

A guide to the Adults with Incapacity (Scotland) Act



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Introduction

Mental capacity refers to our ability to make decisions for ourselves and act on them. Brain injury can impair this ability and when this happens the Adults with Incapacity (Scotland) Act 2000 ('the Act') allows others to help.

The Act provides a framework for safeguarding the welfare and managing the finances of adults who lack capacity. It aims to protect people who lack capacity

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to make particular decisions, but also to support their involvement in making decisions about their own lives as much as possible. When someone is assessed as lacking capacity for specific decisions, the Act allows someone else to be appointed to make the decisions on their behalf.

Who does the Act apply to?

The Act applies to any adult (over the age of 16) who lacks the capacity to make some or all decisions for themselves because of 'mental disorder', including the effects of brain injury. The Act also covers those unable to communicate their decisions because of physical disability.

Principles of the Act

There are five key principles under the Act. These principles state that all decisions or actions made on behalf of an adult with impaired capacity must:

- **Benefit the adult** - any action or decision must be beneficial to the person and must only be taken when the benefit cannot be achieved without it
- **Be the least restrictive option** - any action or decision taken should be the minimum necessary to achieve the purpose and should restrict the person's freedom as little as possible
- **Take account of the wishes of the person** - the past and present wishes and feelings of the person should be taken into account as far as possible and the person must be offered help in communicating their views
- **Take account of the views of others with an interest in the person's welfare** - this includes the person's primary carer, nearest relative, named person, attorney or guardian
- **Encourage the person to exercise existing skills and develop new ones** - the person should be encouraged to participate by using any skills they have relating to property, financial affairs or personal welfare, and to develop new skills if possible

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These principles must be followed by anyone who takes action or decisions on behalf of someone else, whether they are a formally appointed decision maker or not .

Decision making after brain injury

The cognitive, behavioural and emotional effects of brain injury can make rational decision making very difficult. Decision making involves many different functions working together. For example, the following skills are essential:

- **Short-term memory** - holding information in mind and thinking things through
- **Long-term memory** - remembering previous choices, decisions and their outcomes
- **Emotional regulation** - assessing and controlling the emotional aspects of situations
- **Planning and organisation** - making plans and assessing their likely outcomes

If any one of these processes is affected by brain injury, then decision-making abilities may be impaired.

People are affected in different ways – some find it hard to make a decision at all, finding that even what seem like simple decisions, such as what to have for dinner, become almost impossible. Some people become impulsive, making hasty decisions and acting without thinking things through. This can have devastating consequences for finances, relationships, careers and any other aspect of life.

Assessing capacity

If decision making is a particular problem in any aspect of a person's life, then the Act can help to assess the person's capacity. According to the Act, an adult lacks legal capacity to make a particular decision when there is evidence that they are

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unable to:

- Understand the information relevant to the decision
- Make a decision based on the information given
- Act on the decision
- Communicate the decision
- Retain the memory of the decision

Someone cannot be assessed as lacking capacity if their only problem in these regards is in communicating their decision. Any practical means of helping them to communicate must be taken. If the person has communication difficulties then it would be useful to consult a speech and language therapist to help them convey their wishes. Similarly, memory loss due to brain injury does not automatically mean that the person lacks capacity. If they can retain memory of the relevant information long enough to make the decision, then that may be sufficient.

The Act recognises that capacity is 'decision specific' and that people may be capable of some decisions but not others, depending on their complexity. It is important to remember that people have a right to make decisions that might be considered unwise, unusual or eccentric. Therefore, when assessing capacity you should focus on whether the above criteria have been met, rather than on your own opinion of the decision itself.

Who can assess capacity?

There are no standard capacity tests and the assessment depends on the circumstances. Capacity can be assessed by a number of different people such as carers, GPs, neuropsychologists and social workers, depending on the decision being made and its importance.

For instance, carers and relatives may be able to judge capacity relating to straightforward everyday care issues, whereas social workers and psychologists may be involved with more complex decisions such as setting up care plans and

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signing legal documents. Capacity needs to be reassessed over time as there may be recovery or deterioration.

Supporting people to make their own decisions

All reasonable efforts must be made to help people to make their own decisions. This may include taking time to discuss the decision with them and explaining the relevant circumstances and potential consequences.

It is important to help the person as much as possible to understand the relevant information. For example, by talking to them in an environment free from distractions and when they are at their most alert.

Making decisions for someone else - the options

Many everyday decisions can be made without needing to seek legal authority. It is simply not practical to seek permission to make decisions such as what someone will wear or what they will have for dinner. Difficulties arise when decisions have a significant effect on a person's life, such as signing a legal contract, selling property, managing large sums of money or consenting to an operation. The Act provides a legal framework for people to get permission to make such decisions on someone else's behalf.

The first thing to remember is that the five key principles outlined earlier must be followed in regards to any decision. They apply to everyday actions and are legally binding for anyone given permission to make more significant decisions.

The Act covers two main areas of decision making:

- Health and personal welfare
- Financial affairs and property

It provides a number of ways to act or make decisions for someone who lacks capacity. The main provisions are as follows:

Power of attorney

This is a means by which individuals, while they have capacity, can grant

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can grant someone they trust the power to manage their affairs should they lose capacity to do so themselves. Currently a solicitor, solicitor advocate or licensed medical practitioner must certify that the person has capacity to grant a power of attorney.

There are two broad categories that a power of attorney may cover:

- Continuing power of attorney for financial and property matters
- Welfare attorney for health and personal welfare matters

Both types can be granted to the same person. The person making the appointment can choose to grant very broad or very limited powers to their attorney.

Application - to the Office of the Public Guardian (Scotland) (see 'Useful organisations')

Access to funds scheme

This scheme provides a simple way of managing the everyday finances of someone who lacks the capacity to do so.

An individual (normally a relative or carer) can apply to become a 'withdrawer' and gain access to an adult's bank or building society account in order to pay their bills and regular expenses.

Application - to the Office of the Public Guardian (Scotland) (see 'Useful organisations')

Intervention orders

An individual, usually a family member or friend, can apply to the sheriff to be an 'intervener'. This would normally be suitable where there is a single action or decision to be taken on behalf of the person, for example, a financial or property transaction or a legal action. Intervention orders can also cover health and personal welfare matters and more than one can be in place at any one time.

Only one person can be nominated to be an intervener and usually the person

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who wishes to act for the adult makes the application and nominates themselves. Only those powers specifically stated in the order can be used.

Application - to the sheriff court (see below for further details)

Guardianship orders

An individual can apply to the sheriff court to be appointed as a 'guardian'. This is appropriate when the continuous management of the person's property and/or financial affairs or the safeguarding of their welfare is required, and a series of linked decisions is needed.

Guardianship orders are suitable when the person has long-term needs in relation to these matters, and has lost capacity to take decisions or actions for themselves. It is possible for a guardian to have powers relating to a person's finances and property, powers relating to their health and personal welfare, or both. Powers are again limited to those specifically stated in the guardianship order.

Application - to the sheriff court (see below for further details)

Management of a resident's funds by authorised establishments

If there is nobody else with appropriate legal authority under the options above, then managers of registered establishments, such as care homes and hospitals, can manage up to £10,000 of a resident's money. This must be done in accordance with certain safeguards and only after a certificate of incapacity has been obtained.

Application - the manager must apply to the Care Inspectorate for authority (see 'Useful organisations')

Medical treatment and research

The Act allows treatment to be given to safeguard or promote the physical or mental health of an adult who is unable to provide consent themselves. Doctors must seek the consent of any appointed welfare attorney or guardian with health

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care decision making powers if it is practical and reasonable to do so.

When there is disagreement a second medical opinion must be sought. Cases can also be referred to the Court of Session (the highest civil court in Scotland) in certain circumstances. The Act also permits research involving an adult incapable of giving consent, but only under strict guidelines.

Choosing the right options

Combinations of these options can be tailored to suit the needs of an individual. For example, in order to manage someone's household bills they may only require a withdrawer under the Access to Funds scheme. However, they may also require a welfare guardian to make arrangements for residential care.

The Act makes it clear that provisions should only be granted when absolutely necessary for the person's benefit. The fundamental principles of the Act outlined earlier are designed to help you decide which options are suitable and it is important to remember that the person should be kept as involved and independent as possible.

Applying for intervention or guardianship orders

You will need to think about which welfare powers and/or financial powers you are likely to need and consideration of the principles of the Act will help you to make this decision. If you decide that guardianship or intervention orders are necessary for financial and/or welfare matters then there are a number of steps that must be taken.

It is advisable to engage a solicitor to carry out the necessary legal steps, especially if your application is for complex powers or if there are likely to be objections from other parties. You can find members of Headway's head injury solicitors list at www.headway.org.uk/supporting-you/in-your-area/head-injury-solicitors-directory and solicitors specialising in capacity issues can be found from the Law Society of Scotland's database (see 'Useful organisations').

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However, using a solicitor is not essential and you can make the application yourself.

If the sheriff decides that a single intervention will suffice then they will be able to grant an intervention order without you having to make another application. If, on the other hand, you apply for an intervention order but the sheriff decided that a guardianship order is necessary, then you would need to go through the application process again. It will be necessary to notify the local social services department of your intentions as soon as possible as they will need to carry out an assessment. Two medical reports must also be obtained, one from a doctor specialising as a 'relevant medical practitioner' under the Mental Health (Care and Treatment) (Scotland) Act.

A step-by-step guide to applying for an order is available in the Scottish Government publication Guardianship and intervention orders – making an application: A Guide for Carers.

The duties and responsibilities of interveners and guardians

Becoming an intervener or guardian is a lot of responsibility. The Act sets clear guidelines for decision makers to follow, in order to protect the rights of people who lack capacity.

- **Remember the key principles** - The five key principles of the Act must be followed at all times
- **Duty of care** - Neglect or abuse of any kind can be treated as a criminal offence
- **Fiduciary duty (position of trust)** - This means that you are in a position of trust with respect to matters covered by your powers and must not abuse your position in any way
- **Duty to keep accounts and records** - Financial interveners or guardians must keep records of financial or property transactions, while welfare interveners and guardians must keep records of major decisions and actions taken

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- **Duty of confidentiality** - The access to confidential information and right to disclose it are specified in the court order, which must be adhered to
- **Duty to inform the Office of the Public Guardian (Scotland) of any change in circumstances** - The OPG must be informed of any change in the adult's capacity, as well as any changes in the intervener or guardian's contact details

The OPG is responsible for managing the overall situation for financial guardians and must be consulted for all large transactions. The OPG will agree a budget with the guardian for all routine expenditure.

A detailed description of the duties and responsibilities of interveners and guardians can be found in the Scottish Government publication Code of Practice: for persons authorised under intervention orders and guardians.

Summary

It is common for people to have difficulty making decisions after brain injury. This can place enormous pressure on families, who are required to manage financial and property affairs and to ensure that welfare decisions are made in the best interests of their relative.

The Adults with Incapacity (Scotland) Act 2000 provides ways to help safeguard the welfare and finances of people who lack capacity to make decisions for themselves. It also aims to ensure that solutions focus on the needs of the individual in question and that the person retains as much independence as possible.

The Act allows for simple, everyday decisions to be made without formal authority. For more complex decisions regarding finances, property, health and personal welfare, applications can be made to the appropriate authority, such as the sheriff court or the OPG. Anyone subsequently appointed as a decision maker must adhere to the principles of the Act and pay particular attention to their duties and responsibilities.

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Useful organisations

Care Inspectorate

The independent scrutiny and improvement body for care services in Scotland. Regulates and inspects care services and carries out social work and child protection inspections. Care home managers must apply to the Care Inspectorate for permission to manage a resident's funds.

Tel: 0345 600 9527

Email: enquiries@careinspectorate.gov.uk

Web: www.careinspectorate.com

Citizens Advice Scotland

Local Citizens Advice Bureaux can be an excellent source of advice and information when applying for provisions under the Act. You can also contact the Patient Advice and Support Service through the CAB. You can find your nearest CAB in the phone book or at the details below.

Helpline: 0800 028 1456

Web: www.cas.org.uk

Law Society of Scotland

Regulates and represents all practising solicitors in Scotland. Provides information to the public on where to find and what to expect from solicitors.

Tel: 0131 226 7411

Web: www.lawscot.org.uk

Local authorities

Under the Act, local authorities have a duty to supervise welfare guardians, including visiting them on a regular basis. They also have a duty to investigate any complaints against welfare guardians. Contact details are in local telephone directories and at www.direct.gov.uk/en/DI1/Directories/Localcouncils/index.htm.

Mental Welfare Commission for Scotland

The Commission also has a role in protecting the interests of adults with

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incapacity due to mental disorder. It contacts and sometimes visits welfare guardians and people on welfare guardianship orders, provides information guides and a helpline, and also has the power to investigate complaints.

Tel: 0800 389 6809

Email: mwc.enquiries@nhs.scott

Web: www.mwcscot.org.uk

Office of the Public Guardian (Scotland) (OPG)

The role of the OPG is to supervise those authorised to manage the finances and property of adults with incapacity under the Access to Funds scheme, intervention and guardianship orders.

Tel: 01324 678300

Email: opg@scotcourts.gov.uk

Web: www.publicguardian-scotland.gov.uk

Scottish Government

Provides a wide range of useful publications and can respond to general enquiries about the Act.

Tel: 0300 244 4000

Email: awireform.queries@gov.scot

Web: www.gov.scot/collections/adults-with-incapacity-forms-and-guidance

Scottish Independent Advocacy Alliance

Provides a directory of advocacy services in Scotland.

Tel: 0131 510 9410

Email: enquiry@siaa.org.uk

Web: www.siaa.org.uk

Helpline: 0808 800 2244

Email: helpline@headway.org.uk

Web: www.headway.org.uk



Scottish Legal Aid Board

Provides information on all aspects of legal aid and a list of solicitors registered for legal aid work.

Tel: 0131 226 7061

Email: general@slab.org.uk

Web: www.slab.org.uk

Sheriff courts

The sheriff courts are 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 and anyone else with an interest can appeal to the court against an order or any aspect of the order. Complaints against an intervener, guardian or attorney can also be investigated by the sheriff court and the court can reduce or remove the powers granted. You can find your local sheriff court on www.scotcourts.gov.uk.

Acknowledgements

Many thanks to Thompson's Solicitors for their help in the production of this publication.

As a charity, we rely on donations from people like you to continue being able to provide free information to those affected by brain injury. To donate, or find out how else you can get involved with supporting our work, visit www.headway.org.uk/get-involved.

If you would like to leave feedback for this publication, please consider completing our short survey at www.surveymonkey.co.uk/r/hwpublications or contact us at publications@headway.org.uk.

Last reviewed 2020. Next review 2025.

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