

Legal Studies Research Programme

The Adults with Incapacity (Scotland) Act 2000: Implementation, Monitoring and Research

Jan Killeen, Alzheimer Scotland – Action on Dementia
Fiona Myers, Scottish Development Centre for Mental Health
Fiona M. MacDonald, Scottish Executive

The Adults with Incapacity (Scotland) Act 2000 (the Act) modernised the law with the aim of improving existing, and introducing new, measures to safeguard the interests of adults who are unable to make all or some decisions, or to communicate decisions, relating to their welfare or finances. It has been estimated that this legislation could potentially apply to around 100,000 affected adults, as well as their carers and families. In 2002, the Scottish Executive commissioned a two-year consultancy entailing work examining the implementation of those parts of the Act for which the Justice Department has responsibility, monitoring the use of the Act, and researching its operation and impact on users. This paper summarises the findings of that project.

Main Findings

- In broad terms, the Adults with Incapacity Act is meeting its central aims to provide enhanced protection for people who may potentially benefit from the legislation and to offer more flexible and specifically appropriate means to realise this. This is recognised by users.
- Uptake levels of different provisions under the Act have varied, but usage has been steady, and has consistently increased for Parts 2 and 6.
- Usage levels for all Parts of the Act have differed considerably by local authority area.
- When to invoke the Act was a major issue for local authorities during the consultancy.
- The roles of proxies and carers are critical – as are their needs for improved support and information.
- There has been insufficient understanding and consciousness of the Act amongst some key groups, such as professions with potential involvement.
- Perceived barriers may be just as important as realised ones in hampering access to the Act.
- The principles and the definition of incapacity, as a decision- and context-specific concept, have been enthusiastically accepted.
- A number of processes may need simplification.
- Actions to address the concerns identified need to include ones aimed at awareness-raising and improved information provision, alongside ones concerned with practice, policy and legislation.

Introduction

The Adults with Incapacity (Scotland) Act 2000 (the Act) modernises and improves the law to safeguard the interests and welfare of adults who are not able to make all or some decisions for themselves. Responsibility within the Scottish Executive for the development and operation of the Act is shared by the Justice and Health Departments.¹

The Justice Department oversees the following:

Part 1 – the principles and operation of the Act

Part 2 – Powers of Attorney (POA)

Part 3 – Intromission with Funds (IWF)

Part 6 – Intervention Orders and Guardianship

Part 7 – miscellaneous provisions

Parts 2 and 3 were implemented in 2001, and Part 6 in 2002.

The remaining parts of the Act are the responsibility of the Health Department:

Part 4 – management of the finances of care home residents

Part 5 – medical treatment and research

The two-year consultancy for the Justice Department focussed on Parts 2, 3 and 6, and consisted of three main areas of activity in relation to the Act: supporting its implementation; monitoring patterns of usage; and conducting more in-depth research into its operation and people's experiences. Separate research and consultation have been undertaken on Part 5.²

This consultancy on the Adults with Incapacity Act was also a process of ongoing dialogue, over its two-year duration, between the contractors, the Scottish Executive and the networks of stakeholder and user contacts which were established.

¹ Extensive information, including research publications, explanations of key terms and roles, and resources for using the Act can be found on the official website: www.scotland.gov.uk/Topics/Justice/Civil/16360/4927.

² Davidson, S., et al. (2004) *Review of the Implementation of Part 5 of the Adults with Incapacity (Scotland) Act*. Edinburgh
Drinkwater, H., et al (2004) *Review of the Code of Practice for Part 5 of the Adults with Incapacity (Scotland) Act 2000*. Edinburgh

Supporting Implementation

The consultancy included activity designed to support the operation of Parts 2, 3 and 6. Several complementary activities aimed to: identify issues arising from users' and potential users' experiences; review information and support, including the codes of practice; and provide a source of assistance to resolve difficult queries about operation.

Three contact networks were established to facilitate this work: potential beneficiaries and representative organisations; agencies with operational responsibilities under the Act; and agencies with duties under the Act. Through meetings, working groups, training sessions and case material, these networks offered feedback. Additionally, the consultancy was contacted by more than 100 individuals (including carers), often seeking help with complex problems or airing difficulties they were experiencing.

Over time, across the different contact groups, and through various fora, key issues were identified that related to how the Act was being implemented.

For adults and potential users:

- a lack of accessible information for adults about their rights if subject to the Act;
- uncertainty over who should support the adult to have a voice in the process;
- unforeseen barriers to IWF;
- difficulties with finding people to act on behalf of adults with moderate means.

For carers and family members:

- inadequate information and support;
- considerable costs associated with guardianship applications;
- perceived poor co-operation from professionals for lay people making private guardianship applications;
- the need for training and sharing of good practice;
- interface issues with banking and data protection legislation;
- the perceived inappropriateness of the sheriff court for Part 6 applications.

For agencies and professionals with responsibilities or duties under the Act:

- lack of clarity amongst local authorities about when to invoke the Act, giving rise to concerns about equity of access and transparency in decision-making;
- the need for multi-agency training;
- the need for good practice guidance on communication with adults, assessing capacity, and notifying an adult when they become subject to an intervention;
- welfare guardianship powers applied for are often more extensive than the reports suggest are needed to benefit the adult;
- the lack of emergency powers;
- the need to simplify some processes and procedures, such as supervision of welfare guardianships.

Monitoring Use

Another component of the consultancy involved monitoring of usage of the separate parts of the Act from implementation until April 2004, based on quantitative data held by the Office of the Public Guardian (OPG). The data suggest a dynamic pattern of usage as awareness of, and confidence in, the legislation has grown.

Usage of procedures

In three years of operation, more than 30,000 Powers of Attorney (POA) were registered (but not necessarily operational) with the OPG. Between 60 and 70% of registrations were for continuing or financial POAs; combined continuing and welfare registrations increased from one quarter to 40% of all POAs; numbers of welfare-only POAs were low but rising.

The number of cases of Intromission with Funds (IWF) has been low since implementation with less than 200 per annum.

Between the first and second years of operation, Guardianship orders doubled in number to around 600, with the type of order changing considerably. In 2002-03, three quarters had been for welfare powers alone, 20% for financial guardianship, and less than 10% for

combined powers. In 2003-04, welfare-only guardianships fell to just 46%, while combined and financial-only types each doubled.

In 2003-04, the number (167) of intervention orders tripled the previous year's figure, with the majority (81%) being financial.

Usage by area

Rates of use of different parts of the Act were examined in relation to GROS estimates per 100,000 of over 16 year olds in each local authority area. The data show consistent and considerable variation in the use of POA across the country. The socio-economic and demographic profiles of areas with highest and lowest use appear to be possible explanatory factors, along with prevalence of use of POA prior to the Act. Rates of guardianship per 100,000 of the population also indicate diverse usage levels by local authority areas. Against a Scotland-wide average of 14 orders per 100,000, rates varied from extremes of four to 28 orders. As well as transitional issues, local authority policy and practice, demographics and other local factors could contribute to the variation. There were also variations in the types of orders in separate local authority areas. The overall low figures for IWF and intervention orders make distribution patterns far less clear.

Status of applicants and proxies

Data on the relationship of applicants to the adult reveal the roles played by private individuals and local authorities.

Powers of Attorney and Intromission with Funds

Acting jointly or alone, across financial and welfare powers, relatives were consistently around 80% of attorneys. Friends tended to be appointed more as welfare attorneys, whereas professionals were more likely to act as joint attorneys with financial powers. Relatives were the most frequent applicants for IWF.

Guardianship and Intervention Orders

There was a shift in the types of applicants for guardianship. In 2003-04, compared with the previous year, the proportion of applicants who were relatives rose by almost 50%, while local authorities dropped by almost the same proportion. The proportion of 'other' applicants (mainly professionals) was stable. Relatives

tended to apply for financial or financial and welfare orders; local authorities made the vast majority of applications for welfare-only orders; professionals applied for around 10% of orders; and friends rarely apply for guardianship. The proportion of interveners that are local authorities or professionals increased.

Users of the Act

Across all procedures and years, around two thirds of granters and adults were female, apart from IWF where women account for three quarters of adults who have someone appointed as a withdrawer to manage their finances. Data on minority ethnic groups were available for POA and IWF only and may be incomplete. Nevertheless, it appears that non-white users have comprised less than a half a per cent of users of these Parts of the Act, suggesting under-representation of non-white groups.

Continued monitoring of the OPG's and other data should allow better understanding of the factors behind these emerging patterns.

Research

Two research projects were undertaken to explore in greater depth the operation of the Act. One dealt with Parts 2 and 3, the other with Part 6. In general, their common aims were to identify and describe:

- factors informing awareness and usage of the procedures studied;
- perceptions of those involved in the application or registration processes and in bringing an order into effect;
- perceived outcomes for the adult and the applicant.

To access the various groups of individuals involved presented methodological difficulties which were intensified by the ethical and data protection issues which arise in research with such populations.

Research on Parts 2 and 3

Part 2, POA, and Part 3, IWF, were intended to provide more accessible and less restrictive means to manage the finances, property and welfare of an adult with incapacity, than did previous options or the use of Part 6.

To analyse the operation of Part 2 and 3, two methods were adopted:

- a postal survey of a sample of advice and voluntary agencies;
- a telephone survey of a sample of withdrawers and granters of POA.

Although the sample sizes for both surveys were very small (23 agencies and just 8 interviews), the data generated echoed themes which had emerged in the course of the implementation activity, and revealed new insights.

The postal study explored levels of awareness amongst agencies who could have a key role in providing clients with advice and information about using Parts 2 and 3. It gathered information about their awareness, opinions and use of information about the Act, and the relevant queries they had handled. The telephone survey of users investigated their experiences and perceptions of using these Parts.

The merits of using these procedures

Generally, these Parts of the Act were seen as beneficial for granters and withdrawers. Organisations familiar with the operation of the Act and its users acknowledged the value of the procedures. Using POA empowered and offered choice for the individual to plan ahead, lessening the possibility of future disagreements, difficulties, or the use of more restrictive, imposed options to manage their finances and/or welfare. IWF allowed someone with an interest in the adult to manage his/her affairs, often avoiding the freezing of bank accounts. Protective mechanisms in both procedures were appreciated.

The need for increased awareness

A strong theme was the need to widen and deepen awareness of both Parts, amongst the public and professionals. This includes targeting groups who might especially benefit from early action in relation to granting POA (e.g., people at risk of losing capacity in the near future) and bodies like banks. The need for widely accessible, easily comprehensible and varied information was stressed by agencies.

The complexity of the application processes

Perceptions of the complexities of these procedures differ, partly because POA application and registration are largely lawyer-driven, whereas IWF is led by relatives or others close to the adult. Complexity appeared to be more a feature of the latter process, which some saw as bureaucratic and onerous on the lay applicant, who was usually responsible for completing the application, obtaining and having countersigned a certificate of incapacity, setting up a designated account, and detailing how the transferred funds will be used over three years.

The accountability and responsibility of withdrawers

Once the authority to intromit with funds has been obtained, the role of withdrawer involves the maintenance of expenditure records and accountability to the OPG. Fears of making mistakes and anxiety over being answerable to an external body, expressed by the withdrawers interviewed, were noted by advice agencies. They too who had dealt with such concerns amongst their clients. This exemplifies a tension running through the legislation between the central protection of the adult from exploitation and having means to ensure accountability that are not so complex or burdensome that they deter people from assuming roles under the Act.

Support in the role

Agencies reported people approaching them with queries about their role as a withdrawer or attorney. Withdrawers interviewed in the telephone survey were aware of supervisory mechanisms and of the responsibilities they had adopted, but felt they were unsupported in their role, which could be a factor in the lower than anticipated use of Part 3. Only one withdrawer recalled seeing the relevant code of practice. Advice agencies could have an increased supportive role.

Limitations

Respondents in both the postal and telephone surveys drew attention to the limitations in IWF of being able to access only one of the adult's bank or building society accounts. Having to go through the process again to access other accounts was seen as 'restrictive and illogical'. Nor does Part 3 allow a person to open an account for an adult who does not already have one. This can lead to use of Part 6 instead, which may be contrary to the principle of the least restrictive option.

The requirement that a withdrawer must be acting in a personal, not professional, capacity could also curtail the usefulness of IWF, specifically for people moving from hospital to the community. It was suggested that organisations or their representatives should be allowed to act as withdrawers.

The data do not indicate definitively whether people are experiencing difficulties finding others to act as attorneys for them.

Timescales and costs

The small number of granters of POA who were interviewed did not express concerns about timescales or the legal fees involved. For withdrawers, the time taken to process applications was more significant as the adult's account would be frozen in the interim. The effects of medical and legal fees on those using Part 3 were not clear.

Research on Part 6 of the Act

This qualitative study addressing the use of Part 6 had specific objectives to describe and explore:

- determinants and infrastructure issues informing usage;
- how assessment and decision-making processes influence the course of action taken;
- how legal processes and procedures meet the objectives of the Act;
- immediate outcomes of using Part 6;
- and possible interface between the Act and other legislation.

An in-depth case study-based methodology, entailing semi structured interviews with a range of people involved in a sample of 13 cases, was employed. In each case, guardianship or an intervention order had been considered: in ten, one of these was granted; in two, alternative avenues were pursued; and in the remaining one, a power of attorney had initially been considered, but a financial guardianship was eventually pursued. The sampling approach is outlined in the full report.

A total of 58 people were interviewed, with the aim of pursuing the views and experiences of: the adult, their nearest relative/significant others, their guardian or intervener, the MHO undertaking the statutory

assessment, medical assessors, legal advisors and relevant others. The cases included adults with learning disabilities, dementia, acquired brain injury, mental health problems, and a combination of physical and other disabilities.

Qualitative analysis of the interview transcripts allowed key themes to emerge, some of which relate specifically to Part 6, some with more general applicability to the Act.

Starting the process

Two overlapping triggers - to minimise risk or to establish decision-making authority - intersect with questions about when to invoke the Act.

The initial stages of application present a far greater burden for private applicants, acting very much on their own, in contrast to the structures and processes within which local authorities make applications.

Assessment of capacity and decision-making

Interviewees' accounts of the assessment process exposed four key issues:

- the multidisciplinary nature of assessment;
- the potential extensiveness of the process in terms of the variety of people who may be involved;
- local authority applicants derive benefit from joint and collaborative working, facilitated by case conferences;
- assessors both attempt to establish the adult's past and present wishes and assess or judge the tenability of these.

The data suggest that Part 6 has been used for two distinct populations:

- adults able to communicate and act, but with impaired decision-making judgement in aspects of their lives, exposing them to risk;
- and those who may have 'global incapacities', for whom a body or person must be found to make decisions for them legitimately.

These generated two overlapping models of decision-making, with different emphases:

- focusing on risk and its minimisation, and seeking powers over the adult (largely local authority applications);
- focusing on decision-making and forward planning, seeking powers to (generally made by individuals).

Respondents, including those engaged in assessment, generally welcomed the principle that an adult may be legally capable of making some but not all decisions and actions. Recognition of the relative nature of capacity did not, however, always extend into consideration of the powers sought, which may be formulated separately from discussions informing a decision to pursue a Part 6 application.

Intervention orders were little used for welfare matters, which could reflect the adult having long-term needs, but could partly derive from uncertainty about their future needs, coupled with a practical aim to avoid having to make a further application under the Act. MHOs had a key role in identifying and effecting alternatives to Part 6.

Making an application

Application entailed intense activity within a tight time period for both intervention orders and guardianships. MHOs had a major coordinating and advisory role in local authority applications. Private applicants, managing the process virtually in isolation, found that delays and errors increased legal costs and stress for them.

Selection of guardian or intervener was largely determined by whether there was a relative, friend or carer willing to take responsibility. Where an application originated from real or perceived risks to the adult, the role was more often taken by a local authority. Relatives, friends and carers sought the role when the trigger was a wish to assume legal decision-making authority on the adult's behalf.

As a local authority cannot become a financial guardian, this created problems where no individual was available for the role and there were insufficient funds in the adult's estate to pay a solicitor to assume the role.

Legal processes

Three key themes emerged in relation to Part 6 applications.

- Possible barriers stemming from the complexity and comprehensibility of the process (especially for lay people) and types of representation for the adult. Using the sheriff court exposes a tension between recognising the importance of the process and the experience of the setting as over-formal and even distressing.

- Varying practices, including differences in relation to the roles of local authorities, sheriffs and safeguarders or curators ad litem; the appointment of safeguarders; the involvement of independent advocates; and orders for caution.
- Complex interface issues between the Act and mental health legislation, suggesting the need for attention to interaction with the Mental Health (Care and Treatment) Act 2003 once implemented.³

Procedural and immediate outcomes from considering a Part 6 application

The process was perceived to be time-consuming and complex, in a context where there are no emergency provisions. This could be felt to outweigh the benefits of financial guardianship where the adult's funds were limited.

Immediate welfare outcomes consisted of either substantive changes through recourse to the legislation; or 'due process' changes providing a formal legal basis for arrangements that could already be in place. It was often difficult to determine whether and how evident changes in the adult's life could be directly attributed to using the Act, changes in care planning and service provision, or to changes in personal circumstances.

An indirect but significant outcome was that a Part 6 assessment allowed potential alternatives to be considered.

Support and supervision

Three key points arose from the data in relation to support and supervision.

- The lack of support for lay applicants, guardians or attorneys during the Part 6 application process and once powers have been granted should be considered, in addition to the supervision and scrutiny exercised over those granted powers.
- A difficult balance has to be struck between meeting the support and advice needs of financial guardians and attorneys and the need to ensure financial accountability.

³ A detailed comparison of the texts of the Adults with Incapacity Act and the Mental Health (Care and Treatment) (Scotland) Act 2003 (which comes into force in 2005) was commissioned by the Executive in 2004. The work was undertaken by Jean Gordon and reveals where there may be areas of interface between the two Acts. Gordon's comparison will be published on www.scotland.gov.uk/Topics/Justice/Civil

- The nature and frequency of local authority supervision of guardianships varied.

Accessibility and equality

While Part 6 is accessible to private applicants, infrastructure and procedures may compromise this, and processual complexity and formality hamper inclusion of adults themselves.

Suggestions for Further Research

One of the tasks of the consultancy was to devise a possible forward strategy for further investigation into Parts 2, 3 and 6. On the basis of findings and analysis from all three elements of the consultancy – implementation support, monitoring and research – five focal areas were suggested for further study.

- Longitudinal research in relation to adults for whom action under Part 6 had been considered to explore the operation of guardianships, over the long term.
- Exploration of the roles of proxies in relation to different parts of the Act.
- Areas of interface between the Act and other welfare (especially mental health), and financial legislation.
- Quantitative analysis of court data protection and other data to explore aspects of the processes involved, including timescales.
- Analysis of the financial impacts of operating and using the Act, for individuals, statutory bodies and the courts.

Conclusion

Generally, the Act is meeting its core aims to provide enhanced protection for adults and more flexible and specifically appropriate means to realise this. Usage of some provisions has been lower than was anticipated, but for others has increased steadily since implementation. The consultancy was able to flag areas of concern at an early stage, allowing the Scottish Executive and other bodies to address certain critical issues while the work was still underway. The work was also able to identify possible suggestions for practice, along with potential non-legislative and legislative means for achieving change. The various approaches which were adopted to explore the operation of the Act facilitated a deeper and more subtle appreciation of emerging issues than would have been possible had only one of the consultancy activities been undertaken.

If you wish further copies of this Research Findings or have any enquiries about social research, please contact us at:

Scottish Executive Social Research

4th Floor West Rear

St Andrew's House

Regent Road

EDINBURGH

EH1 3DG

Tel: 0131 244-2256

Fax: 0131 244-5393

Email: socialresearch@scotland.gsi.gov.uk

Website: www.scotland.gov.uk/socialresearch

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