

Adults with Incapacity

The Adults with Incapacity (Scotland) Act 2000 sets out a legal framework for regulating intervention in the affairs of adults who may not have capacity to make important decisions about their finances or welfare. This may be as a result of a mental health problem, learning disability, or dementia. The framework is underpinned by principles which enable interventions to be tailored to the needs of the individual.

The practice guidance is composed in line with legislation such as the Adults with Incapacity (Scotland) Act 2000, Mental Health (Care & Treatment) (Scotland) Act 2003 and the Adult Support & Protection (Scotland) Act 2007. The guidance should be read in conjunction with the updated Code of Practice for Local Authorities exercising functions under the 2000 Act.

Overview

The Adults with Incapacity (Scotland) Act 2000 provide for decisions to be made on behalf of adults who lack legal capacity to do so themselves because of mental disorder or inability to communicate. The decisions concerned may be about the Adult's property or financial affairs, or about their personal welfare, including medical treatment.

What is incapacity?

The Act is the first of its kind to define incapacity in terms of decision making ability and to take account of the complexity of the decisions to be made. For example, a person may be completely capable of deciding what they will wear or eat, but may be unable to decide the level of care necessary in order for this to happen (acting on decisions). They may be unable to comprehend the complexities of their situations or the levels of care they may actually require (understanding decisions). They may have lost problem solving abilities (making decisions). They may have poor short term memory leading them to forget decisions they have made (retaining the memory of decisions). They may have lost the ability to communicate decisions as in those who have suffered physical trauma, or more commonly those who have an organic brain syndrome leading to such conditions as expressive dysphasia and the loss of reading or writing ability.

For the practitioner it is often a matter of fine judgement as to whether or not there may be issues of incapacity. Despite poor memory, is there consistency of response when presented with the same factors? Despite poor ability to carry out decisions is the adult still able to make informed choices and to determine how these choices will be met and the implications of their actions? Does the adult in fact have a full appreciation of the issues involved, but is simply disagreeing with the plans proposed?

Who Decides Incapacity?

Whilst Social Work staff are often at the forefront of such issues, it is the province of medical practitioners to determine whether or not the Adult does or does not have capacity in relation to the decisions requiring to be made.

Where Does the Adults with Incapacity (Scotland) Act 2000 fit in the Legislative Framework?

The Adults with Incapacity (Scotland) Act 2000 is central to the legislative tools concerned with the provisions of care and protection for those made vulnerable by mental disorder. It may be used separately or in conjunction with any of the other Acts:

- *The Social Work (Scotland) Act 1968*
- *The Health & Community Care Act 1990*
- *The Mental Health (Care & Treatment) (Scotland) Act 2003*
- *The Adult Support & Protection (Scotland) Act 2007*

The Overarching Principles

The Adults with Incapacity (Scotland) Act 2000 was the first Act to have at its base an overarching set of principles which must be followed in making decisions by all persons intervening in the affairs of an Adult, namely:

Benefit

It must be of use to the Adult. Clearly the provision of an appropriate level of care is in the interests of the Adult. Where there is agreement amongst all professional and familial persons with an interest in the Adult's affairs and the Adult is not objecting to the proposed plans, a measure taken under the Social work (Scotland) Act 1968 to arrange that care would be compliant with the principle of the intervention being of benefit.

Must be the Minimum Intervention

And the action which is the least restrictive to the freedom of the Adult. Such a position will have been arrived at in the process of:

Consultation with Relevant Others

However, if the Adult or other interested parties object to the proposed arrangements, or it is known that such measures would not have been in accordance with the Adult's past wishes, to proceed would be to contravene Principle 4. Any intervention must:

Take account of the Past and Present Wishes of the Adult

*Any measures to be taken which would override the Adult's known past or present views **must** be authorised through the use of Adults with Incapacity (Scotland) Act 2000 where the Adult's views will be taken account of, and decisions taken on their behalf will be accountable to the law. Any attempt to impose measures in the face of objections or issues may be perceived as Deprivation of Liberty under Article 5 of the Human Rights Act.*

Encourage the Adult to Exercise Whatever Skills He or She Has

This is often overlooked in applications for Guardianship Orders particularly in applications by individuals where the requested powers have been copied from the Code of Practice and detail all possible powers that a Guardian may have, the net effect being to give the Guardian power to dictate every aspect of the Adult's life. This is clearly in conflict with the principle of minimum intervention and must be considered in the context of the Adult's capacities as well as incapacities.

Measures of Intervention Authorised by the Act.

Power of Attorney

The Adult may grant an Attorney powers over property and finance (Continuing Attorney) or welfare (Welfare attorney) or both.

The granter must have capacity to grant this and where there is doubt medical opinion must be sought. Power of Attorney does not become active until the granter loses capacity and a letter of confirmation from a consultant or GP to that effect is generally required.

Social Work Officers and Community Nursing staff should encourage Adults and carers to pursue Power of Attorney when there is a diagnosis of mental disorder in which it is anticipated that capacity may be lost in the future and whilst there is still the possibility of determining the Adult's wishes regarding their future care.

Withdrawal of Funds

This provides carers and spouses with a means of accessing the Adult's funds in order to pay day to day expenses and care requirements which would be properly overseen and audited by the Office of the Public Guardian.

Intervention Orders

Where a single transaction would be sufficient to deal with a clearly defined financial, property or welfare matter an application may be made to the Sheriff. As with Guardianship Application this requires two medical reports and a report by someone with sufficient knowledge if the intervention is regarding property or finance. This would usually be the Adult's solicitor but a Social Work Officer may complete the report. Social Workers may be Interveners but if this is proposed an additional person is required to complete the application to avoid conflict of interest, this may be a Mental Health Officer or another officer of the Council. Reports are completed on the prescribed form.

In practice, Intervention Orders are more often used in the field of property and finances as transactions tend to be discrete interventions such as the signing of a tenancy agreement or the sale of a house to provide for care costs. Welfare Interventions tend to be more complex or of an ongoing nature and Guardianship is therefore more appropriate.

Financial Guardianship

This is not generally considered to be workable where the resources are less than £30,000 as other less restrictive measures can be put in place such as Access to Funds (previously known as Intromission with Funds) or, Part 4 Management of Resident's Finances, where the Adult is resident in a care home. This only allows for management of sums up to £10,000 and sums greater than this must be supervised by the Care Commission and funds appropriately invested for the Adult's benefit.

Where the Adult has the prospect of inheriting a sizeable estate in the future as in the case of younger Adults with Learning Disabilities a Financial Guardianship may be appropriate. The Local Authority may in exceptional circumstances make an application for Financial Guardianship where no one else is doing so and it is necessary. The Local Authority may not, however, act as Financial Guardian and this must be delegated to an independent solicitor.

Welfare Guardianship

The Local authority may only make application for welfare Guardianship when no one else is doing so and it is considered necessary. The application may propose a relative as Welfare Guardian or if no one suitable and willing is identified the proposed Guardian will be the Chief Social Work Officer.

The functions of the Guardian are then in practice delegated to a Social Work Officer to carry out the functions on the Chief Social Work Officer's behalf. The Chief Social work Officer has the power to revoke a Welfare Guardianship and is under obligation to do so if the grounds are no longer met.

Medical Treatment

Certificates of Incapacity to Consent to Medical Treatment

An Adult who cannot give informed consent to medical treatment can only be treated under a Certificate of Incapacity authorised by Section 47 of the Act. This is issued by the GP or if the Adult is a hospital patient by a hospital doctor and is renewable three yearly. If a Welfare Attorney or Guardian has been granted medical powers they can consent to medical treatment. Only where no such powers have been legally granted is a Section 47 Certificate required. The Certificate applies to treatment for physical and mental disorders that do not fall under the scope of the Mental Health (Care & Treatment) (Scotland) Act 2003.

Participation in Research

There are strict conditions regarding the Adult taking part in research when they cannot give informed consent. This may be problematic for researchers as was discovered during the research into the effectiveness of the Adults with Incapacity (Scotland) Act 2000 in the report "Learning from Experience".

The Office of the Public Guardian

Registration of Powers of Attorney and Guardianship

All Guardianships and Powers of Attorney must be registered with the Office of the Public Guardian. They will provide help and guidance to all prospective applicants by telephone or via the web site. The Office of the Public Guardian has a specific remit to oversee the operation of all Guardianships with powers over property and financial affairs and has a duty to investigate complaints into the misuse of powers in relation to these. The Public Guardian's powers to make enquiries into misuse of financial powers has been extended by the Adult Support & Protection (Scotland) Act 2007.

The Mental Welfare Commission

The Mental Welfare Commission has a duty to oversee the operation of Welfare Guardianships and to investigate any complaints relating to these or deficiencies in the care provided to the Adult.

The Mental Welfare Commission have a duty to visit Adults under Guardianship Orders and will require to be updated on a six monthly bases by those Social Work Officers who have responsibility for supervision of the Adult and Guardian as to how the powers are being used.

The Mental Welfare Commission will also require to be notified if Guardianship has been revoked, if the Adult has been moved and if any issues in the Guardian's exercise of powers is unsatisfactory.

Limitation of Liability

The Act makes it a criminal offence to wilfully misuse the powers of Guardian, a Continuing or Welfare Attorney and incorporates both acts of commission and omission. Social Workers therefore have to exercise judgement in this regard when supervising Guardianships and Guardians.

Fiduciary duty (duty of care) will not be breached if the person acted reasonably and in good faith or failed to act but the failure was reasonable and in good faith.