

## **Changes to the Adults with Incapacity (Scotland) Act 2000 in the Adult Support and Protection (Scotland) Act 2007 and their commencement.**

The Adult Support and Protection (Scotland) Act 2007 (the 2007 Act) which received Royal Assent on 21 March 2007 makes a number of changes to the Adults with Incapacity (Scotland) Act 2000 (the 2000 Act). The 2007 Act can be found at: <http://www.opsi.gov.uk/legislation/scotland/acts2007/20070010.htm>

### **The changes**

The 2007 Act makes the following changes to the 2000 Act:

#### **Powers of attorney**

The changes are:

- where both welfare and financial powers are being granted in a single deed, only one certificate that the granter understands the nature and extent of what he is doing will be required (currently two separate certificates are needed);
- clarification that a power of attorney comes to an end on bankruptcy; that in terms of signing certificates supporting the registration of powers of attorney, 'solicitor' means a 'practising solicitor'; and on what is required to revoke a power of attorney;
- all changes in welfare powers of attorney will be notified to the Mental Welfare Commission for Scotland (currently only those which relate to mental disorder), and the Public Guardian will send notification of welfare powers of attorney to local authorities as well as the Mental Welfare Commission for Scotland.

#### **Access to funds (sometimes referred to as intromission with funds)**

The changes are:

- more flexible arrangements for countersigning of applications – the counter-signatory will no longer have to be a member of a prescribed class, will not need to know the adult, and will need to have known the applicant for at least one year (rather than two years as currently), but must still state that he or she has sufficient knowledge of the applicant to support the application;
- more flexible arrangements for managing the bank accounts of adults with incapacity and transferring funds between accounts;
- provision for the Public Guardian to authorise banks to release information about an adult's account and also to open an account to enable an application to be taken forward;
- provision for joint and reserve withdrawers to overcome current difficulties when a withdrawer is unable to act;
- organisations as well as individuals will be able to use the scheme;
- more streamlined arrangements for renewing authority to access to funds and moving from financial guardianship to access to funds.

## **Guardianship and intervention orders**

The changes are:

- to allow sheriffs to dispense with caution where appropriate (caution is a type of insurance to safeguard the adult's estate from any loss due to the actions of the intervener or guardian, but it can be disproportionately expensive and difficult to obtain); and to permit other forms of security to be accepted by the Public Guardian instead of caution;
- discretion for sheriffs to accept medical reports which are older than 30 days old in certain circumstances;
- a regulatory provision to enable Ministers to prescribe new classes of medical practitioners who can sign the second medical certificate for applications where incapacity is as a result of mental disorder;
- where an adult lives outwith Scotland and lacks capacity because of a mental disorder, a suitably qualified local practitioner to be able to visit and to prepare the second report after discussion with an officer or Commissioner of the Mental Welfare Commission for Scotland;
- sheriffs to be able to make interim orders for a period of more than three months, up to a maximum of six months, where this is appropriate in the circumstances of the case;
- a new provision allowing for a guardianship order to be applied for in the three month period prior to a person's sixteenth birthday;
- a simplified renewal process for guardianships;
- local authority to be able to recall welfare guardianships where the Chief Social Work Officer is the guardian;
- requirement for the renewal of transitional guardianships (pre Act curators, tutors dative and tutors-at-law), if appropriate, within two years;
- a number of minor administrative changes to ensure information is appropriately notified to the Public Guardian.

## **Other changes**

- Clarification of the powers of local authorities to deliver services under the Social Work (Scotland) Act 1968 to adults who lack capacity;
- A provision that in considering AWI applications sheriffs must take account of the views expressed on behalf of the adult by a person providing independent advocacy services;
- A provision to allow for displacement of an adult's nearest relative on an application by a person with an interest in the adult's welfare, or by the adult him/herself;
- A provision to allow the Public Guardian to take part in, or initiate, court proceedings when it appears to her to be necessary to safeguard an adult's property or financial affairs;
- Enhanced powers for the Public Guardian to obtain information when carrying out an investigation;
- There are also a number of technical amendments.

## Commencement of provisions

**Section 64** of the 2007 Act which inserts new section 13ZA into the Social Work (Scotland) Act 1968 to clarify the powers of local authorities in relation to provision of services to adults with incapacity to address an issue about the use of court orders under the 2000 Act was commenced on **22 March 2007**. Related guidance to Directors of Social Work was issued on 30 March 2007 and can be accessed at <http://www.scotland.gov.uk/Topics/Justice/Civil/awi/latest-news/ccd5-2007>

The Adult Support and Protection (Scotland) Act 2007 (Commencement No. 1, Transitional Provision and Savings) Order 2007 commences the following amendments relating to the 2000 Act on **5 October 2007**

<http://www.opsi.gov.uk/legislation/scotland/ssi2007/20070334.htm>

<b>Section</b>	
54	Preliminary
55(whole)	Sheriffs must take account of the adult's views as expressed by a person providing an independent advocacy service
56(whole)	Someone other than the adult can apply for the displacement of the nearest relative
	<b>Powers of Attorney</b>
57(1)(a) & (2)(a)	All powers of attorney must contain a statement to the effect that the drafter has considered how and by whom incapacity should be determined
57(1)(b)(i), (1)(c), (2)(b)(i), (2)(c) (9)	For the purposes of signing a certificate to support the registration of a power of attorney, a solicitor must be a 'practising solicitor in terms of the Solicitors (Scotland) Act 1980
57(1)(d)	Clarification that powers of attorney cease on bankruptcy of granter or the attorney
57(2)(d)	Consequential on repeal of s48(1) by the Mental Health (Care and Treatment)(Scotland) Act 2003
57(4)	The Public Guardian will send notification of registration of welfare powers of attorney to local authorities as well as the Mental Welfare Commission for Scotland (MWC). Currently the MWC only is sent the information. Both the MWC and local authorities will be able to request a copy of the document. This amendment brings notification of registration into line with notification of changes to powers of attorney which are already sent both to the MWC and to local authorities.
57(5)	Where a sheriff makes an order in respect of any welfare power of attorney it must be notified to the MWC, not only those as at present where incapacity is by reason of mental disorder. This ensures that the MWC

	receives relevant information about all of the welfare powers of attorney about which it has received notification of registration.
57(6)	All changes in welfare powers of attorney will be notified to the Mental Welfare Commission for Scotland, not just those where incapacity is by reason of mental disorder. Currently the MWC is only notified in cases where the adult lacks capacity because of mental disorder. Again, this ensures that the MWC receives relevant information about all of the welfare powers of attorney about which it has received notification of registration.
57(8)	The Public Guardian will notify the resignation of all welfare attorneys to the Mental Welfare Commission for Scotland, not just those where incapacity is by reason of mental disorder. As above, this ensures that the MWC receives relevant information about all of the welfare powers of attorney about which it has received notification of registration.
	<b>Intervention Orders</b>
59(2)	Provides for notification to the Public Guardian by the person authorised under the intervention order of a change in his or her or the adult's address within 7 days of such a change. Provision for such notification by guardians is already made in section 64(4) of the 2000 Act. This amendment brings the provisions for interveners into line with those for guardians.
59(3)	New section 56A provides for notification to the Public Guardian of the death of a person authorised to intervene by his or her personal representatives. Section 22 requires an attorney's personal representatives to notify the death of the attorney to the Public Guardian. There is no equivalent requirement in part 6 in relation to the death of a guardian/intervener. This amendment ensures that relevant information is included in the Registers maintained by the Public Guardian to keep them up to date
	<b>Guardianship Orders</b>
60(7)	Consequential on repeal of s48(1) by the Mental Health (Care and Treatment)(Scotland) Act 2003
60(8)	Amends section 70 (non-compliance with decisions of guardian with welfare powers) to remove the unintended effect that a warrant may be issued for the adult's removal from his or her place of residence where a third party has refused to comply with the guardian's decision. The change will ensure that there is no risk of a warrant being issued for the adult's removal where a third party has refused to comply with the guardian's decision. It also inserts a new subsection to provide that the sheriff may, on cause shown, disapply the intimation requirement and the corresponding right to object within a prescribed period. The reason for this is that in urgent cases a delay of the prescribed period of 21 days can prove detrimental to the welfare of the adult concerned.
60(10)	Amends section 72(1) to provide that where a guardianship order has expired the Public Guardian may grant a discharge to a financial guardian

	<p>in respect of the former guardian's actings and intromissions with the estate of the adult. Section 72 provides that the Public Guardian can discharge a guardian at any time after guardianship has been recalled, resignation, removal or replacement of the guardian or the death of the adult. No provision is made however for discharge on expiry of the guardianship, in those situation where the adult remains alive. The amendment addresses that gap.</p>
60(15)	<p>Inserts new section 75A which provides for notification to the Public Guardian of the death of a guardian by his or her personal representatives. Section 22 requires an attorney's personal representatives to notify the death of the attorney to the PG. There is no equivalent requirement in part 6 in relation to the death of a guardian. This amendment ensures that relevant information can be included in the Registers maintained by the Public Guardian to keep them up to date.</p>
60(17)	<p>Transitional guardians must apply to renew the guardianships, if appropriate, within 2 years from 5 Oct 07</p>
61	<p>Inserts new section 81A which strengthens the Public Guardians's powers to obtain information when carrying out investigations into the exercise of authority by proxies under the 2000 Act. Section 81A(1) provides that proxies can be required by the Public Guardian to provide her with their records and other relevant information. In addition, banks and other financial institutions can be required by the Public Guardian to provide her with records and other relevant information about the accounts of the adult concerned. Section 81A(2) provides that proxies comprise attorneys, withdrawers, persons authorised under intervention orders and guardians and include former proxies. Section 81A(3) provides for fees to be charged by fundholders for providing information.</p>
67	<p>Extends the powers of the Public Guardian to take part in or initiate court proceedings, when it appears to him or her to be necessary, to safeguard the property or financial affairs of an adult with incapacity</p>
<b>Section 77(1) and Schedule 1( part only)</b>	<p>Paragraph 3(b) amends the Legal Aid (Scotland) Act 1986 Act to allow regulations to be made so that free civil legal aid will be available for intervention or guardianship orders which relate to the personal welfare of the adult, in cases where the application is made by the adult him or herself.</p> <p>Paragraph 4 (a) amends the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") to provide that a guardianship order cannot be made under the 1995 Act if there is an existing guardianship order made under the 2000 Act which makes the same provision as that applied for. Subparagraph (b)(i) clarifies that section 58(7) of the 1995 Act applies only to guardianship orders made under section 58. Subparagraph (b)(ii) removes the limited application of the provision to offenders. Subparagraph (c) is consequential on the repeal of section 58(1) of the 1995 Act in the Mental Health (Care and Treatment) (Scotland) Act 2003.</p> <p>Paragraph 5 Subparagraph (a) amends section 6(2)(b)(iii) of the 2000 Act to take account of the wider range of authorities which can be granted</p>

	under Part 3 of the 2000 Act as a consequence of the amendments in section 58 to that part. Subparagraphs (b) and (c) are consequential changes on the State Pensions Credit Act 2002 and exclude state pensions credit from the list of funds which can be managed under Part 4 of the 2000 Act. Subparagraph (d) is to improve the readability only of section 47(2). Subparagraph (e) clarifies the regulation making power in section 87(1) of the 2000 Act. Subparagraph (f) is consequential on Chapter 1 of Part 17 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Subparagraph (g) is to correct a numbering error. Subparagraph (h) is a clarificatory amendment.
<b>Section 77(2) and Schedule 2</b> — <b>Repeals (part only)</b>	Solicitors (Scotland) Act 1980 repeals in section 24F(1)(b) and section 24(G)(4) remove obsolete references to curators bonis.  Section 142 of the Mental Health Act 1983 which relates to the payment of the salary and pensions from monies provided by Parliament or the Consolidated Fund of “mentally disordered persons” will not be available in future cases. It offers no formal protection for the funds and has already been repealed for England and Wales. The mechanisms available under the Adults with Incapacity Act are now available for any future cases which arise. There will be a saving provision to ensure that any existing arrangements are affected  Repeals to the 2000 Act

## Future commencement

There will be further Commencement Orders for the remaining changes relating to the 2000 Act. We are considering the Regulations and Rules of Court which are required to enable changes (as set out below) to come into operation. A consultation on draft regulations commenced on 16 August and can be accessed at <http://www.scotland.gov.uk/Consultations/Current>

We hope the remaining changes will be commenced in April 2008.

57(1)(b)(ii) & (iii) (2)(b)(ii) & (iii)	Only one other person need be consulted who can confirm from his or her knowledge of the adult that the adult understands the impact of signing the power of attorney
57(3)	Only one supporting certificate will be required for registration of a power of attorney with both welfare and financial powers
57(7)	Formalised revocation process for powers of attorneys
58	New Part 3 - see paras 88-127 of the Revised Explanatory Notes at <a href="http://www.scottish.parliament.uk/business/bills/62-adultSupport/index.htm">http://www.scottish.parliament.uk/business/bills/62-adultSupport/index.htm</a>
59(1)(a)	Makes changes relating to reports to accompany applications - see section 60(1)
59(1)(b)& (c)	Sheriffs will have discretion to dispense with caution where they consider it appropriate. These sections provide that the sheriff may permit the Public Guardian to accept other forms of security instead of caution

60(1)	Provides for 'relevant medical practitioners', acceptance of medical reports more than 30 days old, interim guardianships of up to 6 months
60(2), (4) (5), (6),(9) (13), (14)	Caution changes – see above
60(3)	Simplified renewal process for guardianships
60(11)	Restricts recall by MWC to those cases where incapacity is by reason of mental disorder and provides for local authority recall of welfare guardianships where the Chief Social Work Officer is the guardian
60(12)	Recall process for local authorities where the Chief Social Work Officer is the guardian
60(16)	Guardianship applications can be applied for in the 3 months before a child's 16 <sup>th</sup> birthday

### **Codes of Practice**

The codes of practice for parts 2, 3 and 6 of the Act and for local authorities are being revised to take changes to the 2000 Act into account. Our intention is that penultimate drafts of the revised codes will be available on the website later this year (on which comments will be welcomed) with a view to revised codes coming into effect in April 2008.

The Office of the Public Guardian is also revising its various forms and guidance notes and certain procedures which are necessary to take account of the legislative changes. They are planning a series of training events. More information can be found on their website - <http://www.publicguardian-scotland.gov.uk/>.