



Health Department
Human Resources Directorate

Dear Colleague

Mental Health (Amendment) (Scotland) Act 1999: The "Clarke" Act

Purpose

1. The purpose of this letter is to inform you of the coming into force on 11 January 2000 of the Mental Health (Amendment) (Scotland) Act 1999.
2. The Act, which amends section 94 of the Mental Health (Scotland) Act 1984, results from a Private Members' Bill, introduced at Westminster by Mr Eric Clarke MP. The Clarke Act is quite separate from the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, which was passed by the Scottish Parliament in September 1999, and which also amended the 1984 Act.
3. The Clarke Act introduces a new provision into section 94 of the Mental Health (Scotland) Act 1984, which will enable hospital managers to continue to manage the funds of patients who are unable to look after their own financial affairs when discharged from hospital into the community.
4. The Clarke Act is intended as an interim measure pending consideration by the Scottish Parliament of the Adults With Incapacity (Scotland) Bill, which will make full provision for managing the welfare and finances of adults with incapacity.

This letter should be read in conjunction with the guidance issued by the Scottish Executive on 29 October 1999 - **'PROTECTION OF THE FINANCES AND OTHER PROPERTY OF PEOPLE INCAPABLE OF MANAGING THEIR OWN AFFAIRS'** Community Care Circular CCD2/1999. That guidance makes reference to the proposed

12th January 2000

Addresses

For action

General Managers, Health Boards
Chief Executives, NHS Trusts
General Manager, State Hospitals
Board for Scotland
Directors of Social Work/Chief Social
Work Officers
Director, Mental Welfare
Commission for Scotland
Directors of Housing
Chief Executives, Local Authorities

For information

Chief Executive, COSLA
General Manager, Common Services
Agency
Scottish Federation of Housing
Associations

Enquiries to:

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amendment to section 94 of the 1984 Act, to which the Clarke Act has given effect. Further details are given in the Annex.

Action

6. This letter should be drawn to the attention of all those whose duties require a knowledge of the provisions of the 1984 Act with respect to the protection of the finances and property of people incapable of managing their own affairs.

7. Addressees are asked to review their own guidance and procedures in the light of this letter and to draw it to the attention of relevant practitioners and staff. As registering authorities, local authorities and health boards are asked to bring this letter to the attention of persons in charge of registered residential care homes and nursing homes and to the managers of other supported housing facilities in their area.

8. Any queries relating to this letter should be addressed to Ian Turner, Public Health Policy Unit, Scottish Executive, St Andrew's House, Edinburgh, EH1 3XD, e-mail Ian.Turner@scotland.gov.uk.

Yours sincerely



KEVIN WOODS
Scottish Executive Health Department

Background

1. Section 94 of the Mental Health (Scotland) Act 1984 allows managers of hospitals to receive and hold money and valuables for a person who is liable to be detained or is being treated in hospital if they are incapable, through mental disorder, of managing their own affairs. The 1984 Act made no provision for hospital managers to pass the funds of such a patient to any other person or to expend them for the patient's benefit after the patient had left hospital to reside in the community. In consequence, the patient's funds became trapped and unable to be used for their benefit.

2. The Mental Health (Amendment) (Scotland) Act 1999 - the Clarke Act - addresses this difficulty. This Act amends section 94 of the Mental Health (Scotland) Act 1984 by inserting, after subsection (3), a new subsection (3A), the effect of which is to allow managers of a hospital to continue to hold money and valuables and to spend the money for the benefit of the person whose funds are being managed, after discharge from hospital.

Text of the Mental Health (Amendment) (Scotland) Act 1999 - the Clarke Act

3. The Clarke Act inserts the following text after of section 94 (3) of the 1984 Act:

'(3A) The managers of a hospital may continue to –

(a) hold money (and receive interest accruing thereon) and valuables on behalf of a person in pursuance of subsection (1) of this section, and

(b) expend the money or dispose of the valuables in pursuance of subsection(3) of this section,

despite the person ceasing to be liable to be detained in the hospital under this Act or in receipt of treatment for mental disorder as a patient in the hospital.'

Guidance on implementation

4. This letter should be read in conjunction with the guidance issued by the Scottish Executive on 29 October 1999 - **'PROTECTION OF THE FINANCES AND OTHER PROPERTY OF PEOPLE INCAPABLE OF MANAGING THEIR OWN AFFAIRS'** Community Care Circular CCD2/1999.

5. Part 1 of Circular CCD2/1999 sets out the general principles for the assessment of an individual's capacity to manage their own affairs. It also sets out the principles to be followed in any intervention in the financial affairs of such an adult, namely:

- Any intervention in the financial affairs of an incapable adult should produce a benefit for that adult. Any person wishing to intervene should be satisfied that this benefit could not be achieved otherwise.
- Any proposed intervention should be that which is least restrictive to the incapable adult's freedom having regard for the purpose of the intervention.
- Anyone managing an incapable adult's finances and affairs should, where it is reasonable and practical to do so, encourage him or her to use existing and develop new skills.
- Any person proposing to make an intervention in the affairs of an incapable adult should take account of his or her present and past wishes and past preferences.

6. Part 1 of Circular CCD2/1999 also sets out the mechanisms for managing an incapable adult's funds. In particular, paragraphs 1.31 and 1.32 describe the powers of hospital managers to receive and hold money and valuables on behalf of patients who are incapable of managing their own affairs. Paragraph 1.33 makes reference to a proposed amendment to the 1984 Act to allow hospital managers to manage the funds of patients who have been discharged into the community. Part 2 describes the arrangements which should be put in place for the management of their personal funds and property before they are transferred or discharged to community settings. Part 3 deals with the formal arrangements and protection of the finances and property of incapable adults in the community or who are preparing for discharge from NHS care.

7. Those charged with ensuring the adequate management of an incapable adult's finances and property should make the optimum use of the options set out in Circular CCD2/1999 and develop solutions which best meet the needs of each individual and reflect the general principles set out for intervention in a person's affairs.

8. Paragraphs 2.27 to 2.29 of circular CCD2/1999 give guidance on planning the arrangements to be made for a patient's affairs after discharge. The Clarke Act provides additional flexibility by enabling hospital managers to continue to hold and manage funds on behalf of the patient after discharge, where no alternative arrangements are possible. The Clarke Act also provides for the interest accruing on the patient's funds which are being managed on their behalf by hospital managers to continue to be accrued and held with the capital.

9. Where it is intended that hospital managers will continue to manage a patient's funds after discharge, the discharge planning team should discuss with the care team in the community the patient's future care and the part the patient's capital will play in this. They should consider, in particular, the frequency of access required to these funds and how this access will be managed. It should be borne in mind that new money payable to the patient (such as DSS payments) is not "entrapped" and appropriate arrangements should be made for the management of such funds in the community on behalf of the patient. These arrangements will not involve the hospital managers.

After discharge

10. Where hospital managers manage the funds of a discharged patient they should continue to do so in accordance with the guidance in Circular CCD2/1999.

11. Hospital managers may, in response to an appropriate request from the care team of a discharged patient, make payments from the patient's funds after satisfying themselves as to the benefit to the patient of the proposed expenditure. Accordingly, hospital managers should set up and agree procedures with the patient's care team for requesting payments from the patient's funds and for approving and recording such payments. Hospital managers should also set up audit procedures whereby they can monitor the receipt of the goods and services purchased by the care team from the funds released on behalf of the patient.

12. Hospital managers, who continue to look after the funds of people who leave hospital to live in the community, will wish to keep in mind the need for periodic reviews of their incapacity, in terms of the 1984 Act, to manage and administer their personal affairs.

Mental Welfare Commission for Scotland

13. The Mental Welfare Commission, under their general protective powers, will wish to be reassured that proper systems are in place for the continuing management of the patient's funds. Accordingly:

13.1 hospital managers must notify the Commission of each case in which they continue to manage the funds of a discharged patient (whether or not the patient's funds exceed the limit above which consent is required from the Commission to manage those funds by section 94 (2) of the 1984 Act).

13.2 hospital managers must seek the approval of the Commission for expenditure from such a discharged patient's funds of more than £500 in any one year.

In addition, hospital managers must include information on the funds of discharged patients, which they continue to manage, in their regular reports on the management of all incapax patients' funds to the Commission and to the Scottish Health Advisory Service.