

Scotland

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1. The law relating to Adults with Incapacity has been fundamentally reformed in Scotland but to a great extent this programme of reform predated the United Nations Convention on the Rights of Persons with Disabilities.

The United Nations CRPD was signed by the UK in 2009 together with the Optional Protocol. It has not, however, been directly incorporated into domestic law. This is in contrast to the European Convention on Human Rights which was directly incorporated into domestic law by the Human Rights Act 1998 and further in respect of Scotland by the Scotland Act 1998. The CRPD Committee published its *Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland* in 2017 (C/GBR/CO/1) but to date there has been little clear indication from either the UK or the Scottish Government as to specific measures intended to address any of the concerns raised (see Equality and Human Rights Commission [Progress on Disability Rights in the United Kingdom](#), October 2018). The Scottish Government has adopted a *Delivery Plan for the UN Convention on the Rights of Persons with Disabilities 2016-21* (2016) as part of their wider commitment to *A fairer Scotland for disabled people* (2016).

2. The Office of the Public Guardian was created by the Adults with Incapacity (Scotland) Act 2000 and it has a range of functions in respect of measures taken to support the decision making and protection of concerned adults. The Office maintains a public register of powers of attorney that have been registered, guardianship and intervention orders and authorisation granted under the access to funds scheme. While there has been significant increase in the number of powers of attorney registered, it remains the case that only a minority of older people in Scotland has registered a Power of Attorney.¹

3. The principal legislation in Scotland is to be found in the Adults with Incapacity (Scotland) Act 2000. This is part of a wider statutory framework, underpinned by similar principles and objectives, including the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007. This significant statutory reform was the product of a series of Discussion Papers and Reports by the Scottish Law Commission as part of its *Fourth Programme of Law Reform*, concentrating on the law relating to Judicial Factors, Powers of Attorney and Guardianship of the Incapable. In its *Report on Incapable Adults* (SLC No 151, 1995), the SLC identified the need for reform of the law at that time as “fragmented, archaic and [failing] to provide an adequate remedy in many common situations” (para 1.15).

For the purposes of the 2000 Act, an adult is any person who has attained the age of 16. An adult will be treated as being incapable where he or she is incapable of acting; making decisions; communicating decisions; understanding decisions or retaining the memory of decisions as a result of a mental disorder or the inability to communicate because of a physical disability (s1(6)).

The Adults with Incapacity (Scotland) Act 2000 is underpinned by four General Principles (s1): that there shall be no intervention in the affairs of an adult unless it is necessary and for his benefit; where intervention is to be made, the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention, shall be taken; the wishes of the adult, where it is possible to ascertain them, and the view of others closely related to or otherwise involved with, the adult concerned, shall be taken into account to the extent that it is

¹ KA Levin, J Carson, E Crighton, “Measuring the impact of a public awareness campaign to increase Welfare Power of Attorney registrations in Scotland” (2017) 46(4) *Age and Ageing* 659-664.

reasonable and practicable to do so; those appointed under the Act to intervene in the affairs of an adult shall encourage him or her in the exercise and development of skills.

4. Various procedures existed at common law or under statute in respect of an adult with incapacity including the appointment of a guardian, tutor-dative, tutor-at-law, curator bonis or attorney. These were replaced by the Adults with Incapacity (Scotland) Act 2000, which instead provides for various frameworks:

(i) Powers of Attorney

The 2000 Act provides for two types of Power of Attorney: a continuing Power of Attorney who has power to deal with money and property or a Welfare Power of Attorney who may make decisions concerning health, care and personal welfare. It is also possible to grant a Combined Power of Attorney which includes both of these functions. A Power of Attorney may only be created where the granter has capacity and it may take effect immediately or be designed to come into effect at some point in the future when the granter becomes incapacitated. These Powers of Attorney must be registered with the Office of the Public Guardian. A Power of Attorney may subsequently be revoked by the granter; where the attorney is the spouse or civil partner of the granter, it will terminate on separation, divorce or dissolution and, the attorney will cease to be able to act on the appointment of a Guardian under the 2000 Act to the extent that the latter has power to act in the same matters.

(ii) Management of funds

Part 3 of the Adults with Incapacity (Scotland) Act 2000, as amended by the Adult Support and Protection (Scotland) Act 2007, provides a system whereby the Public Guardian may authorize a person to “intromit with the funds of an adult for certain purposes” including payment of local and central government taxes and payment in respect of sustenance, accommodation, fuel, clothing and related goods and services (2000 Act, s24A). Such authorisation may be granted where the adult is incapable of making decisions in respect of the particular matters.

(iii) Intervention Orders

Intervention orders may be granted by a sheriff on an application by any person claiming an interest in the property, financial affairs or personal welfare of an incapable adult, including the adult himself. An intervention order may direct specific action or the taking of a specific decision (2000 Act, s53).

(iv) Guardianship Orders

Any person claiming an interest, including the adult concerned, may apply to the sheriff for a guardianship order (2000 Act, s57). An initial guardianship order is subject to a maximum limit of three years but can be renewed (s58). An order may be granted in respect of a child under the age of 16 within three months prior to their 16th birthday but will not come into effect until they reach that age (s79A). The powers, which may be conferred on a guardian, extend to all aspects of the property, financial affairs or personal welfare of the adult concerned, including the power to pursue or defend actions of divorce, separation, dissolution of civil partnership or nullity of marriage in the name of the adult (s64).

5. In 2018, the Scottish Government commenced consultation on reforms to the [Adults with Incapacity \(Scotland\) Act 2000](#) but while analysis of the consultation responses has been published, as yet there is no clear indication of plans for reform. Key concerns related to the need to ensure that the adult’s rights, will and preferences are paramount, that intervention is minimal, that there is adequate training and support for guardians and attorneys and that consideration is given to the need for independent advocacy.