

Adults with Incapacity (Scotland) Act 2000

Changes We Are Thinking About

Easy Read Version

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Introduction

The Adults with Incapacity (Scotland) Act 2000 was one of the first laws made by the Scottish Parliament after it was set up in 1999.

The law was made to protect the rights of adults who cannot make decisions about their own lives.

A lot has changed in the last 20 years. The Scottish Government thinks it is time to take a look at how the law is working and think about ways to make it better.

This consultation paper was put together after talking to lots of organisations. We thank them for the time it took them to talk about this.

We also want to hear what you think about these ideas.

A Consultation is how we ask the public for their thoughts and ideas before we make changes to the law. This Consultation sets out the things we are thinking about and asks you questions about what we want to do.

1. Adults with Incapacity

We think of adults as people who can make decisions about their own lives.

But some adults can't make those decisions. We call these '**adults with incapacity**'.

This could be because of a brain injury, a mental illness, a stroke or learning disability. Most people in Scotland who cannot make decisions for themselves have dementia.

Adults with incapacity still know what is going on around them and they should be fully involved in life decisions.

The Adults with Incapacity (Scotland) Act 2000 set up ways to protect adults over the age of 16 who could not make some or all decisions for themselves. This included ways to manage their money and the things they owned. This was only done if the decisions were for the good of the adult with incapacity.

All the wishes of the adult should be listened to when making decisions about them.

Since 2000 we have started to look at peoples' human rights differently. Some people now think that the law does not fully protect the human rights of adults with incapacity.

If someone is being kept in a care home or hospital and is not able to agree to this, they might be having their human rights taken away from them.

2. Changes we are thinking about

We are thinking about making some changes to the law so that it will be fit for the next 20 years and beyond.

We want to change the law so that adults with incapacity get more support to have as much say as possible in decisions about their lives.

We want this law to be in line with an adult's rights and their wishes.

We will report on the work we are doing in the summer of 2018.

We will also look at any effects the new law might have on equalities and make sure we know how much money the changes will cost.

3. Taking away an adult's freedom

Sometimes an adult with incapacity might need to be kept in a hospital or care home for their own good and the good of others. We need to make sure there are good laws about this.

These laws should be as much about how a person lives as where they live.

If an adult is forced to live in a place or a way that they do not want, this should count as taking away their freedom.

We think an adult's freedom has been taken away if:

- Someone has to be with them all the time and they are not free to leave the place where they are being kept.
- Barriers (locked doors) are used to keep the adult in some areas where they are being kept.
- Their actions are controlled by physical force, restraints, medication or being watched all the time.

An adult should get support to understand why they are being kept this way and give their views about it.

If they cannot agree to it then another adult who is a **guardian** or who has **power of attorney who has been given the right to make these decisions** can make the decisions for the adult with incapacity. A guardian needs to be given the right to make decisions about another adult by the court. When an adult chooses another adult to make decisions for them this is called a power of attorney. This power of attorney will need to clearly say if it allows the adult to have their freedom taken away. If it doesn't, a court order or a guardianship order will be needed.

We think this will make it possible for an adult with incapacity to have their freedom taken away but in a lawful way that is for their own good.

Questions:

Do you agree with our ideas about taking away a person's freedom?

Yes

No

Please tell us about this in the box below.

Are there any other things we need to think about here?

Please tell us about this in the box below.

4. Principles of the Adults with Incapacity Law

Adults with incapacity must have their thoughts and wishes taken into account as far as possible. This is one of their human rights.

We want to put a new principle in the law which says:

An adult can only have changes made to their lives if all practical help and support has been given to help them make a decision and they have still not made the decision.

This will mean an adult can only have a decision made for them if it is needed and if it is the best way to protect their rights, freedoms and interests.

Questions:

Do you agree with this principle?

Yes

No

Please tell us why you think this in the box below.

Do you think any other principles are needed?

Yes

No

Please tell us why you think this in the box below.

Please tell us about these in the box below.

5. Powers of Attorney and Official Supporter

Powers of Attorney

When an adult chooses another adult to make decisions for them, this is called a **power of attorney**.

We think this is a good way of protecting an adult's interests, but the law is unclear about how or when the power to make some decisions about an adult's care and welfare should be used.

There is also a worry that the law does not do enough to protect adults with incapacity from having their freedom taken away if one person has the power to make decisions about this.

We think a power of attorney must be clear about when it can be used.

We think a power of attorney can only be used to take a person's freedom away if the power of attorney has clear rules allowing this. These rules are called advance consent.

Questions:

Do you agree that we need clearer rules about how the power of attorney should be used? Do you think the use of advance consent will help with this?

Yes

No

Please tell us about this in the box below.

Official Supporter for Decision Making

Sometimes a person might need some help and support to make a decision about their lives and would like to involve a family member or friend they trust.

Other countries have laws that let a person choose another adult to support them in making decisions.

We think that an adult should be able to have an official supporter who can help them understand situations and make decisions. The supporter would not be able to make decisions for the adult. We would like your ideas on how this might work.

Questions:

Do you think it would be a good idea to have Official Supporters?

Yes

No

Please tell us about this in the box below.

Do you think 'Official Supporter' is the right name for this role?

Yes

No

If you said no, can you think of a better name?

6. Capacity Assessments

Law and health professionals have to decide if an adult can make decisions. This is called **capacity assessment**.

When an adult is setting up a power of attorney, it needs to be approved by a **solicitor, advocate or doctor**. They need to speak to the person granting power of attorney and make sure they understand the agreement and what it means.

Another way for an adult to have another person who is allowed to make decisions for them is a **guardianship order**. For this to happen, 2 doctors have to examine the adult and decide they are unable to make decisions for themselves.

Medical treatment for incapacitated adults can be authorised by the main doctor in charge of the adult's care, or a dentist, optician or nurse.

We would like your views on any other professionals who should be able to do capacity assessments.

Questions:

Should we change the rules so that more professionals can do assessments for guardianship orders?

Yes

No

If you said yes, which professionals should these be? Please tell us about this in the box below:

7. Graded Guardianship

Even with all the help and support we can give them, some people will still be unable to make decisions for themselves. Because of this there will always be a need for guardianship orders.

It is important that guardianship orders should only be used when the adult cannot make their own decisions and the adult's wishes must be followed as far as they are known.

There is a problem with this system because guardians are being given a lot of power over adults with incapacity and the process of getting a guardianship often does not involve the adult.

We have suggested a kind of graded guardianship that can be made to suit the adult's needs and only lasts as long as it is needed.

We also want to make the system simpler, so that it would be easier for the adult to be at court hearings about their case if they want.

We are suggesting there should be three grades of guardianship:

- **Grade 1 Guardianship**

A grade 1 guardianship would be quite easy and fast to apply for.

A grade 1 guardian would be able to do simple things for the adult like signing a tenancy agreement, handle the adult's money under a certain amount and deal with day to day welfare matters. They would not be able to change where the adult lives

Grade 1 guardianships require an application to the Office of the Public Guardian.

- **Grade 2 Guardianship**

Grade 2 guardianships would be for adults who have more complex needs and who might need help to change where they live. Grade 2 guardians could also handle more of an adult's money.

Grade 2 guardianship would also be needed to make decisions about the adult's care which might take away some of the adult's freedom.

Grade 2 guardianships would have to be looked at by a Sheriff or Mental Health Tribunal. This would only have to be done in writing without going to court.

- **Grade 3 Guardianship**

Grade 3 guardianships would only be made when the adult or some other person disagreed with the grade 1 or 2 application.

Grade 3 applications would go to Sheriff Court or a Mental Health Tribunal hearing would look at the case.

Questions

Do you agree with our ideas for a 3 grade guardianship system?

Yes

No

Please give reasons for your answer in the box below:

Is the system easy to use and flexible enough to cover all situations?

Please give reasons.

We propose that at every grade if an interested party wants a full hearing there should be one. Do you agree?

Please give reasons.

Please add any further comments you have on our ideas for graded guardianships.

8. Who should handle Cases under Adults with Incapacity Law?

We think that adults with incapacity should be more involved in the process of picking their guardian with powers to make decisions for them. The **hearings** should be more welcoming and accessible to everyone who is involved.

Right now the hearings happen in the **Sheriff Court**. As part of our plans for graded guardianships, we need to think about the best place to deal with each grade of guardianship.

We have been asked to think about using the **Mental Health Tribunal for Scotland** as a place for holding guardianship hearings.

We suggest that grade 1 guardianship applications should be handled by **the Office of Public Guardian (OPG)**.

Then grade 2 and 3 guardianships should be held in the Sheriff Court or the Mental Health Tribunal for Scotland.

Questions:

Do you think the OPG should handle grade 1 guardianship cases?

Yes

No

Please give reasons for your answer.

Do you think the Sheriff Court should handle grade 2 and 3 guardianship cases?

Yes

No

or

Do you think the Mental Health Tribunal for Scotland should handle grade 2 and 3 guardianship cases?

Yes

No

If you have any other thoughts on who should handle the guardianship cases, please tell us in the box below:

9. Supervision and Support for Guardians

Supervision of Welfare Guardianships

The **Office of Public Guardian** supervises guardians when dealing with property and money, and **local authorities** supervise guardians when dealing with welfare, along with the **Mental Welfare Commission**.

Some people have told us they are concerned about the supervision of welfare guardians. Local authorities have not always been able to supervise welfare guardians as well as they would like.

The Mental Welfare Commission visits people who are getting welfare guardianship. They look at concerns the adult or their guardian might have, and how their care and support is given.

For this to work best, we think there should be three different levels of supervision for the three grades of guardianship.

We think the three organisations involved in supervising guardians should work more closely together.

Questions:

Do we need to change the way guardianships are supervised?

Yes

No

If your answer is yes, please give your views on our suggestion for the Office of Public Guardian, Mental Welfare Commission and local authorities to work closely together to supervise guardianships.

If you have a different idea about this, please tell us in the box below:

Support for Guardians

We want to make sure that people know what they are taking on before they agree to be guardians. We also want to make sure they can get help and support after they become guardians.

We have been told that people are often surprised by what being a guardian involves and that they were not ready for it.

We think it is very important that guardians know that they have to follow the Adults with Incapacity law and that they have to make decisions that go along with the wishes of the adult.

This is not good for the adult with incapacity or for the guardians. We would like your ideas on how to make this better.

Questions

What sort of advice and support should be given to guardians?

Do you have views on who should give this support and advice?

Please tell us about your ideas in the box below:

Support for Attorneys

Choosing an attorney is not the same as choosing a guardian. An attorney is chosen by an adult to make decisions for them in case they are not able to make decisions for themselves.

Attorneys are not supervised the way guardians are. But if someone is worried about the way an attorney is carrying out their role they can tell the Office of Public Guardian who can look into the case.

Becoming an attorney can be a lot to take on. There is advice available online and the Office of Public Guardian can answer some questions, but people have said that attorneys need more advice and support.

We would like your view on this.

Question:

Do you think attorneys need more support to help them carry out their role?

Yes

No

If you answered yes, what sort of support do you think they need?

Please tell us in the box below:

10. Order to End a Residential Placement, Making a Short Term Placement

We think the law needs to say something about people who are being kept in a care home other than a hospital and are not free to leave.

We think the law should put an end to people being put into care home services and having their freedom taken away without authorisation when they have no way of agreeing to this.

The law should also put a stop to arrangements in care home services that take away the freedom of an adult when they cannot agree to these arrangements. This could include being locked in a room or put in restraints.

Questions:

Do you agree that the new law should include something about ending residential placement or arrangements that take away an adult's freedom?

Yes

No

Tell us more about this in the box below:

Short Term Placement

We understand that there are times when an adult must be moved quickly for their own safety and there might not be time to get their agreement because they are unable to make decisions for themselves.

We think there should be a short term care order in these situations.

We suggest that a group of different professionals should have a meeting to decide if an adult needs a short term care order. The meeting must include a Mental Health Officer.

We suggest that the placement should be for no longer than 28 days and can be renewed once. Any adult can appeal the decision.

Questions:

Do you agree that there is a need for a short term placement order in the new law?

Please tell us if you have any other view on this.

Local Authority Services

The law says that local authorities can give care services to adults who need them even when the adults are unable to agree to have the service.

This can only happen if the local authority decides the service would help the adult. This can include moving the adult to a care home. This can only happen if there is no objection from the adult or anyone who says they speak for the adult.

Questions

Do you think the law should still let local authorities give care services to adults with incapacity in this way?

Yes

No

Please give reasons for your answers.

11. Advanced Directives

An adult can say what they want their future healthcare to be like in case they lose the ability to make decisions for themselves. This is called an **advanced directive**. This is a way to make sure that doctors do what the adult wants when they can no longer make decisions for themselves.

Sometimes these wishes are called **living wills** but in Scotland they are usually called advanced directives.

Although the Adults with Incapacity law does not say anything about advanced directives in particular, they would be part of the information a doctor would look at when deciding what treatment an adult with incapacity should have.

It has been suggested that part of the new Adults with Incapacity law should say clearly how advanced directives should be used.

Questions:

Should the new Adults with Incapacity law say something clearly about advance directives in Scotland or do you think the law we have at the moment is enough to protect peoples' wishes?

Yes

No

If we do make a law about advanced directives, should it be part of the Adults with Incapacity law, or some other law?

Please give reasons for your answers.

12. Authorisation for Medical Treatment

At the moment there is nothing in the law about stopping a patient from leaving hospital if that is the best way to keep them safe during or after treatment for physical health problems.

But if an adult is taken into hospital against their consent for psychiatric treatment, the law says they can be kept in hospital against their wishes if it is for their own good. This is done through a **section 47 certificate**.

We suggest that there should be a section 47 certificate which also says that adults with incapacity can be stopped from leaving hospital after during or treatment for a physical condition, if that is the best way to keep them safe and healthy. The lead health professional in charge of the patient's treatment would be able to make this decision.

The new section 47 certificate would also allow adults with incapacity to be taken into hospital for treatment or tests if the lead health professional thinks this is the best thing for the adult.

Questions:

Do you agree that we should change the law so that adults with incapacity should be kept in hospital against their wishes if that is the best way to keep them safe and healthy?

Yes No

Do you think that the law should allow an adult with incapacity to be taken to hospital for the treatment of a physical illness or to have tests?

Yes No

Please tell us more about this:

13. Medical Research

At the moment, the law says that adults with incapacity in Scotland cannot take part in medical research.

This means that when research is being done into things like poisons or alcohol, people who are incapable because of poison or the alcohol cannot take part in the research.

This also means that adults who are incapable because of strokes cannot take part in research to find better ways to treat strokes.

This means an important group cannot take part in research.

Normally an adult's nearest relative or guardian has to agree to the adult taking part in research. We think this should change so that an adult with no nearest relative or guardian can have two doctors (the adult's GP and another independent doctor) agree to the adult taking part in medical research. The adult would stop taking part straight away if they showed any sign of being unhappy with the research.

QUESTIONS

If there is no guardian or nearest relative to agree, should we say that two doctors can agree to the adult taking part in research?

Yes No

When drafting their power of attorney should adults be asked if they want to be involved in health research?

Yes No

Do you have any more thoughts about this?

14. Any Other Comments

This consultation is based on what we have been told by a range of people and organisations. There might be other areas of the law that you would like to see changed. If so, please tell us about this below.

Question:

Is there anything else about the Adults with Incapacity law that you think should be changed?

Please tell us about this in the box below:



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