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Adults with incapacity

Laura Gilman

The Adults with Incapacity (Scotland) Act 2000 contains a system which enables others to safeguard the welfare and manage the finances and property of adults who lack capacity to make decisions for themselves. This briefing provides an overview of that system, including how those with relevant powers are supervised. It also considers the recent proposals for reform in this area.



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Introduction

The [Adults with Incapacity \(Scotland\) Act 2000](#) (the 2000 Act) contains a system that enables necessary interventions to safeguard the affairs of an [adult with incapacity](#).

The 2000 Act was amended by Part 2 of the [Adult Support and Protection \(Scotland\) Act 2007](#) (the 2007 Act). Together, the two acts currently regulate the management of the affairs of adults with incapacity in Scotland.

This briefing provides an overview of the management of the affairs of adults with incapacity in Scotland. It covers:

- [the definition of incapacity](#)
- [the types of intervention currently available](#)
- [how interventions are supervised](#)
- [various proposals for reform](#).

Throughout the briefing, we signpost further sources of information on the 2000 Act, including the various [Codes of Practice](#). Scottish Ministers are required to produce the Codes under the 2000 Act and they provide detailed guidance on different aspects of the legislation.

If legal advice is required particular to the circumstances of an individual case this should be sought from a solicitor.

Definition of incapacity

The law in Scotland generally presumes that adults, i.e. **those over the age of 16**, are capable of making personal decisions for themselves and of managing their own affairs. The starting point is a **presumption of capacity** and this can only be overturned where there is medical evidence stating otherwise.

The [Adults with Incapacity \(Scotland\) Act 2000](#) defines **incapacity** as when an individual is incapable of:ⁱ

- acting; or
- making decisions; or
- communicating decisions; or
- understanding decisions; or
- retaining the memory of decisions,

in relation to any particular matter as mentioned in any provision of the Act.

This incapacity can be due to an inability to communicate because of physical disability, learning disability or another condition such as dementia. A person shall not fall within this definition if their inability to communicate can be made good by human or mechanical aid (whether of an interpretative nature or otherwise).

This is not an ‘all or nothing’ definition. The Act recognises that an individual may lack capacity to make certain decisions relating to their affairs but might have capacity to make other decisions. For example, someone may have the capacity to deal with the weekly shop, however they might need some help in making decisions about paying their bills or dealing with their bank accounts.

The Scottish Government have published [a guide for health and social care professionals on assessing the capacity of individuals in their care](#).

ⁱ Adults with Incapacity (Scotland) Act 2000, section 1(6).

Principles of the Adults with Incapacity (Scotland) Act 2000

The legislation contains a [set of five principles](#) which must guide any decision to intervene in the affairs of an adult.ⁱⁱ These are set out in the box below:

- **Principle 1: benefit**

Any action or decisions taken must benefit the adult and only be taken when that benefit cannot reasonably be achieved without it.

- **Principle 2: least restrictive option**

Any action or decision taken should be the minimum necessary to achieve the purpose. It should be the option that restricts the person's freedom as little as possible.

- **Principle 3: take account of the wishes of the adult**

In deciding if an action or decision is to be made, and what that should be, account shall be taken of the present and past wishes and feelings of the adult as far as they can be ascertained. The adult should be offered appropriate assistance to communicate his or her views.

- **Principle 4: consultation with relevant others**

In deciding if an action or decision is to be made, and what that should be, account shall be taken of the views of the nearest relative and the primary carer of the adult, the adult's named person, any guardian or attorney with powers relating to the proposed intervention, and any person whom the Sheriff has directed should be consulted, in so far as it is reasonable and practicable to do so.

- **Principle 5 – encouraging the adult**

Any guardian, attorney, or manager of an establishment exercising functions under this Act shall in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he or she has concerning property, financial affairs or personal welfare as the case may be and to develop new such skills.¹

ii Adults with Incapacity (Scotland) Act 2000, section 1(1)-(5).

Types of intervention

The 2000 Act makes provisions for **a number of different types of intervention**, where an adult is found to have incapacity.

These interventions should be used [under the principles of the 2000 Act](#), including principle two, using the least restrictive option required in the circumstances. As such, the interventions cover a number of different potential scenarios.

The interventions under the 2000 Act discussed by this briefing are:

- [guardianship](#)
- [powers of attorney](#)
- [intervention orders](#)
- [access to funds](#).

[We have also included information on appointee schemes for claiming benefits](#), which are not covered directly by the Act.

Not all interventions under the 2000 Act are covered by this briefing. Those excluded are:

- interventions contained in Part 4 of the Act, on the management of residents' finances in establishments such as hospitals and care homes
- Part 5 of the Act, on medical treatment decisions for adults with incapacity.

Guardianship

If an adult **has already lost their capacity**, and is no longer able to conduct their own affairs, a guardian may be appointed to make decisions on their behalf. This is under Part 6 of the 2000 Act.

A guardianship order made by the court is used in situations where there is a continuous need to be involved in the affairs of an adult with incapacity. An alternative is an **intervention order**, [which authorises a one-off intervention in the affairs of an adult with incapacity](#).

A guardian **must be appointed by a court**, following an application for guardianship.

The application can be made by any person **claiming an interest** in the property, financial affairs or personal welfare of an adult.ⁱⁱⁱ For example, a guardian could be a partner, relative, carer or (if the guardianship relates to personal welfare only) the chief social worker of the local authority.^{iv}

iii Adults with Incapacity (Scotland) Act 2000, section 57(1).

iv Adults with Incapacity (Scotland) Act 2000, section 59(1).

The court has broad discretion in deciding who to appoint as a guardian, and will have regard to a number of factors when making their decision.^v

The application is made to [the local sheriff court](#) in the first instance, [with the possibility of appeal to a higher court](#).^{vi}

Legal advice should be sought on whether a guardianship order is considered to be both appropriate and beneficial to the particular adult with incapacity.

A court application for a guardianship order will contain a list of the powers considered necessary to look after the adult with incapacity's affairs.

It is possible to have a guardian who has powers in respect of the adult with incapacity's:

- personal welfare (a **welfare guardian**)
- property and finances (a **financial guardian**)
- personal welfare, property and finances.²

Based on the adult with incapacity's condition and circumstances, the sheriff will decide how long the order should last. It is usual for orders to be granted **for a period of three years**. However it might be granted for **a shorter period of time, a longer period of time** or indeed **for the lifetime of the adult** where considered appropriate.^{vii}

For **children who are about to reach the age of 16**, and for whom a guardianship order is required, [it is possible to apply for a guardianship order up to three months before their 16th birthday](#). This means that the guardianship order will take effect on the day that they turn 16.

Further sources of information on guardianship include:

- [What is a guardianship order?](#) (Office of the Public Guardian (Scotland))
- [How guardianship is set up](#) (Scottish Government)
- [Applying to make decisions on behalf of someone else](#) (Scottish Government)
- [Applying for a guardianship or intervention order - guide for carers](#) (Scottish Government)
- [Code of Practice for persons authorised under intervention orders and guardians](#) (Scottish Government)

v Adults with Incapacity (Scotland) Act 2000, section 59.

vi Adults with Incapacity (Scotland) Act 2000, sections 2 and 57 and Courts Reform (Scotland) Act 2014, Part 5.

vii Adults with Incapacity (Scotland) Act 2000, section 58(4).

Powers of attorney

The 2000 Act also makes provision on **powers of attorney**. This is in Part 2 of the Act.

The power of attorney intervention differs from guardianship orders, as it is not granted through the courts. The provisions for creating a power of attorney instead allows the adult themselves to **nominate an attorney** to manage their affairs. This is done through **the signing of a legal document**.

A key point is that the power of attorney needs to be nominated **while the adult still has capacity** to make this decision.

Like guardians, people placed in the position of power of attorney will have a list of agreed powers over the adult's affairs. They may exercise powers over property and finances (**a continuing attorney**), welfare decisions (**a welfare attorney**), or a combination of these.

It is possible to create **more than one power of attorney**. It may be that the individual wants to choose different people to exercise powers over financial decisions and welfare decisions.

It is also possible to **give the same powers to all named attorneys**, and require that they work together when decisions need to be made.

It is also possible to specify a **substitute attorney** in the document creating the power of attorney. A substitute attorney can step in and replace the original attorney in certain circumstances, including when the original attorney dies, resigns or has their powers revoked (removed).

The only limit on who can be named as a power of attorney is that **someone who is declared bankrupt** or enters a protected trust deed cannot exercise power over another individual's finances and property.^{viii}

A continuing or welfare attorney shall have no authority to act until the document conferring the power of attorney has been [registered with the Office of the Public Guardian \(Scotland\)](#).^{ix}

A (registered) power of attorney document relating to the adult's personal welfare **becomes active at the point when the adult has lost capacity**.

A (registered) power of attorney relating to property and finances however, **can become active at any given point, if that is what the adult in question has stipulated**. For example, they may wish the power of attorney to take control of some financial decisions before they have lost capacity.³

Further sources of information on powers of attorney include:

- [What is a power of attorney?](#) (Office of the Public Guardian (Scotland))

viii Adults with Incapacity (Scotland) Act 2000, section 15(5).

ix Adults with Incapacity (Scotland) Act 2000, section 19.

- [Setting up a power of attorney](#) (Scottish Government)
- [Power of Attorney and Mental Capacity](#) (Age UK)
- [Continuing and welfare attorneys: code of practice](#) (Scottish Government)

Intervention order

Part 6 of the 2000 Act also makes provision for **intervention orders**.

An intervention order is made by a court to appoint someone to **undertake a one-off action or actions on behalf of an adult with incapacity**. This can include actions such as selling a house or signing legal documents, which need to happen once only. [If the powers are needed on a regular basis, a guardianship order is more appropriate.](#)

Similar to a guardianship order, an intervention order can be applied for through the [local sheriff court \(with the possibility of an appeal to a higher court\)](#). Anyone with an interest can apply for an intervention order.^x

The order will detail exactly what powers are being placed in the hands of another adult. The applicant will need to show that the intervention order is for the benefit of the adult with incapacity, and that it is appropriate under the circumstances.^{xi}

There is not normally a fixed period of time that an intervention order is granted for, and it will last until the action it has been needed for has been carried out. Once the action is complete, the powers to intervene on behalf of the adult with incapacity end.
4

Further sources of information on intervention orders include:

- [What is an intervention order?](#) (Office of the Public Guardian (Scotland))
- [Applying for a guardianship or intervention order - guide for carers](#) (Scottish Government)
- [Code of Practice for persons authorised under intervention orders and guardians](#) (Scottish Government)

Access to funds

[As noted earlier](#), the 2000 Act works on the principle of using the least restrictive option required to intervene in the affairs of an adult with incapacity. There are some circumstances where all that may be needed is **the ability to access money in the adult with incapacity's bank account**. This is covered by Part 3 of the 2000 Act.

^x Adults with Incapacity (Scotland) Act 2000, section 53(1).

^{xi} Adults with Incapacity (Scotland) Act 2000, sections 2 and 53.

The **access to funds scheme** allows an individual, local authority or another organisation to apply for authority to access and manage the funds belonging to an incapable adult. The application is made directly through the Public Guardian and does not require a court order.

For example, an access to funds application would allow a person or body to **pay the bills or care home fees** on behalf of an adult with incapacity. The scheme is only suitable if the financial affairs of the adult are relatively simple. Complex financial needs such as investments or the sale of a house would not be appropriately managed in this way, and would require either a [guardianship order](#) or [an intervention order](#).

An access to funds application is also not needed in circumstances where only access to state benefits or a state pension is required. This level of access is covered by the [benefits appointee schemes](#).

While the Public Guardian is the body that usually reaches decisions under Part 3 of the 2000 Act, the Public Guardian can **remit** (transfer) an application to [the local sheriff court](#). This can be on the Public Guardian's own initiative, or when asked to do so by the applicant, or someone objecting to the application. The sheriff's decision on a remitted application is final (i.e. not subject to appeal).^{xii}

Further sources of information include:

- [What is meant by Access to Funds?](#) (Office of the Public Guardian (Scotland))
- [Adults with incapacity: code of practice for those authorised to access funds](#) (Scottish Government)

Benefits appointee schemes

The [Department for Work and Pensions](#) (DWP) is the department of the UK Government responsible for pensions, and for state benefits reserved to the UK Parliament and Government.

[Social Security Scotland](#) is responsible for managing the state benefits that are devolved to Scotland. It is [an executive agency](#) of the Scottish Government.

Where an adult with incapacity requires support with accessing their state benefits or pension, it is possible to appoint someone to act on their behalf, referred to as **an appointee**.

The process and operation of the appointee scheme is very similar in both the DWP and Social Security Scotland.

The appointee can sign any forms required to claim benefits on behalf of the adult with incapacity. The appointee has a responsibility to notify the DWP or Social Security

xii Adults with Incapacity (Scotland) Act 2000, section 27F.

Scotland of any changes of circumstances. The money from the benefit is paid into the account of the appointee, and is expected to be spent for the benefit of the adult with incapacity. [Unlike the other interventions explained earlier in the briefing](#), these schemes were not created by the 2000 Act.

It is possible to appoint the same person to act as an appointee with both the DWP and Social Security Scotland, or to appoint different individuals to these roles.⁵

The situation is monitored once an appointee is put in place to ensure that it continues to be suitable both for the adult and their appointee for the scheme to continue.⁶

As the schemes only cover the state benefits being received by the adult with incapacity, this may not be a sufficient intervention if the adult has other financial interests that also need to be supported. One of the other [interventions discussed earlier in the briefing](#) may be required if further financial intervention is required.

Supervision

The [different interventions available under the 2000 Act](#) are supervised by a number of different bodies in Scotland. Their role is to ensure that the different interventions meet the needs of adults with incapacity, and that they are used appropriately. The bodies that provide supervision in Scotland are:

- [Office of the Public Guardian \(Scotland\)](#)
- [local authorities](#)
- [Mental Welfare Commission for Scotland](#)
- [the courts.](#)

Office of the Public Guardian (Scotland)

The [Office of the Public Guardian \(Scotland\)](#) (the Public Guardian) was established in 2001 and is based in Falkirk. It is the main body that **oversees the different financial interventions** that can be made on behalf of an adult with incapacity.

The functions of the Public Guardian: an overview

The **functions of the Public Guardian** are set out in the 2000 Act. With some degree of potential overlap in practice, these include:

- **maintaining a public register** of a) [powers of attorney that have been registered](#); b) [guardianship orders](#) and [intervention orders granted](#); and c) [authorisations granted under the access to funds scheme](#).^{xiii}
- **supervising any financial guardian** or [any person who is authorised under an intervention order](#) in the exercise of their functions relating to the property or financial affairs of an adult with incapacity.^{xiv}
- **receiving and investigating any complaints** regarding the exercise of functions relating to the property or financial affairs of an adult made in relation to a) [continuing attorneys](#); b) [financial guardians](#) or [those authorised under intervention orders](#); and c) [authorisations granted under the access to funds scheme](#).^{xv}
- more generally, **investigating circumstances made known to them** where the property or finances belonging to an incapable adult appear to be at risk.^{xvi}

The Public Guardian may also be required by the court to **supervise continuing attorneys**.^{xvii}

xiii Adults with Incapacity (Scotland) Act 2000, section 6(2)(b).

xiv Adults with Incapacity (Scotland) Act 2000, section 6(2)(a).

xv Adults with Incapacity (Scotland) Act 2000, section 6(2)(c).

xvi Adults with Incapacity (Scotland) Act 2000, section 6(2)(d).

The duty of the Public Guardian is to ensure that individuals with powers act for the benefit of the adult with incapacity and carry out their duties properly within the scope of their powers.⁷

The Public Guardian can only intervene when the concerns raised relate to financial measures. The role of safeguarding the welfare aspects of the 2000 Act [fall instead to local authorities](#) and to the [Mental Welfare Commission for Scotland](#).

The public register: in more detail

The [statutory public register](#) acts as a central repository in Scotland for all interventions on record. At the time of writing, [individuals can search the register for free in order to find any details they need in relation to interventions currently in place](#).

The register is also used to let relevant local authorities know when a power of attorney or guardianship order is in place for an individual with whom they are working. [This is because the Public Guardian lets the relevant local authority know when a welfare power of attorney or welfare guardianship has been registered.](#)^{xviii}

A further use of the register is to **recognise any court-sanctioned measures** that have been put in place in other countries, but that now relate to someone living in Scotland. For such measures to appear on the register, there must first be an application to [the local sheriff court](#).⁸

Investigations in practice

The Public Guardian has **an investigation team** that [looks into any reports highlighting concerns that someone has acted inappropriately](#), such as bills not being paid, or money that is apparently missing from a bank account. To report a concern to the team about how:

- [a financial guardian](#)
- [a person with power to access and manage funds under the access to funds scheme](#)

is acting, an individual should [contact the guardianship or access to funds team](#).

The team gathers information from a variety of sources and they can take steps to intervene to safeguard financial matters if an adult with incapacity's estate is found to be at risk.⁹ This can include providing advice to the appropriate parties, requesting banks to freeze accounts, encouraging [a new application for guardianship](#), or escalating concerns to [Police Scotland](#) as appropriate.¹⁰

xvii Adults with Incapacity (Scotland) Act 2000, section 20.

xviii Adults with Incapacity (Scotland) Act 2000, sections 19(2)(c) and 58(7)(d).

Local authorities

The 2000 Act confers **a wide range of functions on local authorities**, [many of which intersect with the responsibilities of the Mental Welfare Commission for Scotland](#).

Under **section 10 of the 2000 Act**, local authorities have a role in **supervising guardians** who are appointed with functions relating to the personal welfare of an adult with incapacity.^{xix} They may also **supervise a welfare attorney** where ordered to do so by the sheriff court.^{xx}

Local authorities must make an initial visit to the adult with incapacity and their guardian **within three months** of the court approving the guardianship order, with subsequent visits taking place at least **every 12 months**.^{xxi}

Local authorities also have a statutory duty to receive and investigate complaints in circumstances where the personal welfare of an adult with incapacity seems to be at risk.^{xxii} It is the **social work team** who carry out any investigations that are deemed to be required. They are expected to liaise with [the Mental Welfare Commission for Scotland](#) in order to prevent duplication of investigations.

The investigating officer is able to take **urgent action** if required, and may apply to the court for an [intervention order](#) or interim [guardianship order](#) (that is to say a temporary guardianship order, pending final disposal of the case) to ensure the safety of the individual.^{xxiii} 11

There are also situations where local authorities are expected to **apply for an intervention or guardianship order** for an individual in their area who is felt to require one.^{xxiv} The local authority may be appointed as a welfare guardian where there is no individual to take on this role, and in these situations the duties of a welfare guardian will normally lie with **social work officers**.

Local authorities **cannot** take on the role of a financial guardian, but if there is no suitable person connected to the adult with incapacity to take on this role, the local authority can nominate a suitable person such as a solicitor or accountant. 11

Local authorities also have a general duty to provide **information and advice** to those exercising welfare functions under the 2000 Act, which includes attorneys, guardians and those appointed under intervention orders, when requested to do so.^{xxv}

xix Adults with Incapacity (Scotland) Act 2000, section 10(1)(a).

xx Adults with Incapacity (Scotland) Act 2000, sections 10(3)(b) and 20(2)(c); Adults with Incapacity (Supervision of Welfare Attorneys by Local Authorities) (Scotland) Regulations 2001/77 (Scottish SI).

xxi Adults with Incapacity (Supervision of Welfare Guardians etc. by Local Authorities) (Scotland) Regulations 2002/95 (Scottish SI), reg 2 (as amended).

xxii Adults with Incapacity (Scotland) Act 2000, section 10(3)(d).

xxiii Adults with Incapacity (Scotland) Act 2000, section 12.

xxiv Adults with Incapacity (Scotland) Act 2000, sections 53(3) and 57(2); 58(1)(a) and (b).

xxv Adults with Incapacity (Scotland) Act 2000, section 10(1)(e).

Mental Welfare Commission for Scotland

The [Mental Welfare Commission for Scotland](#) ('the Commission') was originally set up under the Mental Health (Scotland) Act 1960, and their role has been updated in a number of more recent pieces of legislation, including the 2000 Act.

The Commission has statutory duties that cover their main areas of work, including monitoring the various acts, carrying out investigations into the care and treatment of people with mental health issues or incapacity and providing information.^{xxvi}

The work of the Commission [differs from that of the Public Guardian](#), in that it is focussed on the **welfare parts of the 2000 Act**, rather than financial interventions.

The Commission regularly **monitor how aspects of the 2000 Act are working**, visiting a selection of adults [on guardianship orders](#) and publishing reports on this monitoring work. They also write to all new guardians explaining their role and where they can go to seek additional support.

The Commission is able to **conduct investigations** where concerns about an adult with incapacity's welfare have been raised as part of their monitoring work. This is particularly true if a case highlights wider concerns within the health, social care or justice system. [Recent examples of investigations](#) include:

- the [care of women with mental ill health in prison](#)
- the [discharge of people from hospital who lack capacity to make decisions for themselves](#)
- a separate report into the [delayed discharge of a specific individual](#).

Concerns about the welfare of an individual cannot be raised directly with the Commission, but should be instead be raised directly with the organisation involved with their care at a local level.

Investigations are followed with a written report and recommendations for how the issue can be resolved. Recommendations may also highlight opportunities for learning by other agencies so that similar cases can be avoided in the future.¹²

Courts

Earlier in the briefing, we discussed the role of the sheriff court in

- [appointing guardians](#)
- [granting intervention orders](#)
- [considering some applications under the access to funds scheme](#).

xxvi Adults with Incapacity (Scotland) Act 2000, section 9.

However, more generally, the 2000 Act [gives the local sheriff court wide and flexible powers](#) to deal with issues that come before the court in relation to the affairs of an adult with incapacity.^{xxvii}

Supervisory powers

If there are **concerns about the management of the affairs of the adult with incapacity** by any individual with financial or welfare powers, the courts have a range of powers to intervene.

For example, the sheriff court can give someone with welfare or financial powers **directions** in the exercise of those powers.^{xxviii}

It is possible for the court to **alter an existing court order** or **end the court order entirely**. These steps may also be taken **in response to concerns raised** by an individual or body, or, separately, to **address a change of circumstances**. For example:

- more powers might be required than was originally envisaged
- the adult concerned may recover sufficient capacity to make their own decisions
- it may become the case that an adult's personal welfare or financial affairs can be managed by another means.^{xxix}

The powers of the sheriff court in relation to [attorneys](#) and [guardians](#) are considered in more detail in the next sections of this briefing.

Power of attorney

[As noted earlier in the briefing](#), it is the adult (when they still have capacity) who decides who they want to act as their attorney. However, the court can still have a role in relation to attorneys.

Under **section 20** of the 2000 Act, anyone with an interest can apply to the sheriff court in relation to an attorney. If the court considers it **necessary to safeguard or promote the interests of the adult concerned**, it can take steps including:

- ordering the supervision of a continuing attorney (i.e. an attorney with financial powers) [by the Public Guardian](#)
- requiring the supervision of a welfare attorney [by the relevant local authority](#)
- removing some of the powers of the attorney, or terminating the attorney's appointment.

Guardians

Sheriff courts have the power to **change the powers held by a guardian**, or to **change a**

xxvii Adults with Incapacity (Scotland) Act 2000, sections 2, 3, 20, 71 and 74.

xxviii Adults with Incapacity (Scotland) Act 2000, section 3(1) and (3).

xxix Adults with Incapacity (Scotland) Act 2000, section 3(6); section 71 and 74.

guardian.^{xxx} This can be done if an application is made to the court by anyone with an interest (including the adult themselves). This power means that guardians can retire or change the powers that they hold, as required.

The [Public Guardian](#) may also initiate these proceedings with the court where an existing financial guardian is found to be failing in the exercise of their powers. Local authorities and the [Mental Welfare Commission for Scotland](#) have similar powers over welfare guardians.¹³

It is also possible to **end a guardianship order if required**. The technical term for this process is **recall**.^{xxxii} It is distinct from the situation where another guardian remains for the adult with incapacity or another guardian is to be appointed by the court for that person.

Anyone with an interest can apply to the sheriff court for the recall of welfare or financial powers, including an existing guardian or an adult who is the subject of an order.

Recall of guardianship via bodies other than the courts

Instead of making an application to the sheriff court, there are several **alternative ways** to apply for the recall of guardianship powers:^{xxxii}

- requests for a recall of financial powers can also be submitted to the [Public Guardian](#)
- requests for a recall of welfare powers can be made to the [Mental Welfare Commission for Scotland](#) or the [relevant local authority](#).

[Relevant forms to support the options which exist outside the court process are available on the Scottish Government's website.](#)

These various bodies can also decide to recall guardianship powers **on their own initiative**.

In respect of a decision relating to recall by any body other than the court, if someone is not satisfied with the decision, it is possible to appeal to the sheriff court.

Appeals

The sheriff court can also **hear appeals** in relation to certain decisions taken under the 2000 Act by an individual or body other than by the sheriff court. For example [a decision that someone lacks capacity](#) (taken other than by the sheriff court) can be appealed in this way.^{xxxiii}

xxx Adults with Incapacity (Scotland) Act 2000, sections 71(1)(b) and (c) and 74.

xxxi Adults with Incapacity (Scotland) Act 2000, section 71(1)(c).

xxxii Adults with Incapacity (Scotland) Act 2000, section 73.

xxxiii Adults with Incapacity (Scotland) Act 2000, section 14.

The higher civil courts in Scotland also **hear appeals** under the 2000 Act, in relation to certain decisions of the sheriff court under the Act.

Here the 2000 Act needs to be read in conjunction with Part 5 of the [Courts Reform \(Scotland\) Act 2014](#), which sets out the current structure for appeals in civil cases.

Under this system, appeals from the sheriff are to the [Sheriff Appeal Court](#), **not** to the sheriff principal (as stated in the 2000 Act). In some circumstances, there is the possibility of further appeal to [the Court of Session](#) and to [the UK Supreme Court](#).

Proposals for reform

There have been various proposals to reform the law around adults with incapacity since the 2000 Act came into force. The Adult Support and Protection (Scotland) Act 2007 amended the original Act in a number of ways, but other proposals for reform have not yet made it into legislation. These suggested reforms, and any ongoing work in relation to these, are discussed further in the following sections:

- [the Bournemouth case \(2004\) and Cheshire West Case \(2014\)](#)
- [the work of the Scottish Law Commission \(2012-2014\)](#)
- [the work of the Office of the Public Guardian \(2011\)](#)
- [the Scottish Government's consultation in 2016](#)
- [the work of the Mental Welfare Commission for Scotland \(2017\)](#)
- [the Scottish Government's consultation in 2018](#)
- [current developments in policy and practice.](#)

The Bournemouth case (2004) and Cheshire West case (2014)

Article 5 of the [European Convention on Human Rights](#), now incorporated into domestic law by the [Human Rights Act 1998](#), says that a person must not be imprisoned or detained without good reason.

In 2004, the [European Court of Human Rights](#) (ECtHR) issued its ruling in the [Bournemouth case](#). The case concerned an adult who had severe autism and challenging behaviour, who was determined to lack capacity to choose where he lived. After an incident at a day centre he was informally admitted to hospital for a number of months, and was denied contact with his carers. The ECtHR held that he had been deprived of his liberty, and that Article 5 had been breached.¹⁴

This case was the first of several cases which made it clear that people who lack capacity to consent to a deprivation of liberty must have the protection of the legal and procedural safeguards associated with Article 5.

A later example is the 2014 UK Supreme Court decision in the [Cheshire West case](#), which was also [influential in the development of the Scottish law relating to deprivation of liberty](#).¹⁵

These cases resulted in scrutiny of the 2000 Act in terms of its compatibility with Article 5.

Concerns were expressed, and continue to be expressed, that the current regime is not adequate to meet Article 5 requirements.

The work of the Scottish Law Commission (2012-2014)

The [Scottish Law Commission](#) ('the SLC') is the independent body which makes recommendations on law reform to Scottish Ministers. After [the Bournewood case](#), it was approached by stakeholders about the implications of the case on existing law in Scotland as it related to adults with incapacity. These stakeholders included:

- the [Mental Welfare Commission for Scotland](#)
- [ENABLE Scotland](#)
- the Mental Health and Disability Subcommittee of the [Law Society of Scotland](#).

The SLC's [Adults with Incapacity project](#) involved looking at the 2000 Act in the context of deprivation of liberty. The SLC [published a report in 2014](#) (including a draft Bill) ¹⁶ and, in [its initial response to that report in 2015](#), ¹⁷ the Scottish Government committed to [consulting on that report](#).

The SLC said that:

- adults with incapacity are being confined to hospital wards and residential facilities in Scotland without any underlying legal process, which is contrary to Article 5 of the ECHR
- the current process for the exercise of authority needs to be reviewed, and legislation put in place to ensure the safety and liberty of adults with incapacity. ¹⁶

The work of the Office of the Public Guardian (2011)

As discussed earlier in this briefing, the [Office of the Public Guardian \(Scotland\)](#) ('the Public Guardian') has a statutory role relating to both [powers of attorney](#) and [guardianship orders](#).

In 2011, the Public Guardian published a report looking at issues with guardianship orders called [Early Deliberation on Graded Guardianship](#). ¹⁸

The report noted **various delays and problems in the process for applying for guardianship**. It argued there has been **a significant increase in guardianship orders granted for an indefinite period**. It suggested that this is happening because people wished to avoid having to go through the system again.

[As noted earlier](#), it is a key principle of the 2000 Act that any intervention should be at the lowest level necessary to deliver the benefit to the adult with incapacity. The report raised concerns that granting guardianship orders for indefinite periods, arguably for administrative convenience in some cases, would breach this principle.

The Public Guardian suggested a **system of ‘graded guardianship’** to address the concerns it identifies. It proposed that less contentious applications would be granted by the Public Guardian, freeing up court time and professional resources for more contentious cases.¹⁸

The Scottish Government’s consultation in 2016

The Scottish Government [consulted at the start of 2016](#)¹⁹, both on [the SLC’s 2014 report](#) and reforms more generally. It published an [analysis of consultation responses in July 2016](#).²⁰

On **deprivation of liberty**, the **main themes** emerging from this consultation were:

- there is a compelling need to ensure a lawful process is in place for people who may need to be deprived of their liberty in community or hospital settings and lack capacity to agree to such a placement
- [the changes proposed by the Scottish Law Commission](#) would result in a huge workload for an already pressurised system and workforce
- any changes to the law should take place within the context of a wider revision of adults with incapacity legislation

On **changes to the current legislation more generally**, the most popular areas suggested for change were:

- a move to a **form of graded guardianship**, similar to that [proposed by the Public Guardian](#)
- consideration of a **change of jurisdiction** for adults with incapacity, that is to say who has authority to hear and determine a case in the event of a dispute: a shift was proposed from [the local sheriff courts](#) to a specialist tribunal
- creation of a **short term, emergency placement order** that can be put in place quickly
- consideration of changes needed to implement the [UN Convention on the Rights of Persons with Disabilities](#).²¹

The work of the Mental Welfare Commission for Scotland (2017)

In 2017, the [Mental Welfare Commission for Scotland](#), which, as noted earlier, has a statutory role in relation to [welfare guardians](#) and [welfare attorneys](#), [published a joint report with Edinburgh Napier University](#). The report called for reforms to Scottish mental health law, including the 2000 Act.

Suggested reforms included:

- **New forms of guardianship**, to replace existing forms of guardianship. The replacements would aim to provide a more flexible, proportionate and rights-respecting way to make decisions about money, care and welfare, for people who cannot take those decisions themselves.
- **The possibility of unified legislation**, replacing Scotland's two separate legislative frameworks for mental health and incapacity. The aim for the replacement framework would be completely new, non-discriminatory legislation for making decisions about welfare and treatment where an adult is unable to make decisions unaided.²²

The Scottish Government's consultation in 2018

Following their 2016 consultation, and the work of the Mental Welfare Commission for Scotland, Scottish Government officials subsequently worked with stakeholders and service users to develop detailed proposals for change, which were set out in a 2018 consultation paper.²³

Topics covered by the consultation included:

- proposals for a **short term placement order** to enable adults with incapacity to be moved to a more appropriate setting quickly, whilst longer-term plans for care and wellbeing are being made
- discussion about **the appropriate judicial forum** for cases associated with the adults with incapacity legislation (i.e. whether to change from the existing model involving [the local sheriff courts](#) to a possible specialist tribunal)
- proposals to move to a **model of two or three levels of graded guardianship**, with a more streamlined application process. Only the most complex cases would be considered either by a sheriff or a full tribunal hearing; the aim is to ensure only the least restrictive powers available to help the adult with incapacity are granted
- amending power of attorney to provide for a **supportive attorney to help individuals make decisions for themselves**, and for clarity on **advance consent to possible deprivation of liberty in the future**
- **consolidating work being done across the Scottish Government in supported decision-making**; the aim of this is to **ensure that individuals are supported to make their own decisions** about the matters that affect their lives even though they may be coping with changes in their capacity.²⁴

Responses to that consultation, where permission has been given for these to be published, [are available online](#) (253 out of 317 responses). The Scottish Government also published [a summary and an analysis of consultation responses](#) in August 2018.²⁵

The Scottish Government **summarised the consultation responses** as follows:

“The main themes emerging from the consultation are that there is strong support for change to the Adults with Incapacity (AWI) legislation and practice. There is consensus on the need to make changes to meet the requirements of the [UN Convention on the Rights of Persons with Disabilities](#), and to address problems around overly burdened, complex systems, but a wide range of views as to how we might achieve those changes. Many respondents expressed concern that the proposals contained within the consultation do not go far enough in meeting the requirements of the [UN Convention on the Rights of Persons with Disabilities](#) and that actions are needed to provide support for decision-making, and support for carrying out decisions.

In particular, the model for graded guardianship within the consultation was heavily criticized, with many respondents suggesting that it did not provide enough safeguards, nor provide enough support to enable the adult to make their own decisions. Further, rather than making the process less complex, we ran the risk of creating more bureaucracy, which certainly was not the intention.

The need for multi-agency training was a recurring theme, as was the need for independent advocacy to be given the same priority in AWI legislation as it has in mental health legislation.

Many respondents commented on the need to strike the right balance between supporting individuals and upholding their rights, and the viable provision of care, and were of the view that the consultation proposals do not do this.”²⁶

Current developments in policy and practice

Work on proposals for reform of legislation relating to adults with incapacity is ongoing in Scotland. This covers the following areas:

- [the work of the Scottish Government](#)
- [the Scottish Mental Health Law Review](#)
- [the specific issue of delayed discharge](#).

The current work of the Scottish Government

[The Government set up three working groups over the autumn of 2018](#) “to firm up policy recommendations” following the analysis of the [2018 consultation](#).

These groups discussed:

- deprivation of, and restrictions on, liberty
- graded guardianship proposals and a forum for adults with incapacity casework the Scottish Government had received

- support and training for attorneys and guardians.

The working groups were set up and operated from **September 2018–March 2019**, with the original aim of introducing legislation within the last parliamentary session.

The Scottish Government also says that it is in the process of making **short-term changes to current practice (which do not require legislation)** in the following areas:

- revising the [codes of practice](#) to ensure that practice reflects the legislation
- promoting **the use of supported decision-making** with the aim of maximising the autonomy and exercise of legal capacity for persons with impaired capacity. This is in line with the requirements of the [UN Convention on the Rights of Persons with Disabilities](#)
- providing **more education and support** to all those parties using the legislation
- **developing guidance to improve the use of power of attorney** to ensure the preferences of the person who granted the power of attorney are adhered to.

On the timing of any future legislation, [the Scottish Government states](#):

"We are continuing to work with stakeholders on the proposals that have already been suggested, in order that we can develop them as far as possible. We will need to incorporate the findings of the [Scottish Mental Health Law Review](#) chaired by John Scott QC before taking forward ideas into legislation. This means that our timescales for legislative change are shaped around the conclusion of that review."²⁷

Potential changes to legislation on the topic of mental health and adults with incapacity during the new session of Parliament are discussed further in a [SPICe blog on the topic](#).

Scottish Mental Health Law Review

At the end of **March 2019**, Clare Haughey MSP, the Minister for Mental Health, announced [an independent review of the Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#), chaired by John Scott QC.

The group's work includes elements that cross over into adults with incapacity legislation, such as [assessments of capacity](#) and having capacity as a threshold for accessing various public services. **Therefore, a decision was taken by the Scottish Government to put legislative reform of the 2000 Act on hold pending the outcome of the review.**

The consultation on the Scottish Mental Health Law Review ran from **February to May 2020** and [consultation responses](#) are available online. Both an [analysis of the responses and an interim report](#) of that Review were published in **December 2020**.²⁸

The final report of the Scottish Mental Health Review is currently **expected to be published in autumn 2022**.²⁹

Delayed discharge

Many individuals in hospital whose discharge has been delayed are adults with incapacity waiting for [guardianship orders to be approved by the court](#) before they can be found more suitable accommodation. This became a particular issue at the start of the COVID-19 pandemic in 2020 as hospitals prepared to respond to the new challenge posed by the virus.

The Scottish Government have been working on improving this process in order to improve the discharge pathway and minimise the amount of times adults are delayed, whilst respecting an individual's rights, will and preference throughout the process. This work has included working with Health and Social Care Partnerships in order to learn lessons and share good practice. This [learning was gathered together and published in November 2020](#).³⁰

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