



HEALTH AND SOCIAL CARE MORAY: ADULT SERVICES

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

POLICY

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Moray Council, High Street
Elgin, IV30 1BX



01343 563374



educationandsocialcare@moray.gov.uk

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1.0 Aims and Objectives of this policy

1.1 Aim:

To ensure that services provided by Health and Social Care Moray: Adult Services comply with the requirements of the Adults with Incapacity (Scotland) Act 2000 (AWI).

1.2 Objectives:

- To describe the duties and responsibilities of staff employed by Health and Social Care Moray: Adult Services in respect of the operation of the Adults with Incapacity (Scotland) Act 2000.
- To ensure that services provided by Health and Social Care Moray: Adult Services in respect of the Adults with Incapacity (Scotland) Act 2000 comply with all relevant legislation.
- To ensure that services provided by Health & Social Care Moray: Adult Services comply with the policies and procedures of the Integrated Joint Board, the Moray Council and NHS Grampian.
- To ensure that services provided by Health and Social Care Moray: Adult Services recognise community planning aims and organisational objectives.

2.0 Adults with Incapacity – the Adults with Incapacity (Scotland) Act 2000 (The 2000 Act)

The Adults with Incapacity Scotland Act 2000 (The 2000 Act) sets out a legal framework for regulating interventions into the affairs of adults who do not have capacity to make important decisions about their property or financial affairs or about their personal welfare. This may be as a result of a mental ill health, learning disability, acquired brain injury or age related illness such as dementia. The Act provides extensive safeguards for Adults with Incapacity. The framework is underpinned by principles which enable interventions to be tailored to the needs of the individual.

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The practice guidance is composed in line with the three pieces of legislation that govern this area, these being:

- the **Adults with Incapacity (Scotland) Act 2000**
(<http://www.legislation.gov.uk/asp/2000/4/contents>);
- the **Mental Health (Care & Treatment) (Scotland) Act 2003**
(<http://www.legislation.gov.uk/asp/2003/13/contents>); and
- the **Adult Support & Protection (Scotland) Act 2007**
(<http://www.legislation.gov.uk/asp/2007/10/contents>).

The guidance should be read in conjunction with the updated Code of Practice for Local Authorities exercising functions under the 2000 Act
(<http://www.scotland.gov.uk/Resource/Doc/216923/0058136.pdf>).

This is further explained in Section 3.0.

Overview

The 2000 Act provides for decisions to be made on behalf of adults who lack legal capacity to do so themselves because of mental disorder or inability to communicate. The decisions concerned may be about the Adult's property or financial affairs, or about their personal welfare, including medical treatment.

What is incapacity?

The Act is the first of its kind to define incapacity in terms of decision making ability and to take account of the complexity of the decisions to be made. For example, a person may be completely capable of deciding what they will wear or eat, but may be unable to decide the level of care necessary in order for this to happen. A person may be unable to take the necessary steps to implement their decisions (**acting on decisions**). They may be unable to comprehend the complexities of their situations or the levels of care they may actually require (**understanding decisions**). They may

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have lost problem solving abilities (**making decisions**). They may have poor short term memory leading them to forget decisions they have made (**retaining the memory of decisions**). They may have lost the ability to communicate decisions as in those who have experienced physical trauma, or acquired brain injury or more commonly those who have an organic brain syndrome leading to such conditions as expressive dysphasia and the loss of reading or writing ability.

For the practitioner it is often a matter of fine judgement as to whether or not there may be issues of incapacity. Despite poor memory, is there consistency of response when presented with the same factors? Despite poor ability to carry out decisions is the adult still able to make informed choices and to determine how these choices will be met and the implications of their actions? Does the adult in fact have a full appreciation of the issues involved, but is simply disagreeing with the plans proposed?

Adults need information, time and support to make decisions. Involvement of an Independent Advocate may support the adult to make decisions. Requiring support to make decisions does not amount to incapacity.

Who Decides Incapacity?

Whilst Adult Services staff are often at the forefront of such issues, it is the province of medical practitioners usually the adult's GP or an approved Psychiatrist under Sec 22 of the Mental Health Act 2003 to determine whether or not the Adult does or does not have capacity. The capacity assessment is specific to the decisions that are required.

For practitioner information regarding assessing capacity, please refer to AWI (Scotland) Act 2000 Communication and Assessing Capacity – A guide for Social Worker and Health Staff <http://www.gov.scot/Resource/Doc/210958/0055759.pdf>

3.0 The Adults with Incapacity (Scotland) Act 2000

- 3.1 The Act sets out the system for protecting the welfare of adults who are unable to make decisions for themselves.
- 3.2 The Act allows other people to make decisions on behalf of adults with incapacity in respect of managing their affairs including arranging services, managing finances and property and medical treatment.
- 3.3 People who are most likely to benefit from provisions under the Act include those with a learning disability, dementia, mental ill health, head injury or a physical disability that prevents a person from communicating.
- 3.4 The AWI Act contains general overarching principles which apply to the WHOLE act:

Principle 1 – Benefit

Any person intervening in the life of the adult who lacks capacity must be satisfied that there is a benefit to the adult and that such benefit cannot be achieved without the intervention.

Principle 2 – Minimum Intervention

The intervention must be the least restrictive option in relation to the freedom of the adult who lacks capacity.

Principle 3 – Take Account of the Wishes of the Adult

The views of the adult who lacks capacity must be sought, by any means possible. If the adult can communicate by any means, it is a legal requirement to obtain the views of that adult, even if that means using an interpreter or a Speech and Language Therapist. It is important to note that it is compulsory to take account of the past and present wishes/feelings of the adult if they can be obtained.

Principle 4 – Consultation With Relevant Others

The views of the nearest relative, the primary carer, any person already appointed to act for the adult and any other person who appears to be relevant must be sought.

Principle 5 – Encouragement of Skills

Whatever skills he or she has, the adult must be encouraged to exercise these skills they have concerning property, financial affairs or personal welfare, and to develop new such skills.

Measures of Intervention Authorised by the Act:

3.5 Power of Attorney (Part 2 of the AWI Act).

This is a means by which adults, whilst they have capacity, can grant someone power to act as their financial and/or welfare guardian on or following a formal assessment of the adult's lack of capacity.

A Power of Attorney is the Authority given by an individual (known as the granter) to another person(s) (known as the attorney(s)) to make decisions in relation to the granter's financial affairs and/or their health and personal welfare. The granter must have capacity to grant this and, where there is doubt, medical opinion must be sought.

Power of Attorney for welfare powers does not become active until the granter loses capacity. It enables the attorney to make decisions about the granter's health and welfare but only if the granter is unable to do this himself. No-one can make decisions about a granter's welfare whilst he still has the ability to do this for himself.

A Power of Attorney for property and financial affairs can include an authorisation that the attorney act on the granter's behalf whilst he is still mentally capable; however, this is just to assist the granter - the decisions still lie with the granter.

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All staff working in Adult Services should encourage adults to pursue Power of Attorney when it is anticipated that capacity may be lost in the future and whilst there is still the possibility of determining the Adult's wishes regarding their future care.

Relevant forms and guidance from the Office of Public Guardian (OPG) can be found: http://www.publicguardian-scotland.gov.uk/forms/power_of_attorney.asp

Adults may wish to give instruction to a solicitor to assist them in drawing up their Power of Attorney. The solicitor will assess the adult's understanding in relation to the granting of a POA and will seek medical confirmation if there is doubt. The Power of Attorney must be registered with the Office of the Public Guardian for it to be legal and must be enacted usually through an assessment by a medical practitioner.

3.6 Access to Adults' Funds (Part 3 of the AWI Act)

This is a means of accessing the adult's bank or building society account in order to meet their living costs.

Applications are made to the OPG to gain access to the funds of an adult who is unable to manage them. Details of all of the adult's bank accounts must be provided.

This provides carers and spouses and, if necessary, the local authority with a means of accessing the adult's funds to pay day to day expenses and care requirements. This is overseen and audited by the Office of the Public Guardian.

The Moray Council's Management of Clients' Money Policy should be read in conjunction with this part of the Act. Consideration of making arrangements for DWP Appointeeship must be made at this stage so that the adult does not accrue unnecessary debt in relation to care fees.

Relevant forms and guidance from the Office of Public Guardian (OPG) can be found:

http://www.publicguardian-scotland.gov.uk/forms/intromit_with_funds.asp

3.7 Management of Residents Finances (Part 4 of the Adults with Incapacity Scotland Act 2000)

This is a means of authorised establishments (care home) management of the finances of resident adults up to £10,000.

This only allows for management of sums up to £10,000. Sums greater than this must be supervised by the Care Inspectorate and funds appropriately invested for the adult's benefit.

Where the adult has the prospect of inheriting a sizeable estate in the future (for example as in the case of younger adults with learning disabilities) it may be appropriate to consider a Financial Guardianship. The Local Authority may in exceptional circumstances make an application for Financial Guardianship where no one else is doing so and it is necessary. The Local Authority may not, however, act as Financial Guardian and this must be delegated to an independent solicitor.

3.8 Medical Treatment (Part 5 of the Adults with Incapacity Scotland Act 2000)

This is the means for one off or ongoing medical treatment to be given to protect or promote the physical and mental health of an adult who is unable to consent.

The Act allows treatment to be given to protect or promote the physical and mental health of an adult who is unable to consent. These can be for:

- One-off medical treatment such as an operation or;
- Ongoing treatment through, for example, their GP or dentist

Certificates of Incapacity to Consent to Medical Treatment

An adult who cannot give informed consent to medical treatment can only be treated under a Certificate of Incapacity authorised by Section 47 of the Act. This is issued by the GP or, if the adult is a hospital patient, by a hospital doctor. Each medical treatment requires a separate Section 47 Certificate to be issued; for example, the certificate for treatment by the GP does not authorise the dentist to give treatment. A Certificate of Incapacity Sec 47 is renewable every three years. If a Welfare Attorney or Guardian has been granted medical powers they can consent to medical treatment. However, a Section 47 Certificate must still be issued in these circumstances. The Certificate applies to treatment for physical and mental disorders that do not fall under the scope of the Mental Health (Care & Treatment) (Scotland) Act 2003.

The medical treatment certificate has to be in a certain form and a copy can be accessed from the following link:-

www.scotland.gov.uk/Resource/Doc/1097/0000581.pdf

3.9 Intervention and Guardianship Orders (Part 6 of the AWI Act)

These orders allow decisions to be made on behalf of an adult, there are two types of order:

Intervention Order

An Intervention Order is for a one-off decision where short-term help is needed, for example, selling a house, terminating a tenancy or signing a document. A single transaction can include the winding up of a property and the disposal of furniture etc. In other words there may be more than one action in the single transaction of selling a house.

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Where a single transaction would be sufficient to deal with a clearly defined financial, property or welfare matter an application for an Intervention Order may be made to the Sheriff. As with an application for a Guardianship Order, this requires two medical reports and a report by someone with sufficient knowledge if the Intervention is regarding property or finance. This would usually be the adult's solicitor but a Social Work Officer may complete the report. Social Work Officers may be Interveners but if this is proposed an additional person is required to complete the application to avoid conflict of interest, this may be a Mental Health Officer or another officer of the Council. In practice the Intervenor is usually named as the Team Manager.

Reports are completed on the prescribed form. In practice, Intervention Orders are more often used in the field of property and finances as transactions tend to be discrete Interventions such as the signing of or termination of a tenancy agreement or the sale of a house to provide for care costs. Welfare Interventions tend to be more complex or of an ongoing nature and Guardianship is therefore more appropriate.

Relevant forms and guidance from the Office of Public Guardian (OPG) can be found:
http://www.publicguardian-scotland.gov.uk/forms/intervention_orders.asp

Guardianship Order

A Guardianship Order is where the continuous management of affairs is needed. Application can be made for a Financial or Welfare Guardianship or both.

Relevant forms and guidance from the Office of Public Guardian (OPG) can be found:
<http://www.publicguardian-scotland.gov.uk/forms/guardianships.asp>

Financial Guardianship

This is not generally considered to be workable where the resources are less than £30,000 as other less restrictive measures can be put in place such as Access to

Funds (section 3.6) or Management of Resident's Finances (section 3.7), where the adult is resident in a care home. If the Adult has more than £30,000 it is possible under Access to Funds to pay outstanding bills and purchase funeral arrangements etc to bring the adult's assets down to a workable resource so that Financial Guardianship is not required.

Welfare Guardianship

The Local Authority may only make application for Welfare Guardianship when no one else is doing so and where there is no one else suitable and it is considered necessary. The application may propose a relative as Welfare Guardian or if no one suitable and willing is identified the proposed Guardian will be the Chief Social Work Officer.

The functions of the Guardian are then in practice delegated to a Social Work Officer to carry out the functions on the Chief Social Work Officer's behalf. The Chief Social Work Officer has the power to revoke a Welfare Guardianship and is under obligation to do so if the grounds are no longer met.

4.0 The Office of the Public Guardian Registration of Powers of Attorney and Guardianship

All Guardianships and Powers of Attorney must be registered with the Office of the Public Guardian. They will provide help and guidance to all prospective applicants by telephone or via the web site. The Office of the Public Guardian has a specific remit to oversee the operation of all Guardianships/Attorney with powers over property and financial affairs and has a duty to investigate complaints into the misuse of powers in relation to these. Therefore, suspected misuse of a Guardian or Attorney's responsibilities towards the adult's finances should be reported to the Office of the Public Guardian (OPG) and the police. The OPG has no powers to recuperate the adult's assets that have been misappropriated.

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The Public Guardian's power to make enquiries into misuse of financial powers has been extended by the Adult Support & Protection (Scotland) Act 2007. If the OPG concludes that a Guardian or Attorney has misused the adult's finances the Local Authority can be requested to make an application to the Sheriff Court for the Chief Social Work Officer to take on the role of Welfare Guardian, to appoint a suitable Financial Guardian and to revoke the existing POA or Guardianship.

5.0 The Mental Welfare Commission

The Mental Welfare Commission has a duty to oversee the operation of Welfare Guardianships and to investigate any complaints relating to these or deficiencies in the care provided to the Adult.

The Mental Welfare Commission has a duty to visit Adults under Guardianship Orders and will require to be updated annually by those Social Work Officers who have responsibility for supervision of the Adult and Guardian as to how the powers are being used.

The Mental Welfare Commission will also require to be notified if Guardianship has been revoked, if the Adult has been moved and if any issue in the Guardian's exercise of powers is unsatisfactory.

6.0 Limitation of Liability

The Act makes it a criminal offence to wilfully misuse the powers of Guardian, a Continuing or Welfare Attorney and incorporates both acts of commission and omission. Social Workers therefore have to exercise judgement in this regard when supervising Guardianships and Guardians.

Fiduciary duty (duty of care) will not be breached if the person acted reasonably and in good faith or failed to act but the failure was reasonable and in good faith.

There are procedures in relation to this section and guidance notes for practitioners.

7.0 Where Does the Adults with Incapacity (Scotland) Act 2000 fit in the Legislative Framework?

The Adults with Incapacity (Scotland) Act 2000 is central to the legislative tools concerned with the provisions of care and protection for those made vulnerable by mental disorder. It may be used separately or in conjunction with any of the other Acts:

- *The Social Work (Scotland) Act 1968*
- *The Health & Community Care Act 1990*
- *The Mental Health (Care & Treatment) (Scotland) Act 2003*
- *The Adult Support & Protection (Scotland) Act 2007*

8.0 Related Policies/Procedures/Legislation

- Adult Support and Protection (Scotland) Act 2007
- Adults with Incapacity (Scotland) Act 2000
- Mental Health (Care and Treatment) (Scotland) Act 2003
- The Social Work (Scotland) Act 1968
- The Health & Community Care Act 1990
- Data Protection Act 2018/GDPR
- Freedom of Information (Scotland) Act 2002
- The Human Rights Act 1998
- The Equality Act 2010
- The Moray Councils Managing Clients Money Policy

9.0 Equalities Statement

9.1 The Moray Council will not and does not discriminate on any grounds. The Council advocates and is committed to equalities and recognises its responsibilities in this

connection. The Council will ensure the fair treatment of all individuals and where any individual feels that they have been unfairly discriminated against, that individual shall have recourse against the Council in line with the Council's grievance and harassment procedures.

In relation to equality of information provision, the Council will ensure that all communications with individuals are in plain English, and shall publish all information and documentation in a variety of formats and languages. Where required, the Council will use the services of its translation team to enable effective communication between the Council and the individual. Where an individual has sight, hearing or other difficulties, the Council will arrange for information to be provided in the most appropriate format to meet that individual's needs. The Council will also ensure that there are no physical barriers that could prohibit face to face communications.

If there is a complaint involving discrimination, click on the link below for reporting form and procedure: <http://www.moray.gov.uk/downloads/file62366.pdf>.

10.0 Data Protection

- 10.1 Data Protection Legislation, including the Data Protection Act 2018 (DPA) and the General Data protection Regulations (GDPR), governs the way information is obtained, recorded, stored, used and destroyed. Data protection is the responsibility of everyone and data protection legislation gives individuals rights to know how personal information can be collected, used and stored. Health & Social Care Moray complies with all the requirements of the legislation and ensures that personal data is processed lawfully, fairly and in a transparent manner; that it is used for the purpose it was intended and that only relevant information is used. Health & Social Care Moray will ensure that information held is accurate, and where necessary kept up to date and, that appropriate measures are taken that would prevent the unauthorised or unlawful use of any personal information.

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Any sharing of data between NHS Grampian and the Moray Council is carried out in accordance with the Information Sharing Protocols between the two bodies. Refer to the Single Shared Assessment page of the Moray Council's intranet, particularly the Practitioner Leaflet v5.0 and the Information Sharing without Consent Protocol.

The Council's Data Protection Officer is Alison Morris, Records and Heritage Manager who can be contacted via the Information Coordinator at info@moray.gov.uk.

For more information please see the Council's DPA Guide:

http://intranet.moray.gov.uk/Information_management/information_security.htm or http://www.moray.gov.uk/moray_standard/page_119859.html for Subject Access Request information.

11.0 Freedom of Information

- 11.1 The purpose of the Freedom of Information (Scotland) Act 2002 is to “provide a right of access by the public to information held by public authorities”. In terms of section 1 of the Act, the general entitlement is that a “person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority”. Information which a person is entitled to is the information held by the public authority at the time that the request is made. This is a complex area of the law that can overlap with the Data Protection Act and other legislation.

All Freedom of Information requests are to be sent to the Council's Information Co-ordinator.

12.0 Human Rights Act

12.1 The Human Rights Act 1998 incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic law. It is unlawful for the Council, as a public authority, to act in a way which is incompatible with a Convention right.

What rights does the Human Rights Act protect?

- The right to life – protects your life, by law. The state is required to investigate suspicious deaths and deaths in custody;
- The prohibition of torture and inhuman treatment – you should never be tortured or treated in an inhuman or degrading way, no matter what the situation;
- Protection against slavery and forced labour – you should not be treated like a slave or subjected to forced labour;
- The right to liberty and freedom – you have the right to be free and the state can only imprison you with very good reason – for example, if you are convicted of a crime;
- The right to a fair trial and no punishment without law - you are innocent until proven guilty. If accused of a crime, you have the right to hear the evidence against you, in a court of law;
- Respect for privacy and family life and the right to marry – protects against unnecessary surveillance or intrusion into your life. You have the right to marry and raise a family;
- Freedom of thought, religion and belief – you can believe what you like and practice your religion or beliefs;
- Free speech and peaceful protest – you have a right to speak freely and join with others peacefully, to express your views;
- No discrimination – everyone's rights are equal. You should not be treated unfairly – because, for example, of your gender, race, sexuality, religion or age;
- Protection of property, the right to an education and the right to free elections – protects against state interference with your possessions; means that no child can be denied an education and elections must be free and fair.

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The Human Rights Act is integral to all the functions and policies of the Council. Any doubts or queries regarding its effect or implications must be referred to the Legal Services Manager (Litigation and Licensing). The Council's Legal Services cannot advise a member of the public.

13.0 Review and Feedback

The implementation and effectiveness of this policy will be reviewed annually.