

Key Points:

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Legal arrangements for managing financial affairs

Age Concern Scotland receives many requests for information from older people and their relatives enquiring about what happens when someone needs help with the collection of benefits and/or the management of their financial affairs. Most people are able to manage their own financial matters throughout their lives, but others may need help either on a temporary or a permanent basis.

You may need someone to collect your pension or to go to the bank for you. You may wish to make legal arrangements so that a person of your choice can attend to your financial affairs if, at some point in the future, you are unable to do this for yourself. You may be a relative or friend of someone who is no longer able to collect their benefits themselves or visit the bank or post office, or you may need to take over the management of someone's financial matters if the person has become too confused to manage for him/herself.

This factsheet briefly outlines the various methods of administration that are available and the procedures involved.

NB. Dealing with financial matters can often be complex. This factsheet is intended for guidance only. It may be advisable to seek legal advice before entering into any of the arrangements or signing any of the documents described in this factsheet.

This factsheet is for people living in Scotland. For anyone living in England, Wales and Northern Ireland, a similar Factsheet 22, *Legal arrangements for managing financial affairs* is available by telephoning: 0800 00 99 66 (free call) or write to Age Concern FREEPOST (SWB 30375), Ashburton, Devon TQ13 7ZZ.

Contents

1. Collecting Social Security benefits	2
1.1 Collecting benefits: an agency arrangement	2
1.2 Collecting benefits: becoming an appointee	3
2. The Adults with Incapacity (Scotland) Act 2000 (referred to as the “2000 Act”)	4
3. Dealing with money	8
3.1 Bank and building society accounts	8
3.2 Power of Attorney	9
3.3 Trust for administration	9
3.4 Negotiorum gestio	10
3.5 Curator Bonis	10
3.6 Continuing power of attorney and welfare power of attorney for Adults with Incapacity	10
3.7 Access to Funds for Adults with Incapability	12
3.8 In hospital	13
4. Further information	13
4.1 Sources of help	13
4.2 Further reading	14
5. Further information from Age Concern	15

1. Collecting Social Security benefits

1.1 Collecting benefits: an agency arrangement

People who receive a benefit or a pension may nominate someone - called an agent - to collect the money for them, but not to spend it. Where this is a temporary arrangement, each week the people entitled to the benefit complete a declaration on the payment slip to enable someone to collect the money for them. This is an informal arrangement between claimants and their agents.

If an agent is needed for a long time, an agency card may be obtained from the local Social Security office, which states that the named person is authorised to collect the money. For further information contact your local Social Security office.

You may choose as your agent a relative, a carer, a friend, a neighbour or by arrangement with the social work department possibly a home help. People who are unable to understand that they are giving such power cannot make a valid appointment of an agent, so this method cannot be used to collect a benefit or state pension if claimants are too confused to manage their own affairs.

Residents in residential homes run by the local authority can nominate a named officer of the local authority to act as a "signing agent". That officer takes on the responsibility of cashing benefit payment slips on behalf of the residents. For further information ask the home manager or ask to see a social worker.

1.2 Collecting benefits: becoming an appointee

If people who are entitled to a social security benefit or allowance are unable to act for themselves (for example because of a temporary mental incapacity due to illness or an accident), a representative of the Secretary of State for Social Security - usually the benefit supervisor in the local Social Security office - may, on receiving a written application, appoint someone else to claim, receive and spend benefits on their behalf. It is an accepted policy of the Social Security that a close relative who lives with or frequently visits the claimant is usually the most suitable person to act.

Application forms to become an appointee can be obtained from your local Social Security office. The Social Security must satisfy itself that claimants are unable to manage their affairs. You may be asked to provide medical evidence of their incapacity and the Social Security may want to visit both the claimant and person applying to become appointee. The Social Security must also check on the suitability of the person who has applied to act.

If claimants wish to continue to collect their own benefits, and providing that they are able to understand the implications of claiming and receiving social security benefits, then the Social Security office should not give approval for an appointee.

Where a person lives in a care home, and there is no available close relative or friend willing to act, and the local authority is unable to recommend someone, consideration may be given, as a last resort, to appoint someone from the care home to act as appointee. All money collected by the appointee must be used for the benefit of the person for whom they are acting.

Where the Social Security appoints someone to act, it is for social security purposes only and does not give the appointed person the authority to deal with capital or other income belonging to the incapacitated person. Unspent pension and benefits may constitute capital, even if held in the name of the appointee, and the appointee may have to consider other action, such as appointing a continuing attorney.

2. The *Adults with Incapacity (Scotland) Act 2000* (referred to as the “2000 Act”)

This Act received Royal Assent on 9 May 2001. It changed the system for protecting the rights and interests of adults (aged 16 or over) who are incapable of managing their own affairs. It deals with the management of their property, financial affairs and personal welfare, including medical treatment. Subject to safeguards in the legislation, it allows other people to make decisions on behalf of them.

Those acting for adults with incapacity owe a duty of care to them. They must exercise skill and care in carrying out their functions. Their relationship is based on this duty and as such they must not enter into engagements in which they have personal interests which conflict with the interests of the adult, or place themselves in a position where their duty to one beneficiary conflicts with a duty owed to another. This duty of trust also means they must use confidential information only for the benefit of the adult and not for their own advantage or to benefit others.

Those with functions under the Act cannot misuse the adult’s funds, but if they do they have to refund them, with interest. It is a criminal offence for someone who is acting on behalf of an adult with incapacity to ill treat or wilfully neglect that person.

An adult is defined as incapable where they cannot act, make, communicate, understand or remember decisions by reason of mental disorder, or of inability to communicate because of physical disability.

The general principles which must be followed are outlined in the Act and are as follows:

All decisions made on behalf of an adult with impaired capacity must:

- benefit the adult;
- take account of the adult's wishes and feelings, the views of the nearest relative or primary carer and of any guardian or attorney as far as it is reasonable and practicable to do so;
- restrict the adult's freedom as little as possible while still achieving the desired benefit; **and**
- encourage the adult to use existing skills or develop new skills.

The Role of Officials

The Public Guardian, Sheriffs, Mental Welfare Commission and local authorities all have roles to play.

The Public Guardian

The Public Guardian supervises those exercising financial powers under the Act and investigates complaints relating to their financial functions. He keeps a register of those having powers of attorney, those who have access to an adult's funds and use of the funds, and in the future he will also keep registers of both guardianship and intervention orders.

Local Authorities

Local authorities are responsible for looking after the welfare of adults with incapacity. Their responsibilities include the monitoring of actions of welfare guardians, investigating complaints and looking into suspicious circumstances.

The Mental Welfare Commission

The Mental Welfare Commission has a role to play in the protection of the interest of only adults whose incapacity is a result of a mental disorder. They can investigate complaints and look into suspicious circumstances about the exercise of welfare powers if the local authorities haven't carried out their duties.

The Sheriff

Sheriffs can be involved at various stages in dealing with matters arising under the *2000 Act* and have been given wide and flexible powers in so doing.

Sheriffs must consider whether safeguarders should be appointed to safeguard the views of adults with incapacity at court proceedings. They can appoint separate curators (known as curators ad litem) to express the views of the adults with incapacity if the safeguarders cannot manage to do both.

Sheriffs can also give directions on how the attorneys use their powers. They can make orders about, for example, supervision of the power of attorneys, submission of accounts, for reports on the exercise of power, revocation of attorney's powers, and termination of appointment of attorneys.

The courts will generally inform the adults of all court applications and orders made about their affairs unless they decide that the information would likely put the adults' health at serious risk, and Sheriffs must inform the Public Guardian of any such orders they make. An appeal can be made to sheriffs to challenge an assessment of incapacity, as well as for other types of appeals.

New laws on guardianships and intervention orders have recently come into force under the Act. The new form of guardianship is more flexible, allowing for a guardian to be given powers in dealing with property, financial, personal welfare and medical matters. Procedurally, this is not hugely different from the previous curatory system. The differences lie in the principles of the Act and the need now to be proactive in dealing with those who require such assistance.

Where a one-off decision is required, such as selling property, then seeking an intervention order from a local sheriff would be appropriate. Where longer-term arrangements are needed, such as someone with severe learning disabilities or someone with moderately advanced dementia, a guardianship order from a local sheriff should be sought.

A guardianship can be taken if the adult is considered incapable of taking the actions sought in the order and there is no other sufficient means under the Act. Two independent medical reports of the incapacity are required. The local authority must apply for guardianship when certain criteria exist; when it is necessary for the protection of the adult's property, financial affairs and personal welfare and no one else has made an application.

There is a Code of Practice for persons authorised under intervention orders and for guardians effective from 1 April 2002.

Although not connected to a person's ability or incapacity to manage his financial affairs, Part 5 of the *Adults With Incapacity Act* contains provisions

dealing with medical treatment of adults with incapacity and research. The interests of the patient who cannot consent are protected in these new arrangements. The aim is to provide authority for medical treatment to an adult with incapacity to maintain or improve that person's physical or mental health.

Certain treatments fall outwith the general authority to provide treatment. Doctors and those acting on their instructions have a duty to give treatment to an adult with incapacity and undertake research in some circumstances.

On 1 October 2003, Part 4 of *The Adults With Incapacity Act* came into force. This part contains provisions about the management of finances of patients or residents with incapacity in "authorised establishments", which includes health service and state hospitals, independent and private psychiatric hospitals, limited registration services and care homes.

Managers of such establishments can only intervene where no other arrangements are in place and where it is suitable and appropriate that they intervene. If managers intervene, they must act for the benefit of that person. They will be able to claim, receive, hold and spend any pensions, benefits, allowances or other payments to which that person is entitled other than those under the *Social Security Contributions and Benefits Act 1992*. They can claim, receive, hold and spend money, hold any other moveable property (personal effects and possessions), and dispose of their moveable property.

Managers are prevented from managing any matter if its value exceeds prescribed amounts without the consent of the supervisory body. Duties and functions are set out in section 41 which include, among others, keeping records and ensuring that funds (including cash) held over £500 (the current prescribed amount) are placed in an account which earns interest.

These establishments will be registered with supervisory bodies who have substantial powers in connection with the role of establishments in management of the resident's financial affairs, including a duty to make inquiry from time to time about how managers are carrying out financial management and investigating any complaints, and a power to revoke an establishment's power to manage any resident's money.

After a resident ceases to be a resident or ceases to be incapable, the managers can continue to manage that person's affairs for not longer than 3 months, while other necessary arrangements are being made.

There is a duty on the managers throughout the period of management to make provision for indemnifying residents against any loss attributable to any act or omission in the exercise of their powers, or for any breach of duty, misuse of funds or failure to act reasonably and in good faith.

There is a duty on the supervisory bodies to make inquiry from time to time about how managers are carrying out the management of funds, investigate any complaint received as to how matters are being managed (section 40), and a power on these bodies to revoke an establishment's power to manage any resident's money (section 45).

It should be noted that Part 4 may be affected by the *Regulation of Care (Scotland) Act 2001* (not yet fully in force) and the *Mental Health (Care and Treatment) (Scotland) Act 2003* (not in force until April 2005). There may also be an influence from England in their draft Mental Incapacity bill which differs substantially from Scotland's legislation.

There have been many sets of regulations made as well as codes of practice issued to deal with the various matters raised in the *2000 Act*. The Office of the Public Guardian has also published various guidance notes on each of the parts of that Act.

3. Dealing with money

3.1 Bank and building society accounts

If people are mentally capable but unable to visit their bank or building society to carry out a particular transaction they may authorise a third party to do so through a third party mandate.

It is necessary to contact the bank or building society where the account is held to ask about their requirements for a third party mandate. In some cases a letter of authority or the completion and signing of a single form is sufficient and this may be used as and when it is required until it is cancelled. Other institutions require a fresh form authorising someone to act on the account holder's behalf to be completed before each transaction.

In the case of joint accounts, mental incapacity of an account holder terminates the mandate and the bank or building society is entitled to decline any further transactions until it has new instructions from all account holders, including the legally authorised representative of the incapacitated person.

3.2 Power of Attorney

People may find it useful, at some time during their lives, to have someone else formally authorised to deal with their financial affairs on their behalf, especially where these finances are complex. This can be done by a document called a Power of Attorney, which is normally drawn up by solicitors.

This document may be used even where the person granting the power has not lost their capacity to manage their affairs. Examples where this could be used might be because of illness or absence abroad for a long period. In any case, the power must be signed when the granter has the capacity to sign the deed. Once signed, it should be registered in the Books of Council and Session for preservation.

The authorised people are called 'attorneys'. They should be people the person granting the Power of Attorney trusts - such as a spouse, a solicitor, relative or close friend. The advantage of choosing solicitors is that they will be able to deal with any tax or legal matters arising but the disadvantage is that there will be charges incurred. Relatives or friends will not charge fees but may not be able to manage all the affairs without professional help. It would be advisable to consider an alternative attorney if the person chosen to act as an attorney can no longer act.

The Power of Attorney document sets out what the attorney is authorised to do. It may give wide-ranging powers or be limited to specific acts such as selling a house. If it is a limited power, the person who gave the power can still act on his own behalf in other matters. The usual types of powers given in a Power of Attorney include:

- operating bank and building society accounts;
- paying bills;
- completing tax returns;
- buying and selling investments and/or other property such as a house; and signing documents;
- all on behalf of the person granting the power.

3.3 Trust for administration

This is an alternative of the Power of Attorney route but is similar in many respects to it. A granter hands over their property to trustees who manage it.

The trust is made for the benefit of the granter, who may end the arrangement at any time. There are more checks and balances in this arrangement than with a Power of Attorney.

3.4 Negotiorum gestio

If people become incapable of managing their own affairs, it may be possible for others to act on their behalf without written authorisation because it can be assumed that those people would have given authorisation had they been capable of doing so. This is an informal arrangement that could be useful in an emergency situation. This legal principle is called negotiorum gestio.

However, there is no legal requirement to accept the signature of others in these circumstances and not all organisations will necessarily be happy with this arrangement.

3.5 Curator Bonis

When people became mentally incapable of managing their affairs or appointing someone else to do it for them, it was often necessary to apply to the courts for a person to be appointed as a curator bonis. However, since April 2002 it is not competent to appoint a curator bonis, tutor-dative or tutor-at-law to a person who has attained the age of 16 as a result of the *2000 Act*. Guardians will be appointed instead. Curator bonis created before April 2002 become guardians under that Act and be supervised by the Public Guardian.

3.6 Continuing power of attorney and welfare power of attorney for Adults with Incapacity

Any Power of Attorney granted before January 1991 is normally only valid while the people who made it were capable of giving instructions. Any Enduring or Continuing Power of Attorney granted between January 1991 and the *Adults With Incapacity Act 2000* coming into effect would normally continue in force even after the granter became mentally incapable of managing their property and affairs. However, the *Adults With Incapacity Act 2000* has repealed this, and now in order to ensure that a Power of Attorney is continuing there must be an express statement of the granter's intention in the Power of Attorney.

If they become mentally ill and no longer able personally to supervise or direct the attorney then that power may become invalid.

In these circumstances it may be possible for the attorney to carry on acting if you go to Court or on the basis of negotiorum gestio (see Section 3.4 above). The person making the power can terminate an attorney's appointment at any time. This is best done in writing.

The extent of the application of the 2000 Act to pre-Act Powers of Attorney is given in paragraph 4 of Schedule 4 of that Act, which states the provisions which do not apply. It may be complicated and you should obtain legal advice.

People can now appoint a 'continuing attorney' or a 'welfare attorney' while the granter is capable of making these powers. Provisions relating to these new types of arrangements are found in Part 2 of the 2000 Act. This Part provides for the registration, monitoring and supervision of these attorneys. A continuing power of attorney given by the granter that relates to his property or financial affairs continues to have effect when the granter loses the capacity to deal with the matters concerned. Those which do not continue on incapacity are not registered with the Public Guardian, only those which are 'continuing power of attorney'.

A 'welfare attorney' is a power of attorney relating to the personal welfare of an adult with incapacity which commences on the granter's incapacity. It can only be used to make decisions after the granter loses capacity to deal with such matters. A person is acting wrongly and without authority if he intervenes when the adult could still take a decision on the particular matter in question. It can only be given to individuals, not to local authorities and the like. It is a restricted power since welfare attorneys are not able to place granter in hospital for treatment of mental disorder against their will and cannot consent to any form of treatment as specified in the Act. The Act also does not authorise intervention in respect of certain decisions, such as consent to marriage and making a Will. The current legal status of attorneys with such powers is unclear. You should seek legal advice.

General comments about continuing and welfare powers of attorneys

All continuing and welfare powers of attorney granted on or after 2 April 2001 must be registered with the Public Guardian in order to be effective. In order to apply for registration a power of attorney, the appropriate Certificate and a fee of £35 is required. There are also fees involved at later stages when, for example, accounts are submitted for auditing purposes (currently £75).

Attorneys must keep records of their actions. The attorneys can resign after giving proper notification to the Public Guardian.

If a granter and an attorney are married, the power of attorney shall come to an end under separation, divorce or declaration of nullity of marriage, or on appointment of a guardian.

The Office of the Public Guardian has published Guidance for Solicitors and Advisers on Continuing Powers of Attorney and Welfare Powers of Attorney and the Scottish Executive has published a Code of Practice. These are available on the Office of the Public Guardian's website.

3.7 Access to Funds for Adults with Incapability

Part 3 of the *2000 Act* sets up a new scheme under which the Public Guardian can allow access to funds of an adult with incapacity. Authority could be given to family members and carers but not social work departments or other statutory bodies. The funds are likely to be bank and building society accounts and funds in accounts where the adults with incapacity are sole holders. Authority to access would be only given to one person at any one time.

The practice is to freeze accounts when adults lose capacity to operate them but the *2000 Act* allows a person, usually family member or carer, to access and use the funds if their application is successful. The Public Guardian must inform the adult with incapacity and others with an interest that an application has been made since they have a right to make comments, and the Public Guardian must take account of these views.

If the application has been successful, the Public Guardian issues a statutory certificate and allows the adult's account to be accessed or a new separate account to be opened and the approved amount transferred to it. The *Adults With Incapacity Act* sets out the types of expenditure that may be authorised and include such things as taxes, day to day household expenses, care costs, and other debts.

The Guardian has discretion to allow other payments such as gifts and exceptional payments. The authority for regular payments from the account should normally last for three years but this can vary, and it is possible to re-apply for the authority on the expiry of the time limit. If the Public Guardian denies access to the funds, it is possible to make an appeal to the Sheriff through the courts.

Those with access to funds must keep records of their transactions, and the Public Guardian can check these records to monitor the use of the funds.

The Public Guardian has discretion to suspend or terminate an authority to have access to funds but an appeal to the sheriff can be made against such decisions.

Authority ceases where a guardian is appointed, an intervention order is granted or an attorney acquires authority to act.

The Office of the Public Guardian has published Access to Funds Guidance and the Scottish Executive has published a Code of Practice. Both are available on the Office of the Public Guardian's website.

Joint accounts

Part 3 of the 2000 Act does not apply to accounts which are "either/or survivor" accounts, ie where one adult with capacity can operate the account without the signature of the adult with incapacity, unless the account holders have agreed to opt out on the incapacity of one of them or a court order prevents the adult with capacity to operate the account. The adult who still has the capacity to operate the account can continue to do so and this should prevent the account from being frozen.

3.8 In hospital

If long-term care in hospital is required, the Health Board can take over responsibility for the finances of mentally incapax people if there is no-one else to do so and if the person is certified. Social Work departments do not have powers to administer funds of people who are incapax, and carers may continue to manage their affairs.

From October 2003, authorised establishments are able to manage the financial affairs of a patient without being required to seek consent of the Mental Welfare Commission. They will be able to claim, receive and hold any pensions, benefits, allowances or other payment to which the patient is entitled other than those under the *Social Security Contributions and Benefits Act 1992*. The supervisory bodies with which these establishments are registered can revoke this power.

4. Further information

4.1 Sources of help

ASCS - Advice Service Capability Scotland, 11 Ellersly Road, Edinburgh, EH12 6HY, tel: 0131 313 5510.

Alzheimer Scotland - Action on Dementia, 22 Drumsheugh Gardens, Edinburgh EH3 7RN, tel: 0131 243 1453 (24 hour Dementia Helpline freephone 0800 808 3000). Provides specialist information and support for people with dementia and their carers in Scotland. Local support groups across Scotland. An information pack is available for carers.

ENABLE, 6th Floor, 7 Buchanan Street, Glasgow, G1 3HL, tel: 0141 226 4541.

Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh, EH3 7YR, tel: 0131 226 7411.

Legal Services Agency, Strathclyde and Lothian Mental Health Legal Representation Projects, 11th Floor, Fleming House, 134 Renfrew Street, Glasgow, G3 6ST, tel: 0141 353 3354. Also at 5 Shandwick Place, Princes House, Edinburgh, tel: 0131 228 9993. Qualified solicitors give free and confidential advice on all aspects of the law as it affects people with dementia.

Mental Welfare Commission for Scotland, KFI, Argyle House, 3 Lady Lawson Street, Edinburgh, EH3 9SH, tel: 0131 222 6111.

The commission safeguards the rights of mentally ill and mentally handicapped people in hospital and living in the community. The commission has a duty to investigate any matter brought to its attention. It exercises its powers in relation to individual cases where there are grounds to believe that ill treatment or deficiency of care or loss or damage to property of a handicapped or mentally ill person have occurred.

Social Work Department of your local authority. See local telephone directory for address.

The Office of the Public Guardian, Hadrian House, Callendar Business Park, Callendar Road, Falkirk FK1 1XR, tel: 01324 678300.

4.2 Further reading

Adults with Incapacity (Scotland) Act 2000 - This is a general information leaflet on the new legislation. This is available by phoning 01331 244 2193 or on the Scottish Executive website at www.scotland.gov.uk/justice/incapacity.

It's Your Decision - a leaflet prepared by ENABLE for the Scottish Executive. This is also available at www.scotland.gov.uk/justice/incapacity.

Dementia, Money & Legal Matters - a guide for carers. Information for families of persons subject to curatory, published by the Accountant of Court and available free from Alzheimer Scotland - Action on Dementia, 22 Drumsheugh Gardens, Edinburgh, EH3 7RN, tel 0131 243 1453.

Disability Rights Handbook - A guide to Rights, Benefits and Services for all People with Disabilities and their Families. Disability Alliance ERA, Universal House, 88-94 Wentworth Street, London, E1 7SA, tel: 0171 247 8776.

Mental Health - A Guide to the Law in Scotland. Butterworths and Scottish Legal Action Trust. (Out of print but available in libraries).
Mental Health (Scotland) Act 1984 & Adults with Incapacity (Scotland) Act 2000 - Greens Annotated Acts. Published by Hilary Patrick and Adrian Ward in 2001.

Various Codes of Practice and Guidance Notes published by the Office of the Public Guardian are available on its website at:
www.publicguardianscotland.gov.uk

There is also a list of solicitors who specialise in these areas at the Law Society in Scotland.

5. Further information from Age Concern

Your Rights - A Guide to Money Benefits for Older People. £4.99 & £1.99 postage from Age Concern Scotland, 113 Rose Street, Edinburgh, tel: 0131 220 3345.

For any additional factsheets mentioned, for a full list of factsheets and/or a book catalogue, phone 0800 00 99 66 (free call) or write to Age Concern FREEPOST (SWB 30375), Ashburton, Devon TQ13 7ZZ.

The following factsheets may be of use:

Factsheet 7s	<i>Making your will</i>
Factsheet 14s	<i>Dealing with someone's estate</i>
Factsheet 43s	<i>Obtaining and paying for legal advice</i>

For any additional factsheets mentioned, for a full list of factsheets and/or a book catalogue, phone 0800 00 99 66 (free call) or write to Age Concern FREEPOST (SWB 30375), Ashburton, Devon TQ13 7ZZ.

If you have questions arising from this factsheet, or it does not cover the information you require, please contact Age Concern Edinburgh's team of trained volunteers who run a confidential Scottish-wide telephone information service for older people: tel: 0131 467 7118 (Monday-Friday 10am-4pm, answering machine out of these hours) or write to them at Dalry House, 15 Orwell Place, Edinburgh, EH11 2AD.

Age Concern provides factsheets free to older people, their families and people who work with them. If you would like to make a donation towards the work of Age Concern Scotland, you can send a cheque or postal order (made payable to Age Concern Scotland) to Age Concern Scotland, 113 Rose Street, Edinburgh EH2 3DT. Find out more about Age Concern Scotland online at www.ageconcernscotland.org.uk, or Age Concern England at www.ageconcern.org.uk.

Age Concern's series of over 40 factsheets is available as a subscription service to those whose work involves older people; for details of this service please call us on 0990 00 99 66 (national call rate) and ask for our factsheet subscription leaflet.

This factsheet is based on one of the same title produced by the Information Unit, Communications & Marketing Division at Age Concern England and is adapted for Scottish use.

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