

**EXPLANATORY MEMORANDUM TO THE**  
**ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 (CONSEQUENTIAL**  
**MODIFICATIONS) (ENGLAND, WALES AND NORTHERN IRELAND)**  
**ORDER 2005**

**2005 No. 1790**

1. This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

## **2. Description**

The order amends references in the Child Support Act 1991 (the “1991 Act”), the Social Security Administration Act 1992 (the “1992 Act”) and the Social Security Administration (Northern Ireland) Act 1992 (the “Northern Ireland 1992 Act”). These all contain references to “the appropriate person” for various purposes relating to disclosure of information. All of these references include a definition of a Scottish mental health custodian, but changes in the Adults with Incapacity (Scotland) Act 2000 (the “2000 Act”) means that the definition requires to be updated.

## **3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1. The order is being made in exercise of the powers conferred by sections 104, 112(1) and 113 of the Scotland Act 1998. The Instrument is by virtue of Schedule 7 paragraph 3(2)(b) to that Act, subject to type C procedure and is subject to affirmative resolution procedure in the UK Parliament.

3.2. Section 104 of the Scotland Act 1998 provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of any Act of the Scottish Parliament. References in the 1991 Act, the 1992 Act and the Northern Ireland 1992 Act to a Scottish mental health custodian could not be amended in the 2000 Act since they would be changes to the law of England and Wales and Northern Ireland. This order makes these consequential changes.

## **4. Legislative Background**

4.1. The 2000 Act, most of which came into force between 2<sup>nd</sup> April 2001 and 4<sup>th</sup> November 2003<sup>a</sup>, amended the 1991 Act and the 1992 Act, including the definition under these Acts of a “mental health custodian”. However, being an Act of the Scottish Parliament it could only make such amendments to the legislation as it operates in Scotland. The previous definition continues in force in England and Wales and in Northern Ireland, although it does not follow current Scottish mental health terminology.

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<sup>a</sup> The Adults with Incapacity (Scotland) Act 2000 (Commencement No. 5) Order 2003 states in the explanatory note that “The provisions of the Act remaining to be commenced after this Order are certain provisions from schedules 4 to 6.”

4.2. Article 2 of the order provides for the modification of the definition of mental health custodian in the 1991 Act as it applies in England and Wales. (The definition which this Order modifies is not used in Northern Ireland.).

4.3. Article 3 provides for the same modification of the 1992 Act and Article 4 provides for the same modification of the Northern Ireland 1992 Act.

## **5. Extent**

The order applies, as appropriate, to England, Wales and Northern Ireland only.

## **6. European Convention on Human Rights**

The Parliamentary Under Secretary of State for Scotland has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of The Adults with Incapacity (Scotland) Act 2000 (Consequential Modifications) (England, Wales and Northern Ireland) Order 2005 are compatible with the Convention rights.

## **7. Policy background**

7.1. The main purpose of the 2000 Act was to make provision as to the property, financial affairs and personal welfare of adults who are incapable by reason of mental disorder or inability to communicate; and for connected purposes.

7.2. As described above, because the 2000 Act could not make amendments to the 1991 Act, the 1992 Act or the Northern Ireland 1992 Act as regards England and Wales and Northern Ireland, and so the previous definitions continue there, even although it does not follow current Scottish mental health terminology.

7.3. Initially this was not thought problematic. However, it has now been realised that persons may seek to transact “Scottish” social security or child support business at offices outwith Scotland, and may meet the operative definition in one jurisdiction but not in the other. Although this can be dealt with administratively (and is currently so dealt with), it is considered desirable that the definitions should be identical throughout the United Kingdom, to avoid any potential legal problems.

7.4. The order therefore harmonises the legislation that currently applies in England and Wales and in Northern Ireland to that which applies in Scotland.

## **8. Impact**

8.1. A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2. There will be no impact on the public sector.

## **9. Contact**

Clare Jones at the Scotland Office, e-mail: [clare.jones@scotland.gsi.gov.uk](mailto:clare.jones@scotland.gsi.gov.uk), can answer any queries regarding the instrument.