

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

EXPLANATORY NOTES

THE ACT

Part 7: Miscellaneous

Section 80: Future appointment of curator bonis etc incompetent

386. This section confirms that no new appointments can be made once the relevant provisions of the Act come into force to the ancient offices of curator bonis, tutor-dative or tutor at law to an adult. Schedules 5 and 6 amend and repeal statutory provisions for the exercise of these offices. The position of existing curators and tutors once the provisions of the Act are commenced is covered at schedule 4.

Section 81: Repayment of funds

387. This section requires those with functions under the Act listed in subsection (1) to refund to the adult any funds that they misuse, with interest. The rate of interest is fixed by Rules of Court.
388. Subsection (2) clarifies that repayment under this section is to be considered as a separate matter to forfeiture of a guardian's remuneration under section 69. Section 82 clarifies limits on the liability of those with responsibility for an adult's financial affairs under the Act.

Section 82: Limitation of liability

389. Attorneys, guardians and others with functions under the Act are held at common law to owe a duty of care to the adult with incapacity. This duty requires the exercise of due skill and care in carrying out the functions required on the adult's behalf. Where the proxy is a professional person they must demonstrate the skill and care that would be expected of a reasonably competent member of that profession.
390. There will also be a common law fiduciary relationship between an adult with incapacity and a person acting on their behalf under the Act. A fiduciary duty is one based on trust. It is a general principle that those having fiduciary duties to discharge are not allowed to enter into engagements in which they have or can have a personal interest conflicting or which may conflict with the interests of those whom they are bound to protect. There are other fiduciary duties: the undivided loyalty rule and the confidentiality rule. The undivided loyalty rule requires those with a fiduciary duty not to place themselves in a position where their duty towards one beneficiary conflicts with the duty owed to another. A fiduciary must make available to a beneficiary all the information that is relevant to the beneficiary's affairs. The confidentiality rule requires that a fiduciary must use information obtained in confidence from a beneficiary for the benefit of that beneficiary and must not use it for his or her own advantage or for

the benefit of others. These rules are of particular importance where, for example, a guardian acts for several adults with incapacity.

391. Breach of a fiduciary duty normally gives rise to liability on the part of the fiduciary. However, where a person acting under this legislation is a member of the adult's family it may be very difficult or even impossible to avoid breaches of fiduciary duty completely. In many cases those acting for the adult will be family members. Actions such as the apportionment of household expenses between them, or decisions on investments, either to generate maximum income or for capital growth, involve a conflict or potential conflict between the adult and the person acting for them.
392. This section allows breaches of common law duties of care and fiduciary duties owed to an adult with incapacity to be excused, where actions have been reasonable and in good faith, and the general principles in section 1 have been followed, without the courts being required to grant dispensations in individual instances. That would, in many cases, require repeated applications to court which would involve unnecessary expense and might in the long run be prejudicial to the appointment of family members and, indeed, others to act under the legislation.
393. Subsection (2) clarifies that foreign guardians and attorneys are also excused breaches of fiduciary duty, where they act in accordance with subsection (1)(a) and (b).

Section 83: Offence of ill-treatment and wilful neglect

394. This section replicates the criminal offence, created by section 105 of the Mental Health (Scotland) Act 1984, therefore ensuring that an equivalent offence will apply to all those exercising welfare powers under this legislation.
395. The penalties for someone found guilty of an offence under this section are set out at subsection (2). These are in line with the penalties for the current Mental Health Act offence. At subsection (2)(a) someone found guilty of an offence under this section on summary conviction may be imprisoned for up to 6 months or fined up to £5,000. Someone convicted of this offence on indictment may be imprisoned for up to 2 years or given an unlimited fine.

Section 84: Application to guardians appointed under Criminal Procedure (Scotland) Act 1995

396. Section 84 and the consequential amendments at paragraph 26 of schedule 5 change the current provisions for guardianship orders made under the Criminal Procedure (Scotland) Act 1995. The 1995 Act allows the High Court or the sheriff court, on convicting a person of an offence punishable by imprisonment, to place that person under the guardianship of a local authority or of a person approved by a local authority. This option is available if the person is suffering from mental disorder, but not for particularly serious offences for which the sentence is fixed by law.
397. **Section 84** and paragraph 26 of schedule 5 allow the criminal courts to appoint a welfare guardian or to make an intervention order under the new legislation. Amendments are required to the 1995 Act, because the existing office of Mental Health Act guardian is being abolished and replaced with the new form of guardianship. Several of the provisions of Parts 1, 5, 6 and 7 must therefore be inserted into the 1995 Act. For example, to provide for the court to confer specific powers on the guardian and determine the period for which the guardian is appointed, to make provision for joint and substitute guardians, to require registration of the order by the Public Guardian, to clarify the role of the Mental Welfare Commission in relation to the adult under guardianship and to allow for recall of guardianship by the Mental Welfare Commission or the local authority. The incapacity conditions for guardianship under the new legislation must also be satisfied.

Section 85: Jurisdiction and private international law

398. This section brings into effect schedule 3 which describes the jurisdiction under the Act of the Scottish courts and other statutory authorities. It also makes provision for the private international law of Scotland affecting adults with incapacity.

Section 86: Regulations

399. Subsection (1) provides that regulations made by the Scottish Ministers under this legislation are to be subject to negative procedure in the Parliament. The procedure requires the regulations to be laid before the Parliament not less than 21 days before they are due to come into force. If any objection is raised within a period of 40 days then a debate on the regulations as a whole is held. Regulations are either approved or rejected in their entirety by the Parliament. If they are rejected, then the Scottish Ministers are required to lay a revised set before the Parliament, subject to the same procedure.
400. Subsection (2) is a standard provision to allow regulations to make flexible provision for different circumstances and to cover incidental, related matters.

Section 87: Interpretation

401. This section provides definitions of various terms used within the Act and includes cross-references to sections of the Act where terms are defined.
402. The definition of nearest relative is based on that in the Mental Health (Scotland) Act 1984. The nearest relative is the person first listed among the adult's spouse or partner, child, father or mother, brother or sister, grandparent, grandchild, uncle or aunt, nephew or niece.
403. Subsections (2) and (3) allow a same-sex partner to be treated as the adult's nearest relative, in the same way as the Mental Health (Scotland) Act 1984 allows an unmarried opposite-sex partner to be so treated.
404. Subsection (4) defines when a person is held to be bankrupt for the purposes of the legislation. Under common law a financial power of attorney falls on the bankruptcy of either the granter of the power or the attorney. Section 16 (7) of the Act clarifies, however, that a welfare power need not terminate if the attorney becomes bankrupt.

Section 88: Continuation of existing powers, minor and consequential amendments and repeals

405. Subsection (1) brings into effect schedule 4 which clarifies the position when the provisions of the Act are enacted of existing curators bonis, tutors, guardians and continuing attorneys.
406. Subsection (2) brings into effect schedule 5 which contains amendments to existing legislation as a consequence of the provisions of the Act.
407. Subsection (3) brings into effect the repeals of the existing legislation set out in schedule 6.

Section 89: Citation and commencement

408. Subsection (1) confirms the short title of the legislation, by which it will be commonly known.
409. Subsection (2) allows the Scottish Ministers to bring different parts of the legislation into force on different dates, by means of Orders which are not subject to any Parliamentary procedure.

410. Subsection (3) is a standard provision for commencement Orders under subsection (2) to make transitional provisions relating to existing statutory arrangements. Some transitional provisions are already included in schedule 4.

Schedule 1: Managers of an Establishment

411. This schedule set out in detail the definition of manager as used in relation to the establishments referred to in Part 4 of the Act.
412. [Paragraph 1](#) identifies the “managers” of a given establishment.
413. Sub-paragraph (a) provides that for a hospital managed by a Health Board (rather than a NHS Trust) the Health Board responsible for that hospital constitutes the “managers” as referred to in Part 4.
414. Sub-paragraph (b) provides that where a NHS Trust exists to run a hospital, the managers are the directors of the Trust.
415. Sub-paragraph (c) provides that in the case of a State hospital, depending upon the arrangements in place for its management, the “managers” are either the Scottish Ministers, a State Hospital Management Committee or one of the bodies referred to in (c) (iii) to whom management responsibility may be delegated. There is currently only one such establishment in Scotland, the State hospital at Carstairs which is managed by a Special Health Board, the State Hospitals Board for Scotland.
416. Sub-paragraph (d) provides that in the case of a private hospital registered under the Mental Health (Scotland) Act 1984 or an unregistered hospital, the “managers” are either the persons operating the business in question or someone appointed manager of the establishment by them. There are currently no such establishments in Scotland.
417. Sub-paragraph (e) provides that for local authority residential establishments either the local authority in question or anyone appointed by them to manage the establishment constitutes the “managers”.
418. Sub-paragraphs (f) and (g) provide that for an independent sector care establishment registered with the local authority and a nursing home registered with the Health Board respectively the “managers” shall be the individual registered as running the establishment or anyone they appoint managers so long as that person is named in the application for registration.
419. [Paragraph 2](#) provides that the Scottish Ministers may amend this list in Regulations.

Schedule 2: Management of Estate of Adult

420. This schedule makes detailed provision for the Public Guardian’s supervision of guardians with powers over the property and financial affairs of an adult and sets out where the Public Guardian’s consent is required to some specific activities of such guardians.
421. [Paragraph 1](#) requires a financial guardian to draw up a management plan setting out how the adult’s estate falling within the scope of the guardian’s powers should be handled. The management plan must be submitted to the Public Guardian for approval, generally within a month of the inventory of the adult’s assets required at paragraph 3. The Public Guardian may require the draft management plan to be amended. The plan is subsequently to be kept under review by both the guardian and the Public Guardian. Until the plan has been approved, the guardian will generally have only limited powers to spend the adult’s resources for their day to day needs. The sheriff may dispense with the need for a management plan, for example in the case of a small or simple estate or where the guardian has only very limited powers. There are provisions for decisions of both the Public Guardian and the sheriff in relation to the management plan to be appealed.

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422. **Paragraph 3** requires a financial guardian to produce an inventory of the adult's estate falling within the scope of the guardian's authority within 3 months of the guardian's appointment. The Public Guardian may decide that there is no need for an inventory or may allow for an alternative, for example, in the case of a small estate or a guardian with very limited powers.
423. **Paragraph 4** requires the guardian to lodge all money received on behalf of the adult in a bank or building society account in an account in the adult's name. Any sum over £500 must be placed in an interest-bearing account. This figure may be varied in regulations made by the Scottish Ministers. These provisions are required to guard against the possibility of the guardian using the adult's funds for their own purposes.
424. **Paragraph 5** governs the activities of a guardian in relation to the adult's investments and business. Guardians are allowed to retain existing investments if they get proper professional advice and also to make new investments in the name of the adult, with the agreement of the Public Guardian. When considering any investment strategy the guardian is specifically required to have regard to current general investment principles as set out at sub-paragraph (3). The guardian is allowed to continue running the adult's business subject to any requirements that may be imposed by the Public Guardian.
425. **Paragraph 6** deals with the disposal of an adult's house or acquisition of new accommodation for the adult by the guardian. The Public Guardian is required to consent to a sale or purchase of accommodation and this is to be a 2-stage process. The first stage requires the guardian to apply to the Public Guardian for consent to the principle of selling or buying the house. At this point, the adult and others with an interest are to be informed and given the chance to object. Appeals may be made to the sheriff against the Public Guardian's decision. In the second stage, once the authority to the principle of sale or purchase has been obtained, the guardian is required to seek the Public Guardian's consent to the actual sale or purchase price. This will generally need to be done very quickly because of the Scottish legal system and there is no requirement to notify the actual price to anyone else or to allow any objections to be made at this stage.
426. **Paragraph 7** requires financial guardians to submit annual accounts to the Public Guardian for audit. There is some flexibility for the Public Guardian to allow accounts at intervals greater than a year, for example, when the estate is modest and there is little change from year to year. The Public Guardian may also waive the requirement for accounts altogether in such cases and ask for information in another form. The Public Guardian will accept alternative information where the guardian has powers over the adult's business. The Public Guardian is to arrange for all accounts to be audited.
427. **Paragraph 8** provides for the Public Guardian to approve accounts if they appear to be a true and fair view of the guardian's management of the adult's estate. At that point, the guardian's remuneration is to be determined. If the Public Guardian is not satisfied with the accounts, he is required to prepare a report and the accounts are to be adjusted. There are provisions for an appeal to the sheriff against the Public Guardian's decision. If the accounts show that the adult has not had the benefit of any part of their resources, the guardian will be required to pay interest on the relevant amount to the adult.

Schedule 3: Jurisdiction and Private International Law

428. The private international law provisions of this schedule bring the law of Scotland in this regard into line with the Hague Convention of 13 January 2000 on the International Protection of Adults. This has the effect of regulating the relations between the Scottish legal system and other legal systems with respect to the matters dealt with under the Act. Provision is made for the jurisdiction of the Scottish judicial and administrative authorities. The schedule also provides for which country's law will apply in any given case and what legal decisions made in other countries will be recognised and given effect to in Scotland.

429. [Paragraph 2](#) deals with the domestic jurisdiction of the sheriff. It clarifies which sheriff is to deal with applications and other measures. This will normally be the sheriff in whose sheriffdom the adult concerned lives, with certain exceptions. For example, where an adult who normally lives in France owns a flat in Dundee, the sheriff court in Dundee will have jurisdiction to make orders or appoint a guardian with powers in relation to that flat, but no powers in relation to the adult's personal welfare or other financial affairs.
430. Sub-paragraph (1)(c) allows the sheriff to make an order which is urgently needed for the protection of the adult, if the adult is present within the sheriffdom at the date of application.

Schedule 4: Continuation of Existing Curators, Tutors, Guardians and Attorneys Under This Act

431. [Paragraph 1](#) describes what happens on the "relevant dates" i.e. the dates on which provisions of the Act come into effect, of people who hold the offices of curator bonis, tutor-dative and tutor-at-law. Each of these office-holders will become a guardian to the adult concerned under the new legislation. Former curators bonis will have powers over the whole of the adult's property and financial affairs as they did previously. Former tutors-dative will retain the powers that they were granted by the court when they were appointed; these are generally welfare powers, but it is possible for the court to confer financial powers. Former tutors-at-law will have powers over the adult's finances and welfare.
432. [Paragraph 1](#) further provides that court proceedings for the appointment of a curator bonis, tutor-dative or tutor-at-law already underway when the provisions of the Act are enacted, should continue on the basis of the former law. The effect will be that a curator bonis, tutor-dative or tutor-at-law is appointed, rather than a guardian under the new statutory provisions.
433. [Paragraph 2](#) deals with the position of people appointed as guardians under the Mental Health (Scotland) Act 1984 when the guardianship provisions of the Act are enacted. They will continue to have the powers conferred on them: to require the adult to reside at a specified place, to require the adult to attend for treatment or training and to require access to be given to doctors, mental health officers and others.
434. [Paragraph 3](#) provides that any court proceedings in relation to existing office-holders other than their initial appointment, underway when the provisions of the Act are enacted should continue on the basis of the former law. This would apply, for instance, where there was an appeal against the appointment of an existing office-holder.
435. [Paragraph 4](#) deals with the position when the provisions of the Act are enacted of attorneys with financial or welfare powers that continue on the incapacity of the grantor of the power. Such attorneys are to become continuing or welfare attorneys as defined in Part 2 of the Act. However, there is no requirement for the Public Guardian to register the power. There is no need for the documents conferring the power of the attorney to be in the form prescribed in the Act. The attorney does not need to keep records, nor notify the Public Guardian of changes of address, or of his or her proposed resignation.
436. [Paragraph 4](#) does, however, require continuing and welfare attorneys appointed before the Act to observe the general principles at section 1 and come under the general supervisory and investigative jurisdiction of the relevant statutory authority. The statutory authority would investigate if a complaint was made about such an attorney and would supervise them if ordered to do so by the courts. The attorney's authority would terminate on his or her divorce from the grantor, unless the power of attorney provides otherwise.
437. [Paragraph 5](#) deals with the position, when the Act comes into force, of hospital managers who have been managing patients' money under section 94 of the 1984 Act.

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They may continue to do so, but will be subject to the new requirements imposed on managers in Part 4.

438. [Paragraph 6](#) sets out which provisions of the new legislation are to apply to former curators bonis, tutors-dative and tutors-at-law and Mental Health Act guardians, who have become guardians under the provisions of the legislation.
439. Sub-paragraph (2) provides that the court order appointing the office-holder is to have the same effect as the Public Guardian's certificate of appointment in authorising the guardian to manage the adult's property and financial affairs and receive payments due to the adult. These provisions would only apply where the guardian had the relevant powers over the adult's finances, by virtue of having been a curator or tutor.
440. Sub-paragraphs (3) and (4) deal with the renewal of existing office-holders' powers after the Act comes into force. Under sub-paragraph (3), the appointments of curator bonis, tutors-dative and tutors-at-law will have to be reconsidered by the court within 5 years. Guardians who were formally Mental Health Act guardians will have their appointment re-considered by the court at the periods set out in the 1984 Act: 6 months after appointment in the first instance and annually thereafter. At that point the court will consider the extent of the guardian's powers which need not be the same as the 3 powers formerly conferred on Mental Health Act guardians.
441. Sub-paragraph (6) provides that the Public Guardian may decide to what extent to apply the provisions of schedule 2: Management of Estate of Adult to existing office holders who become guardians under the provisions of the Act. This will, for example, allow the Public Guardian to require a former curator bonis to produce a management plan and accounts.
442. Sub-paragraph (8) clarifies that former office-holders who become guardians do not have to have their appointment registered by the Public Guardian, as do guardians appointed under the provisions of the Act.
443. [Paragraph 7](#) makes transitional arrangements for the period during which Parts 2, 3 and 4 of the Act will have been commenced but guardianship under Part 6 will not yet have come into force.

Schedule 5: Minor and Consequential Amendments

444. [Paragraph 1](#) is a general provision that references in existing legislation or private documents to curators bonis, tutors or curators to adults are, after the provisions of the Act are enacted, to be taken as references to guardians with the appropriate financial or welfare powers. The following paragraphs of this schedule deal with specific statutory references which require amendment or repeal, but it may not have been possible to identify all of these, hence a general provision is required. There are also some United Kingdom enactments which it would not be appropriate to change for Scotland only, for example, the Taxes Management Act 1970, which includes references to tutors and curators.
445. Most of the consequential amendments in this schedule are self-explanatory.
446. Amendments to the Judicial Factors (Scotland) Act 1889, in paragraph 6, confirm that the Public Guardian will in future carry out many of the functions that the Accountant of Court used to perform in relation to curators bonis.
447. [Paragraph 17](#) includes numerous amendments to the Mental Health (Scotland) Act 1984. The amendments between section 19 and section 35I of that Act are to ensure that welfare guardians and attorneys with relevant powers should be treated in the same way as the nearest relative in relation to various aspects of detention and community care orders under the 1984 Act.

Schedule 6: Repeals

448. The repeals at schedule 6 are mainly required as a consequence of the replacement of the existing offices of curator bonis, tutor-dative, tutor-at-law and Mental Health Act guardian by the new form of guardianship under this legislation. Most of the repeals are self-explanatory but specific reference is made in these Notes to the changes to the Judicial Factors Acts, the Trusts (Scotland) Act 1921 and the Mental Health (Scotland) Act 1984.
449. The repeals of provisions in the Judicial Factors Acts 1849, 1880 and 1889 remove references to curators and tutors from the Acts and the detailed accounting regime imposed on curators bonis and tutors with financial powers. This regime is replaced by the more flexible regime, provided in Part 6 and schedule 2 of the Act, tailored to the needs of each adult and supervised by the Public Guardian.
450. The repeals of references to tutors and curators in the Trusts (Scotland) Act 1921 are required because, under that Act, these office holders were treated as trustees. This Act does not confer trustee status on guardians with financial powers as it is intended that guardians should be regulated in the exercise of their powers solely by the provisions of the new legislation. References to guardians are also repealed as they were not intended to refer to guardians under this Act, nor do they refer to any other type of guardian.
451. The repeal of sections 36 to 52 of the Mental Health (Scotland) Act 1984 has the effect of abolishing Mental Health Act guardianship which is replaced by the new form of guardianship. The protective and supervisory roles of the Mental Welfare Commission and local authorities in relation to guardianship under the 1984 Act are being replaced by similar roles in relation to welfare guardians under the new legislation. The powers of hospital managers to look after money and valuables belonging to in-patients with mental disorder are being repealed, and replaced with powers in Part 4.