



## **EDUCATION AND SOCIAL CARE SERVICES**

### **ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000**

## **POLICY**

## DO YOU HAVE A VISUAL IMPAIRMENT?

**This document is available in large print format upon request.**

### **DO YOU HAVE DIFFICULTY UNDERSTANDING THE ENGLISH LANGUAGE?**

If you have a problem reading or understanding the English language this document is available in a language of your choice.

Please ask an English speaking friend or relative to phone or write to The Moray Council Equal Opportunities Officer:

The Equal Opportunities Officer  
Corporate Policy Unit  
The Moray Council  
High Street  
Elgin, Moray  
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**Tel:** 01343 563321  
**Email** [equalopportunities@moray.gov.uk](mailto:equalopportunities@moray.gov.uk)

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**1.0 Aims and Objectives of this policy**

**1.1 Aim:**

To ensure that services provided by the Department of Community Social 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 the Department of Community Social Services in respect of the operation of the Adults with Incapacity (Scotland) Act 2000.
- To ensure that services provided by the Department of Community Social Services in respect of the Adults with Incapacity (Scotland) Act 2000 comply with all relevant legislation.
- To ensure that services provided by the Department of Community Social Services comply with Moray Council corporate policies and procedures.
- To ensure that services provided by the Department of Community Social Services recognise community planning Aims and organisational objectives.

**2.0 Adults with Incapacity**

The Adults with Incapacity (Scotland) Act 2000

<http://www.legislation.gov.uk/asp/2000/4/contents> sets out a legal framework for regulating intervention in the affairs of adults who may not have capacity to make important decisions about the property or financial affairs or about their personal welfare – including medical treatment. This may be as a result of a mental health problem, learning disability, or dementia. The AWI Act introduces extensive new safeguards for Adults with Incapacity. The framework is underpinned by principles which enable interventions to be tailored to the needs of the individual.

The practice guidance is composed in line with legislation such as the Adults with Incapacity (Scotland) Act 2000 (<http://www.legislation.gov.uk/asp/2000/4/contents>),

## DRAFT Adults with Incapacity (Scotland) Act 2000

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 Adults with Incapacity (Scotland) Act 2000 provide 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 (**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 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 suffered physical trauma, 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?

### **Who Decides Incapacity?**

Whilst Social Work staff are often at the forefront of such issues, it is the province of medical practitioners to determine whether or not the Adult does or does not have capacity in relation to the decisions requiring to be made.

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 ([www.scotland.gov.uk/Publications/2008/02/01151101/0](http://www.scotland.gov.uk/Publications/2008/02/01151101/0)).

### **3. 0 The Adults with Incapacity (Scotland) Act 2000**

- 3.1 The Adults with Incapacity (Scotland) Act 2000 sets out the system for protecting the welfare of adults who are unable to take decisions for themselves.
- 3.2 The AWIA 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 use the AWIA 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 Act contains general overarching principles which apply to the WHOLE act:

**Principle 1 – Benefit**

Any person intervening in the life of the incapable adult 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 incapable adult.

**Principle 3 – Take Account of the Wishes of the Adult**

The views of the incapable adult 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.) It is important to note that it is compulsory to take account of the past and present wishes/feelings of the adult. If these can be ascertained by any means possible.

**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 the adult's lack of capacity.

A Power of Attorney is the Authority given by an individual (known as the grantor) to another person(s) (known as the attorney(s)) to make decisions in relation to the grantor's financial affairs and/or their health and personal welfare.

The grantor must have capacity to grant this and where there is doubt medical opinion must be sought. A welfare Power of Attorney does not become active until the grantor loses capacity but a financial Power of Attorney may be active whilst the grantor still has capacity.

Social Work Officers/CCOs should encourage Adults to pursue Power of Attorney when there is a likelihood in which 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](http://www.publicguardian-scotland.gov.uk/forms/power_of_attorney.asp)

**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.

## **DRAFT Adults with Incapacity (Scotland) Act 2000**

Applications are made to the OPG to gain access to the funds of an adult who is unable to manage them.

This provides carers and spouses with a means of accessing the Adult's funds in order to pay day to day expenses and care requirements which would be properly overseen and audited by the Office of the Public Guardian.

The Moray Councils Management of Clients Money Policy should be read in conjunction with this part of the AWI Act.

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

### **3.7 Management of Residents Finances (Part 4 of the AWI Act)**

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 and sums greater than this must be supervised by the Care Commission and funds appropriately invested for the Adult's benefit.

Where the Adult has the prospect of inheriting a sizeable estate in the future, as in the case of younger adults with learning disabilities, a Financial Guardianship may be appropriate. 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 undertaken to an independent solicitor.

### **3.8 Medical Treatment (Part 5 of the AWI Act)**

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 AWIA 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 and is renewable three yearly. If a Welfare Attorney or Guardian has been granted medical powers they can consent to medical treatment. Only where no such powers have been legally granted is a Section 47 Certificate required. 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](http://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 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 or signing a document.

Where a single transaction would be sufficient to deal with a clearly defined financial, property or welfare matter an application may be made to the Sheriff. As with Guardianship Application 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/Community Care Officer (CCO) may complete the report. Social Workers/CCOs 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.

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 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](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.

## **Welfare Guardianship**

The Local authority may only make application for welfare Guardianship when no one else is doing so 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. The Public Guardian's power to make enquiries into misuse of financial powers has been extended by the Adult Support & Protection (Scotland) Act 2007.

## **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 have a duty to visit Adults under Guardianship Orders and will require to be updated on a six monthly bases 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 issues in the Guardian's exercise of powers are 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 1998
- Freedom of Information (Scotland) Act 2002
- The Human Rights Act 1998 and Equality Legislation.
- 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 relating to, 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 against 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 The Data Protection Act 1998 governs the way information is obtained, recorded, stored, used and destroyed. The MCHSCP complies with all the requirements of the Act and ensures that personal data is processed fairly and lawfully, that it is used for the purpose it was intended and that only relevant information is used. The MCHSCP 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".

### **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 Information Co-ordinator in the Chief Executives Department.

## **12.0 Human Rights Act**

12.1 In October 2007 the three equalities commissions: Racial Equality, Disability Rights and Equal Opportunities were merged to form one Commission: **The Equality & Human Rights Commission (Scotland)**.

The main aspects covered in the **Human Rights Act 1998** are:

Right to life; protection from torture; protection from slavery and forced labour; right to liberty and security; right to a fair trial; no punishment without law; right to respect for private and family life; freedom of thought, belief and religion; freedom of expression; freedom of assembly and association; right to marry; protection from discrimination; protection of property; right to education and right to free elections.

The Human Rights Act can overlap with many areas of the Council's policies, any doubts or queries regarding its effect or implications must be referred to the Legal Services Manager (Litigation and Licensing).

## **13.0 Review and Feedback**

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