

Short Guide to AWI 2000 Act

About the Adults with Incapacity (Scotland) Act 2000

Introduction

The Adults with Incapacity (Scotland) Act 2000 ('the Act') was one of the earliest pieces of legislation to be passed by the Scottish Parliament. It provides a framework for safeguarding the welfare and managing the finances of adults who lack capacity due to mental disorder or inability to communicate.

This guide outlines who the Act can help and the arrangements that can be put in place to give others authority to act or make decisions for someone who lacks capacity to do so for him/herself. It explains what is meant by 'incapacity' and sets out the principles to be followed by everyone who is authorised to act on behalf of someone with incapacity.

The term 'proxy' used in this leaflet is the general term used for someone who has been authorised to act on behalf of an adult with incapacity. A brief description is given of each of the public bodies responsible for supporting, supervising and regulating proxies appointed under the Act. The legal responsibilities of proxies and guidance on how they should exercise their powers are set out fully in codes of practice ([see Useful Addresses and Publications section of this leaflet](#)).

Who the Act can help

The Act introduced a system for safeguarding the welfare and managing the finances and property of adults (age 16 and over) who lack capacity to act or make some or all decisions for themselves because of mental disorder or inability to communicate due to a physical condition. It allows other people to make decisions on behalf of these adults, subject to safeguards. The main groups to benefit include people with dementia, people with a learning disability, people with an acquired brain injury or severe and chronic mental illness, and people with a severe sensory impairment.

How the Act can help

The Act provides the following ways for safeguarding a person's welfare and managing his/her financial affairs or both. The Act aims to ensure that solutions focus on the needs of the individual: for example, a person with dementia may be able to decide what sort of support he/she would prefer to help with day to day living, but be unable to manage his/her money. In such a case a financial intervention may be all that is needed. In other circumstances a combination of welfare and financial measures may be necessary.

The Act does not authorise action in every matter where the person may have impaired capacity. Certain decisions can never be made on behalf of a person who lacks capacity, for example, consent to marriage or making a will. The Act imposes other restrictions on what a proxy is able to do, for example, a welfare attorney or guardian or intervener cannot place the person they are acting for in a mental hospital against his/her will or consent to certain treatments on his/her behalf.

Power of attorney (Part 2 of the Act). This is a means by which individuals, whilst they have capacity, can grant someone they trust powers to act as their continuing (financial) and/or welfare attorney. One or more persons can be appointed. A continuing (financial) power of attorney continues or commences (where specified) on the granter's loss of capacity. A welfare power of attorney only comes into effect in the event of the granter's loss of capacity. All powers of attorney under the Act must be registered with the Public Guardian.

Information about setting up a power of attorney is available on the Office of the Public Guardian (Scotland) (OPG) website. A copy of A Guide to Powers of Attorney is available from the OPG - see the Further Information section.

Access to Funds scheme (Part 3 of the Act). This is a way of accessing the adult's bank or building society account/s in order to meet his/her living costs. This scheme is best suited to 'steady state' estates where the income and outgoings are easily regulated. Proactive administration of money is not permitted under this scheme, e.g. management of investments. An application can be made to the OPG by an individual (normally the person's main carer/other family member) or organisation. The person or organisation appointed is called a 'withdrawer'. If little is known about the adult's finances, the OPG can, on application, provide authorisation for information about an adult's bank or building society account/s to be disclosed. This is so that an informed decision can be made as to the most suitable arrangements needed for managing the adult's funds, e.g. access to funds or financial guardianship.

Guardianship order (Part 6 of the Act). Guardianship can cover property and financial matters or personal welfare, including health, or a combination of these. It is likely to be suitable where the person has long-term needs in relation to these matters, and has lost, or has never had, capacity to take decisions or action on these matters for him or herself. An application may be made to the sheriff court by individuals, or by the local authority where no one else is applying and the adult has been assessed as needing a guardian. Before granting a guardianship order, the sheriff would have to be satisfied that the adult is incapable with regard to the matters in question, and that there is no other suitable means of safeguarding or promoting the adult's interests in these matters.

Intervention order (Part 6 of the Act). This would normally be suitable where there is a single action or decision to be taken on behalf of the adult. This could, for example, be a financial or property transaction or a legal action on behalf of the adult such as signing a tenancy agreement. Intervention orders can cover both financial and welfare matters. An application may be made to the sheriff court by an individual or local authority.

How to go about getting an intervention or guardianship order

For further information request a copy of 'Guardianship and Intervention Orders - making an application. A Guide for Carers' (see Further Information section). The guide provides information on:

- how to decide whether an order is needed, and if so which order is needed;
- who can apply for an order;
- how to consider what powers to apply for.

It also provides:

- a step by step guide to applying for an order - including how to go about getting the necessary reports and important time-limits for submitting an application;
- examples of summary applications;
- information on costs of making an application and legal aid;
- information on arrangements for supervision of financial and welfare guardians.

Management of (care home/hospital) residents' funds (Part 4 of the Act). The Act allows authorised care establishments and hospitals to manage a limited amount of the funds and property of residents who are unable to do this for themselves and have no one else available to do so. A certificate of authority may be granted to a care home manager by the supervising body (local authority or health board).

Medical treatment decisions (Part 5 of the Act). The Act allows treatment to be given to safeguard or promote the physical or mental health of an adult who is unable to consent. The principles apply to medical treatment decisions as to other areas of decision-making. Where a welfare attorney or guardian has been appointed with health care decision-making powers the

doctor must seek his/her consent where it is practicable and reasonable to do so. Where the adult has no proxy a doctor is authorised to provide medical treatment, subject to certain safeguards and exceptions.

Where there is disagreement a second medical opinion must be sought. The Mental Welfare Commission holds a list of specialist doctors for this purpose. Cases can also be referred to the Court of Session in certain circumstances.

Other health care staff may also be authorised to provide treatment to an adult who is unable to give consent, so long as the treatment required is within his/her specialism, for example, a dentist.

Consent to Research (Part 5 of the Act). The Act permits medical research involving an adult incapable of giving consent subject to certain safeguards and exceptions.

Codes of Practice

Details of the measures described above are provided in the relevant codes of practice and guides available from the Office of the Public Guardian (Scotland) and Scottish Government (see Useful Addresses and Publications).

About capacity

The law in Scotland generally presumes that adults are capable of making personal decisions for themselves and of managing their own affairs.

It is important to remember that having a diagnosis of, for example, dementia, does not mean, of itself, that the person is unable to make decisions for him/herself. It is also important to remember that just because someone acts unwisely - whether or not mental disorder is present - does not mean that capacity is lacking.

For the purposes of the Act, "incapable" means incapable of:

- acting on decisions; or
- making decisions; or
- - communicating decisions; or
 - understanding decisions; or
 - retaining the memory of decisions.

in relation to any particular matter due to mental disorder or inability to communicate because of physical disability.

Principles to be followed

The Act aims to protect people who lack capacity to make particular decisions, but also to support their involvement in making decisions about their own lives as far as they are able to do so. Anyone authorised to make decisions made on behalf of someone with impaired capacity must apply the following principles:

Principle 1 - benefit

- Any action or decision taken must benefit the person and only be taken when that benefit cannot reasonably be achieved without it.

Principle 2 - least restrictive option

• Any action or decision taken should be the minimum necessary to achieve the purpose. It should be the option that restricts the person's freedom as little as possible.

Principle 3 - take account of the wishes of the person

• In deciding if an action or decision is to be made, and what that should be, account must be taken of the present and past wishes and feelings of the person, as far as this may be ascertained. Some adults will be able to express their wishes and feelings clearly, even although they would not be capable of taking the action or decision which you are considering. For example, he/she may continue to have opinions about a particular item of household expenditure without being able to carry out the transaction personally.

The person must be offered help to communicate his or her views. This might mean using memory aids, pictures, non-verbal communication, advice from a speech and language therapist or support from an independent advocate. A Guide to Communication and Assessing Capacity is available at: <http://www.scotland.gov.uk/Publications/2008/02/01151101/0>

Principle 4 - consultation with relevant others

- Take account of the views of others with an interest in the person's welfare. The Act lists those who should be consulted whenever practicable and reasonable. It includes the person's primary carer, nearest relative, named person, attorney or guardian (if there is one).

Principle 5 - encourage the person to use existing skills and develop new skills

Supervision and regulation

Under the Act four public bodies are involved in the regulation and supervision of those authorised to make decisions on behalf of a person with incapacity. These are: the Office of the Public Guardian (Scotland), the Mental Welfare Commission for Scotland, the courts and local authorities.

The Office of the Public Guardian (Scotland) (OPG)

A main function of the OPG is to supervise those authorised to manage the finances and property under the access to funds scheme, intervention and guardianship orders. Other important functions are to:

- provide information and advice (non-legal) on financial matters in relation to the Act;
- register powers of attorney, intervention and guardianship orders;
- - authorise access to funds, register withdrawers and issue certificates;
 - supervise continuing (financial) attorneys where ordered to do so by the sheriff;
 - investigate complaints against anyone authorised to manage the finances of an adult, including continuing attorneys.

The Mental Welfare Commission

The Commission has an important role in protecting the interests of adults with incapacity due to mental disorder. In relation to the Act:

- the Commission contacts and sometimes visits welfare guardians and people on welfare guardianship orders;
- has the power to investigate complaints;
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 - provides a range of guides for carers, service users and professionals and a freephone helpline.

The Court

The court is responsible for the appointment of financial and welfare guardians. The sheriff decides on the powers to be granted, and how long the powers should last. The adult him/herself and anyone else with an interest can appeal to the court against an order or any aspect of it. A complaint against an intervener, guardian or attorney can also be taken to the sheriff court and investigated. Where a serious complaint is upheld the court can reduce or remove the powers granted.

The Local Authority

Under the Act local authorities have a duty to supervise welfare guardians. All newly appointed welfare guardians should be visited within the first three months of appointment and thereafter twice a year. They have a duty to provide advice and information to welfare guardians and welfare attorneys. Local authorities also have a duty to investigate complaints against welfare guardians and attorneys and, in certain circumstances, the court can order the local authority to supervise a welfare attorney.

Legal Aid

An adult, someone authorised to act on his or her behalf under the Act, or anyone with an interest in the adult's welfare or affairs may be able to apply for legal aid. For example, costs may be incurred in making an application to the courts or in seeking legal advice. Two sorts of legal aid are available under the Adults with Incapacity Act.

- **Advice and Assistance**
This is available, subject to the statutory financial eligibility test being satisfied, to enable people to seek advice from a solicitor on any aspect of the Act. It is the solicitor who applies the financial eligibility test in respect of applications for legal aid for Advice and Assistance. Where the applicant is someone other than the adult, financial eligibility will be assessed on the resources of the adult and not the applicant. Although legal aid by way of advice and assistance may be available certain fees, e.g. to the OPG may still be payable. Note that the OPG provides non-legal advice free - for example, about the suitability of using the Access to Funds scheme or financial guardianship where person may lack capacity to manage his/her finances.
- **Civil Legal Aid**
This is available without a means-test in respect of applications for an intervention or guardianship order which include welfare powers or a mix of welfare and financial powers. In this case the solicitor applies to the Scottish Legal Aid Board who decides if the application meets the eligibility criteria. Where there is no welfare element and the application is for financial powers only, the Board will look at the income and capital of the adult.

The Scottish Legal Aid Board website www.slab.org.uk provides information by region on solicitors registered for legal aid work. A fact sheet on the Adults with Incapacity Act and legal aid is available at: <http://www.scotland.gov.uk/topics/justice/civil/awi>

Deciding if a person needs the help of the Act

If you are unsure about the needs of the person you are concerned about or if the Act will help, it is advisable to contact the local authority social work department in the area where the person lives. The local authority has a duty to assess the needs of anyone who may lack capacity due to a mental disorder or severe communication difficulty caused by a physical condition.

You can also seek advice and information from the Office of the Public Guardian (Scotland) on financial matters and from the Mental Welfare Commission on welfare matters. Specialist voluntary organisations may also be able to help (see list of useful addresses at the end of this leaflet). You can also consult the Scottish Government's website at:
<http://www.scotland.gov.uk/topics/justice/civil/awi>

If you are concerned that urgent action might be needed because an individual is or may be at risk of harm, you should contact the local authority social work department in the area where the person lives.