

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

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.

*These notes relate to the Adults with Incapacity (Scotland)
Act 2000 (asp 4) which received Royal Assent on 9 May 2000*

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.