



Adults with Incapacity

(Scotland) Act 2000

Code of Practice

For supervisory bodies under part 4 of the Act



SCOTTISH EXECUTIVE

Making it work together

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

CODE OF PRACTICE

FOR SUPERVISORY BODIES UNDER PART 4 OF THE
ACT

EFFECTIVE FROM 1ST OCTOBER 2003

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Adults with Incapacity (Scotland) Act 2000

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EXECUTIVE SUMMARY

1. The Adults with Incapacity (Scotland) Act 2000 (the Act) received Royal Assent in May 2000. It sets out a new framework for regulating the intervention in the affairs of an adult who has or may have impaired capacity in a wide range of property, financial and welfare matters.

2. Part 4 of the Act provides a mechanism whereby managers of certain residential and care establishments (including care homes and hospitals) may manage the finances of adults who reside there who in the opinion of a medical practitioner are incapable of managing them. Managers will only be authorised to intervene in respect of a particular resident adult however where no other arrangements are in place for managing that adult's finances and also where it is suitable and appropriate that the managers intervene.

3. This Code, called the "Code of Practice for Supervisory Bodies" (the Code), sets out in detail the principles, rules and guidelines which should be followed by supervisory bodies in meeting their obligations in this area and also explains the obligations which are placed on managers themselves. Supervisory bodies will be expected to comply with the Code.

4. There are three supervisory bodies for the purposes of Part 4 of the Act: NHS Boards, the State Hospital and the Scottish Commission for the Regulation of Care (the Care Commission). Their supervisory responsibilities for the purposes of Part 4 of the Act are as follows:

NHS Boards:

- NHS health service hospitals

The State Hospital Board:

- The State Hospital

The Care Commission:

- Independent hospitals
- Private psychiatric hospitals
- Care home services
- Limited registration services

Further details are set out at paragraphs **1.3 to 1.5 and 4.1 to 4.17** of the Code.

Part 4 of the Act is limited to the types of establishments above and only managers of these establishments will be able to rely on Part 4 of the Act. Managers of these establishments must follow the processes set out in Part 4 of the Act (and noted at paragraph 6 below) before they will have the power and authority to manage an adult's finances under Part 4 of the Act.

Outline of the authorisation process

For almost all practical purposes, the following steps must be followed before an establishment will be authorised:

- (i) *The establishment itself must be authorised.*

The process envisaged for NHS Hospitals and the State Hospital is that the hospital should be issued with a formal ‘Note of Authority’ by their relevant supervisory body before they will be regarded as being authorised. **This is discussed in more detail at paragraphs 5.6 to 5.14 of the Code.**

Of other establishments - independent hospitals, private psychiatric hospitals, and care home services - must be registered under the Regulation of Care (Scotland) Act 2001 (the “ROC Act”), and as such they are by definition authorised establishments. **This is described in detail at paragraphs 5.2 to 5.5 of the Code.**

In addition, under the ROC Act residential establishments which only provide accommodation (and do not provide a care service) may, if they wish to be empowered under Part 4 of the Act to manage a resident's finances, apply to be registered as a “limited registration service”. **Limited registration is discussed at paragraphs 3.13 to 3.17 of the Code.**

Certain establishments (those other than authorised NHS Hospitals or the State Hospital) may choose to opt out of Part 4 of the Act as part of their application for registration under the ROC Act or, if they choose, following registration, in which case they will not be authorised to manage any resident's finances. **Opting out of Part 4 is considered in detail at paragraphs 3.7 to 3.12 of the Code.**

- (ii) *The managers of authorised establishments must then obtain a certificate of incapacity from a medical practitioner that the resident is incapable of managing his or her finances.*

First, it must be appropriate for Part 4 of the Act to apply (see generally **paragraphs 1.1 and 1.2 of the Code**). The managers must therefore look at the existing arrangements in place and consider all other appropriate courses of action which could be taken in relation to the resident. In doing this they must take into account the general principles of the Act (discussed at **paragraphs 1.16 to 1.19 of the Code**).

Having gone through that process, if they are still of the view that management of a resident's finances under Part 4 is the best option, they must then arrange for a medical practitioner to examine the resident's capacity (see **paragraphs 1.12 to 1.15 of the Code** on the definition of incapacity). If the medical practitioner considers that the resident is incapable of managing his or her finances, the medical practitioner shall issue a certificate in the prescribed form (an example of the form may be found at **Appendix 2 of the Code**). Normally, managers must send a copy of the certificate of incapacity to the adult whose affairs will be managed, and to the supervisory body, and must notify the adult that they intend to manage the adult's finances. Where managers consider however that notifying the adult would be likely to pose a serious risk to the adult's health, the Act sets out a procedure which must be followed if managers do not wish to be required to notify the resident. **The above processes are set out in detail at Paragraphs 6.15 to 6.41 of the Code. Paragraphs 6.25 to 6.30 in particular discusses non-intimation to the adult.**

- (iii) *Having obtained a certificate of incapacity, the managers in almost all practical cases must then obtain a section 42 certificate from the supervisory body.*

A section 42 certificate **must** be obtained **before** managers can spend or deposit a resident's cash (e.g. petty cash) or if they withdraw or spend funds from a resident's account. The supervisory body has a discretion as to whether or not to grant such a certificate. The supervisory body must be satisfied that it is appropriate to issue a certificate before they do so. The application process for a section 42 certificate is discussed in detail at **paragraphs 6.44 to 6.54 of the Code**.

The only circumstance in which a section 42 certificate would not be required is where managers are merely holding moveable property on behalf of a resident. However, if they wanted to dispose of a resident's moveable property by sale, they would be required to obtain a section 42 certificate (and would also require to obtain the consent of the supervisory body if the amount realised would be more than £100).

Managers may also specify in their application the names of other officers or members of staff of the establishment whom they wish to have authority to manage a resident's finances. **Only those persons who are named on the section 42 certificate will have that authority however.**

What can be managed

5. Once they have authority to manage a resident's finances (see above), managers will be able to manage the following matters on behalf of that resident (up to certain financial limits):

- Claiming, receiving, holding and spending any pension, benefit or allowance or other payment (other than under the Social Security Contributions and Benefits Act 1992 – **Appendix 1 of the Code** lists what managers are not authorised to manage under Part 4 of the Act) to which the resident is entitled
- Claiming, receiving, holding and spending any money to which the resident is entitled
- Holding any other moveable property (e.g. personal effects and possessions) to which the resident is entitled
- Disposing of (e.g. by sale) the resident's moveable property

Managers must not manage any matter where:

- In the case of cash or funds, it has a value greater than £10,000
- In the case of disposals of moveable property, the amount realised would be more than £100

- unless they have first obtained the consent of the relevant supervisory body.

In considering whether these initial limits would be exceeded by carrying out the action or transaction concerned, managers must also take the aggregate value of funds or moveable property into account. Where managers wish to manage matters over the relevant value, they must obtain the consent of the supervisory body.

Managers are additionally obliged to ensure that funds (including cash) held over £500 are placed so as to earn interest.

6. In managing a resident's finances under Part 4 of the Act, managers must act in accordance with the general principles and rules set out in section 1 of the Act and in particular with the rules set out in Part 4 of the Act (particularly section 41 of the Act). **The general principles are set out in detail at paragraphs 1.16 to 1.19 of the Code.** The practical implications of these are also discussed in general terms at **paragraphs 7.12 to 7.28 of the Code.**

7. Once they have the authority, managers must comply with their duties under the Act, and will also be subject to monitoring and supervision by the supervisory body under the Act. The supervisory body also has remedial powers under section 45 of the Act to revoke the manager's power to manage and to take over temporary management of the resident's finances. **This is discussed in detail at paragraphs 6.58 to 6.63 and 9.4 to 9.21 of the Code.**

The role of the supervisory bodies

8. The supervisory bodies have a number of supervisory obligations under Part 4 of the Act. Amongst other matters, they are responsible for granting Certificates of Authority to managers to spend and withdraw a resident's funds (under section 42 of the Act), for monitoring how managers are managing residents' finances and for investigating complaints and conducting inquiries in relation to management. Supervisory bodies also have a number of remedial powers under Part 4 which include the power to revoke the authority to manage and, on a short term basis, to take over management of a resident's finances.

The general role of the supervisory bodies is described in more detail at **paragraphs 4.1 to 4.17 of the Code.** Monitoring requirements are described in more detail at **Part 7 of the Code.** Conducting inquiries and dealing with complaints is discussed at **Part 8 of the Code.** The power to revoke the managers' authority to manage is discussed at **Part 9 of the Code.**

(End of Executive Summary)

INTRODUCTION

General

1.1 Part 4 of the Adults with Incapacity (Scotland) Act 2000 (the “Act”) provides a means of lawful intervention to manage the financial affairs of adults with incapacity, while providing appropriate protection from abuse of their financial affairs for those adults made subject to its provisions. The key aim is to ensure that such adults have their rights respected, and that everyone with responsibilities under the Act understand that they have an obligation to safeguard these rights, consistent with the Act's general principles. Part 4 applies to those relatively few adults who lack capacity to manage their financial affairs and who have no other means available to do so under the AWI Act and whose main residence is a care home or hospital. It establishes a statutory regime that permits managers of certain establishments to manage the financial affairs and property of certain residents. Other accommodation service providers, referred to as ‘limited registration’ services in paragraphs **3.13 to 3.17** of this Code, *may* seek to register with the Care Commission for the purposes of managing the matters prescribed in Part 4.

Part 4 provides that managers may only manage a resident’s financial affairs where such intervention is considered to be the most suitable consistent with the Act’s principles. Part 4 does not apply where certain other proxy arrangements are in place for managing a resident’s finances. This means that they cannot manage the funds of residents where there is:

- a **continuing power of attorney**: where individuals make plans for their future by granting such a power to a person of their choice (at a time when they have capacity so to do) and which includes management of their financial affairs, and which has been registered with the Office of the Public Guardian;
- an **authority to intromit with funds** (Access to Funds) has been granted by the Office of the Public Guardian;
- an **intervention or guardianship** order with relevant financial powers approved by the Courts; or
- where funds are excluded by the Act from being managed because they are payments of the type of social security benefits listed in Appendix 1

The authority to manage matters under Part 4 is limited to:

- £10,000 - for cash and funds; and
- £100 for other types of moveable property

There may be exceptions to these - see paragraphs **6.66 to 6.69** of this Code.

The exercise of the powers will be subject to stringent monitoring and record keeping.

1.2 Management of an adult’s finances by a care home or hospital under Part 4 is therefore an important measure under the Act, but whose use must be carefully considered as being of benefit to the adult, the one least restrictive of the adult’s freedom, and having first taken into account the adult’s views and those of any other person considered to have an interest in the adult. It is therefore envisaged that the powers in Part 4 will mostly be used for those residents with impaired capacity in establishments who have no one other than the manager of the establishment to lawfully act for them.

Who should read this Code?

1.3 This detailed Code of Practice should be *read* and *adhered to* by staff of the supervisory bodies (Scottish Commission for the Regulation of Care (the Care Commission); NHS Boards; and State Hospital Board(s)) that carry responsibility for registering care homes, private psychiatric and independent hospitals, and NHS hospitals in terms of authorising those unregistered hospitals, to manage the financial affairs of adults with incapacity. All staff within the Care Commission, and NHSScotland hospitals, who are or who may be involved in supervising, monitoring and authorising intervention under Part 4 of the Act, and those who may be called upon to manage the financial affairs of adults with incapacity, should therefore familiarise themselves fully with the contents of this Code.

1.4 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 Act, and who have been provided with a separate Code of Practice for Managers of Authorised Establishments (Managers' Code).

1.5 Those authorised establishments which are required to register with the Care Commission (care homes, independent and private psychiatric hospitals) will be covered by the requirements of the Act unless they choose to opt out of being so, in which case they may not manage the finances of residents to whom Part 4 would apply. Those authorised establishments which choose to register with the Care Commission for the purpose of Part 4 of the Act (limited registration service) will also be covered by the requirements of the Act. It is therefore important that managers of these establishments should fully familiarise themselves with 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. Whilst all managers should make themselves aware of the provisions of Part 4 of the Act, it is recognised that the operational structures in some establishments will mean that 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 staff and managers may be working, and of the various systems that may exist for supporting them in fulfilling their responsibilities under the Act.

1.7 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 NHSScotland 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.

1.8 In recognition of these differences and where considered helpful, matters are dealt with in the Code under separate headings for registered (supervised by Care Commission) and unregistered establishments (supervised by NHS Boards).

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 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 ‘adult’ or ‘resident’). 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 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 other services (limited registration service) which may register with the Care Commission for this purpose. These new arrangements are to come into force on 1 October 2003. This Code of Practice will therefore supersede Circular No: CCD2/1999, and NHS MEL (1999)25.

1.11 The Act introduces a number of new proxy arrangements permitting management of the financial affairs of adults with impaired capacity. Parts 2, 3, 4 and 6 make provision permitting intervention in the financial affairs of an adult. The appropriate form of intervention is to be determined by applying the principles in section 1 of the Act. The application of the principles should have the effect of limiting the situations in which it is necessary to use the powers detailed in Part 4. Intervention under Part 4 should only be necessary after all other alternative measures under the Act, or other competent lawful management arrangements, have been carefully considered and found to be unsuitable by the multi-disciplinary care team, and where it will benefit the resident.

Incapacity

1.12 ‘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. Further information on incapacity as it applies in relation to the operation of Part 4 is provided at section 7 of this Code.

1.13 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 on the relevant matter.

1.14 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.

1.15 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))

1.16 All decisions made on behalf of an adult with impaired capacity must give effect to the principles of the Act. These are:

Principle 1 – benefit

1.16.1 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

1.16.2 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

1.16.3 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: 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

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

- the 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

1.16.5 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.

1.17 These principles are to be applied when a decision is being made on whether to invoke the provisions of the Act, and when an adult’s financial affairs are being managed. It will be important to ensure that the proposed intervention is necessary to benefit an adult who lacks capacity. Part 4 should not be used where an adult can, with some assistance, exercise sufficient or adequate control over their financial affairs. Equally, Part 4 is intended to meet a clearly identified need, and residents who are incapable have a right to expect that their affairs will be properly and competently managed as part of the overall care they receive.

1.18 Even when the powers to intervene under the Act are being exercised, 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.

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

Limitation of liability

1.20 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.

1.21 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.

1.22 Excluding DWP benefits which may only be managed under Appointeeship arrangements, managers may manage the financial affairs of residents with an incapacity whose total assets, including savings and income do not exceed £10,000. The establishment should retain a balance in order to meet the possible day to day purchase requirements of the resident. Assets exceeding £500 must be placed in an interest bearing account. Approval to manage assets of a higher limit, or to dispose of moveable property beyond £100, may be sought from the supervisory body. In such circumstances however, managers and the supervisory body, should consider whether this would be of benefit to the resident, and whether other interventions under the Act might be more appropriate.

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 can still be helpful as a useful starting point in considering responsibilities under the new framework of 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 1 of the Act and these must inform all of the decisions and actions taken by 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, or in supported living arrangements. 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 others there may be 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 due to impaired capacity. This includes arrangements which will be

required for residents in hospitals. It also allows services which provide accommodation but are not a care service to seek registration for the sole purpose of managing resident's finances (limited registration services). Part 4 provides for a robust system of authorisation, control and regulation of these arrangements, all aimed at protecting and benefiting the adults concerned.

2.7 The provisions of the Act are designed to regulate intervention in the affairs of adults who have or may have impaired capacity by giving effect to the Act's key principles, which are considered in more detail below. In many respects they echo the principles and approach that was set out in the Crosby Report and CCD 2/99. As a general guide, any arrangements that have been developed on the basis of the principles and practices described in these documents 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 managers should make any decision about a resident's financial affairs.

2.8 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.

2.9 In the course of registering care homes and other establishments, the Care Commission will require that rigorous and robust systems are in place with regard to the finances of all residents who may require varying levels of 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 accommodation settings, will have some level of involvement in the day to day management of residents' finances.

2.10 In ensuring that the general quality of financial management arrangements in authorised establishments are of a good standard, the Care Commission and NHS Boards will create a context for handling the financial affairs of adults with incapacity. For all authorised establishments managing residents' financial affairs, including limited registration establishments, the records in respect of transactions which require to be kept are detailed in section 41(e) of the Act, as clarified in paragraphs **7.39 to 7.42** of this code. Hospitals will have been managing financial matters under the Crosby report guidance, and these continue to represent a good basis on which to integrate Part 4 practice.

2.11 Part 4 cannot replace existing practices where residents retain sufficient capacity, perhaps with assistance, to exercise a measure of influence and choice as to how their funds are spent. These are not adults with incapacity, and so such arrangements are able to continue. For those with an incapacity relating to financial matters, and where another proxy is already in place e.g. DWP Appointeeship, Powers of Attorney, these arrangements may 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.

2.12 In order to comply with section 37(2) of the Act, and the Act's principles, a manager must consider all other appropriate courses of action, and he/she may in fact conclude that, for an adult with incapacity, there is no need for the above mentioned types of proxy arrangements to be ended, and for arrangements to be put in their place under the terms of Part 4. (DWP Appointeeship cannot, in any case, be included within Part 4 arrangements.)

This however, places a significant burden of responsibility upon those involved, both to satisfy themselves that matters are being handled competently and appropriately, and to ensure these are consistent with the expressed wishes of the resident. Care records will show that such arrangements have been reviewed and monitored.

2.13 Under the Act, managers are the professionals who are empowered to decide whether an adult should be assessed as to whether they lack capacity and subsequently, whether their affairs should be managed under the provisions of the Act. It is important therefore that managers understand that they are accountable for the actions they may take under the Act. However, in practice, 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.

2.14 In this context, any decision regarding a resident's capacity and the measures that might need to be put in place to manage their financial affairs 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 manager to take whatever action he/she considers necessary to enact the shared decision(s).

Regulatory context

2.15 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.

2.16 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.

2.17 The new legislation as well as providing new regulatory powers – expanded the type of services to be regulated; set up two new bodies – the Scottish Commission for the 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.

2.18 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 are being developed.

2.19 The appropriate supervisory body will be expected to comply with this Code.

AUTHORISED ESTABLISHMENTS

Purpose of this part

3.1 Before managers can intervene under Part 4, the establishment itself must be authorised to do so. For those managing in NHSScotland hospitals, and the State Hospital, this is achieved by the issue of a formal Note of Authority by the appropriate NHS Board which conveys the authority for managers to manage under Part 4. Paragraphs **5.6 to 5.14** below provide additional information on this process. For those establishments that need to be registered with the Care Commission, which are care home services, independent and private psychiatric hospitals, and limited registration services, their registration under the Regulation of Care (Scotland) Act 2001 designates them as authorised under Section 35 of the Act. Paragraphs **5.2 to 5.5** below provide additional information on this process. This part of the code therefore explains the process of becoming an authorised establishment.

3.2 It also explains the circumstances in which a care home, or independent and private psychiatric hospitals, may opt out of the provisions of Part 4 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 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 wide range of registered services, those that are defined as authorised establishments in relation to Part 4 of the Act, as amended by the Regulation of Care Act (Scotland) 2001, are:

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

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

Opting out of the provisions of Part 4 – Registered establishments only

3.7 There is no obligation on care homes or independent or private psychiatric hospitals to manage incapacitated residents' financial affairs. Section 35(3) of the Act allows these registered establishments to opt out of being an authorised establishment for the purposes of managing residents' finances under Part 4 by giving notice to the supervisory body i.e. the Care Commission. If an establishment chooses to do so, it will not have the power to manage residents' financial affairs under the provisions of Part 4 of the Act. 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.

3.8 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 managers and registration applicant understand the implications of opting out for the continuing care and well-being of residents.

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

3.10 Any residents able to do so, or their carers, nearest relative, or others with an interest, 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 the resident's care. In the event that previous or proposed arrangements are no longer considered adequate or appropriate, and opt out is pursued, managers should establish suitable arrangements with the local authority or any other party with relevant powers under the Act, which enables the resident to access their funds as and when they need to do so, on a day to day basis.

3.11 If, and when, an establishment chooses to opt out of the provisions of Part 4 of the Act, the managers must ensure that all current and future residents, their carers, as well as care management staff, are made aware of this fact and that the full implications are discussed with them, including the possibility that the local authority may need to 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.

3.12 In the event that a registered care service does opt out, and no other intervention under the Act has been or is likely to be made to protect an adult's financial affairs, responsibility falls upon the relevant local authority to consider whatever lawful techniques under the Act may be used, including applying for an intervention or guardianship order under sections 53(3) or 57(2) of the Act.

New form of limited registration

3.13 All establishments that provide a care service within the scope of the 2001 Act require to register with the Care Commission. Some establishments that do not provide a care service, and so are otherwise not required to register with the Care Commission, may seek

registration under section 8 of the Regulation of Care (Scotland) Act 2001, for the sole purpose of managing residents' finances.

3.14 To apply for limited registration, an establishment must provide accommodation but cannot be a care service.

3.15 If a resident loses capacity whilst living in a home or other facility that is not a care service, the establishment may seek registration for the sole purpose of managing the resident's finances.

3.16 However, establishments that are 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 an individual resident needs the manager(s) to manage their financial affairs. The establishment may apply for registration as an authorised establishment for the purposes of section 35 of the Act at any time in order that notification may subsequently be made to manage the affairs of an individual resident, when the circumstances require it.

3.17 Applications for 'limited registration' under 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. The Regulation of Care (Requirements as to Limited Registration Services) (Scotland) Regulations 2003 (SSI 2003/266) set out the requirements in relation to fitness of the provider, manager, employees, and other matters.

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 Care Commission is the supervisory body in the case of:

- a care home;
- an independent hospital or private psychiatric hospital;
- a limited registration establishment.

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

- an NHSScotland hospital.

4.4 In the case of the State Hospital, the supervisory body is the State Hospital Board.

The role of the Scottish Commission for the Regulation of Care (Care Commission)

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

4.6 In the case of the Care Commission, this work will be conducted alongside its other statutory registration and inspection activity under the Regulation of Care (Scotland) Act 2001. Care Commission officers will require to consider issues relating to 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 required (under section 42(2) of the Act) from time to time to make inquiry as to the manner in the managers of an authorised establishment are carrying out the management of residents' finances. The managers of authorised establishments should undertake their responsibilities under the Act in a manner that is consistent with the principles of established best practice in care planning and review. The Care Commission will encourage managers to consult on a regular basis, and on any one-off significant matters, with professional colleagues, carers, and others with a significant interest in the resident concerned. Such consultation should be recorded.

4.8 The retention and management of information relating to Part 4 of the Act will form an important part of the responsibilities of supervisory bodies. Further guidance on this is set out in section 10 of this Code. The arrangements that are put in place by each supervisory body to record, retain, vary and dispose of data must comply with Data Protection Act 1998 requirements.

The role of NHS Boards

4.9 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, which will be prepared by Boards and set out the necessary roles and responsibilities between them and the hospitals they have supervisory responsibility for, will be required to formalise a suitable supervisory arrangement.

4.10 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 the supervisory arrangements are considered to be, they will be the subject of regular scrutiny in order that they comply with the Act, and the Part 4 Codes of Practice. NHS Board officers should therefore 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.

4.11 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.

4.12 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.

4.13 The retention and management of information relating to Part 4 of the Act will form an important part of the responsibilities of supervisory bodies. Further guidance on this is set out in section 10 of this Code. The arrangements that are put in place by each supervisory body to record, retain, vary and dispose of data must comply with Data Protection Act 1998 requirements.

Disseminating information concerning Part 4 of the Act

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

4.15 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.

4.16 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.

4.17 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, should put structures in place to ensure appropriate sharing of knowledge and experience relating to the application and enforcement of matters under the Act.

ESTABLISHMENTS THAT CAN MANAGE RESIDENTS' FINANCIAL AFFAIRS

Purpose of this part

5.1 This part of the code considers the appropriate inspection arrangements for authorised establishments that are supervised by the Care Commission, and by NHS Boards, to manage residents' financial affairs. It also covers the necessary processes required to scrutinise managers' fitness and actions, and how the power to manage should be regularly reviewed.

Registered establishments

5.2 An establishment that is registered with the Care Commission before Part 4 comes into force will, after the coming into force of Part 4, be authorised for the purposes of Part 4 of the Act, and will subsequently be supervised by the Care Commission. Therefore, managers of such establishments which take up their entitlement to manage the financial affairs of any resident with impaired capacity, will have their arrangements for managing such affairs under Part 4 inspected by the Care Commission as part of their planned programme of inspections.

5.3 Any application by an establishment under the Regulation of Care (Scotland) Act 2001 for registration as a care home service, limited registration service, independent hospital, and private psychiatric hospital post 1 October 2003, will have its arrangements for operating Part 4 of the Act scrutinised by the Care Commission as part of the registration process.

5.4 The Care Commission will have criteria for determining the fitness of providers and managers of the authorised establishments that are required to register as a care service with the Commission. Procedures and requirements regarding the fitness of providers and managers of limited registration services will also be developed.

5.5 The Regulation of Care (Scotland) Act 2001 also provides for the regulation of the social services workforce by the Scottish Social Services Council (SSSC), which is now established. The SSSC regulates education and training of social service workers and raises 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.

Unregistered establishments

5.6 As explained at 3.1 above, all unregistered establishments must be issued with a formal 'Note of Authority' by the responsible NHS Board, setting out their power to manage residents' financial affairs under the Act. This authorisation will be reviewed at the first inspection carried out by the NHS Board, after implementation of Part 4, subject to agreement upon any action that may be required at an earlier date, to address identified weaknesses in arrangements or practice.

5.7 In the meantime, until an establishment is issued with a note of authority, NHSScotland hospitals should continue with existing arrangements for the management of residents' funds, subject as they are to both internal and external audit. Paragraphs **11.1 to 11.3** on transitional arrangements however explain the position for those resident's financial affairs that are presently managed under section 94 of the Mental Health (Scotland) Act 1984, which is repealed on commencement of Part 4.

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

5.9 As for registered establishments, in the event that a manager leaves the establishment to which their authorisation relates, the manager or his/her employer, 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.

5.10 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.

5.11 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 resident's overall care plan.

5.12 In the past, practice has tended to result in all NHS residents, whether they lack capacity or not, being permitted to make use of the systems that exist for managing residents financial affairs. With the Act now in place and prescribing how interventions should be considered and acted upon, the key issues to be determined are, in accordance with the principles in the Act, whether intervention is necessary and appropriate, and that any such intervention is a lawful one which is least restrictive of the adult's freedom. Every encouragement should therefore be given to the majority of residents who are able to do so, to manage their financial affairs for themselves, or to consent to other arrangements, perhaps involving friends or relatives, to be set up or to continue.

5.13 In just the same way, adults with incapacity need not be made subject to the provisions of Part 4 merely because they happen to be patients in an NHSScotland hospital, provided they are able to exercise sufficient capacity in relation to their financial affairs, or where other lawful arrangements might be in place. 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.

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

Record of Part 4 status for registered establishments

5.15 All registered establishments will have the details of their Part 4 status reflected on their certificate of registration issued under the Regulation of Care (Scotland) Act 2001. These would be:

- Authorised;
- Opted-out;
- Revoked

5.16 In the event that a manager leaves a registered establishment, the manager or his/her employer, should notify the Care Commission in accordance with the requirements of their registration, and make suitable interim arrangements until such time as a new manager is appointed.

Inspection of the power to manage

5.17 For registered establishments, the continuation of the power to manage residents' financial affairs under the Act is dependent upon the outcome of scrutiny of arrangements that will take place as part of the Care Commission's inspection programme.

5.18 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 and approval of arrangements concerning the management of residents' financial affairs, that will take place at least annually.

THE PROCESS REQUIRED TO MANAGE FINANCIAL AFFAIRS, AND FOR AUTHORISING MANAGERS TO WITHDRAW THE FUNDS OF INDIVIDUAL RESIDENTS

Purpose of this part

6.1 This part of the code deals with the preparatory work that the managers of authorised establishments, as part of the multi-disciplinary care team, must undertake prior to making any intervention, the responsibilities on managers when they manage financial affairs, and the associated issues concerning medical certificates of incapacity.

6.2 It also considers the steps required to submit an application to withdraw (and spend) the funds of an individual resident, and the processing and issuing of Certificates of Authority under section 42 of the Act, as the basis upon which supervisory bodies authorise named person(s) to spend the funds of a resident. It is important that managers of establishments understand that they will not be able to spend any cash held, or withdraw and spend funds of a resident who has a medical certificate of incapacity, without first applying for and receiving a Certificate of Authority under section 42, which is specific to a named resident. It is this authority which empowers spending of a resident's funds, and which fundholders require to release funds held in a resident's account(s).

Context of supervisory bodies' role

6.3 In addition to the duty to supervise establishments operating Part 4 powers, as dealt with under an earlier section above, supervisory bodies may authorise named person(s) to withdraw and spend the funds of individual residents, and if appropriate to manage matters exceeding the limits set in the Part 4 Regulations.

6.4 Before a supervisory body becomes involved in doing so, the 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 withdraw and spend a resident's funds (which includes cash), it will have to be satisfied that the preparatory process and actions by the manager were consistent with the principles underpinning the Act.

6.6 The supervisory bodies have a discretion under section 42(1) of the Act as to whether or not to grant a certificate to permit managers and named person(s) to withdraw and spend funds. It is important therefore to be clear about the context within which supervisory bodies exercise their oversight of managers, and named person(s), regarding the management of the financial affairs of individual residents.

What can be managed by the managers of an authorised establishment?

6.7 Section 39 of the Act permits managers to manage the matters, on behalf of residents with impaired capacity, as follows:

- 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) (see Appendix 1 for details of those matters which are excluded);
- 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 buildings: e.g. furniture, pictures, jewellery, bank accounts, shares.

6.8 Part 4 authorisation includes the power for funds to be placed to earn interest, and to manage debt, and by virtue of a ‘Certificate of Authority’ having been issued by the supervisory body under section 42 of the Act, the means by which a resident’s account(s) and other funds may be accessed and spent by named person(s). In practice therefore, managers may wish to submit both the notice of intention to manage (see paragraph 6.31), and the application for a Certificate of Authority (see paragraph 6.44), at the same time.

6.9 The maximum amount which may be managed by managers in any one financial year in respect of an individual resident’s affairs is £10,000. Managers may apply in writing to the supervisory body to manage matters exceeding this limit. They are also empowered to dispose of moveable property of the resident not exceeding £100, but in doing so managers must only be acting for the benefit of the resident, and must have regard to the sentimental value that any item might have for the resident. A Manager may apply in writing to the supervisory body for permission to dispose of any moveable property above £100. Funds held in excess of £500 must be placed so as to earn interest.

6.10 Some 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 will have been the subject of an application and scrutiny process, as is required under benefit legislation.

6.11 As mentioned at the outset, the provisions of Part 4 of the Act will not affect DWP Appointeeship arrangements, but managers should inform the relevant supervisory body of any such arrangements at the time that they seek a Certificate of Authority under section 42 or later, should the prospect emerge, of their being appointed to this role. The process of applying for a certificate under section 42 is explained in paragraphs 6.44 to 6.48 below.

6.12 The two roles are not incompatible, and will often co-exist. Part 4 enables managers to open accounts, *and in certain circumstances the manager is under an obligation to open an account*, in the name of the resident and thereby ensure that the resident can earn interest on their savings. The ongoing management of a resident’s care may often raise the possibility of Part 4 management operating alongside DWP Appointeeship. It is important to remember however that a manager cannot manage DWP benefits under Part 4 arrangements.

6.13 In situations where other lawful proxy arrangements continue to prove an appropriate basis for managing the financial affairs of a resident with incapacity, i.e. where Part 4 intervention would not be appropriate, 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 resident's modest benefit income.

6.14 In the event that an authorised establishment's power to manage under part 4 is revoked, the supervisory body may notify the DWP accordingly, in order that they DWP may, if they so wish, carry out their own inquiries.

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 certificate of incapacity (Appendix 2) after examining the resident, the form of which is laid down in the Adults with Incapacity (Management of Residents' Finances) (No.2) Regulations 2003 (SSI 2003/266). The manager will have decided to intervene under Part 4 only after thorough consideration of the Act's principles, and having determined Part 4 is the least restrictive intervention permitted by the Act.

6.16 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 be satisfied 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.

6.17 In most cases, the Office of the Public Guardian (OPG) will have the relevant information if it is not readily available from the adult, their carer, or relatives. The OPG may levy a charge for providing this information.

6.18 In addition to satisfying themselves about the position as regards existing legal powers in respect of the adult concerned, the issue of incapacity and related matters concerning arrangements to manage financial-related matters on the resident's behalf, should have been considered carefully by the multi-disciplinary care team. In many cases, alternative lawful arrangements are likely to have been operating for some time. Possible variations on these arrangements should be considered, and it may be that these would continue to be the most appropriate intervention in compliance with the Act's principles. Only if these have been discounted in comparison with the benefits of Part 4 intervention should the manager proceed to seek the necessary authority to manage the resident's financial affairs under the provisions of Part 4.

6.19 The medical practitioner who is requested to examine the resident 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 except, in the case of an NHS Trust, for the payment of salary or fees to the practitioner by the establishment.

6.20 If the decision is taken to seek authority 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. Parliament has decided that non-intimation is such a serious step that specific safeguards must be in place. See paragraphs **6.25 to 6.30** below.

Consulting with other parties

6.21 In many cases, the likelihood of the planned intervention posing a serious risk to the health of a resident will be rare, and 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 by the manager.

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, replying, due account should be taken in the timing of any examination. Residents and relatives should be informed that advice and guidance is available from the public guardian, the local authority, the Mental Welfare Commission, or from an advocacy service.

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. It may be appropriate for the manager 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.

6.24 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 lawful 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

6.25 In the event that the manager, in consultation with the multi-disciplinary care team, considers that intimation to the resident (such intimation being required under section 37(3)) of the intention to require an examination, or take any action under section 37(4), would **be likely to pose a serious risk to the health of the resident**, the manager must write to the supervisory body accordingly, seeking a direction that he/she need not take the action required under sections 37(3) and 37(4). Section 37(4) requires managers to:

- send a copy of the certificate of incapacity to the resident and to the supervisory body, who shall notify the resident's nearest relative; and
- notify the resident and the supervisory body that they intend to manage the resident's affairs.

6.26 The supervisory body, in considering the request for a direction, 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. The manager will have submitted the reasons why such a direction is considered necessary, and should include a record of the multi-disciplinary discussion on this issue. He/she will also have included the views of the nearest relative where these have been made known. Having done so, it will direct the manager to arrange for medical examinations to take place in order to establish whether intimation should occur, in accordance with regulations made under section 37(9) of the Act.

6.27 These regulations (the Adults with Incapacity (Management of Residents' Finances) (No.2) (Scotland) Regulations 2003 (SSI 2003/266)) require that 2 medical practitioners, one of whom may need to be a specialist in mental disorder (one of the medical practitioners will require to be so specialised where the resident's incapacity is wholly or partly by reason of mental disorder), certify that intimation would pose a serious risk to the health of the individual concerned (Appendix 3). It is important that such medical examinations are conducted independently of each other. In approaching a medical practitioner for reports, a manager's starting point should usually be the adult's GP, or hospital consultant.

6.28 The manager should notify the resident's nearest relative of the 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.

6.29 The Act requires that the views of the nearest relative must be taken into account regarding any proposed intervention in an adult's affairs, where it is reasonable and practicable to do so. Unless the nearest relative is involved at an early stage in discussions with the 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.

6.30 If medical approval is given for non-intimation, the manager will need to send both certificates to the supervisory body who will, if both opinions concur, issue a written direction that the manager need not take the actions required under sections 37(3) and 37(4). Thereafter, the manager will then require to arrange for an examination to consider the resident's capacity under section 37 and, in approaching a medical practitioner for reports, a manager's starting point should be the adult's GP, or hospital consultant.

Notifying others when a medical certificate of incapacity is issued

6.31 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 – but see **6.32** below. The supervisory body must then inform the resident's nearest relative that a certificate has been issued. In addition, the manager must also notify the same two parties of his/her intention to manage the resident's affairs using the application form 'Notice of Intention to Manage the Financial Affairs of a Resident' (Appendix 4), and in so doing explain what other courses of action have been considered and why they were not considered appropriate. In providing such an explanation, 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.

6.32 In the event that the manager is directed by the relevant supervisory body that intimation of a medical examination, or action under section 37(4) need not be made, neither a copy of the certificate of incapacity, nor notification of the intention to manage their funds, should be sent to the resident.

6.33 Having considered the information submitted by the 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.

6.34 Having notified the supervisory body of their intention to manage the resident's financial affairs, the manager may not withdraw or spend the funds of the resident (which includes a resident's cash, e.g. petty cash) until an application for a Certificate of Authority to withdraw and spend the funds of the resident has been submitted to the supervisory body, and such a certificate has been issued. In practice therefore, managers may wish to submit both the notice to manage, and the application for a Certificate of Authority, at the same time.

Payment for medical examinations

6.35 The cost of the medical examinations under section 37 of the Act should 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.

Reviewing medical certificates of incapacity

6.36 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. The date of expiry of the certificate will be known, and a tracking system should be in place to ensure this is reviewed regularly. In this way it will be viewed as an integral part of the individual's 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 meet the requirements of the resident's preferred lifestyle.

6.37 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, believes that there has been a change in the condition or circumstances of the resident or in the resident's incapacity, they may request that the manager review the certificate of incapacity.

6.38 The resident's ability to manage aspects of their own financial affairs and/or their circumstances, should be reviewed regularly by the manager, the medical practitioner who has certified incapacity, and by any other person having an interest in any of the resident's financial affairs, and if it appears that there are grounds for reconsidering the appropriateness of the certificate of incapacity, particularly as it relates to specific areas of capacity, the medical practitioner should do so.

6.39 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.

6.40 When a certificate of incapacity is reviewed and consequently revoked by the medical practitioner concerned, the manager is required under section 44(1) of the Act to manage the resident's affairs for a period not exceeding three months from the date on which the resident ceases to be incapable while such other arrangements as are necessary for managing the resident's affairs are made. The manager must therefore notify the supervisory body of the change and, once suitable alternative arrangements have been made, return any associated Certificate of Authority to withdraw and spend funds issued by the supervisory body to that supervisory body within 3 working days. If a certificate of incapacity is varied by the medical practitioner, then the manager must send a copy to the resident, and to the supervisory body.

6.41 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 ensure that suitable arrangements are in place for the future.

Other matters requiring regular review

6.42 It is the manager's responsibility to monitor any changes that occur relating to the resident's funds and account(s), and to ensure that the limit of the resident's assets that are managed does not exceed £10,000. Where the level of assets managed indicate that this may be likely, the manager should be particularly vigilant and advise the supervisory body accordingly in order to trigger the review earlier. In the event that the resident's assets do exceed £10,000 and the supervisory body does not consider it appropriate to consent to the manager to manage a higher limit, the possibility of the local authority seeking a guardianship order, under which a level of delegated authority to the authorised establishment may be arranged, could be one option available.

6.43 It is also important that managers keep under review the levels of cash held on behalf of any resident in order that these do not accumulate beyond £500. While it is open to a manager to place any funds of a resident into an account in the resident's name, the Part 4 Regulations specify that sums above £500 must be placed in an account so as to earn interest.

Applications for a Certificate of Authority to withdraw a resident's funds

6.44 Once a manager has obtained a certificate of incapacity, and subsequently notified the supervisory body of his/her intention to manage a resident's financial affairs (using the Notice of Intention to Manage the Financial Affairs of a Resident (Appendix 4)), the manager must then apply for a Certificate of Authority (Appendix 5) if he/she intends to withdraw and spend a resident's funds. For practical purposes, the manager may wish to submit the request for a Certificate of Authority at the same time as the Notice of Intention to Manage.

6.45 The Certificate of Authority, if issued, empowers named person(s) to withdraw and spend money from specified accounts and funds managed on behalf of the resident, and enables the fundholder of any account(s) to release the funds. The Certificate of Authority also authorises the named person to spend a resident's cash (e.g. petty cash).

6.46 An application for a certificate to withdraw and spend funds must be in writing and specify:

- the resident's name, date of birth and address;
- the relevant account(s) of the resident and the fundholders;
- whether any cash may be held on behalf of the resident;
- the person(s) to be authorised to withdraw and spend funds (being managers, officers, or members of staff of the establishment).

6.47 The supervisory body, mindful of the information that must be included within the Certificate of Authority, and the purposes for which the intervention is being taken, will consider an application for a certificate. The application should also therefore provide the following information:

- Alternative arrangements explored;
- How the intervention will benefit the resident;
- Proposed duration of the intervention;
- Proposed timing and arrangements for review;
- Name and address of the nearest relative.

The supervisory body may also require any further information in support of such an application which it may consider necessary to reach a decision.

6.48 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.

Issuing a Certificate of Authority to withdraw a resident's funds

6.49 The Certificate of Authority, if issued by the supervisory body, must specify the information as listed in paragraph 6.46 above, and should be in the format specified in Appendix 5.

6.50 It will be for the person(s) named in the Certificate of Authority to establish suitable arrangements with the fundholder (in most cases these will be banks and/or building societies) to allow for either the original certificate and/or copies to be accepted upon presentation. In general, it is envisaged that the manager of the establishment will require to retain the original certificate for scrutiny purposes, but to arrange for the fundholder(s) to take a copy of the original certificate on its first presentation in support of a withdrawal. Thereafter, a fundholder(s) would expect to be presented with a copy of the certificate for all subsequent withdrawals.

6.51 The supervisory body should inform the fundholder(s) of the issue of the Certificate of Authority, the names of the authorised person(s), the account(s) and the period covered by the certificate. Only one certificate should be issued in respect of a relevant resident to the managers of an establishment by the supervisory body, though there may be more than one authorised person named on the certificate.

6.52 If the resident does not have an interest bearing account and their cash exceeds £500, the manager must arrange for it 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 under section 42 to withdraw the resident's funds, and it should be anticipated that the names person(s) in any certificate would expect to withdraw funds from such an account.

6.53 Excluding DWP benefit income, managers may manage the financial affairs of residents whose total assets, including savings and income, do not exceed £10,000. This sum is laid down in the Adults with Incapacity (Management of Residents' Finances) (No.2) (Scotland) Regulations 2003 (SSI 2003/266). 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.

6.54 It is the manager's responsibility to ensure that procedures are in place to enable the authorised persons to be aware of any changes that occur relating to the resident's account(s), to ensure that the assets being managed do not exceed £10,000, and that these persons understand they may not dispose of a resident's moveable property with a value of more than £100 without the prior approval of the supervisory body. 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 a review earlier. Paragraphs **6.64 to 6.69** below provide additional information on the action to be taken in this scenario. Otherwise, the supervisory body will monitor the situation through an annual review.

Varying a Certificate of Authority to withdraw a resident's funds

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 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 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 should satisfy itself as to the need for a variation and review the evidence provided. The supervisory body will issue an amended Certificate of Authority, when appropriate, within 5 working days of receipt of all of the necessary information.

Revoking a Certificate of Authority to withdraw a resident's funds

6.58 When information is received by the supervisory body concerning changes in the circumstances of a resident in respect of whom a Certificate of Authority is in place, the implications for the continuation of the Certificate of Authority should be considered.

6.59 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.

6.60 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, shall 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.

6.61 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 manager, in order that they may take any necessary action.

6.62 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.

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

Matters requiring further written authority from the supervisory body

6.64 The power to manage under Part 4 of the Act, and the Adults with Incapacity (Management of Residents' Finances) (No.2) (Scotland) Regulations 2003 (SSI 2003/266), 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 value of the assets that are to be managed by requiring that specific authority be sought in writing from the supervisory body, by the manager, in respect of both the disposal of any moveable assets, and the overall level of the affairs which may be managed.

6.65 Further written authority is required to:

(a) Dispose of a resident's valuables or any moveable property above £100. In such cases, the manager must only undertake such disposal with the consent of 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 £100 which may relate to a single or a number of items depending upon the circumstances.

(b) Manage any other matters with a greater value than £10,000. If it becomes apparent to the manager, after a Certificate of Authority has been issued or recently reviewed, that a 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.

6.66 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, but which would not be provided as part of the ongoing contract of care.

6.67 Details concerning any request for the approval of the sale of a resident's moveable objects should be compiled by the manager, as should details concerning a request to approve the management of affairs whose value exceeds £10,000, and no action may be taken regarding the matters set out in either request until written authorisation from the supervisory body has been received by the manager. In both cases, an authorisation may be issued by the supervisory body to the applicant, setting out the terms of any authorisation that is granted.

6.68 In the case of the disposal of valuables or moveable property, it will be important that the manager can demonstrate that the disposal will benefit the adult and is consistent with the Act's principles.

6.69 In the event that the resident's assets do exceed £10,000, and the supervisory body having considered all the information necessary to take a decision consistent with the Act's principles, does not consider it appropriate to authorise managers to manage a higher limit, and no one else is likely to make an intervention, it may prove necessary for the local authority to seek a guardianship order, under which a level of delegated authority to the authorised establishment may be arranged. Managers should note however that in the event of a local authority securing a guardianship order, this would result in the manager no longer being able to manage that resident's financial affairs (see section 46(1) of the Act).

Possible uses for residents' money

6.70 Managers must only spend a resident's money on items or services which are of benefit to the resident and they may not spend money on items or services which are provided by the establishment to or for the resident as part of its normal service (see also in particular paragraphs **7.26 and 7.28** of the Code).

6.71 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

In spending any money or funds belonging to a resident, managers must in each case take into account the general principles of the Act (noted at paragraphs **1.16 to 1.19** of the Code). See also paragraph **7.28** of the Code. In doing so, managers must consider whether an item or service would unduly drain a resident's funds.

6.72 Further examples of appropriate ways in which residents' money may be spent are set out in Appendix 6.

6.73 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 those involved.

6.74 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 person(s) must ensure that this is the case and that account has been taken of the legal ownership of the goods to be bought, and how any subsequent asset disposal would be managed.

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 a resident ceases to be resident in that establishment.

7.2 It also considers the importance of monitoring any continued involvement by a manager in the affairs of a resident, after the resident has ceased to reside in that establishment.

Indemnifying the resident

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

- (1) 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;
- (2) Any breach of duty, misuse of funds or failure to act reasonably and in good faith on the part of the managers.

7.4 The maintenance of a current certificate of insurance relating to these matters will be monitored by the supervisory body in fulfilling its overall supervisory role.

Issues relating to incapacity

7.5 The supervisory body should satisfy itself that the manager is aware of the general issues set out below. In turn, the manager should satisfy him/herself that the staff involved in fulfilling the provisions of the Act are also aware of these issues.

7.6 Incapacity as described 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, short term or intermittent.

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. Through the ongoing assessment process therefore, 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 care manager.

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 with incapacity should be encouraged to develop new skills in order to take part in the exercise of this responsibility.

7.9 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, preferably 6-monthly but 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 manager in turn is supported in giving practical effect to these decisions.

7.10 This applies to residents who are not subject to the provisions of the Act just as much as it does to those who are. It is important to reiterate here that an adult who is able, perhaps with assistance, to consent to arrangements for their financial affairs to be managed is not an incapable adult. This type of arrangement 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.

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

Principles of intervention and their practical implications

7.12 The principles that must underpin all interventions under the Act are set out in the introduction to this code of practice. For manager(s)' 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.

7.13 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.

7.14 Managers should not benefit directly from any bank offers or promotions relating to administration of accounts. Also, a clear policy should be in place concerning gift giving, on behalf of residents whose financial affairs are being managed. This should cover giving to family members, friends', and care staff etc.

7.15 The most effective way of proceeding is to base all decisions that are made on the adult's behalf on his or her expressed wishes (if known), those of the adult's nearest relative, and the views and opinions of the full multi-disciplinary care team. Managers have the ultimate responsibility for actions taken and will be accountable for these, but should not feel obliged to carry the full burden of responsibility for everything that is done under the Act, on behalf of the resident. Their role is to give practical effect to a shared decision reflecting the views of all of those 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 resident concerned.

7.16 All State and other entitlements and benefits to which the resident with incapacity is entitled should be claimed (other than those listed at Appendix A, which a manager does not have the power or authority to claim under Part 4 of the Act). This should include any aids, adaptations and necessary equipment. It may be appropriate to seek specialist advice from a benefits advice centre, an advocacy advice service, or an Independent Financial Advisor.

7.17 Sufficient funds should be readily available to respond to the day to day needs and preferences of the resident. The income of many residents will accumulate week by week as they are received from the DWP and elsewhere, and if they go unspent. In the case of residents with incapacity, each establishment should retain an amount in order to meet their possible day to day purchase requirements. Beyond this, savings should be transferred into the resident's interest bearing account(s).

7.18 Such funds should be held separately from the funds of the establishment and must be kept in a single named account. It is not good practice to hold residents' funds in pooled accounts, and section 41(c) of the Act provides supervisory bodies with powers to require that funds of resident's be kept separate. It must, in any case, 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.

7.19 The Act requires managers of establishments to encourage the adult to exercise whatever skills he/she has concerning their property and financial affairs, and to develop new skills in this regard. When it is agreed by the multi-disciplinary care team that a resident is likely to benefit from opportunities to develop their capacity, the manager should ensure that an account is opened in the resident's name in order that funds can be transferred as required, and the resident can be provided with opportunities to manage their funds directly.

7.20 In some cases where the manager has taken up the power to manage, the extent of the incapacity may be such that it may 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. Such an approach would be consistent with Act's principles, especially section 1(5).

7.21 All of the formal systems for managing the financial affairs of adults with incapacity should be subject to the provisions of the Act, and any requirements laid down by the Care Commission, or NHS Board. These will be 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.

7.22 Arrangements for the management, supervision and review of the financial affairs of a resident with incapacity should be recorded in the care plan. 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. These will be subject to inspection by the supervisory body.

7.23 Reviews of the resident's capacity should involve all relevant parties, e.g. key worker, nearest relative, family, care manager etc, and the resident where their views can be ascertained, and the responsibilities of all the individuals and agencies involved should be recorded.

7.24 In practical terms, the focus for 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.

7.25 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.

7.26 Residents whose funds are managed under Part 4 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. It is possible for adults with incapacity to enjoy and benefit from extra services e.g. art therapy, musical entertainment etc., and contributions from such resident's should not be excluded because of their incapacity. In doing so, staff should exercise on behalf of the resident the judgement and discretion that he or she might reasonably be expected to exercise if they were capable of doing so.

7.27 When the provisions of Part 4 are invoked, there should be 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.

7.28 The funds of an adult with incapacity, including their weekly personal allowance, must 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 health or 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 (consistent with the resident's wishes where known) that

would otherwise not be available. As ever, it will be a matter for careful judgement whether a resident will in fact benefit from such an arrangement, and managers will need to ensure that any contribution sought from each resident is not disproportionate to the adult's available income. Paragraphs 6.70 to 6.74 above provide further guidance on this important aspect.

When a resident with incapacity ceases to reside in an establishment

7.29 The decision that a resident should leave the establishment, 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 adult's care. The resident where they are able to exercise some capacity, as well as any relatives or 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.

7.30 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.

7.31 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 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, continuing Part 4 management is no longer appropriate as capacity has returned and other practical arrangements for involving the resident in taking control of their own financial affairs, will require to be implemented (but see paragraph 7.34 below for interim arrangements).

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

7.33 If the registered establishment to which they (i.e. a person in respect of whom a certificate of incapacity has been issued under section 37 of the Act) 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 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 to give sufficient time to make alternative arrangements under the Act, but must in any case be done within 14 days of the resident leaving the establishment. This is a specific requirement placed on managers, as set out in section 44(4) of the Act. If it appears to the relevant local authority that no other lawful intervention has or is likely to be made to manage the adult's financial affairs, the local authority will want to consider whether or what form of lawful proxy, 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

7.34 When an incapable resident ceases to be resident in an authorised establishment, or ceases to be incapable, the manager of the establishment must continue to manage his/her affairs for an interim period of up to 3 months while such other arrangements as are necessary for managing his/her affairs are being made. Once these are in place, the manager is no longer required to manage the resident's financial affairs.

7.35 The need for a manager to continue their role in this way should be considered by the multi-disciplinary team overseeing the resident's care planning, and 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.

7.36 In the case of residents who have regained capacity, the retention by the manager of the power to manage their financial affairs for a period of time after they have moved 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, an independent advocacy service, or welfare rights adviser, to offer assistance to the person.

7.37 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.

7.38 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 records and statements

7.39 Managers are required to keep financial records in the course of managing resident's financial affairs. It must also be possible to ascertain any interest due to the resident at any time, especially so if more than one account is being managed. The records 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 to be initialled/signed for by a member of staff
- financial commitments made but not yet paid for
- income due but not yet received
- notes from last review

7.40 A second staff signature should be provided where possible. In larger establishments, 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.

7.41 Through its ongoing monitoring of an establishment, the supervisory body will seek evidence that statements are prepared in the following circumstances:

- Where the resident ceases to be incapable of managing their affairs. Two statements will be required. The first 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. The second statement must cover the period from the date on which the resident ceases to be incapable to the end of the period in which managers continue to manage the resident's financial affairs.
- 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 managers' cease to manage the resident's financial affairs. A copy must be given to the person who appears to the manager(s) 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.

7.42 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.

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 the actions of manager's, or named persons under section 42, managing matters 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 gives significant powers to the Care Commission relating to registered establishments. It is within this context that the conduct of inquiries concerning the Act in registered establishments should be viewed.

8.4 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 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 including, if in place, the power to revoke any Certificate of Authority under section 42 of the Act issued by the Care Commission in respect of a named resident.

8.5 Where these efforts do not produce the required changes in matters relating to the management of resident's 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.

8.6 The specific statutory powers to revoke a Certificate of Authority issued under section 42 of the Act, and the general power to manage, are the main courses of action available to the Care Commission in respect of registered facilities, in circumstances where the conduct of the managers or the named person(s) is considered to be unacceptable. This being the case, any decision not to invoke these powers, where circumstances suggest that it could be appropriate, must be clearly documented and explained to the manager(s) of the establishment, and to any complainant whose concerns led to such action – see paragraphs **8.15 to 8.17** below.

Conducting inquiries – NHS Boards

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

8.8 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.

8.9 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.

8.10 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 or named persons(s) are fulfilling their responsibilities under the Act.

8.11 In most cases, these matters will appropriately be dealt with through discussion and by the introduction of agreed changes to practice and procedures.

8.12 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 may be given by NHS Boards to revoke a Certificate of Authority under section 42 of the Act in respect of an individual resident, or possibly the power to manage under the Act conveyed in the Note of Authority.

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

8.14 The power to revoke the Note of Authority to manage, and any Certificate of Authority to withdraw and spend a named resident's funds, are the courses of action available to NHS Boards in respect of unregistered facilities, in circumstances where the conduct of the managers and named person(s) they have authorised is considered to be unacceptable. This being the case, any decision not to invoke these powers, where circumstances suggest that it could be appropriate, must be clearly documented and explained to the managers, and to any complainant whose concern may have led to such action – see paragraphs **8.18 to 8.20** below.

Dealing with complaints – The Care Commission

8.15 The Care Commission may, from a number of sources, receive complaints regarding the manner in which a manager, or named person(s) in a Certificate of Authority issued under section 42 of the Act, 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.

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

8.17 As set out at paragraphs **8.3 to 8.6** above, the Care Commission has specific powers to revoke any Certificate of Authority issued under section 42 of the Act, and to revoke the power to manage under section 45 of the Act.

Dealing with complaints – NHS Boards

8.18 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 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.

8.19 In the case of unregistered establishments, the NHS Board will seek to secure the authorised manager’s 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 invoking the powers available to it under the Act is required.

8.20 As set out in paragraphs **8.7 to 8.14** above, the NHS Board has specific powers to revoke any Certificate of Authority issued under section 42 of the Act, and to revoke the power to manage under the Act.

REVOCATIONS AND APPEALS

Purpose of this part

9.1 This part of the code considers the means by which the Certificate of Authority, the power to manage (or in the case of a limited registration establishment its registration), under Part 4 is revoked.

9.2 It outlines the responsibility of supervisory bodies to act in the capacity of manager, in order that the financial affairs of a resident are managed appropriately after revocation.

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 Certificate of Authority, or power to manage

9.4 When the Care Commission has decided to revoke any Certificate of Authority issued under section 42 of the Act, or an establishment's power to manage which it may revoke under section 45 of the Act, they should notify the manager(s) accordingly in writing. The notice should set out:

- The reasons for the decision to revoke the Certificate of Authority or power to manage;
- The effective date of revocation;
- Arrangements for contact between the establishment and the supervisory body regarding the latter's role as 'manager' pending the transfer of this power to another person or authority (only necessary for revocation under section 45 of Act);
- Details of the appeals procedure;
- A contact name, telephone number and address for all future communications with the supervisory body in its supervisory role; and
- Be signed by a designated person within the Care Commission.

It will also be necessary to inform the resident (if appropriate), their nearest relative, the relevant local authority, the Scottish Social Services Council, and if involved the advocacy service, of this action. It may also be appropriate to inform the DWP of this action. Where a Certificate of Authority is revoked, the Care Commission **must** inform the fundholder(s).

9.5 Action by the Care Commission under the Regulation of Care (Scotland) Act 2001 that results in the cancellation of registration of an establishment, including a limited registration service, will automatically revoke the power to manage and any Certificates of Authority issued under section 42 of the Act.

9.6 The manager(s) **must** return any Certificates of Authority issued under section 42, and the registration certificate, in order that the power to manage can be practically removed.

9.7 Any decisions made by the Care Commission can be the subject of representations in accordance with any 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 (Act of Sedurant (Summary Applications, Statutory Applications and Appeals etc. Rules) Amendment (Adults with Incapacity) 2001 (SSI 2001/142)).

9.8 The decision of the sheriff is final.

The NHS Board - How to revoke the Certificate of Authority, or power to manage

9.9 When the NHS Board has decided to revoke any Certificate of Authority issued under section 42 of the Act, or an establishment's power to manage as conveyed in its Note of Authority, they should notify the manager(s) accordingly in writing. The notice should set out:

- The reasons for the decision to revoke the Certificate of Authority or power to manage;
- The effective date of revocation;
- Arrangements for contact between the establishment and the supervisory body regarding the latter's role as 'manager' pending the transfer of this power to another person or authority (only necessary for revocation under Section 45 of the Act);
- Details of the appeals procedure;
- A contact name, telephone number and address for all future communications with the supervisory body in its supervisory role; and
- Be signed by a designated person within the NHS Board.

9.10 It will also be necessary to inform the resident (if appropriate), their nearest relative, and if involved the advocacy service, of this action. It may also be appropriate to inform the DWP of this action. Where a Certificate of Authority is revoked, the NHS Board **must** inform the fundholder(s). The manager(s) **must** return any Certificates of Authority issued under section 42 in order that the power to manage can be practically removed.

9.11 Action by the NHS Board that results in the cancellation of the power to manage will automatically revoke any Certificates of Authority issued under section 42 of the Act.

9.12 Any decisions made by the NHS Board can be the subject of representations in accordance with appropriate internal appeals arrangements. In circumstances where the power to manage has been removed, such a decision may be appealed 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 (Act of Sedurant (Summary Applications, Statutory Applications and Appeals etc. Rules) Amendment (Adults with Incapacity) 2001 (SSI 2001/142)).

9.13 The decision of the sheriff is final.

The supervisory body acting as manager

9.14 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. This applies to both registered and unregistered establishments.

9.15 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.

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

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

9.18 Where the representative of the Care Commission, or NHS Board officer, acting as 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 under section 42, such applications should be made to the appropriate supervisory body. The supervisory body will take into account the need for separation between decisions related to an individual resident's affairs, and where decision making sits in regard to the establishment.

9.19 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. While the Act allows the transfer of management of a resident's finances back to the resident, this should only be effected if it would be the most appropriate solution in the circumstances, taking into account the general principles of the Act (including the wishes of the resident, and the resident's present and foreseeable state of incapacity).

9.20 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.

Handling complaints regarding the supervisory body acting as authorised manager

9.21 Arrangements should be in place to ensure that any complaints as to the supervisory body's conduct in its role as 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

9.22 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.

9.23 In this event, the relevant documents will require to be re-issued by the supervisory body, following confirmation that all details included on any relevant certificates are correct.

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 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 authorised 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 registers and records will frequently require to be changed and the resulting variations or revocations notified to relevant parties within required time limits.

10.4 In respect of the Care Commission, information concerning registered establishments will be held on the appropriate registers it maintains under the Regulation of Care (Scotland) Act 2001.

10.5 In respect of NHS Boards, any register should include the following information:

Power to manage - unregistered services

the name, address, contact, and personal details of the authorised manager(s) for each establishment, type of service offered by each separate unregistered establishment, and number of Certificates of Authority issued under section 42.

10.6 All registers should be maintained in electronic form, and 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 a 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 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.

10.9 The details that should be stored by each supervisory body in respect of each resident for whom a manager is managing the financial affairs are:

- the name, date of birth, and gender of the resident; and

In respect of any Certificate of Authority under section 42 that has been 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 Incapacity, its date of issue and date of expiry (which will relate to each particular Certificate of Authority issued under section 42).

TRANSITIONAL MATTERS

11.1 The Act, and Part 4 to which this Code refers, introduces a new means of managing the financial affairs of an adult with incapacity, as it is recognised that any intervention in an adult's affairs is an infringement of their freedoms, and that such intervention must be justified, lawful and controlled. The Act permits lawful intervention in such matters, with the appropriate safeguards and controls. It is therefore incumbent on all those presently involved in the management of the financial affairs of an adult with incapacity, to review these arrangements as early as possible against the Act's principles, ensuring that any continuing arrangements are lawful interventions consistent with the Act's principles.

11.2 As outlined in this Code, and the Code for Managers of Authorised Establishments, the process of prior consideration by managers to intervene, and subsequent action to manage the financial affairs of an adult with incapacity under Part 4 must be properly planned, considered, and executed. In this regard it is not a decision which should be taken lightly. Consequently, managers of establishments registered with the Care Commission prior to commencement of Part 4, managers of establishments seeking registration under the Regulation of Care (Scotland) Act 2001 after the commencement of Part 4, and managers of unregistered establishments should read the Code of Practice for Managers, and comply with the procedures it outlines. Likewise, managers and supervisory staff within supervisory bodies should comply with the duties and responsibilities placed upon them by Part 4. In respect of NHS hospitals (unregistered establishments) which are managing patients' funds under section 94 of the Mental Health (Scotland) Act 1984 prior to Part 4 commencement, specific transitional arrangements exist under this Part, and are explained at **11.3** below.

11.3 Commencement of Part 4 also means that section 94 of the Mental Health (Scotland) Act 1984 is repealed. In this context, where by reason of mental disorder the adult was and may remain incapable of managing and administering his moveable property and financial affairs, including following discharge from hospital, specific transitional arrangements are required. The AWI Act, at Schedule 4, paragraph 5 sets out, for managers in hospitals only, what these transitional provisions are. In brief, on commencement of Part 4, hospital managers cannot make new arrangements for financial management of an adult's affairs under section 94 as it is repealed, but may for any adult for whom they continue to hold and manage funds and other property under section 94 of the 1984 Act the day before commencement, continue to do so for a period not exceeding 3 years. This includes any authority to manage funds and property at a value approved by the Mental Welfare Commission. Notwithstanding this provision, it will be important to ensure that existing section 94 arrangements are kept under review, and that alternative interventions permitted under the AWI Act introduced, if required, where these would be of more benefit to the adult, and in circumstances where the adult ceases to be incapable, or be resident in hospital. Repeal of section 94 also means that the Mental Welfare Commission no longer has any role in giving consent for the management by hospitals of financial matters higher than those prescribed by Regulations under Part 4 – this role now falls to the relevant supervisory body.

APPENDICES

APPENDIX 1

DWP Guidance on Part 4

Part 4 of the Adults with Incapacity (Scotland) Act 2000 makes provision for the management of the affairs of residents in certain types of establishments. Section 39 lists the matters that such managers may manage. The benefits paid under the Social Security Contributions and Benefits Act 1992 are excluded from this. That means that in terms of section 39 and Part 4 of the Adults with Incapacity (Scotland) Act 2000 the benefits detailed below may not be managed in terms of these provisions:

- Retirement Pension: Categories A, B, C, D
Graduated Retirement Pension
Disablement Pension
Shared Additional Pension
- Maternity Allowance
- Bereavement Benefits: Bereavement Allowance
Bereavement Payment
Widows Pension
Widowed Mothers Allowance
Widowed Parents Allowance
- Attendance Allowance
- Severe Disablement Allowance
- Invalid Care Allowance
- Disability Living Allowance
- Incapacity Benefit
- Guardian's Allowance
- Industrial Injuries Benefits: Disablement Benefit
Reduced Earnings Allowance
Retirement Allowance
Industrial Death Benefit
- Child Benefit
- Working Families Tax Credit
- Disabled Persons Tax Credit
- Income Support
- Social Fund: Winter Fuel Payments
Social Fund Maternity
Funeral Expenses
- Housing Benefit
- Council Tax Benefit

The Social Security Claims and Payments Regulations, Regulation 33 provides a separate method so that those not capable of managing their own affairs may have a person appointed to deal with social security benefit claims. This provision, much in the same way as the Adults with Incapacity (Scotland) legislation, comes into play where there is no other legal proxy to look after the incapable person's affairs.

The two schemes operate separately however. Benefit paid under the Social Security Contributions and Benefits Act 1992 is excluded from the matters that managers of certain establishments may manage under Part 4 of the AWI Scotland Act. Instead, either Social Security Claims and Payments Regulations, Regulation 33 would apply or there would be some other legal appointment or arrangement to allow this to happen on behalf of an incapable person. Managers may however apply to the Secretary of State to consider an application to be appointed to act on behalf of the person for social security benefits.

This would mean that if a manager of a care home or one of the other establishments listed under Part 4 of the Adults with Incapacity (Scotland) Act, applied to deal with the social security benefits listed above then the Secretary of State could consider this application and may make an appointment under regulation 33.

An appointee is not appropriate if the resident already has another person acting on their behalf with relevant powers. This is often referred to as a proxy arrangement. For the purposes of DWP benefits, such proxy arrangements only include where there exists another person with:

- any power of attorney with the relevant powers; and
- any intervention or guardianship order with relevant powers

SCHEDULE 1

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

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

I (full name of medical practitioner)
of
..... (professional address)
have examined (resident’s name),
.../.../.... (resident’s date of birth),
of
.....
..... (authorised establishment where resident lives) on .../.../.... (date)
in my capacity as *

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 nature of 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 given effect to the principles set out in section 1 of the Act.

.....(signature of medical practitioner)

.....(printed name)

.../.../.... (date)

Note: In accordance with section 37(7) of the Act, this certificate shall expire on (three years after date of signature), but it shall be reviewed before that date where it appears that there has been any change in the condition or circumstances of the resident named in this certificate bearing on that resident's incapacity.

* 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.

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 medical practitioner)

of

..... (professional address)

have examined (resident’s name),

.../.../... (resident’s date of birth)

of

.....

..... (authorised establishment where resident lives) on .../.../... (date)

in my capacity as *

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

- that his/her capacity is to be medically examined under section 37(2) of the Act;
- of the result of that medical examination;
- that his/her 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.

.....(signature of medical practitioner)

.....(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.

*** Delete if this is not the case.

APPENDIX 4

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

PART 4

Content of Notice of Intention to Manage the Financial Affairs of a Resident under Section 37

To be completed by the Manager of the Authorised Establishment and submitted to the relevant Supervisory Body together with a signed Medical Certificate of Capacity issued in respect of a named resident.

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

- Name, date of birth and address of resident
- details of those people consulted
- details of what alternative actions have been considered and why they are deemed inappropriate, and how the intervention will benefit the resident
- name and contact details of nearest relative
- whether the resident has a DWP Appointeeship arrangement in place, and who this appointee is
- proposed duration of the intervention.
- proposed timing and arrangements for reviews

As it is envisaged that in almost all practical cases a Manager will also wish to apply for a Certificate of Authority under section 42 of the Act at the same time as giving notice under section 37(4)(b), the following information should also be provided :

Specified accounts or sources of funds to be managed :

- 1.
- 2.
- 3.
- 4.

The person(s) to be authorised to withdraw and spend from these accounts and sources

- 1.
- 2.
- 3.

Confirmation of date of expiry of certificate of incapacity issued in respect of the named resident

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

PART 4
Certificate of Authority
Under Section 42

This certificate is issued by (the Care Commission/NHS Board) as supervisory body in relation to Part 4 of the Adults with Incapacity (Scotland) Act 2000. During the period of validity of the certificate, the authorised person(s) may make withdrawals from the specified accounts or other sources of funds of the resident. The fundholders may make payments accordingly.

Resident’s name, date of birth and address:

Specified accounts or other source of funds:

- 1.
- 2.
- 3.
- 4.

Authorised persons:

- 1.
- 2.
- 3.

Period of validity of certificate:

This certificate is valid until 2003

.....signature
Officer of Care Commission/NHS Board

Note: only persons named in this Certificate of Authority as “authorised persons” will have authority to withdraw, deposit or spend any cash belonging to a resident or to withdraw or spend funds from a resident’s account.

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 residents, 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, pipes and tobacco, 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.

Glossary

Manager:

- The NHS Board in relation to an NHSScotland hospital.
- The State Hospital Management Committee (if appointed) or; the NHS 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 (the ROC Act) in the application for registration of the establishment
- If an application is made under section 27A(1) of the ROC 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 the ROC 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, jewellery, bank accounts, shares

Proxy:

Any lawful arrangement which permits intervention in the affairs of an adult with incapacity, which in this Code includes any power of attorney relating to financial matters, authority to intrude with funds, an intervention or guardianship order, and where social security benefits are being managed under DWP Appointeeship

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