

Making decisions for adults: An introduction to the Adults with Incapacity Act



ENABLE Scotland

**Leading the way in learning disability
in Scotland**



The impact of a person's learning disability can vary enormously. Most adults with learning disabilities have abilities and capacity in many areas of their life – although they may need support in some aspects of daily living. Others may need considerable support with skills and decision-making.

The Adults with Incapacity (Scotland) Act was passed by the Scottish Parliament in 2000. It offers a range of options to assist an adult who lacks the capacity to make decisions and manage different areas of his or her life. Now it is possible for another adult to be given powers to make decisions on behalf of someone who cannot act for him or herself.

This factsheet gives a brief introduction to the Act and some important key principles.

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1. General Principles

The Adults with Incapacity Act sets out some basic principles or rules at the very front of the Act. These rules **must** be followed by anyone who takes any kind of action or decision under the Act. The courts, the sheriff and the Public Guardian will use these general principles to decide whether someone should get legal power for another adult or whether actions have been justified.

The 5 principles

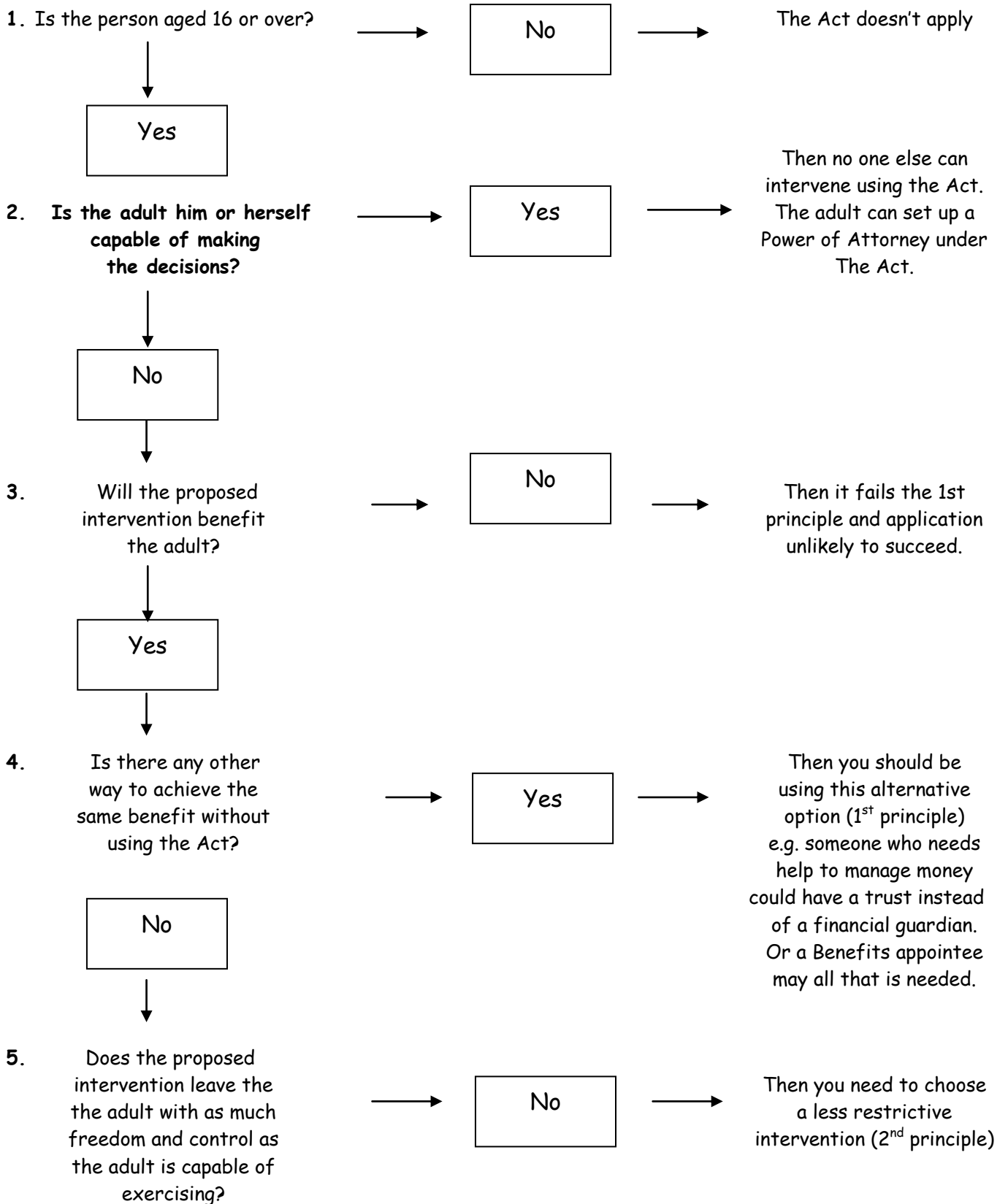
1. You will not get permission to make decisions for another adult unless this will benefit the adult and the benefit cannot be achieved any other way.
2. You will only get the power to make decisions on behalf of someone if these decisions are really needed.
3. You must first ask the adult what he or she wants to happen or find out if he or she has indicated this in the past.
4. You must get the views of the adult's nearest relative and primary carer if this is reasonable and feasible.

If the adult has a guardian or attorney with relevant powers or if the sheriff has told you to consult someone or if you know of any other relevant people with an interest in the adult's well-being then you must get their views if this is reasonable and feasible.

5. You must encourage and allow the adult to make his or her own decisions and manage his own affairs as much as possible and to develop the skills needed to do so. You will not get permission to make a decision for an adult that he can make himself.

The following pages give a step-by-step flowchart to help you follow the 5 principles when you are deciding whether to use the Act or not.

2. Applying the 5 principles



6. Have you asked for and taken account of what the adult wants to happen? Have you found out if the adult gave any view in the past?

Yes

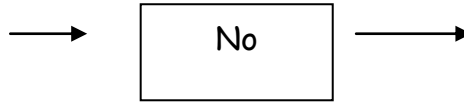
7. Have you consulted relevant others?
This includes the adult's nearest relative and primary carer, any guardian or attorney appointed for the adult, anyone nominated by the sheriff and anyone else who might have a relevant interest in the adult's welfare.

Yes

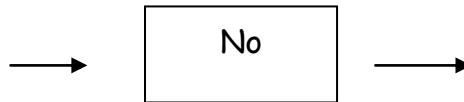
8. If you are successfully appointed to act for the adult, do you have a plan to encourage the adult to participate in any decision-making so he/she can retain or develop his/her decision-making capacity?

Yes

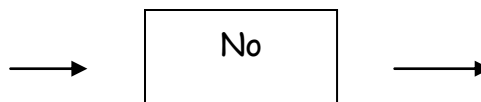
9. Congratulations. You have followed the 5 principles. This should help you choose the right option and meet the requirements of the courts and Public Guardian.



Then you **must**, if these can be discovered in any way. This includes using any communication aid, including mechanical devices or human assistance such as an advocate. (3rd principle)



Then you should make an effort to do so as far as it is reasonable and practicable. You will find this useful in ensuring there are no objections or barriers to your proposed intervention. (4th principle)



Then you need to reconsider. Guardians, attorneys and residential managers have a responsibility to do this as far as it is reasonable and practicable. (5th principle)

3. What is legal incapacity?

The Act says that someone is "incapable" when he or she cannot

- act; or
- make decisions; or
- communicate decisions; or
- understand decisions; or
- keep a memory of decisions because of mental disorder or inability to communicate.

This does not include people whose **only** problem is that they are unable to communicate if this can be overcome in some way using either human or mechanical help.

Why is decision-making and legal capacity important?

In Scotland, once someone is aged 16 or over, he or she is an adult in the eyes of the law. The law assumes that an adult can make their own decisions and can sign legal documents and enter into contracts. This includes things like signing tenancy agreements, taking out insurance policies or credit, getting married or giving consent to medical treatment.

We all have problems making decisions from time to time - usually because we do not have enough information or we simply can't make up our minds. However, some people are not able to make decisions for themselves - especially important legal decisions - because they lack

understanding and awareness of what they are doing and the consequences. Such people are said to have "legal incapacity". This can affect people with learning disabilities or with other mental impairments like dementia, head injury or mental illness. Difficulties arise if someone does not have the legal capacity to make decisions. **No-one can make decisions, give consent or sign legal contracts for another adult unless they have formal legal authority to do so.** This includes parents, other family members or care staff.

Of course, in reality parents and carers make decisions for the person they care for all the time - eg what to wear, what to have for their tea - and help them manage things like their benefits or small amounts of money. Although these decisions are important, these are informal, everyday supports which seldom have legal ramifications. Real difficulties happen when a decision has to be taken which would have a significant impact on a person's life or which involves a legal contract (eg consenting to an operation). Parents often find for the first time that they have no legal right to make these decisions on behalf of their adult son or daughter with learning disabilities.

The Adults with Incapacity Act can now help. It makes it easier for someone else, such as a family member, to get legal permission to make decisions and manage the

affairs of an adult who has legal incapacity. At the same time, there are strong safeguards to protect the adult from financial abuse or unnecessary interference in his or her life.

Do all people with learning disabilities lack legal capacity?

No. No-one automatically lacks capacity just because they have a certain condition or illness. In addition, legal incapacity is not an all-or-nothing situation. It depends on the circumstances and the decision or action that needs to be taken. Many people are capable of understanding and making a decision about some things but not others.

John wants a new television and buys one on hire purchase. He understands that he must pay a certain amount each week until the debt is cleared and that the shop can take the television back if he doesn't pay. He can make this decision and sign this contract himself. In these circumstances he is legally capable. Later, John develops bowel cancer but he is unable to understand what this means or to decide himself about different treatment options or to consent to an operation. Here, he does not have legal capacity. Someone else will need to get permission to make this decision for him.

Who decides when someone has legal capacity or not?

Again, this depends on the circumstances. Lawyers decide if their clients are capable of making decisions; doctors decide if patients are able to consent to treatment; registrars decide if someone understands a marriage contract and so forth. If there is any doubt, a medical opinion may be needed. However, there are no standard tests. The Act stresses that adults should be encouraged to make their own decisions as far as possible and that there should be no intervention in an adult's life unless incapacity is proven. Ultimately incapacity is a legal decision. If an adult is assessed under the Act as having incapacity he (or another interested person) can challenge this through an appeal to the sheriff.

A person has capacity if :

- he has received relevant information (suitable for his level of understanding) and can reason and come to a decision on the basis of this information; and
- he is not under undue pressure from anyone else; and
- he can communicate his decision (with assistance if needed); and
- he holds consistently to this decision.

4. Making decisions for another adult – the options

The Act sets out six different options which someone can use to make decisions for another adult.

Follow the general principles first

First of all, remember you must follow the general principles set out in the Act. These are binding on anyone given permission to make decisions for another adult and will help you decide which option to use. These principles will be used by the courts, the sheriff and the Public Guardian to judge any application made by you for authority to make decisions on someone else's behalf.

Leaving people with as much control as possible

One of the principles of the Act is that an adult should retain as much control as possible over his/her own life and should be encouraged to use and develop any decision-making skills. This means that anyone applying for permission to make decisions for someone else will only get the minimum powers necessary.

Kinds of decisions you will be allowed to make

The Act divides decision-making into 2 main areas:

- decisions about money and property
- decisions about health and welfare

It is possible to apply for permission to help someone with just one area of his or her life (eg. managing money) or with both areas.

Options

There are 6 options that can be used under the Act:

Option	It can give Financial powers	It can give Welfare powers
power of attorney	✓	✓
withdrawer (access to bank accounts)	✓	-
Intervention Order	✓	✓
Guardianship Order	✓	✓
doctors can authorise treatment	-	✓
residential managers can look after residents' finances	✓	-

1. Power of attorney

Any adult, if they are legally capable, can leave instructions in a legal document about what should happen if they later become legally incapable (eg. through illness or injury). The adult can grant another person a "power of attorney" to manage their affairs. An adult can grant either or both

- a continuing power of attorney - for financial and property matters
- a welfare power of attorney - for personal welfare.

2. Withdrawers

An individual (usually a relative or friend) or an organisation can apply to the Public Guardian for permission to open a bank account and/or withdraw money on a regular basis from an adult's bank or building society account in order to pay household bills and regular expenses.

3. Intervention Orders

You can apply to the sheriff for the power to make a one-off or short-term decision or take one action on someone's behalf e.g. to sign a legal contract such as a tenancy agreement or to sell a house. It can cover any kind of decision about property, finance or personal welfare and you can have more than one Intervention Order at one time. You can only use those powers that are stated in the Intervention Order.

4. Guardianship Orders

If an adult needs a substantial amount of help and is likely to continue to do so, you can apply to the sheriff to become the adult's guardian. The sheriff will want to consider whether an Intervention Order could be used instead before agreeing to a Guardianship Order. It is possible to become an adult's financial guardian or welfare guardian or both. You can only have those powers that are stated in the Guardianship Order.

5. Doctors can authorise medical treatment

Medical treatment requires a patient's consent. If the patient does not have the capacity to consent, doctors can authorise treatment by signing a certificate. If there is someone else with the power to consent - like a welfare attorney or welfare guardian - then that person will also need to give consent before the treatment can go ahead.

6. Managers can look after residents' finances

Managers of registered establishments can manage the finances of residents up to the value of £10,000 - but only if there is no-one else with appropriate legal authority like an appointee, financial attorney or a financial guardian. The manager must apply to the Care Commission for authority to do this.

5. Rights of people affected by the Act

The Adults with Incapacity (Scotland) Act aims to leave people in control of their own lives as much as possible while ensuring that people get the support that they may need. It is very important that anyone using the Act to assist another adult understands what rights the adult has. It is also vital that the adult is aware of their rights and able to achieve them.

These rights are laid out in the 5 principles (see pages 3 – 5) and other parts of the Act.

If you are an adult affected by the Act then you have the following rights:

- You have the right to make your own decisions if you can.
- You have the right to have help with making decisions if you need it.
- Any decisions made for you by someone else must help to make your life better.
- Even if you need help with decisions, you have the right to take part in decisions as much as possible and to develop your skills so you can make more of your own decisions in future.
- No-one can make decisions for you or intervene in your life unless this is really needed.
- You have the right to be asked about what you want to happen.
- You have the right to use any communication aid or get support from someone to communicate your wishes.
- You have the right to be protected from some kinds of medical treatment.
- You have the right to information about an application by someone else to make decisions for you and the right to object.
- You have the right to appeal to the sheriff against an assessment of incapacity.
- Your nearest relative has a right to give his or her views about what should happen in your life. You have the right to apply to the sheriff to set aside your 'nearest relative' and have someone else in this role.
- You have the right not to be ill-treated or neglected.
- There are some decisions that no-one can make for you - like getting married, making a will or voting.

6. Rights of nearest relatives and primary carers

The most important person in the Adults with Incapacity (Scotland) Act is the adult who is affected by it. He or she must remain at the centre of things and have as much say as possible in what happens.

Nearest relatives and primary carers also have some rights under the Act – especially to be consulted about their views at certain parts of the proceedings.

Who is the nearest relative?

The Act defines who the nearest relative is. It is the **first** person from the following list :

- spouse (unless court order for divorce, separation or nullity has been granted). This includes a cohabitee in a heterosexual or same-sex relationship if the cohabiting partners have been living together for at least six months.
- child (eldest, excluding the applicant)
- parent
- brother or sister
- grandparent
- grandchild
- uncle or aunt
- nephew or niece
- unrelated person (a person with whom the adult has ordinarily resided for not less than 5 years).

Where more than one person might fall into a category (e.g. uncle or aunt) the eldest takes precedence.

Nearest relatives must be aged 18 or over unless they are a spouse or parent.

The nearest relative must be resident in the UK.

Who is the primary carer?

The 'primary carer' is the person or organisation who gives the most care to the adult and who is responsible for looking after him or her. In many instances this will be a relative eg where someone stays in the family home. In other instances the primary carer may be a care organisation that provides support to the person in their own home.

It is possible for the nearest relative and the primary carer to be the same person.

Rights of both nearest relatives and primary carers

1. Where it is reasonable and practicable to do so, nearest relatives and primary carers have the right to be asked their views by :
 - anyone making an application for permission to make decisions for the adult
 - any doctor who is assessing the adult's capacity to make decisions

- any person writing a report in support of an application for financial decision-making powers
 - the mental health officer writing a report in support of an application for welfare decision-making powers
 - any person with decision-making powers eg. attorneys, guardians etc
 - the sheriff who is assessing the application
 - the Public Guardian
 - any health professionals who give medical treatment under Part 5 of the Act.
2. Nearest relatives and primary carers have the right to information about an application by someone to make decisions for an adult and the right to object.

Rights of nearest relatives only

Nearest relatives (not primary carers) **must** be consulted by and give permission to:

- any doctor who wishes to involve the adult in medical research

Can the nearest relative be set aside?

Yes. An adult with incapacity has the right to apply to the sheriff to have the nearest relative set aside and to have someone else in this role.

People having a 'relevant interest'

People who have a 'relevant interest' also have some rights. This can include relatives, carers, advocates, close friends and professionals.

The sheriff can instruct anyone given decision-making powers on behalf of an adult (e.g. guardians, people with Intervention Orders etc) to consult 'relevant others'.

Anyone having a relevant interest can make their views known to any person authorising interventions under the Act (eg the sheriff, Public Guardian or doctor) or to anyone who carries out interventions under the Act (e.g. attorneys, guardians, etc).

Anyone having a relevant interest can challenge some medical decisions made by doctors under Part 5 of the Act.

The adult or anyone claiming an interest can appeal to the sheriff against an assessment of an adult's incapacity.

7. Further Information

For more information on aspects of the Adults with Incapacity (Scotland) Act you can consult or contact the following sources.

ENABLE Scotland

2nd Floor

146 Argyle Street

Glasgow

G2 8BL

Admin: 0141 2256 4541

web: www.enable.org.uk

Enable Direct (Enquiry Line for families) 0300 0200 101

open Monday-Friday 9:00am-5:00pm

email: enabledirect@enable.org.uk

Office of the Public Guardian

Hadrian House

Callendar Business Park

Callendar Road

Falkirk FK1 1XR

Tel: 01324 678300

Monday-Friday 9:00am – 5:00pm

email: opg@scotcourts.gov.uk

web: www.publicguardian-scotland.gov.uk

Mental Welfare Commission

Thistle House

91 Haymarket Terrace

Edinburgh EH12 5HE

User and carer advice line:

0800 389 6809 –

Mon-Thurs 9am-5pm,

Fri 9am-4.30pm

Textphone: 18001 0800 389 6809

Tel: 0131 313 8777 - Other enquiries

email: enquiries@mwscot.org.uk

web: www.mwscot.org.uk

The **Scottish Government website** contains all the official forms, guidance, codes of practice etc. and has the latest information about changes or consultations about changes.

www.scotland.gov.uk/topics/justice/law/awi

To find a solicitor you can contact:

Law Society of Scotland

26 Drumsheugh Gardens

Edinburgh

EH3 7YR

Tel: 0131 226 7411

Monday-Friday 9:00am – 5:00pm

email: lawscot@lawscot.org.uk

web: www.lawscot.org.uk/

Scottish Legal Aid Board

44 Drumsheugh Gardens

Edinburgh

EH3 7SW

Tel: 0131 226 7061

Email: general@slab.org.uk

Web: www.slab.org.uk

Legal Aid Helpline: 0845 122 8686

(Please note SLAB does not provide legal advice but it can signpost you to a solicitor.)

This information is given as guidance only and is not an authoritative guide to the law. Individual circumstances can vary and people are advised to seek advice if they have a specific concern or query.

Date information correct at: 12/5/2011

For further information about learning disability and related topics visit

www.enable.org.uk

or contact ENABLE Direct -

Tel: 0300 0200 101

Monday – Friday 9am – 5pm.

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Registered office 2nd Floor, 146 Argyle Street, Glasgow G2 8BL