INTRODUCTION

1. This document relates to the Adults with Incapacity (Scotland) Bill introduced in the Scottish Parliament on 8 October 1999. It has been prepared by the Scottish Administration to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Administration and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 5–EN.

THE NEED FOR LEGISLATION

Introduction

2. The present law is failing to meet the welfare (including medical treatment) and financial needs of adults with incapacity. This was recognised by the Scottish Law Commission in their 1995 Report and draft Bill on Incapable Adults.

3. Adults may lose capacity through the effects of mental or physical illness, or injury. In some cases the incapacity is relatively short-term and the person recovers understanding and the ability to communicate. In other cases, such as people with Alzheimer's disease or other forms of dementia or brain injury, mental capacities are lost and never recovered, or are not fully restored. Some people have never had capacity to make decisions about their own affairs, because of congenital conditions or conditions which developed early in their life.

4. The number of adults with incapacity due to dementia is increasing. It is estimated that there may be 60,000 in Scotland at present. There are also about 20,000 people with learning disabilities so severe that they are unable to manage their own affairs. Other people may lose capacity because of accident or illness, making an estimated total of about 100,000 people with incapacity.

5. The present law has many gaps, and much of it, relating to the offices of curator bonis, tutor-dative and tutor-at-law, is fragmented and outdated. These are
people appointed by the courts to take decisions for adults with incapacity. Health and local authority staff, carers and families are uncertain about the legal position. Most existing substitute decision-makers have powers that relate solely to the welfare or to the property and financial affairs of the adult. This means that these arrangements are inflexible and cannot be tailored to individual needs. They can be expensive and there may be insufficient safeguards, supervision or reviews.

6. The law at present also fails to deal adequately with many common practical problems faced by people with incapacity and their carers. It is not possible for the court to deal with a short-term financial problem, such as the sale of a house or the signing of a document. A carer cannot obtain authority to have access to the bank account of an adult with incapacity to meet daily living expenses. A partner who has a joint bank account with an adult who loses capacity cannot gain access to that account without the appointment of a curator bonis.

7. Care establishments, such as residential homes and nursing homes, are unable legally to manage a resident’s personal finances when they lose capacity, even though there may be no one else to do so. This is an increasing problem as more people with incapacity are cared for in community settings rather than being admitted to long-stay hospitals.

8. The case for change is overwhelming. This Policy Memorandum follows the format required by the Parliament’s Standing Orders. It sets out the Scottish Executive’s policy objectives for each Part of the Adults with Incapacity (Scotland) Bill, the alternative approaches that have been considered, the consultation that has been undertaken and the reasons for choosing the options the Executive has decided to follow. Finally, as required, the Policy Memorandum examines the effects of the Bill on equal opportunities human rights, Island Communities, local government, sustainable development and a variety of other individuals, bodies and policy areas.


The title of the Bill

10. The title of the Bill is the Adults with Incapacity (Scotland) Bill, not the Incapable Adults (Scotland) Bill which was the title used by the Scottish Law Commission in its 1995 report. This reflects the fact that incapacity is not an all-or-nothing concept and many adults who suffer from incapacity can still manage some aspects of their life.
Consultation

11. Consultation on this issue started in 1991 when the Scottish Law Commission took up the matter and many organisations and individuals responded to its Discussion Paper on Mentally Disabled Adults. In 1997 the then government published a further consultation paper, Managing the Finances and Welfare of Incapable Adults. It accepted most of the Scottish Law Commission’s recommendations but invited comments on some specific issues. The paper was widely distributed and over 160 written responses were received.

12. The Executive also accepts most of the Scottish Law Commission’s recommendations, which along with the responses to the 1997 paper form the basis of the approach to the Bill. In developing the policy, the Executive has continued to cooperate with interest groups and others with expert knowledge such as the Alliance for the Promotion of the Incapable Adults Bill, the Committee chaired by the Rt Hon Bruce Millan that is reviewing mental health legislation (the Millan Committee), local authorities, health organisations, voluntary bodies and the Mental Welfare Commission.

GENERAL PRINCIPLES AND SUPERVISORY FRAMEWORK

Introduction

13. This section defines who will be affected by the Bill, the general grounds for intervening in an adult’s affairs, the jurisdiction of the courts and the supervisory framework for the new measures. These matters are dealt with in Part 1 of the Bill.

Policy objectives

14. Provisions in the Bill will apply only to adults, who are defined as those aged 16 and over. The legislation will only apply to a person who is incapable of acting, making decisions, communicating decisions, understanding decisions, or retaining the memory of decisions they have made because of mental disorder or because of an inability to communicate caused by physical disability. The Bill will use the definition of mental disorder set out in section 1 of the Mental Health (Scotland) Act 1984, (the 1984 Act) that is: mental illness or mental handicap however caused or manifested. It will be clarified that mental illness includes personality disorder, in line with the recent amendment to the 1984 Act made by the Mental Health (Public Safety and Appeals) (Scotland) Act 1999. An adult will not be treated as suffering from mental disorder only because of immoral or imprudent behaviour or behaviour due only to the influence of alcohol or drugs. Incapacity is to be considered in relation to a particular decision or set of decisions. It is not an all-or-nothing condition.
15. The Mental Health (Scotland) Act definition of mental disorder is being thoroughly reviewed by the Millan Committee. No attempt is made to change the definition used in the current Bill but it is accepted that the definition may need to be reconsidered in the light of the Committee’s findings.

16. Before defining an adult as having incapacity within the meaning of the legislation, all reasonable efforts will have to be made to enable them to communicate effectively. The adult must be given the chance to express his or her current wishes and feelings by any suitable means of communication. The assistance of an independent interpreter or advocate or any other person who is familiar with the adult’s means of communication should be made available. In some cases, technology may help. Before any action under the legislation is attempted, all reasonable efforts will have to be made to enable the adult to understand the issue being considered.

**General principles governing intervention**

17. The Scottish Law Commission formulated admirably the general principles upon which the Bill rests. These are:

- any intervention should produce a benefit to the adult concerned;
- the intervention should be one which is the least restrictive of the adult’s freedom, having regard to its purpose;
- any guardian, attorney or manager of an establishment managing an adult’s finances should be required to encourage that adult to use existing financial and welfare skills and acquire new skills, insofar as it is reasonable and practicable to do so;
- a person proposing to do anything under the legislation must take account of the present and past wishes and feelings of the adult with incapacity, so far as these can be ascertained. This person must also consult with, and take account of, the views of the adult’s nearest relative, primary carer, and guardian or attorney with relevant powers where it is reasonable and practicable to do so.

18. The aim is thus to empower adults with incapacity, respecting their rights and acknowledging that many have been capable of managing their own affairs in the past and some will be able to do so again in the future.

**Role of the courts**

19. In general, it will be the sheriff court that will authorise interventions in the welfare and financial affairs of adults with incapacity. However, certain matters relating to consent to medical treatment as set out below, will only go to the Court of Session. The sheriff will be able to appoint a safeguarder to look after the interests of
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the adult. The safeguarder's role will be to protect the adult's interests in the proceedings.

20. A wide range of people will be able to apply to the court for the new measures, for example, family, friends, neighbours and solicitors as well as statutory bodies with an interest. Proceedings should be as informal as possible, for the benefit of the adult, their relatives, friends and carers. Rules of Court will support the provisions in the Bill to provide procedures for the making of applications and appeals to the courts.

21. The court or the Public Guardian will notify all those concerned, including the adult with incapacity, of applications, registrations and orders under the legislation. Notice will only be withheld from the adult if there is evidence that such notice would pose a serious risk to their health.

Supervisory framework

22. Various statutory agencies will be involved in supervising those who take decisions on behalf of people who lack capacity: the Public Guardian, the Mental Welfare Commission, local authorities and the proposed Scottish Commission for the Regulation of Care. They will be required to co-operate and share information in order to work effectively together. They will, of course, pay due regard to client confidentiality.

Public Guardian

23. The office of the Accountant of Court, which lies within the Supreme Courts, will be expanded to form a new office of Public Guardian. Its functions will be to maintain and amend public registers of court appointments and orders relating to the adult with incapacity; to maintain and amend registers of continuing and welfare attorneys; to authorise access to the funds of adults with incapacity for specified purposes; to supervise and monitor the financial powers of guardians and persons appointed under intervention orders; and to investigate complaints relating to the management of finances by attorneys, guardians and others.

The Mental Welfare Commission

24. The Mental Welfare Commission will retain its general protective functions towards people with mental disorder and its other powers under the 1984 Act. It will monitor attorneys and guardians with welfare powers, and carry out investigations where something appears to be wrong. It will be able to take action, including legal proceedings, to protect the adult’s welfare. Under the 1984 Act, the Commission’s role extends only to people whose incapacity is due to mental disorder, as defined in that
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Act, not to those who are incapable of making decisions for other reasons. This will continue to be the case under the present Bill.

The local authority

25. Local authorities play a major role in the provision of community care. They are therefore already involved in looking after the personal welfare of many adults with incapacity. Their role will be expanded to include the supervision of welfare guardians and attorneys and those acting under intervention orders. They will be able to investigate complaints and suspicious circumstances. They will also have a duty to apply for an intervention or guardianship order if such an order appears necessary for the adult’s benefit. In appropriate cases, the chief social work officer will be appointed as welfare guardian. Investigations will be carried out and reports provided in connection with applications for guardianship or intervention orders. The proposed Scottish Commission on the Regulation of Care will oversee new arrangements for care home managers to manage the finances of residents who lack capacity (see Management of residents’ funds below).

Health boards

26. The Scottish Commission on the Regulation of Care will oversee nursing homes looking after the funds of patients who lack capacity.

Duties in relation to adults with incapacity

27. The relationship between a guardian or attorney and an adult with incapacity is based on trust. The guardian or attorney must take decisions that will benefit the adult, not themselves. For example, a guardian must not profit personally from investing the adult’s money. It is possible, however, that an attorney or a guardian will encounter conflicts of interest because their interventions will result in their obtaining a benefit. For example, a better standard of living for the adult with incapacity may also benefit the carer. Such situations would require careful consideration to ensure that there had been no breach in the guardian’s duty towards the adult. However, so long as the guardian or attorney has acted reasonably, in good faith and in accordance with the general principles set out above, they will not be liable for the breach.

Ill-treatment and neglect

28. The Bill will create a new offence for anyone exercising welfare powers who wilfully neglects or ill-treats an adult with incapacity.
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Codes of Practice

29. When the Bill is implemented, Scottish Ministers will issue various Codes of Practice, mainly for those taking decisions about the welfare, treatment and finances of an adult with incapacity. The Codes will give practical information and guidance and will provide more detail than the legislation itself. Scottish Ministers will consult widely on their content.

Alternative approaches

30. The Scottish Law Commission considered whether applications for legal intervention under this legislation should go to the sheriff court or to a new lay hearing system or to special tribunals. Most people they consulted favoured the sheriff court for its impartiality, authority and experience in conducting hearings and producing reasoned written decisions. The sheriff court was also thought to be the best forum to deal with property and financial cases. It is also of course more accessible generally than the Court of Session.

31. The Scottish Law Commission recommended that proceedings under the new legislation should be heard, so far as possible, by nominated sheriffs who have received special training. The Executive does not think this should be a hard and fast arrangement, especially in remote areas where few sheriffs are available, and it will not be included in the legislation. The Executive is, however, aware of the need to provide all sheriffs with adequate information and training when the Bill is implemented.

Consultation

32. Some concerns have been expressed about the definition of mental disorder used in the Scottish Law Commission report. Since Making the Right Moves was published, the Executive has received representations from the Alliance for the Promotion of the Incapable Adults Bill that the definition of mental disorder is unsatisfactory. An alternative has been proposed, specifically for the purpose of the Bill. The Alliance's views have been considered carefully, but the Executive has decided to retain the definition of mental disorder as one of the threshold criteria for incapacity in the Bill. It is considered that the definition covers all those intended to fall within its scope, including people whose incapacity results from brain injuries. There are advantages in consistency between incapacity and mental health legislation. The Millan Committee is currently reviewing the definition of mental disorder used in mental health legislation and the Executive does not wish to adopt a different approach at the moment. The Executive accepts that the definition may need to be looked at again at some later date in the light of the Millan Committee's findings.
33. Nearly all the comments on the role of the Public Guardian agreed that the proposals set out in the 1997 consultation paper struck the right balance between empowering carers and protecting adults with incapacity. Some respondents thought that the Public Guardian or another public body should monitor management of funds by residential establishments, others that it should be possible to appoint the Public Guardian as financial guardian of last resort. These proposals have been considered but rejected for the reasons set out in sections 5 and 7 of this Memorandum respectively.

34. Most responses agreed the proposals for the roles of the Mental Welfare Commission and local authorities. Some helpfully emphasised the importance of communication between the Public Guardian, Mental Welfare Commission and the local authority to ensure an effective and consistent approach to their responsibilities.

CONTINUING AND WELFARE POWERS OF ATTORNEY

Introduction

35. Part 2 of the Bill endorses the principle that adults should be able to make plans for their future by granting a power of attorney to a person of their choice, which can be exercised in the event of their future incapacity. However, under current law, powers of attorney do not have to be registered and attorneys are not supervised or monitored by any public official. If an attorney abuses their powers there may be no one with sufficient interest to monitor and, if necessary, challenge the attorney's actions. It is also not clear whether, under Scottish law, attorneys can be appointed to exercise welfare, as opposed to financial, powers.

Policy objectives

36. At present, if a person wishes to appoint someone else to manage their property and financial affairs they may do this through the grant of a power of attorney. Such a power may come into force before incapacity and continue to be effective after incapacity. Under the new legislation, it will be possible to grant a financial power of attorney that continues on incapacity, if the granter specifically wants this. The attorney will be known as a continuing attorney.

37. The Bill also creates a new type of attorney with powers over a granter's welfare, which could be very broadly defined and could include all but the most sensitive healthcare matters. This type of arrangement will only come into force once the granter has lost capacity.

38. The same appointment procedure will apply to all continuing and welfare powers of attorney. A solicitor or similar person will be asked to certify that the
person granting the power of attorney understands the full implications of what they are doing. The certificate will also confirm that there is no reason to believe that the document was signed as a result of any action or inappropriate pressure, such as a threat, that would invalidate the grant. All continuing and welfare powers of attorney will have to be granted in writing and details will be held by the Public Guardian in a register open to public inspection.

39. Welfare attorneys will have to be individuals but it will continue to be possible to appoint a body such as a firm of solicitors as an attorney with financial powers. Continuing and welfare attorneys will have to keep records of how they exercise their powers and a Code of Practice will be issued setting out their duties and responsibilities.

40. In order to protect granters who subsequently lose capacity, the court will be able to order the Public Guardian or the local authority to supervise an attorney. It will also have powers to revoke an attorney’s appointment, to order a welfare attorney to report on how any welfare powers have been exercised and to order a continuing attorney to produce accounts relating to the granter’s estate. To offer further protection, the Public Guardian, the Mental Welfare Commission and the local authority will be able to investigate relevant attorneys’ conduct if they have reason to do so.

Alternative approaches

41. The Scottish Law Commission considered whether it might be possible to regard attorneys as privately appointed guardians but concluded that this would make arrangements for attorneys unnecessarily complicated. It is important to preserve the voluntary and personal nature of the appointment of an attorney, so the Bill also retains the distinction between the two types of appointment.

Consultation

42. In the responses to the 1997 consultation paper there was a very strong consensus that attorneys should be obliged to keep records and also that public authorities should be able to investigate their activities even without a complaint or a court order being made. Both these requirements have been adopted in the Bill.

43. A person may wish to grant a temporary power of attorney, for example, to cover a period when they are abroad. Such powers are usually registered in the Books of Council and Session. The 1997 consultation paper asked whether temporary powers of attorney should require registration by the Public Guardian. Most respondents considered, however, that only powers that continue after incapacity should have to be thus registered and the Bill follows this approach.
44. The 1997 consultation paper also asked whether welfare powers should be defined in more detail in legislation. Some respondents thought this should be possible, although others considered it would be hard to achieve. An inclusive definition is difficult because many welfare decisions interact with financial decisions. For example, a decision about admission to residential care may also create costs for the adult concerned. The Bill therefore specifies decisions that are beyond the powers of a welfare attorney, such as consenting to sensitive medical treatments or placing an adult in hospital for treatment of mental disorder.

45. Helpful comments were received in 1997 about the appointment ex officio of chief professional officers as welfare attorneys. There were concerns that a chief officer would be unlikely to know the granter nor be able to identify their personal wishes. The Bill follows the approach that the personal nature of a welfare attorney appointment makes a chief officer of a statutory body unsuitable for the post.

46. Some respondents in 1997 thought there should be express provision for the possibility of the granter of a power of attorney regaining capacity, after the attorney has started to act on their behalf. If this happens, however, the granter will be able to monitor what the attorney does, revoke the appointment or apply to the court in relation to the attorney's actions. No express provision is therefore made in the Bill.

ACCESS TO FUNDS

Introduction

47. Part 3 of the Bill deals with access by carers in domestic settings to the funds of an adult with incapacity held by any individual or organisation. Carers may need to pay for the adult's food, clothing or household expenses. This can be difficult to organise and it is not always possible to make informal arrangements with banks, building societies or other organisations for withdrawals from the adult's account. Such arrangements may also be temporary, pending the appointment of a curator bonis by the court.

48. Many banks take the view that if one holder of a joint account loses the capacity to operate the account that has the effect of bringing to an end the holders' instructions to the bank. The bank will then freeze the account, requiring the appointment of a curator bonis to gain access to the funds. The appointment of a curator bonis is an expensive and elaborate process. While it is going on, the other account-holder will have no access to the jointly-held funds.
Policy objectives

49. Under the new statutory scheme in the Bill, carers or other individuals will be able to submit an application to the Public Guardian, who will authorise payments for a time-limited period from an individual or organisation such as a bank or building society holding the funds of the adult with incapacity.

50. It will not be possible to make use of the withdrawal scheme where another person such as a continuing attorney, or a financial guardian, is appointed with powers over the account. The withdrawer will have to use the funds they receive for the account-holder’s benefit. The Public Guardian will be able to carry out checks on individual withdrawers, requiring them to produce records and vouchers if necessary. The Public Guardian will also be able to investigate complaints about how withdrawers exercise their powers.

51. The Bill also provides that one holder of a joint account can continue to operate the account on the incapacity of the other, unless the account-holders have formally agreed to opt out of this arrangement.

Alternative arrangements

52. The Scottish Law Commission’s investigations revealed an unmet need for simple, inexpensive ways of managing the financial and property affairs of adults with incapacity. Their proposals to allow cash withdrawals or to make payments from bank accounts were welcomed in principle by nearly all those who responded to their 1991 consultation paper. There were some concerns, however, about the potential for abuse. To safeguard against this, the Commission recommended that the Public Guardian should register and monitor such arrangements and the banks should also have a monitoring role.

53. The Bill recognises that change is required and follows the principles of the Scottish Law Commission’s withdrawal scheme.

Consultation

54. Detailed and constructive discussions have been held with the Committee of Scottish Clearing Bankers about the Scottish Law Commission’s proposals. The proposals have been amended to take account of up-to-date banking practices and other practical matters. The Executive believes that the revised scheme is a considerable improvement and offers both flexibility and appropriate safeguards.

55. The Scottish Law Commission recommended that a maximum weekly sum of £50 should be prescribed that could be withdrawn from the adult’s account.
alternative approach was suggested in the 1997 consultation paper, that the Public Guardian should set an appropriate limit in each case. The Public Guardian would also determine the frequency of withdrawals. The majority of respondents agreed with these alternative proposals and the Bill adopts them with the modification that cash withdrawals from the adult's account will not be authorised, because of the difficulty of monitoring these.

56. Following discussion with the Scottish banks, the Scottish Law Commission scheme has been amended further. The Public Guardian will process applications for authority to make use of the adult's funds for the adult's benefit. Such applications will need to state the amount required and the purposes for which it is required. The Public Guardian will issue a certificate, authorising the individual or organisation holding funds to make regular payments to a designated account, to be operated by the withdrawer.

57. The fund-holder's responsibility will be to ensure that authorised payments are made from the adult's account and the account is not overdrawn. The Public Guardian will have access to the fund-holder's and the withdrawer's records in order to carry out checks and confirm that the adult's funds are being used for the approved purposes. The withdrawer will be able to use the designated account in whatever way is most convenient, for example, through standing orders, direct debit, a cheque book or cash card, and will not be restricted to withdrawing cash.

58. The Scottish Law Commission also recommended that the withdrawer's authority should cease after a period of 2 years and a fresh application should then be required. This would place a burden on the withdrawer who would have to make a fresh application, accompanied by a new declaration of fitness. It would also impose a cost on the adult concerned.

59. The responses to the 1997 consultation paper were, on balance, that an authority to withdraw should generally cease after 3 rather than 2 years, at which point the withdrawer should have to make a fresh application to the Public Guardian. The Public Guardian would then be able to vary the period of authority, including making it indefinite. The Bill follows this approach.

60. The proposals for joint accounts appear to command general agreement, although no specific question about these was asked in the 1997 consultation paper.

61. Provisions for both withdrawals and joint accounts have been broadened to apply to any individual or organisation holding funds of an adult with incapacity not merely to banks and building societies. This is helpful in itself as it avoids having to specify which fund-holding bodies the scheme applies to. In its report, the Scottish Law Commission also envisaged that the scheme might be extended through Regulations to other bodies holding funds on behalf of adults with incapacity.
MANAGEMENT OF RESIDENTS’ FUNDS BY CARE ESTABLISHMENTS

Introduction

62. Part 4 of the Bill covers management by hospital and care establishments of patients’ and residents’ funds, where people lack capacity to look after their own resources. Under community care policy, an increasing number of people who are incapable of managing their own financial affairs now live in residential care homes or nursing homes. Their numbers run into several thousands. Others are cared for in long-stay hospitals, although their numbers are decreasing as community care provision increases. Some will already have arrangements in place for managing their financial affairs, but for many, there is no one else to act on their behalf and their income and savings are not large enough to warrant the appointment of a financial guardian (see Intervention Orders and Guardianship, below). The Bill therefore puts on a statutory basis the management by care establishments of the funds and moveable property of residents who are unable to carry out this function themselves. It will also allow establishments such as those providing supported accommodation to seek registration for the sole purpose of managing residents’ finances. The Bill provides for a robust system of authorisation, control and regulation of these arrangements, all aimed at protecting the interests of the adults concerned.

63. The Executive has been assisted in developing this approach by the Association of Directors of Social Work (ADSW), the Mental Welfare Commission and Alzheimer Scotland- Action on Dementia.

Policy objectives

64. The Bill gives managers of NHS and private hospitals, residential care establishments and nursing homes the power to manage the finances and property of residents who do not have the capacity to do this for themselves.

65. These powers will replace those that currently allow NHS hospital managers to look after patients’ funds (section 94 of the Mental Health (Scotland) Act 1984). Such powers are currently restricted to patients detained under the 1984 Act or receiving treatment for mental disorder in the hospital. This new power will cover any patient in hospital who cannot manage his or her own funds. The Mental Welfare Commission will retain its general protective functions in relation to people with mental disorder and as part of those functions will be able to continue to monitor how hospital managers look after the funds of such patients. The Bill also provides that hospital managers may continue to look after funds for a transitional period, for people who have transferred to another hospital or to a care home. Hospital managers will also be able to manage funds for people who have been discharged, until other suitable arrangements can be made. These provisions build on the Mental Health (Amendment) (Scotland) Bill. That private member's Bill currently before the
Westminster Parliament addresses the problem of patients’ funds being "trapped" when they leave hospital. The effect of the proposed change in the private member's Bill will be to allow hospital managers to continue to use personal funds for the benefit of the individual, when cared for in the community.

66. Managers of establishments providing residential care in both the private and voluntary sectors, private hospitals and nursing homes will gain the right to manage residents’ funds through their registration, currently carried out by the relevant local authority or NHS body. This will require the criteria for registration to be extended, to ensure that establishments have proper systems in place to safeguard the interests of residents in this respect. Care establishments managing funds will be subject to regular inspection and monitoring of the performance of this task by the registering authorities. Their authority to manage funds may be removed if they do not perform their duties satisfactorily.

67. A small number of establishments that do not provide personal care as a whole or substantial part of their service, will need to apply for a new form of registration for the limited purpose of managing the funds of residents with incapacity. This will apply, for example, to some organisations offering supported accommodation.

68. There will be a statutory Code of Practice about the exercise of their functions by hospital managers and managers of registered establishments. This will set out detailed aspects of good practice. In the interim period, until the Bill can be implemented, the Executive are issuing guidance to hospitals and care establishments updating and extending the guidance and safeguards set out in the 1985 Crosby Report on the management of patients’ funds.

69. The Executive will be taking forward the proposal in the White Paper Aiming for Excellence published in March 1999 to create a Scottish Commission for the Regulation of Care. That body will be responsible for the registration, inspection and enforcement of standards relating to all forms of residential and nursing care in the community. The new Commission will bring together the functions of the current Registration and Inspection teams in local authorities and health boards and will, in particular, ensure that national standards governing the management of residents’ funds are properly enforced.

70. The Bill will provide appropriate safeguards and restrictions governing the management of funds by managers of hospitals and care establishments. These will include:

- a process for identifying residents unable to manage their own finances and property. For residents of care establishments certificates of incapacity must be signed by a registered medical practitioner who has no financial or other interest in that residential establishment or in the person themselves;
managers will only be entitled to look after residents’ finances where no other arrangements are in place, or are suitable. This means that they cannot supersede an attorney or guardian with relevant financial powers, nor that of a Department of Social Security (DSS) appointee. A number of residents of care establishments have no one other than the manager of their care home to act for them;

managers will be required to act within the general principles under the Bill;

managers will only be able to manage funds up to a level to be prescribed by Ministers. This will be set initially at £5,000. Above that amount, managers will need the consent of the registering authority in order to manage funds and it is likely that other measures, for example, the appointment of a financial guardian, will need to be considered;

managers will have to keep detailed records of how residents' funds are used and provide accounts for audit when the registering authority requires these;

managers will be able to use an existing account belonging to a resident. Above an amount to be prescribed by Ministers, residents' funds will have to be placed in an interest-bearing account;

managers will not be able to dispose of residents' dwellings or heritable property or deal with residents' investments or shares. Nor will they be able to dispose of other items of residents' property which may have a market value without permission from the registering authority. In addition, managers should have regard for the sentimental value which personal items may have when considering their disposal or any expenditure related to them;

managers will not be able to charge for managing residents' funds, nor may these funds be used to contribute towards fees for the care which the establishment provides.

Alternative approaches

71. The Scottish Law Commission recommended a different arrangement for management of residents' funds, whereby managers of NHS and private hospitals, residential care homes and nursing homes would have applied to the Public Guardian for authority to manage residents' financial affairs if no other suitable person was available. The Public Guardian would have monitored how funds were used and investigated any complaints.

72. The 1997 consultation paper, however, pointed out that this proposed role of the Public Guardian would be costly and difficult to carry out effectively, and said that the Scottish Law Commission proposals failed to acknowledge the existing responsibilities of local authorities and health boards for registering and inspecting care establishments. The paper set out the alternative framework outlined above for local authorities and health boards to approve and monitor the management of residents' finances by care establishments. It asked whether voluntary organisations
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might be involved in managing funds of people living in non-registered establishments. The paper went on to endorse most of the Scottish Law Commission's detailed proposals for defining and limiting managers’ responsibilities.

Consultation

73. Most of the comments on this part of the 1997 consultation paper supported its proposals. There was also overwhelming support for legislation in the consultation exercise in 1998 on the draft interim guidance. Some concerns have been expressed about whether local authorities, and to a lesser extent health boards, are adequately resourced for their new responsibilities, and in particular whether the relevant authorities will have the necessary financial expertise. The need for national standards was emphasised and this has since been reinforced by comments from the Millan Committee. There has been universal acceptance of the need for a Code of Practice and for the issue of interim guidance. Each of these concerns has been addressed: it is not expected that these proposals will generate significant additional costs for local authorities which cannot be met from within existing resources; a national care standards committee has been set up; and interim guidance is being issued.

74. There was some support for the idea of voluntary organisations becoming involved in managing the finances of people living in non-registered supported accommodation. However, there were major concerns about enforcing standards and also about the costs of this approach. The Bill therefore creates a new limited form of registration to cover management of funds by these establishments.

75. Several comments were received about the need to avoid conflicts of interest between the financial management of a care establishment and the function of managing residents’ resources. There have been comments about appropriate safeguards and the vast majority of these have been taken on board in the Bill. For example, it is clear that management by the hospital or care establishment should only be undertaken where no appropriate alternative is available. This approach is consistent with that of DSS appointeeship.

76. Careful consideration has been given to the suggestion that the Mental Welfare Commission, rather than the registering authority, should authorise management of resources over the £5,000 limit for care home residents, as it currently does for patients with mental disorder. The Executive does not think it would be appropriate to extend the Mental Welfare Commission's authority in this way. Instead, the authorisation of funds for patients will be brought into the new regulatory framework.

77. The Bill responds to comments received about accounting and auditing, preventing direct charges to residents for managing their funds and the need to provide various restrictions on the purposes for which managers may use funds. For
example, the approval of the registering authority will be required to purchase items shared between a number of residents.

78. The process of identifying residents who are unable to manage their own finances has been carefully examined. The 1997 consultation paper proposed that certificates of incapacity should be signed by a doctor qualified to assess capacity and countersigned by a Mental Health Officer. The responses to the proposal suggested that it would be unnecessarily cumbersome to involve the Mental Health Officer, and other safeguards have therefore been built in, to ensure an independent medical opinion, intimations to the resident and family and the possibility of challenging the assessment of incapacity. The Code of Practice will set out that there should be regular reviews of the need for managers of care establishments to manage funds.

MEDICAL TREATMENT

Introduction

79. Part 5 of the Bill provides for a general authority to give medical treatment to adults who are incapable of giving consent. Healthcare professionals are often unsure how to represent the interests of adults with incapacity in their treatment. There is a lack of clarity concerning the legal framework within which they can make general treatment decisions. It is in the interests of all for legislation to define this matter with greater precision. Attitudes to medical practitioners and their right to make decisions on the treatment of their patients have been changing in recent years. Patients and their relatives expect to be more involved in decision-making than once was the case and medical practitioners now expect to have their decisions questioned and reviewed more frequently.

80. In announcing an Adults with Incapacity (Scotland) Bill as part of the Executive’s first legislative programme, the First Minister made it clear that legislation on medical aspects would only be introduced where it is necessary and desirable to clarify the law. Giving a general authority to treat and undertake research relevant to the treatment of adult patients with incapacity represents such a reform.

Policy objectives

81. The Bill introduces a general authority to treat, which will allow medical practitioners and other healthcare professionals acting on their instructions to give treatment (including diagnostic tests and procedures) and undertake research relevant to the treatment of adult patients who are incapable of consenting to their own treatment.
82. Some adult patients cannot fully understand the decisions required about their treatment and may not be able at all times to discuss their treatment with health-care staff. Because of uncertainty about the legal and ethical issues involved in setting up research work, some of the treatments which could benefit people with incapacity may not be available to them, nor may they be able to benefit from the findings of research into the causes and consequences of many of the medical conditions associated with incapacity. Scots law is currently unclear as to whether a medical practitioner or any other healthcare worker may carry out any invasive procedure or drug treatment if the patient has been unable to give consent, even when such treatment is clearly for the benefit of the patient. The only secure authority in such circumstances at present is by recourse to the courts, a process not suited for everyday use.

83. In England, a House of Lords decision has developed the concept of necessity that a doctor could treat a patient with incapacity where it was in the best interests of that patient to receive such treatment. That decision would not necessarily bind Scottish courts, so Scottish patients and medical practitioners remain in an uncertain position. That is why the Executive considers it desirable to put in place authority to treat in those circumstances.

84. In such a delicate area of policy arrangements are needed to protect both patients and medical practitioners. The Bill places an obligation on the medical practitioner responsible for the medical treatment of the adult to consult relatives, welfare attorneys and guardians about treatment where appropriate. Certain forms of treatments are to be excluded from the general authority to treat. Treatment decisions can be challenged in the Court of Session when those close to an adult with incapacity have grounds for unease. A further important safeguard will be to ensure that assessment of capacity is the responsibility of the medical practitioner in charge of the patient’s treatment.

85. The Bill includes powers to specify forms of treatment which will be excluded from the general authority to treat. Regulations will be brought forward to define treatments which cannot be given if the patient is not able to consent, treatments which will be subject to a second medical opinion, and treatments which cannot be given without the consent of the court. The treatments to be excluded will be finalised in the light of debate and of advice from the Millan Committee which is currently reviewing the Mental Health (Scotland) Act 1984.

86. The Bill requires healthcare staff to take account of the views of the patient with incapacity if these can be ascertained, and those of the nearest relative, when taking decisions on the patient’s treatment. Where a welfare attorney or guardian with relevant powers has been appointed, medical treatment and research participation may only happen with the consent of that person, except where the court has ruled otherwise.
87. If the court has ruled on medical treatment of an adult with incapacity, healthcare staff will have no authority to take action that conflicts with the court’s decision. While the opinion of the court or of an independent consultant is being sought, the Bill provides that healthcare professionals should have the authority to give treatment necessary to save the life of, or prevent a serious deterioration in the condition of, the patient.

88. Special arrangements will be needed in respect of the small number of patients who are, at the time of their treatment, detained in terms of the 1984 Act. The general authority to treat will not take the place of the arrangements for authorising treatment for mental disorder laid out in that Act.

89. The general authority to treat will not authorise the use of force or detention of a patient with incapacity, except where urgently necessary to prevent serious harm to that patient.

90. The general authority to treat an adult with incapacity will be augmented by an authority to conduct research relevant to that treatment. This will be subject to the approval of an ethics committee which will operate on a national basis. Steps to protect the patient will include a requirement that the research must be into the causes, diagnosis, treatment or care of the patient’s incapacity or associated symptoms or disease; that the patient does not object; that the research should involve minimal risk or discomfort to the patient; and that consent should have been obtained from any guardian or welfare attorney with relevant powers or from the adult’s nearest relative.

Alternative approaches

91. The Executive has examined carefully a number of other proposals made by the Scottish Law Commission, by the Alliance for the Promotion of the Incapable Adults Bill, and by others. Such proposals have included legislation to give clear legal force to Advance Statements (“living wills”) and to provide for the withholding or withdrawal of treatment from patients who may be in a persistent vegetative state (PVS). Although such proposals have the sincere support of particular interest groups, the Executive does not consider that they command widespread support at the present time. There are some concerns that attempts to legislate in this area may not adequately cover all situations which might arise, and could produce unintended and undesirable results in individual cases.

Consultation

92. Extensive consultation has taken place on these issues since the Scottish Law Commission published its Report on Incapable Adults in 1995. Issues relating to medical treatment of, and research on, adults with incapacity were addressed at a
This memorandum relates to the Adults with Incapacity (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 8 October 1999

Seminar arranged in May 1999 by the Alliance for the Promotion of the Incapable Adults Bill and at a conference in June 1999 organised by Alzheimer Scotland Action on Dementia. The Alliance seminar brought medical and patient interests together with church and other interest groups. At both of these events a consensus emerged about the approach to be taken in legislation, which was broadly in line with the provisions now included in the Bill. The need to clarify the law in this area has gained widespread acceptance.

Conclusion

93. The Executive believes that it is in the best interests both of patients and of medical practitioners that the law of Scotland should give specific authority for the treatment of adults with incapacity, and research relevant to that treatment, subject to the safeguards set out in this section. The Bill will clarify the law, allow for the views of those who have the patient’s best interests at heart to be taken into account, and provide a mechanism for reviewing treatment decisions when these are not agreed by all. It will obviate the need for repeated and costly applications to the court, and will open the way to more confident and effective treatment for a substantially disadvantaged group of people.

INTERVENTION ORDERS AND GUARDIANSHIP

Introduction

94. As set out earlier, the present law on guardianship is outdated, fragmented and requires reform. Part 6 of the Bill introduces a new flexible system of welfare and financial orders and guardianship based on the principles set in section 1 of the Bill. This will replace Mental Health Act guardianship, tutors and curators bonis.

Policy objectives

95. A guardian is a person appointed with powers to manage the affairs of an adult with incapacity over an extended period. Guardianship orders will be granted by the sheriff court, which must be satisfied that the adult’s incapacity is likely to continue for a period of time and guardianship is the only way to deal satisfactorily with the adult’s affairs.

96. The Bill provides for a single but flexible form of guardian capable of exercising any combination of welfare and financial powers. It also introduces a new type of one-off "intervention orders", based on the principle of minimum necessary intervention. These orders will be made by the sheriff court and will be used to deal with specific matters in the welfare or financial field that do not require the appointment of a guardian.
97. Intervention orders are expected to be sufficient to deal with many specific problems, without imposing continuing management on the adult with incapacity through the appointment of a guardian. More than one intervention order may be granted at any one time. Intervention orders will be used in a wide variety of situations, such as selling property or directing someone to sign a document. Interim orders will be possible to deal with urgent situations, pending the determination of the application for the full order.

98. The local authority will be under a duty to apply for an intervention order where it appears necessary to protect either the financial interests or welfare of the adult with incapacity and no application has been made by anyone else. Any person with an interest, including the adult concerned, will be able to make an application to the sheriff court. The Public Guardian will keep a public register of all orders granted by the court.

99. Anyone with an interest in the welfare, property or financial affairs of the adult will be able to apply for a guardianship order. As with intervention orders the local authority will be obliged to apply for a guardian to be appointed if no one else is doing so.

100. Applications for guardianship orders and intervention orders will be accompanied by two medical reports confirming the adult’s incapacity. Where incapacity is by reason of mental disorder, one of them must be from a medical practitioner currently listed by the health board under section 20 of the Mental Health (Scotland) Act as having special mental health experience. Where the application relates to the adult’s welfare, a further report will be required from the Mental Health Officer giving an opinion as to whether the order is appropriate and on the suitability of the person nominated to be guardian. Where the application relates only to financial or property matters, a report will be required from a person with sufficient knowledge to comment on the appropriateness of the order and the person nominated.

101. The Public Guardian will keep a public register of all guardians appointed by the court with a note of the powers conferred.

102. Guardians may be appointed initially for a period of 3 years and their appointment will be renewable for 5 years. When appropriate, however, the court will be able to appoint or re-appoint a guardian for a different period of time, including indefinitely. Interim orders will also be possible.

103. Only individuals will be eligible to be guardians, except when the local authority’s chief social work officer is appointed as welfare guardian. In that case, there will be a requirement to name the person responsible for carrying out the guardianship duties.
104. Once the guardianship order has been made, the sheriff court may need to renew or vary it, or to change the guardian. The court will be able to revoke a guardian's powers. Local authorities, the Mental Welfare Commission and the Public Guardian will also be able to discharge a guardian, if the condition of the adult has improved or a guardian is not required to deal with their affairs.

105. Joint guardianship will be possible and the guardians appointed will normally be members of the adult's family. Joint guardians will usually be entitled to act independently of each other. In some cases, however, guardians will be required to consult each other before they exercise their powers. Where disputes cannot be resolved, it will be possible to take the matter to court for resolution.

106. The Bill also provides for the appointment of substitute guardians who will operate on the death or resignation of the original guardian.

107. It will be up to the sheriff court to define a guardian's powers, so long as they are appropriate and consistent with the principle that the intervention is the least restrictive of the adult's freedom. The court will also be able to confer a general power on the guardian to deal with all aspects of an adult's welfare or financial affairs. This will, however, be subject to various limitations. A guardian will not be able to consent or agree to the adult's marriage, the adoption of the adult's children or various sensitive medical treatments. Nor will the guardian be able to place the adult in a hospital for treatment of mental disorder against their will.

108. Ministers will make Regulations defining the scope of the powers which may be conferred on guardians and how these are to be exercised. This will ensure that all concerned, including the adult, are clear what decisions the guardian is entitled to take.

109. Where the adult under welfare guardianship refuses to go to or return to a place of residence selected by the guardian, the guardian will be entitled to apply to the sheriff court for a warrant authorising a police officer to apprehend and take the adult to that place. The court will also be able to order third parties to comply with a welfare guardian’s decisions, with appropriate safeguards.

110. The local authority will supervise the exercise of guardians’ welfare powers. The Mental Welfare Commission will have a monitoring role as it has currently in relation to Mental Health Act guardians. This will include visiting those subject to welfare guardianship. The Public Guardian will supervise the exercise of guardians’ financial powers and a financial guardian will have to comply with any order made by the Public Guardian. The statutory bodies will investigate complaints or suspicious circumstances and if necessary take action to safeguard the interests of the adult with incapacity.
111. A guardian with financial and property powers will be obliged, within 3 months of appointment, to submit an inventory of the adult’s estate to the Public Guardian. He or she will also have to draw up a management plan for the estate and submit that for approval to the Public Guardian. The management plan will need to be frequently reviewed. Until the management plan has been approved, the guardian’s powers will be limited. Every year the guardian will have to submit accounts to the Public Guardian for audit. If the guardian wishes to sell the adult’s home or to buy a house for them, it will be necessary to obtain the Public Guardian’s consent.

112. The management plan will be used to decide how to invest the adult’s estate. The guardian will, after seeking proper advice, be able to retain existing investments and, if the Public Guardian agrees, be able to make new ones in the name of the estate. A financial guardian will be able to run an existing business if this falls within the scope of the powers conferred by the sheriff court. A guardian will not, however, be able to use the adult’s funds to start a new business, as this would put the estate at too great a risk. The Public Guardian will be able to direct the guardian to dispose of investments and to sell the business if this seems appropriate.

113. The Public Guardian and the sheriff court will be able to relax some of these requirements for financial management by a guardian where the estate is small or where the guardian has limited powers.

114. All guardians with financial powers and people acting in financial matters under intervention orders will have to provide insurance against any claims of mishandling of funds.

115. Guardians exercising financial powers will generally be entitled to be paid, although this will not normally apply to guardians with welfare powers. The sheriff court will have to approve any payments to welfare guardians and the level will be set by the Public Guardian. Where a guardian with welfare or financial powers has incurred reasonable expenses in carrying out their functions, they will be entitled to reimbursement from the adult’s funds.

**Alternative arrangements**

116. Originally, the Scottish Law Commission proposed that there should be two separate posts of welfare and financial guardian. However, they concluded that it would be simpler to have a single post of guardian, who could be appointed with powers in either field or both.

117. The main area of difference between the Scottish Law Commission’s recommendations and the approach in the Bill is in the scope of the Public Guardian’s role. The Scottish Law Commission recommended that it should be possible to
appoint the Public Guardian as a financial guardian and he should set up a scheme for the low-cost management of modest estates. There has been considerable interest in this point, both during and after the 1997 consultation exercise, in which the then government proposed that there should in fact be no financial "guardian of last resort".

Consultation

118. The 1997 consultation paper posed a wide range of questions about guardianship and many responses were received, both on fundamental principles such as the role of the Public Guardian, and on more detailed points of procedure.

119. There was almost universal support for the proposed new form of guardianship. The majority of respondents agreed that it should not be possible to appoint the Public Guardian as financial guardian although some knowledgeable organisations did want this to be possible.

120. The Executive believes the Public Guardian’s proper role is a registering and supervisory one and wishes to keep a clear focus on these important protective functions. It also considers that other measures in the legislation will be sufficient to meet effectively the need for financial management on behalf of adults with limited resources. For those with significant funds, it will be necessary to appoint a guardian and there should be no difficulty in identifying someone to act.

121. The Millan Committee has expressed the view that it should be possible to appoint the Public Guardian as guardian, but many other organisations in the field now agree with the Executive’s approach.

122. Views were sought in 1997 on how long a guardian’s period of appointment should last. A wide range of responses was received. The majority of respondents thought the initial period should be prescribed in legislation and the Bill gives a guideline on this. There was no general agreement on how long the period should be, but the Executive considers that the Scottish Law Commission's recommendation of 3 years (5 years on renewal) strikes the right balance.

123. Following consultation about factors to be considered by the court when a guardian is appointed, the Bill requires the court to take account of any conflict of interest liable to affect adversely the interest of the adult with incapacity.

124. Many respondents in 1997 thought the duty imposed on joint guardians to consult with each other was sufficient to guard against stalemate over disputed decisions. The Executive accepts the need to give joint guardians recourse to the sheriff court if problems arise, however, and the Bill provides for this.
125. Most respondents agreed that solicitors and local authorities should have to provide insurance if acting as a financial guardian.

126. The Executive accepts the view of the majority of respondents to the 1997 consultation paper, that the requirements for reports to the sheriff court should be the same for intervention orders as for guardianship. It has considered various suggestions that people acting under intervention orders should be subject to supervision and other safeguards, even though these orders are short-term. The Executive agrees in principle and some additional provisions for this are included in the Bill.

127. After consultation, the Executive has extended the Scottish Law Commission's provisions for giving notice of applications and orders. The Scottish Law Commission proposed that a guardian should inform the Public Guardian of his or her appointment. It is now thought that the sheriff court should give such notice, as this will provide a more reliable form of intimation. The local authority are to be notified of all guardians’ appointments and the Mental Welfare Commission are to be informed about welfare guardians.

128. The Bill provides that a welfare guardian may apply to the sheriff court for an order directing a third party to implement or comply with the guardian's instructions. Concerns have been expressed about this provision and the indiscriminate use of such a power would be unacceptable. The Bill provides various safeguards. If a guardian makes such an application, the third party will be given an opportunity to make representations to the court and the sheriff will have to be satisfied that the order will benefit the adult and is the only reasonable way of achieving the desired result.

129. The Scottish Law Commission understood that if a local authority chief social work officer were to be appointed as welfare guardian, the exercise of the powers granted would be delegated to others. Most of the respondents to the 1997 consultation paper agreed that the chief social work officer should be obliged to name the person to whom guardianship is delegated. The principle is important to service users and the Bill makes express provision for it.

130. The 1997 consultation paper raised the question of how the Public Guardian is to be satisfied as to the accuracy of a guardian's inventory of an adult's estate. It suggested that an inventory should form part of the guardian's authority to operate. He or she would be obliged to show the inventory to a third party before any transaction, such as withdrawing money from the adult's bank account. Any suspicions on the part of the third party could then be reported to the Public Guardian. To make this scheme effective, the requirement to prepare an inventory would have to be a compulsory one.

131. Most respondents thought inventories should be compulsory, although the difficulties and expense of such a scheme were also noted. Compulsion would be difficult to implement. The Bill reverts to the Scottish Law Commission's original
proposals and allows the Public Guardian the authority to dispense with the inventory where appropriate.

132. There was strong support in the responses to the consultation paper for the proposal that a threshold should be set below which a management plan could be dispensed with. The paper also asked whether the Public Guardian should have power to dispense with a management plan. Views on this point were finely balanced and the Bill therefore adopts the Scottish Law Commission’s view that a management plan should not always be necessary but that only the sheriff court should have the power to dispense with it.

**MISCELLANEOUS**

**Appeals**

133. Court proceedings under the Bill will be civil proceedings. In general, decisions made by statutory bodies such as the Public Guardian and the local authority will be appealable to the sheriff. Decisions of the sheriff will generally be appealable to the Sheriff Principal with a subsequent appeal, with leave, to the Court of Session.

**Transitional provisions**

134. The Bill clarifies the position of existing substitute decision-makers such as Mental Health Act guardians, curators bonis, tutors and attorneys when the new legislation comes into effect.

135. Existing attorneys with financial powers that continue when the granter loses capacity will be treated as continuing attorneys under the new legislation in many respects. They will not have to register with the Public Guardian, however, or provide information about changes in circumstances. The Public Guardian will supervise these attorneys and investigate any complaints about them if required.

136. After commencement of the legislation it will no longer be possible to apply for appointment as a Mental Health Act guardian, curator bonis or tutor since these offices will be abolished. Existing office-holders will be required to act in accordance with the general principles set out in section 1 of the Bill and will be supervised by the Public Guardian, local authority or Mental Welfare Commission if necessary.

137. Mental Health Act guardians will convert to the new form of guardianship once their appointment comes up for renewal, that is after 6 months or a year. Curators bonis and tutors will keep their existing powers for a maximum period of 5 years. Within that period an application will have to be made to the court for appointment as financial or welfare guardian as appropriate. During the transitional
period, the Public Guardian will have discretion to apply provisions of the new legislation to existing office-holders with financial powers in relation to their management of the adult’s estate.

138. The Bill makes various consequential changes to other legislation. In particular, the guardianship provisions in the Mental Health (Scotland) Act 1984 will be repealed. The Bill amends the Criminal Procedure (Scotland) Act 1995, which allows courts to place mentally disordered offenders under the guardianship of the local authority. In future the courts will have the option to appoint a guardian with welfare powers.

Private International Law

139. The Executive will consider legislation on various Private International Law matters. These concern the relationship between the legal systems of different countries in situations involving adults with incapacity who have connections with more than one country. The legislation would provide for rules to determine which country’s courts have jurisdiction over the adult with incapacity, which country’s law would apply and how decisions made in one country may be enforced in another country. For example, an adult may live in one country, but own property in another.

140. An international convention on these matters has just been finalised by the Hague Conference on Private International Law. The draft convention was the subject of a consultation exercise by the Lord Chancellor’s Department and Scottish Courts Administration earlier this year. The Executive will need to determine in due course how to implement the necessary provisions to implement the convention in Scottish legislation, once the United Kingdom government decides on signature.

IMPACTS OF THE PROPOSALS

Introduction

141. The separate Financial Memorandum sets out the costs arising from the provisions of the Bill, indicating the bodies which will incur these costs and when resources will be required. This section of the Policy Memorandum gives a general account of the effects of the proposals on a number of different bodies. It also looks at the consequences for equal opportunities, human rights and other matters as required in the Parliament’s Standing Orders.

142. In general, the Bill introduces a modern, flexible framework of legislation that will improve both the rights and protection of adults with incapacity. Individuals and organisations will save time and resources that are spent now in working with the
current statutory framework that is cumbersome and expensive and that fails to meet clients’ needs adequately.

**Impact on individuals**

143. People who have never had the capacity or who have lost capacity to make decisions, and those who anticipate that they may do so at some point, will be affected by this legislation. So will families and those who care for them. As explained above, there may be up to 100,000 people in Scotland who lack capacity. The broad approach to the question of charging fees is that the cost of the civil courts should be borne by those using the services. Hence, fees will be charged by the courts and for the use of certain services provided by the Public Guardian’s office. Legal aid will be available in the normal way. People granting a power of attorney will, as now, meet their own legal costs.

**Impact on Scottish Court Service**

144. Additional resources will be required, to expand the office of the Accountant of Court to form that of the Public Guardian, and also to cover new court proceedings. There will be an initial cost, for setting up the Public Guardian’s registers, for providing information and training for sheriffs and court staff, and for producing information for the public.

**Impact on local government**

145. Local authorities are already heavily involved in matters relating to the welfare of many adults with incapacity. The proposals will give local authorities some new duties and powers, in particular where no one else is looking after an adult’s welfare. The proposals will allow local authorities to discharge their duties towards adults with incapacity in a much more appropriate and efficient manner than at present. In particular, the Bill will improve matters for the considerable percentage of residents in local authority residential homes who currently have their finances managed by the home without a statutory basis. Local authorities will need to co-operate with the other statutory organisations involved: the Public Guardian and the Mental Welfare Commission.

146. The proposals will have particular implications for:

- Mental Health Officers;
- Community care practice teams;
- Local authority residential homes.
This memorandum relates to the Adults with Incapacity (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 8 October 1999

147. The principal impact on local authorities will arise in relation to intervention and guardianship orders. When there is no one else to act the local authority must make such applications and when the application relates to an adult’s welfare Mental Health Officers are required to provide reports to the courts. Responsibility for registration and inspection of care establishments is set to transfer to the proposed Scottish Commission for the Regulation of Care. Preparatory work including training will be part of the costs of setting up the Commission. The costs of registration will continue to be recoverable in the usual way. As demand for the provisions of the Bill builds up additional workload and costs will be generated for local authorities; this will be taken into account when setting future funding levels.

Impact on the NHS

148. The provisions in the Bill will have implications for:
   • Registration and Inspection teams in health boards;
   • Doctors who are called upon to make both formal and informal assessments of incapacity;
   • Hospital managers managing patients’ resources;
   • Community psychiatric services;
   • Other healthcare professionals;
   • Nursing homes.

149. Many of the assessments that NHS practitioners will make under the proposals are already carried out in the course of routine care of patients. Hospital managers already have systems for the daily management of patients’ funds. The cost of the registration and inspection process for nursing homes will continue to be borne by the home owners and operators. It will be for each home owner to decide whether any additional administration costs that arise should be reflected in the costs charged to residents. Overall the additional costs falling on the NHS are not expected to be substantial.

Impact on the Mental Welfare Commission

150. The Mental Welfare Commission will retain its general protective functions towards people suffering from mental disorder and will be given some new powers and duties in relation to welfare functions of guardians, attorneys and others. Its powers and duties in respect of guardianship under the Mental Health (Scotland) Act 1984 will be superseded as this form of guardianship is replaced. Some additional resources will be needed for the Commission to enable it to carry out its functions effectively.
Impact on the voluntary sector

151. Many voluntary organisations are involved in providing services for adults with incapacity and in representing their interests. The latter function will become much more straightforward under the new statutory framework. Any costs, such as registration, falling on service providers as a consequence would be recoverable, through the contract price for the service where relevant.

Impact on other bodies

152. The proposals will clarify the position of banks, building societies and other similar organisations in the management of the financial affairs of people with incapacity, through clarifying who is entitled to act. As now, the cost of specific banking and financial services will fall on the account-holder. In general, third parties dealing with those representing an adult with incapacity will have much more reassurance in future about the legality of transactions in which they are involved. This will be helpful for all concerned and no additional costs should be involved.

Impact on human rights

153. The Executive has considered very carefully the effect of these proposals on human rights, since the Parliament requires to be satisfied that legislation is in line with the European Convention on Human Rights. The Executive does not think there will be any difficulties in meeting this requirement.

Impact on equal opportunities

154. The Executive considers that these proposals will considerably improve equal opportunities for people with a legal incapacity. The Bill’s purpose is to allow people with incapacity to exercise the same legal rights as other adults in a way that meets their needs and protects their interests. For example, the general principles set out above will ensure that every effort is made to communicate with people before they are considered incapable of taking a decision. Their present and past wishes will be taken into account and they will be encouraged to use the skills they have and to develop new ones. In choosing the sheriff court as the judicial forum for proceedings under our legislation, the Executive has been very aware of the need for easy accessibility throughout Scotland, so that issues can be dealt with quickly and, wherever appropriate, informally.

155. The proposals will affect older people both as adults with incapacity and as carers, simply because of the nature of the client group concerned. Efforts have been made to ensure that the statutory framework is accessible and appropriate for clients
and this will continue to be borne in mind in implementing the proposals, for example, through providing good, targeted public information.

156. The proposals are likely to have more impact on women than men, both because they live longer and because they are more likely to be involved in caregiving.

157. The Executive considers that the proposals will not discriminate on grounds of sexual orientation. The proposals strengthen the rights of carers and other interested persons to have their views taken into account. Nor do the proposals discriminate on grounds of marital status - a longstanding partner will be treated as the nearest relative of an adult with incapacity and will therefore have the same rights as a husband or wife.

158. The proposals in the Bill will not operate differently, according to the race, culture or religion of those concerned. The need to communicate appropriately has been built in and information about the new measures will be made available in a variety of languages, as is already the practice within the Scottish Court Service.

**Impact on rural areas and island communities**

159. People living in these areas may already experience difficulties in gaining access to statutory services, to the courts and to appropriate sources of advice and information. The proposals in the Bill for a more flexible statutory framework and the use of the sheriff court will improve access to appropriate forms of protection for clients who live outside the main centres of population.

**Sustainable development**

160. The Bill will not have any effect on sustainable development issues.