

# **ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### **Part 1: General**

##### ***Section 1: General principles and fundamental definitions***

5. **Section 1** sets out the general principles that are to be followed by anyone acting under the provisions of the Act to make decisions or intervene in the affairs of an adult. The general principles must be followed by the courts, by statutory bodies such as local authorities and by individuals. This section also defines the people to whom the Act applies.
6. The Act sets out a number of principles to be followed rather than a general test of what is in the best interests of the adult. The “best interests” concept was developed in the context of the law on children. It is a general term and is considered more protective than is appropriate for adults, as it would not give particular weight to the individual’s own views, including those expressed previously while they had the capacity to do so. Subsection (4) refers specifically to the adult’s wishes.
7. Subsection (2) requires that anything done for an adult under the provisions of the Act should produce a benefit for the adult personally, although interventions that incidentally produce a benefit for other people are not excluded. For example, a spouse acting on behalf of an adult who wishes to sell their jointly-owned home would need to ensure that the sale would be to the adult’s benefit, although it might also, incidentally, be to their own advantage.
8. Subsection (2) also requires that the person proposing to intervene should ensure that the intended benefit to the adult concerned cannot reasonably be achieved in another, less intrusive way. Thus, the appointment of a guardian under Part 6 to manage financial affairs for an extended period might be avoided if informal advice and assistance were available or the affairs were re-organised so as to make them easier for the adult to handle.
9. Subsection (3) provides that any intervention should be the minimum necessary to achieve the purpose of the intervention. The rights of the adult are to be restricted as little as possible. This will mean, for example, that a one-off intervention order in relation to an adult’s financial affairs should be considered in preference to the appointment for a longer period of a financial guardian to manage those affairs, wherever the one-off order would provide adequate protection for the adult.
10. Subsection (4) provides that the adult and others connected with them should be consulted about anything that might be done under the legislation. Subsection (4)(a) emphasises the importance of considering the adult’s views, both those known to have been expressed in the past and their current views, regardless of their capacity. The adult should be helped to communicate their views.

11. Subsections (4)(b) and (c) require the views of the adult's nearest relative, primary carer and any guardian or attorney with relevant powers to be taken into account in deciding whether something should be done for an adult under the legislation. In addition, the sheriff may direct that another specified person should have to be consulted and their views taken into account. If views are made known by anyone else with an interest in the adult's welfare or in the action proposed, these will also have to be considered.
12. The nearest relative, primary carer, guardian, attorney and anyone nominated by the sheriff must be consulted by the decision-maker, so far as reasonable and practicable, for example so long as their whereabouts can fairly readily be ascertained. There is no obligation, however, to seek out the views of others who might have an interest, although if such views have been made known to the person taking the decision, they should be taken into account.
13. Subsection (5) requires guardians, attorneys and managers of establishments under Part 4 of the Act to encourage the adult to play as active a role as possible in making their own decisions. This principle might, for example, where appropriate, lead to assisting a young person with a learning disability to play some part in managing their own financial affairs under the supervision of a guardian. The requirement to encourage the use and development of skills is not absolute, however. It might, for example, not be considered reasonable or practicable in terms of this subsection to require adults with rapidly deteriorating capacity to be encouraged to acquire new skills.
14. Subsection (6) clarifies that an adult is a person aged 16 and over. Subsection (6) sets out, through the definition of "incapable", that the provisions in the Act may be applied if the adult either has a mental disorder or is unable to communicate because of physical disability and, because of mental disorder or inability to communicate, is unable to act or to make, communicate, understand or remember decisions. Understanding decisions includes being able to understand or remember information relevant to the decision, including information about the foreseeable consequences of deciding one way or another, or of failing to make the decision altogether.
15. Subsection (6) ensures that all reasonable efforts are made to communicate with the adult in an appropriate way before arriving at a decision on incapacity. For example, the assistance of an independent interpreter who is familiar with the adult's means of communication should be considered. The use of equipment to assist communication should also be considered.
16. Mental disorder is defined at section 87 and the definition is the same as in the Mental Health (Scotland) Act 1984, section 1: mental illness or mental handicap however caused or manifested. Following the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, personality disorder is included in the definition of mental illness. In line with the 1984 Act, a person should not be regarded as mentally disordered by reason solely of immoral conduct, sexual deviancy or dependency on alcohol or drugs nor does the definition cover people who simply act imprudently. People who are temporarily under the influence of alcohol or drugs are not to be regarded as mentally disordered, although those whose mental faculties are impaired due to past alcohol or drug abuse do fall within the definition.
17. Subsection (7) provides that foreign attorneys and guardians should be included in those consulted at subsection (4)(c). This applies to any guardian or attorney recognised by the law of Scotland.

## **Judicial proceedings**

### ***Section 2: Applications and other proceedings and appeals***

18. This section covers procedures of the sheriff court that will be the forum for dealing with many applications and other matters under the Act.

19. Subsection (2) says that applications to the sheriff under the Act are to be by summary application, which allows them to be made speedily and simply.
20. Subsection (3) sets out how appeals may be made against any decision made by a sheriff in an application to the courts under the legislation.
21. Subsection (4) allows Sheriff Court rules, which determine in detail how the sheriff court functions, to set out the type of evidence the sheriff is to consider in deciding whether intimations to the adult of application about them should be withheld. In most cases this is likely to be medical evidence.

### ***Section 3: Powers of sheriff***

22. This section gives the sheriff wide and flexible powers to deal with matters that come before the court in relation to the affairs of an adult with incapacity.
23. Subsection (1) allows the sheriff to give rulings over and above those which they have initially been asked to consider, provided these are related to the matter before the court.
24. Subsection (2) spells out some of the ways in which sheriffs may exercise their powers. For example, in granting a one-off order that an adult's house should be sold, the sheriff might also, under subsection (2)(a), direct that this should be done as quickly as possible, to release the adult's capital. Subsection (2)(d) allows the sheriff to make an interim order very quickly if the situation warrants it, while taking longer to resolve in full the issue before the court. This might, for example, allow the sheriff to direct that an important document was signed on behalf of the adult, while considering whether it was necessary to appoint a guardian to take charge of a major aspect of the adult's affairs in the longer term.
25. Subsection (3) allows the sheriff to give directions to anyone acting under the Act, such as an attorney or guardian, or those holding equivalent offices under the law of any other country, about how they use their powers. The adult and anybody else with an interest in their affairs are entitled to apply to the court for such a direction.
26. Adults with incapacity may not wish, or be able, to appear themselves in court and even if they do appear, they may not be able fully to protect their own interests. Subsection (4) therefore provides that the sheriff should consider whether to appoint a person to safeguard the adult's interests in any application or other court proceeding. It is already possible to appoint a curator ad litem to represent the adult's views to the court; a curator ad litem is a party to the court proceedings. Subsection (5) says that the safeguarder should if at all possible be responsible for finding out the adult's views about the matter before the court and conveying these, as well as safeguarding the adult's interests. However, if the sheriff thinks it is not possible to combine the functions of conveying views and safeguarding interests, a separate curator ad litem may be appointed to convey the views of the adult to the court.
27. Subsection (6) specifically allows the sheriff to vary orders made under subsection (2).

### ***Section 4: Power of Court of Session or sheriff with regard to nearest relative***

28. This section allows an adult to apply to the sheriff to have the person who would otherwise be treated as their nearest relative displaced, for the purposes of the Act. Alternatively, the adult may apply for particular information that would otherwise be given to the nearest relative to be withheld from that person.
29. Subsection (4) clarifies that the adult may only apply to the courts under this section where measures are in operation under the Act because of their incapacity. It is not possible to apply in advance of any incapacity to have the nearest relative displaced or information withheld from them.

### ***Section 5: Safeguarding of interests in Court of Session appeals or proceedings***

30. Section 5 ensures that the appointment of a safeguarder is considered in Court of Session proceedings under the Act, in the same way as such an appointment is considered by the sheriff under section 3. Most matters covered by the Act will be dealt with in the sheriff courts, but appeals against sheriffs' decisions may eventually be heard by the Court of Session and certain matters relating to medical treatment under Part 5 will be heard there.

## **The Public Guardian**

### ***Section 6: The Public Guardian and his functions***

31. This section creates a new post of Public Guardian which is to be held by the Accountant of Court, an officer of the Supreme Courts, who currently supervises curators bonis looking after the financial affairs of adults with incapacity.
32. Subsection (2) sets out the Public Guardian's role, which includes supervising those exercising financial powers under the Act and investigating complaints and suspicious circumstances relating to the exercise of these financial functions.
33. Subsection (2)(b) provides for registers to be kept by the Public Guardian of matters which he is required to register under the Act relating to powers of attorney, use of funds, guardianship orders or intervention orders. A reference in these Notes to a register is a reference to the appropriate register kept under this section.
34. Subsection (2)(d) allows the Public Guardian to investigate any circumstances made known to him where there seems to the Public Guardian to be a risk to the management of the property and financial affairs of an adult with incapacity who lives in Scotland or has property here, even where no-one else is acting for the adult under this legislation.
35. Subsection (2)(e) requires the Public Guardian to give advice to anyone acting under the legislation about managing the finances or property of an adult with incapacity. This may, for example, be done through issuing publications and leaflets.
36. Subsection (2)(f) creates a statutory duty for the Public Guardian to consult the Mental Welfare Commission and the relevant local authority about carrying out duties under the legislation where there may be a common interest. For example, the Public Guardian might ask the Mental Welfare Commission whether they had recently exercised their statutory power to visit a person with a welfare guardian where the Public Guardian thought that information might have been gained at such a visit that would shed light on concerns about the adult's financial affairs.
37. Subsection (3) allows the Public Guardian to look into complaints about financial management by guardians and attorneys appointed in other countries whose powers are recognised in Scotland where the adult is habitually resident, or property in question is situated, in Scotland.

### ***Section 7: The Public Guardian: further provision***

38. Subsection (1) allows Regulations to be made prescribing the information to be included in the Public Guardian's registers, how those registers are to be kept, the format of statutory certificates issued by the Public Guardian and the way in which applications to the office are to be made. Under subsection (1)(d), regulations may also prescribe the type of evidence that the Public Guardian would require before deciding not to inform the adult of matters, where the Act would otherwise require intimation to be given.
39. Subsection (2) allows the Public Guardian to charge a fee for carrying out his functions under the legislation and says that the fee may be required before the Public Guardian takes action, for example before a certificate of authority is issued to an attorney or

guardian. This subsection does not, however, require the Public Guardian to charge for all the services offered and allows discretion for prescribed fees to be waived.

40. Subsection (3) says that the certificates issued by the Public Guardian are to be taken as evidence in court of the matters to which they relate. For example, a certificate confirming that an attorney for an adult with incapacity has authority to act for that person would be evidence that the actions of the attorney on behalf of the adult were valid.

## **Expenses in court proceedings**

### ***Section 8: Expenses in court proceedings***

41. The Public Guardian, Mental Welfare Commission or the relevant local authority may need to initiate legal proceedings to protect an adult's financial affairs or welfare. These statutory authorities may also become involved in existing proceedings to argue for the adoption of a particular course of action or put forward their views. This section provides that the statutory authorities should be entitled to be awarded their expenses by the court. The exception to this provision is that the local authority is required by section 68 to meet the costs of applications where the local authority itself is to act as welfare guardian.
42. Where the statutory authorities are involved in proceedings in order to protect the adult's own interests, expenses are to be awardable out of the adult's resources or against any person whose conduct necessitated the application. Where the statutory authorities are representing the public interest expenses are to be awardable against anyone whose actions have prompted the proceedings or who has behaved unreasonably during them. It is possible, but unlikely, that expenses might be awarded against the adult in such cases.

## **Mental Welfare Commission**

### ***Section 9: Functions of the Mental Welfare Commission***

43. This section sets out the role, under this legislation, of the Mental Welfare Commission, in protecting the interests of adults whose incapacity is a result of mental disorder. The Commission's existence is governed by the Mental Health (Scotland) Act 1984 ("the 1984 Act"). The Commission has no role in relation to adults whose incapacity is due solely to an inability to communicate, for example people who are deafblind.
44. The references in section 3 of the 1984 Act, which set out the Commission's functions in relation to people with guardians appointed under that Act, are being repealed by the Act. Subsection (1) creates a new free-standing set of provisions for the Commission's activities under this legislation. In particular, subsection (1)(b) gives the Commission the power to visit adults on whose behalf others are acting under the Act. Subsection (1)(d) allows the Commission to investigate complaints about the exercise of welfare powers by guardians, attorneys and others, if the local authority, which is the primary complaints body, has not exercised its duty to investigate satisfactorily. Subsection (1)(e) provides for the Commission to look into suspicious circumstances even in the absence of complaints. Subsection (1)(f) allows the Commission to make inquiries if an adult's property, including funds, is at risk. As a result of such investigations or otherwise, the Commission would be entitled to initiate legal proceedings or take other action in order to protect the interests of the adult concerned.
45. Subsection (2) reproduces the requirement currently at section 5(2) of the 1984 Act for local authorities and guardians to allow the Commission the access it needs, for example to interview the adult, to carry out its functions effectively. The requirement is extended to welfare attorneys and those acting under intervention orders



46. Subsection (3) clarifies that the Commission's powers to investigate complaints about welfare matters extend to complaints about the actions of welfare attorneys and guardians appointed in other countries, if their authority is recognised in Scotland and the adult is resident or personal welfare is at risk and the adult is present in Scotland.

## **Local authorities**

### ***Section 10: Functions of local authorities***

47. This section sets out the major role of the local authority in looking after the welfare of adults with incapacity. For example, subsection (1)(a) gives the local authority a duty to monitor the actions of welfare guardians to ensure that they use their powers properly. The local authority is further required to consult the Public Guardian and the Mental Welfare Commission where these authorities share common concerns about matters under the legislation. The local authority is to investigate complaints and suspicious circumstances about the exercise of welfare powers.
48. Subsection (1)(d) and subsection (2) provide for either the local authority where the adult lives or the authority in whose area they are at any time to investigate any potential risk to the adult's personal welfare of which the authority is aware.
49. Subsection (3) creates a power to make regulations about how local authorities supervise welfare attorneys and guardians and those acting under intervention orders. This corresponds to the current power under section 43 of the 1984 Act to make regulations about guardianship under that Act. The current regulations require the local authority, among other things, to visit people under guardianship at least once every 3 months.
50. Subsection (4) clarifies that local authorities can investigate complaints about the exercise of welfare powers by guardians and attorneys appointed under the law of another country, provided that their powers are recognised in Scotland and the adult either lives or is present and at risk in Scotland.

## **Intimation**

### ***Section 11: Intimation not required in certain circumstances***

51. Rules of Court made under the Act will provide generally that adults should be told of all applications to the court about their affairs. The Act provides that adults should also be told whenever the court makes an order about them. This is to ensure that the adult has the chance to express their views to the court before any decisions are made and to be fully aware of arrangements for decisions to be made on their behalf. Subsection (1) allows the sheriff, however, to decide that information about applications or orders should not be given to the adult if such an intimation would be likely to put the adult's health at serious risk. For example, the sheriff might decide on the basis of medical evidence that notifying the adult would be likely to lead to self-harm. In such a case, the sheriff may direct that the adult should not be informed of the matter before the court.
52. Subsection (2) allows the Public Guardian, on similar grounds, to dispense with intimations to the adult that would otherwise be required under the legislation.

## **Investigations**

### ***Section 12: Investigations***

53. Subsection (1) provides that the Public Guardian, Mental Welfare Commission and local authority may follow up an investigation into the exercise by guardians of financial or welfare powers under the legislation, or where an adult appears to be at risk, by doing whatever they think is necessary to protect the adult's interests. In some cases, administrative steps may be sufficient to deal with the problem but in others, legal

proceedings may be required, for example an application to the court for an order giving directions to a guardian or even replacing a guardian.

54. Subsection (2) requires the same bodies to co-operate and exchange information when investigations of complaints are being carried out that involve matters in both the welfare and financial field. For example, a complaint may be made to the Commission about the actings of a welfare guardian. If initial investigations by the Commission lead to suspicious of financial irregularities, the Commission will be required to alert the Public Guardian to these and the two bodies could then make suitable arrangements for further investigations into financial matters.

## **Codes of practice**

### ***Section 13: Codes of practice***

55. This section provides that the Scottish Ministers should draw up and keep under review specified codes of practice for those who have functions conferred on them by the legislation. The codes will offer guidance on the legislation itself and further practical information, for example on keeping records and on how to approach the relevant statutory authorities when required.
56. Subsection (2) requires the Scottish Ministers to consult relevant bodies before publishing or updating codes.

## **Appeal against decision as to incapacity**

### ***Section 14: Appeal against decision as to incapacity***

57. This section ensures that any assessment of incapacity made under the legislation, by a medical practitioner or other person, can be challenged through an appeal to the sheriff. It also sets out how an appeal may be made against a decision on incapacity made by the sheriff.