawful one which benefits the adult, and be the one least restrictive of the adult's freedom. It is therefore possible for existing lawful interventions to continue, or for the manager of a service to make use of other interventions available under the Act concerning financial management. In the latter example however, any other intervention must have been fully considered by a manager of an authorised establishment, and be the one consistent with compliance with the Act's principles.

### Option 3

9. 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 is now in operation, with commencement of Part 4 on 1 April 2003 completing the range of interventions permitted by the Act. Non-statutory 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 Care Commission, thus providing managers of authorised establishments who wish to do so to lawfully manage the financial affairs of an incapable resident.

## Regulation

10. The Care Commission 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.

11. 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

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

- the **Code of Practice for Managers of Authorised Establishments** is written for 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.

13. 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.

## Numbers of care homes and residents

14. Figures in *Scottish Community Care Statistics 2002* show that at 31 March 2002 (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	319	6,007 residents
	private	340	5,160 residents
	voluntary	914	8,667 residents
registered private nursing homes		<u>524</u>	<u>21,733</u> residents
		<u>2,097</u>	<u>41,567</u>

*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 private and voluntary sectors*

15. 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-run homes had their financial affairs managed by the home.

16. If these figures are replicated across the country, it would suggest that there are around 784 residents in private homes, and around 1,818 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 however that many of these will relate only to the management of DWP benefit allowances as the resident would have no other funds: Part 4 is not relevant to these, since they are governed by arrangements laid down by the Department for Work and Pensions.

17. All private and voluntary registered establishments will be expected to operate Part 4 if this is the most appropriate intervention for any individual (unless they opt out by giving notice to the Commission, which will be noted on the Registration Certificate). It seems likely that most private or voluntary services above will need to manage the financial affairs of incapable residents, and will therefore need to comply with Part 4, unless they opt out, or where another lawful intervention is more appropriate.

### **Compliance Costs**

18. There would be no costs under Option 1 above. Option 2 may result in costs to the care provider if there is no existing lawful arrangement in place, and where the manager is required to give effect to the principles of the Act in determining which, if any, intervention under the Act is the most appropriate for the resident. For Option 3, 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 any 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.

19. 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 staff time involved in applying for medical examination, applying for certificates of authority, liaising with GPs, social workers, family relations, and with the Care Commission and possibly the Office of the Public Guardian. Where establishments operate to lesser standards, costs will rise as they seek to meet the requirements of the Code of Practice. As paragraph 18 mentions, there are also the costs of the medical practitioners' fees which could be significant, and it is likely these would, initially, need to be met from the establishment's own resources, before recouping the cost from the resident's income.

20. Extra costs falling on authorised establishments need to be balanced against the assurance residents, and their families, will have that their finances are being managed by authorised persons for their benefit, in accordance with good practice and monitored by the Care Commission as part of its inspection process. Managers, and those acting under their direction, may also be assured that they are acting lawfully in accordance with the Act's principles.

## **Results of Consultation**

21. There has been extensive consultation on Part 4 with the care service sector, NHS Boards and Trusts, Local Authorities, the Care Commission, CoSLA, ADSW, the Mental Welfare Commission, the Law Society for Scotland, the Banking sector, and many interested representative and voluntary sector organisations. Over 2,300 organisations and individuals were invited to comment on the proposals. While the majority of those responding welcomed Part 4's introduction as completing the final piece of the jigsaw in terms of the Act's overall impact and range of interventions for those adults with incapacity, there was mixed views from consultees on the necessity for the documentary materials required to secure the authority to manage a resident's financial affairs. While approximately 50% of respondents were satisfied that this was acceptable to demonstrate the Act's principles had been properly and consistently applied, others objected that the administrative burdens were overly bureaucratic and would be costly to operate. Very few private or voluntary sector interests responded, and those that did argued that the sector could not absorb the costs involved, and called for additional financial assistance to be made available to enable the sector to comply.

## **Enforcement, Sanctions, Monitoring and Review**

22. Unless the establishment has opted out of Part 4, Managers and authorised staff of care home services 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, if Part 4 is deemed the most suitable intervention available under the Act. The Care Commission has the responsibility for inspection of all registered services to ensure continued compliance with the requirements and conditions of registration, including Part 4 operation. In so doing, from 1 April 2003, it will use the Code of Practice for Supervisory Bodies and may, after investigation, revoke an establishment's authority to manage an individual resident's financial affairs it has issued, or if necessary the establishment's power to manage any resident's financial affairs under Part 4. The Mental Welfare Commission also has powers to investigate alleged abuse of an incapable adult's welfare and financial circumstances.

23. Beyond the inspection and monitoring to be conducted by the Care Commission, it is intended to review operation of Part 4 of the Act during 2004-05.

## **Conclusion**

24. For the reasons described above, it is considered that additional costs arising for the private and voluntary 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 residents, 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. Managers of establishments will also benefit through being assured that they are lawfully authorised to manage residents' financial affairs.

**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 Minister of the Scottish Executive**

.....**Date**