
Scottish Adult Incapacity Law: Part 2

There is no “P” in the Adults with Incapacity (Scotland) Act 2000. Instead, the Act refers to “adult”, defined simply as “a person who has attained the age of 16 years” in section 1(6), which also contains the definition of “incapable”, with “incapacity” to be construed accordingly. The definition refers to being incapable of making, communicating, understanding or retaining the memory of decisions. Retaining the memory of decisions is generally construed as retaining memory to an extent and for a duration appropriate to the decision in question. People with short-term memory problems are sometimes treated as capable in that regard if they come consistently to the same decision each time, even although they forget previous occasions, and if they act consistently with that decision. “Incapable of acting” is an element of the definition which precedes those relating to decision-making. This element of the definition encompasses a wide range of capability including ability to act consistently with the adult’s own decisions, to assert and defend rights and interests, to act so as to resist undue influence, and so forth. Put simply, incapacity means being incapable of doing or deciding something with legal significance.

There are however three important qualifications to this definition in section 1(6). The incapability must result from mental disorder, as now defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The incapacity means incapable “as mentioned in any provisions of this Act” and is interpreted as being function-specific and task-specific. Incapacity does not arise “by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise)”. It appears that this last qualification requires to be extended to ensure compliance with the United Nations Convention on the Rights of Persons with Disabilities, to exclude any difficulties in doing and deciding which can be overcome by providing appropriate support – though of course this must be support which achieves genuinely capable acts and decisions, not a masked form of substitute decision-making.

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Section 1(6) is preceded by five subsections which set out the governing principles of the Act. Scotland explicitly rejected a best interests test. The classic statement of the reasons is to be found in paragraph 2.50 of Scottish Law Commission Report No 151 (September 1995) on Incapable Adults:

“Our general principles do not rely on the concept of best interests of the incapable adult We consider that ‘best interests’ by itself is too vague and would require to be supplemented by further factors which have to be taken into account. We also consider that ‘best interests’ does not give due weight to the views of the adult, particularly to wishes and feelings which he or she had expressed while capable of doing so. The concept of best interests was developed in the context of child law where a child’s level of understanding may not be high and will usually have been lower in the past. Incapable adults such as those who are mentally ill, head-injured, or suffering from dementia at the time when a decision has to be made in connection with them, will have possessed full mental powers before their present incapacity. We think it is wrong to equate such adults with children, and for that reason would avoid extending child law concepts to them. Accordingly, the general principles we set out below are framed without express reference to best interests.”

The section 1 principles are perhaps the most outstanding strength of the Act. Except as mentioned below, they anticipated and secure compliance with many of the requirements of the UN Convention. Section 1(1) stipulates that the principles “shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act”. This includes any court order, but extends to anything done by anyone performing any role under the Act – the Public Guardian, local authorities, appointees of all kinds, medical practitioners, certifiers, and many more. An intervention means not only doing something, but refraining from doing it.

The principles stipulate that there must be no intervention unless the person responsible for authorising or effecting it “is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention”. Where intervention is justified “such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention”. Sometimes, this is wrongly defined as the simplest form of intervention. The intervention least restrictive of the adult’s freedom may be quite the opposite. Guardianship is explicitly positioned at the top of the hierarchy of interventions (section 58(1)) but will often be less restrictive of freedom than someone intervening without any legal authority to do so.

Consultation is required at two levels. The lower level is a requirement to take account of the views of specified categories of persons “in so far as it is reasonable and practicable to do so”. This refers to nearest relative, named person, primary carer, any guardian or attorney with relevant powers, any person whom the sheriff has directed to be consulted, and any other person who has made their views known and who appears to the person responsible for the intervention to have an interest in the adult's welfare or in the proposed intervention.

At a significantly higher level, account must be taken of the present and past wishes and feelings of the adult “so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult”. This is an absolute obligation. As with the corresponding wording in the definition of incapacity, it would seem that the UN Convention would require also to refer to provision of support, as well as to aids to communication.

Under the final principle any guardian, continuing attorney, welfare attorney or manager of an establishment “exercising functions under this Act or under any order of the sheriff in relation to an adult” must, insofar as it is reasonable and practicable to do so, encourage the adult to exercise and develop skills in relevant matters.

The Incapacity Act has been described as an example of a code, but it is not a comprehensive one. Many measures not covered by the Act are applied in the context of adult incapacity. Perhaps the most frequent is DWP appointeeship. It would appear that compliance with the UN Convention will require application to all such measures of the Act’s principles and provisions for resort to the courts for directions and remedies.

In outline, the measures provided for in the Act are as follows. Part 2 governs the regime of Continuing (i.e. property and financial) and Welfare Powers of Attorney. This regime came into force on 2nd April 2001. There is a difference with the English regime in that Scottish continuing and welfare Powers of Attorney may be registered following execution, whether or not yet brought into force, and most are registered then. The Act does permit a process of deferred registration, at the granter’s option.

Part 3 of the Act contains two separate measures. The first is an important and simple one. Under section 32, since the Act came into force bank accounts in joint names may be operated by remaining account holders after one of them has lost capacity, a reversal of the previous position, unless the terms of the account state otherwise. It is sometimes important to alert people to the possible need expressly to disapply this provision where that is intended. The remainder of Part 3 is concerned with a scheme of “Access to Funds”, a form of management simpler than guardianship, under which appointments are made by the Public Guardian rather than by the court. Part 4 contains a scheme of administration by registered establishments. Particular medical provisions are contained in Part 5, the main one of these being a system under which, by certification, doctors can authorise treatment. There are also provisions to deal with situations where guardians, attorneys and appointees under intervention orders have relevant powers, and where there are disputes.

Guardianship and intervention orders are dealt with in Part 6. In both cases, they may cover financial and property affairs, personal welfare matters, or both. There is no statutory definition of when each type of order is appropriate. Intervention orders are generally granted for single acts, or processes of self-limiting duration, but there is no reason why they should not be granted for a potential series of such acts, where they do not amount to ongoing guardianship.