



# SCOTTISH EXECUTIVE

## Health Department

5<sup>th</sup> April 2001

Dear Colleague

### MENTAL HEALTH (SCOTLAND) ACT 1984 CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

### EFFECT OF IMPLEMENTATION OF ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

#### Background

1. The Adults with Incapacity (Scotland) Act 2000 amends the Mental Health (Scotland) Act 1984 and the Criminal Procedure (Scotland) Act 1995 to make provision for the introduction of welfare attorneys and new style guardians. This letter gives further information on the implementation of the 2000 Act and its effect on the 1984 Act and the 1995 Act respectively. For ease of reference the amendments to the 1984 Act and the 1995 Act are set out in the Annex.

#### Introduction of 2000 Act

2. The Adults with Incapacity (Scotland) Act 2000 will be introduced in stages from April 2001. The current implementation timetable is as follows:

<u>Part of the Act</u>	<u>Description</u>	<u>Commencement Date</u>
1	General Principles and Fundamental Definitions	April 2001
2	Continuing Powers of Attorney and Welfare Powers of Attorney	April 2001
3	Accounts and Funds	April 2001
4	Management of Residents' Finances	April 2002
5	Medical Treatment and Research	Autumn 2001
6	Intervention Orders and Guardianship Orders	April 2002

#### Addresses

##### For action

General Managers, Health Boards  
Chief Executives, NHS Trusts  
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Board for Scotland  
Directors, Social Work  
Scottish Courts Administration  
Scottish Courts Service  
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##### For information

General Manager, Common Services Agency  
Chief Executive, Health Education Board for Scotland  
Secretary, Mental Welfare Commission  
Director, Scottish Health Advisory Service  
Royal College of Psychiatrists (Scottish Division)  
Royal College of General Practitioners (Scottish Division)  
Director, SCPMDE

#### Enquiries to:

Mrs F Tyrrell  
Scottish Executive Health Department  
Public Health Division  
St Andrew's House  
EDINBURGH EH1 3DG

Tel: 0131-244 2543  
Fax: 0131-244 2846

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### **Welfare Attorneys**

3. From 2 April 2001, the provisions in the 2000 Act, which enable the appointment of continuing and welfare attorneys, will be introduced. Schedule 5 para 17 of the 2000 Act will amend the 1984 Act to enable the views of a welfare attorney to be taken into account in addition to the views of the nearest relative in relation to detained patients, and persons on a community care order or under guardianship in terms of the 1984 Act.

### **Guardianship**

4. The limited provisions of the 2000 Act which are being introduced from 2 April 2001 will not affect guardianship under the 1984 Act. In this respect, the powers and responsibilities of 1984 Act guardians will remain unchanged as will the powers of the local authority and the Mental Welfare Commission. In particular, guardians may continue to be appointed under the 1984 Act.

5. From 1 April 2002, when the remaining parts of the 2000 Act, including Part 6 (Intervention Orders and Guardianship Orders), are implemented the guardianship provisions in the 1984 Act will be repealed. Schedule 4 para 2(1) of the 2000 Act (when enacted on 1 April 2002) provides that any person holding office as a guardian of an adult under the 1984 Act will become a guardian under the 2000 Act with powers as prescribed in the 1984 Act. Schedule 4 para 2(2) makes provision where proceedings for the appointment of a guardian under the 1984 Act have commenced but are not determined before the introduction of Part 6 of the 2000 Act. Schedule 4 para 6 sets out how the 2000 Act will apply to persons who become guardians by virtue of that Schedule. From 1 April 2002, Schedule 5 para 17 of the 2000 Act will amend the 1984 Act to enable the views of a guardian to be taken into account in addition to the views of the nearest relative and welfare attorney in relation to detained patients, persons on a community care order or under guardianship in terms of the 1984 Act. Schedule 6 of the 2000 Act repeals the 1984 Act provisions relating to guardianship.

### **Guardianship under the Criminal Procedure (Scotland) Act 1995**

6. From 1 April 2002, the provisions in sections 57 and 58(1) of the Criminal Procedure (Scotland) Act 1995, which enable the court to place a person on guardianship, will be amended to guardianship under the 2000 Act. Section 84 of the 2000 Act specifies that Parts 1, 5, 6 and 7 of that Act shall apply to a guardian appointed under section 57(2)(c) or section 58(1) of the 1995 Act as they apply to a guardian with powers relating to the personal welfare of an adult appointed under Part 6; and inserts a new section (section 58A) into the 1995 Act for this purpose. Schedule 5 of the 2000 Act amends sections 57 and 58 of the 1995 Act, and Schedule 6 repeals references to guardianship under the 1984 Act in the 1995 Act.

7. The effect of these amendments is that where the court, as a disposal under s57(2)(c) or 58(1) of the 1995 Act, makes an order placing a person's personal welfare under the guardianship of the local authority or of a person approved by the local authority, this will mean guardianship for the purposes of the 2000 Act rather than the 1984 Act.

8. Until 1 April 2002, the provisions for making an order for 1984 Act guardianship under s57(2)(c) and s58(1) of the 1995 Act remain unchanged.

**Intervention Order under the Criminal Procedure (Scotland) Act 1995**

9. Schedule 5 para 26(3) of the 2000 Act makes provision in the 1995 Act (by inserting a new section 60A) for an Intervention Order under the 2000 Act to be made in place of a hospital order or guardianship order, where the court considers it appropriate to do so, ie, as the least restrictive appropriate intervention for adult. This provision will come into force on 1 April 2002.

**Adults with Incapacity (Scotland) Act 2000**

10. Full details of the implementation of the 2000 Act may be found on the Scottish Executive web-site at <http://www.scotland.gov.uk/justice/incapacity/>. A leaflet on the introduction of the Act is also available by phoning the NHS Helpline on 0800 22 44 88.

Yours sincerely

**GODFREY ROBSON**  
**Director of Policy**

**TEXT OF AMENDMENTS MADE BY ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000****1. Amendments to the Mental Health (Scotland) Act 1984 (c.36)**

The amendments at Schedule 5 Paragraphs 17(3) to (23) and 17(24)(b) come into effect on 2 April 2001 only for the purpose of bringing into force these provisions in so far as they relate to welfare attorneys.

All amendments listed below come into effect for all purposes on 1 April 2002.

**Schedule 5 of the 2000 Act**

17(1) In section 3 of the Mental Health (Scotland) Act 1984—

- (a) in subsection (1) “guardianship or” shall be repealed;
- (b) in subsection (2) in paragraph (b) “or who are subject to guardianship” shall be repealed.

17(2) In section 5(2) of that Act “and the guardian of any person subject to guardianship under this Act” shall be repealed.

17(3) In section 19 of that Act—

- (a) in subsection (1) for “either by the nearest relative of the patient or by a mental health officer” there shall be substituted “by the nearest relative of the patient, by a mental health officer, or by a guardian or welfare attorney of the patient who has powers to do so”;
- (b) in subsection (2) after “relative” there shall be inserted “, guardian or welfare attorney, as the case may be,”;
- (c) in subsection (3) after “relative” in both places there shall be inserted “, guardian or welfare attorney, as the case may be”;
- (d) in subsection (4) after “patient” where second occurring there shall be inserted “or by a guardian or welfare attorney of the patient”;
- (e) in subsection (5)(b) after “relative” there shall be inserted “and any guardian or welfare attorney”.

17(4) In section 20(1)(a) of that Act for “or his nearest relative” there shall be substituted “, his nearest relative, guardian or welfare attorney, as the case may be”.

17(5) In section 21(2)(b) of that Act—

- (a) after “relative” where first occurring there shall be inserted “, guardian or welfare attorney, as the case may be”;
- (b) after “relative” where second and third occurring there shall be inserted “guardian or welfare attorney”.

17(6) In section 22(4)(c) of that Act after “relative” there shall be inserted “and any guardian or welfare attorney”.

17(7) In section 24 of that Act—

- (a) in subsection (2) after “relative” there shall be inserted “, of any guardian or welfare attorney who has powers to do so,”;
- (b) in subsection (5) after “relative” there shall be inserted “and any guardian or welfare attorney”.

17(8) In section 26 of that Act—

- (a) in subsection (1)(b) after “patient” there shall be inserted “, by any guardian or welfare attorney of the patient who has power so to consent,”;
- (b) in subsection (4)(b) after “relative” where first occurring there shall be inserted “and any guardian or welfare attorney “ and after “relative” where second occurring there shall be inserted “, guardian or welfare attorney, as the case may be”.

17(9) In section 26A of that Act—

- (a) in subsection (4) after “relative” there shall be inserted “or any guardian or welfare attorney who has powers to do so”;
- (b) in subsection (6)(b) after “relative” where first occurring there shall be inserted “and any guardian or welfare attorney” and after “relative” where second occurring there shall be inserted “, guardian or welfare attorney, as the case may be”.

17(10) In section 29 of that Act—

- (a) in subsection (2) after “relative” there shall be inserted “, to any guardian or welfare attorney”;
- (b) in subsection (4) after “relative” there shall be inserted “, guardian or welfare attorney”.

17(11) In section 30(5) of that Act after “relative” there shall be inserted “and any guardian or welfare attorney of his”.

17(12) In section 31B(3) of that Act after “relative” there shall be inserted “, and any welfare attorney,”.

17(13) In section 33(5) of that Act for “or by the nearest relative” there shall be substituted “, by the nearest relative or by any guardian or welfare attorney who has powers to do so”.

17(14) In section 34 of that Act—

## ANNEX

- (a) in subsection (1) after “relative” wherever occurring there shall be inserted “, or guardian or welfare attorney with powers to do so”;
  - (b) in subsection (2) after “relative” where first occurring there shall be inserted “, guardian or welfare attorney, as the case may be” and after “relative” where second occurring there shall be inserted “, guardian or welfare attorney”;
  - (c) in subsection (3) after “relative” there shall be inserted “or by any guardian or welfare attorney”.
- 17(15) In section 35 of that Act—
- (a) in subsection (1) for “or his nearest relative or both” there shall be substituted “, his nearest relative, his guardian or his welfare attorney or all of them”;
  - (b) in subsection (3) after “relative” there shall be inserted “or any guardian or welfare attorney”.
- 17(16) In section 35B of that Act—
- (a) in subsection (3)(a) after “patient” where first occurring there shall be inserted “or any guardian of the patient” and after “relative” there shall be inserted “and any welfare attorney of the patient”;
  - (b) in subsection (4) after “relative” there shall be inserted “and any welfare attorney of the patient,”.
- 17(17) In section 35C of that Act—
- (a) in subsection (3)(b)(i) after “patient” where first occurring there shall be inserted “or any guardian of the patient” and after “relative” there shall be inserted “and any welfare attorney of the patient”;
  - (b) in subsection (4) after “relative” there shall be inserted “and any welfare attorney of the patient,”.
- 17(18) In section 35D of that Act—
- (a) in subsection (1)(a) after “patient” where first occurring there shall be inserted “or any guardian of the patient” and after “relative” there shall be inserted “and any welfare attorney of the patient”;
  - (b) in subsection (2) after “relative” there shall be inserted “and any welfare attorney of the patient,”.
- 17(19) In section 35E of that Act—
- (a) in subsection (3)(a) after “patient” where first occurring there shall be inserted “or any guardian of the patient” and after “relative” there shall be inserted “and any welfare attorney of the patient”;
  - (b) in subsection (4)(a) after “patient” where first occurring there shall be inserted “or any guardian of the patient” and after “relative” there shall be inserted “and any welfare attorney of the patient”;

(c) in subsection (5) after “relative” there shall be inserted “ and any welfare attorney of the patient,”.

17(20) In section 35G of that Act—

(a) in subsection (2)(a) at the beginning there shall be inserted “any guardian of the patient, and” and after “relative” there shall be inserted “and any welfare attorney of the patient”;

(b) in subsection (3) after “relative” there shall be inserted “ and any welfare attorney of the patient,”.

17(21) In section 35I of that Act—

(a) in subsection (2)(a) after “patient” where first occurring there shall be inserted “or any guardian of the patient” and after “relative” there shall be inserted “and any welfare attorney of the patient”;

(b) in subsection (3) after “relative” there shall be inserted “ and any welfare attorney of the patient,”;

(c) in subsection (5)(a) at the beginning there shall be inserted “any guardian of the patient, and” and after “relative” there shall be inserted “and any welfare attorney of the patient”.

17(22) In section 55(3) of that Act for “apart from section 41(2) of this Act” there shall be substituted “but for the appointment of a guardian under the Adults with Incapacity (Scotland) Act 2000 (asp 4)”.

17(23) In section 95 of that Act

(a) in subsection (1) after “tutor” there shall be inserted “, guardian”

(b) in subsection (2) after “tutor” there shall be inserted “, guardian”.

17(24) In section 125(1) of that Act—

(a) for the definition of ““application for admission” and “guardianship application”” there shall be substituted—

““application for admission” has the meaning assigned to it by section 18 of this Act”;

(b) in the appropriate place, there shall be inserted—

““guardian” includes a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for an adult during his incapacity, if the guardianship is recognised by the law of Scotland;”;

““welfare attorney” includes a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter’s personal welfare and having effect during the granter’s incapacity;”.

## 2. Repeals to Mental Health (Scotland) Act 1984

### Schedule 6 of the 2000 Act

The following repeals of sections of the 1984 Act will come into force from 1 April 2002:

In section 3 in subsection (1) “guardianship or”; in subsection (2)(b), “or who are subject to guardianship”.

In section 7(1)(b), “under the following provisions of this Act”.

In section 10(1)(b) “the following provisions of this Act or under”.

In section 29 in subsection (1), paragraphs (b) and (c) and “or” which precedes them; in subsection (2), “or, as the case may be, by the local authority concerned”; in subsection (3), paragraph (b).

Sections 36 to 52.

In section 53(3), “or his reception into guardianship”.

Section 55(3).

In section 57(4), “or subject to guardianship” and “or so subject” wherever occurring.

In section 59, subsections (1)(b) and (2) and in subsection (3), “or 44”.

Section 61.

In section 76(1) paragraph (b) and “, a guardianship order”.

In section 77, in subsection (1) “or subject to guardianship” and “or, as the case may be, for receiving him into guardianship”; subsection (3).

In section 78, in subsection (1), “or reception into guardianship”; in subsection (2), “or his reception into guardianship”.

In section 80(1), “or subject to guardianship” and “or, as the case may be, for receiving him into guardianship”.

Section 84(4).

In section 87(1), “or subject to guardianship” and “or placed under guardianship.”

In section 92, subsection (1) and in subsection (2)(a), “or subject to guardianship thereunder”.

Sections 93 and 94.



In section 105(2), “subject to his guardianship under this Act or is otherwise”.

In section 107(1)(b), “subject to his guardianship under this Act or otherwise”.

In section 108(1)(a), “or being subject to guardianship”.

In section 110 in subsection (1), “, or in the case of a patient subject to guardianship, the local authority concerned”, “or subject to guardianship”, “or guardianship” in both places, “or his reception into guardianship”; in subsection (4), “or, as the case may be, the local authority concerned in relation to a patient subject to guardianship as aforesaid”.

In section 112, “or his reception into guardianship”.

In section 113(1), “or for reception into guardianship”.

In section 119, “guardianship under this Act”.

In section 121 in subsection (1)(b), “or subject to guardianship”, “or 44”; in subsection (2), “or subject to guardianship”, “or 44”, “and subsection (2) of the said section 44”; in subsection (6), the words from “(in the case of” where first occurring to “guardianship)”, “or section 44”, “respectively”, “or the said section 44 (as the case may be)”.

In section 125 in subsection (4), “or subject to guardianship”; in subsection (5), “or received, or liable to be received, into guardianship”, “(other than under Part V of this Act)”, “or received or liable to be received into guardianship”.

### 3. Guardianship under Criminal Procedure (Scotland) Act 1995 (c.46)

The following amendments to the 1995 Act will come into force on 1 April 2002:

#### Section 84 of the 2000 Act

(2) After section 58 there shall be inserted—

#### **“58A Application of Adults with Incapacity (Scotland) Act 2000**

- (1) Subject to the provisions of this section, the provisions of Parts 1, 5, 6 and 7 of the Adults with Incapacity (Scotland) Act 2000 (asp 4) (“the 2000 Act”) apply—
  - (a) to a guardian appointed by an order of the court under section 57(2)(c), 58(1) or 58(1A) of this Act (in this section referred to as a “guardianship order”) whether appointed before or after the coming into force of these provisions, as they apply to a guardian with powers relating to the personal welfare of an adult appointed under section 52 of that Act;
  - (b) to a person authorised under an intervention order under section 60A of this Act as they apply to a person so authorised under section 53 of that Act.
- (2) In making a guardianship order the court shall have regard to any regulations made by the Scottish Ministers under section 64(11) of the 2000 Act and—
  - (a) shall confer powers, which it shall specify in the order, relating only to the personal welfare of the person;
  - (b) may appoint a joint guardian;
  - (c) may appoint a substitute guardian;
  - (d) may make such consequential or ancillary order, provision or direction as it considers appropriate.
- (3) Without prejudice to the generality of subsection (2), or to any other powers conferred by this Act, the court may—
  - (a) make any order granted by it subject to such conditions and restrictions as appear to it to be appropriate;
  - (b) order that any reports relating to the person who will be the subject of the order be lodged with the court or that the person be assessed or interviewed and that a report of such assessment or interview be lodged;
  - (c) make such further inquiry or call for such further information as appears to it to be appropriate;
  - (d) make such interim order as appears to it to be appropriate pending the disposal of the proceedings.
- (4) Where the court makes a guardianship order it shall forthwith send a copy of the interlocutor containing the order to the Public Guardian who shall—
  - (a) enter prescribed particulars of the appointment in the register maintained by him under section 6(2)(b)(iv) of the 2000 Act;

- (b) unless he considers that the notification would be likely to pose a serious risk to the person's health notify the person of the appointment of the guardian; and
  - (c) notify the local authority and the Mental Welfare Commission of the terms of the interlocutor.
- (5) A guardianship order shall continue in force for a period of 3 years or such other period (including an indefinite period) as, on cause shown, the court may determine.
- (6) Where any proceedings for the appointment of a guardian under section 57(2)(c) or 58(1) of this Act have been commenced and not determined before the date of coming into force of section 84 of, and paragraph 26 of schedule 5 to, the Adults with Incapacity (Scotland) Act 2000 (asp 4) they shall be determined in accordance with this Act as it was immediately in force before that date.”.

#### Schedule 5 of the 2000 Act

26(1) In section 57 of the Criminal Procedure (Scotland) Act 1995—

- (a) in subsection (2)(c) for first “person” there shall be substituted “person’s personal welfare”;
- (b) in subsection (4) after “58(1),” there shall be inserted “58(1A),”;
- (c) at the end there shall be added—

“(6) Section 58A of this Act shall have effect as regards guardianship orders made under subsection (2)(c) of this section.”.

26(2) In section 58 of that Act—

(a) for subsection (1) there shall be substituted—

“(1) Where a person is convicted in the High Court or the sheriff court of an offence, other than an offence the sentence for which is fixed by law, punishable by that court with imprisonment, and the court—

- (a) is satisfied on the written or oral evidence of two medical practitioners (complying with section 61 of this Act) that the grounds set out in section 17(1) of the Mental Health (Scotland) Act 1984 apply in relation to the offender;
- (b) is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this subsection,

the court may, subject to subsection (2) below, by order authorise his admission to and detention in such hospital as may be specified in the order.

(1A) Where a person is convicted as mentioned in subsection (1) above and the court is satisfied—

- (a) on the evidence of two medical practitioners (complying with section 61 of this Act and with any requirements imposed under section 57(3) of the Adults with Incapacity (Scotland) Act 2000 (asp 4)) that the grounds set out in section 58(1)(a) of that Act apply in relation to the offender;

- (b) that no other means provided by or under this Act would be sufficient to enable the offender's interests in his personal welfare to be safeguarded or promoted,

the court may, subject to subsection (2) below, by order place the offender's personal welfare under the guardianship of such local authority or of such other person approved by a local authority as may be specified in the order.”;

- (b) in subsections (2), (3) and (10) for “subsection (1)” there shall be substituted “subsection (1) or (1A)”;

- (c) in subsections (5) and (7) after “subsection (1)” there shall be inserted “or paragraph (a) of subsection (1A),”;

- (d) for subsection (6) there shall be substituted—

“(6) An order placing a person under the guardianship of a local authority or of any other person (in this Act referred to as “a guardianship order”) shall not be made under this section unless the court is satisfied—

- (a) on the report of a mental health officer (complying with any requirements imposed by section 57(3) of the Adults with Incapacity (Scotland) Act 2000 (asp 4)) giving his opinion as to the general appropriateness of the order sought, based on an interview and assessment of the person carried out not more than 30 days before it makes the order, that it is necessary in the interests of the personal welfare of the person that he should be placed under guardianship;

- (b) that any person nominated to be appointed a guardian is suitable to be so appointed;

- (c) that the authority or person is willing to receive that person into guardianship; and

- (d) that there is no other guardianship order, under this Act or the Adults with Incapacity (Scotland) Act 2000 (asp 4), in force relating to the person.”;

- (e) at the end there shall be added—

“(11) Section 58A of this Act shall have effect as regards guardianship orders made under subsection (1) of this section.”.

- (3) After section 60 of that Act there shall be inserted—

**“60A Intervention orders**

The court may instead of making a hospital order under section 58(1) of this Act or a guardianship order under section 57(2)(c) or 58(1A) of this Act, make an intervention order where it considers that it would be appropriate to do so.”.

- (4) In section 61 of that Act—

- (a) in subsection (1), for “and 58(1)(a)” there shall be substituted “, 58(1)(a) and 58(1A)(a)”;

- (b) in subsection (2), after “section 58(1)(a)” there shall be inserted “or 58(1A)(a)”;
- and

- (c) in subsection (3) for “and 58(1)(a)” there shall be substituted “, 58(1)(a) and 58(1A)(a)”.

Schedule 6

Repeals - Criminal Procedure (Scotland) Act 1995

In section 59(2), “or section 39”.

In section 61(1), “or section 39”.

In section 230(1), “or 39”.

In schedule 4, in paragraph 2(1)(b), “or 39”.

Health Department  
Scottish Executive  
**April 2001**