

Trusts and Succession (Scotland) Bill: capacity and the Adults with Incapacity (Scotland) Act 2000

Purpose and structure of this briefing

1. The purpose of this briefing note is to summarise the methods by which a person's capacity or incapacity can be assessed in the [Adults with Incapacity \(Scotland\) Act 2000](#) ('the 2000 Act').
2. The aim is to help the Committee's policy consideration as to how capacity or incapacity of a trustee or beneficiary could be assessed in the context of the [Trusts and Succession \(Scotland\) Bill](#) ('the Bill').
3. Note that, in 2022, SPICe published [a detailed briefing relating to the 2000 Act](#), relevant sections of which are hyperlinked to throughout this committee briefing.
4. This committee briefing note is divided into three sections:
 - As background, the first section provides a short overview of what the 2000 Act does.
 - The second section sets out the key points relating to the approach to capacity/incapacity in the 2000 Act.
 - The third section considers the specific types of intervention in the 2000 Act in more detail.

What the 2000 Act does

5. The 2000 Act contains a system which enables necessary interventions to safeguard the affairs of an adult with incapacity.

6. The 2000 Act defines **incapable**. A person who meets the criteria includes someone having a **mental disorder**, a term defined by cross-referencing to the (separate) mental health legislation.¹ The 2000 Act also sets out [certain key principles](#) which must guide any decision to intervene in the life of an adult with incapacity.²
7. The 2000 Act also sets out the **different types of legal intervention** possible in respect of such an adult. **Powers of attorney** (Part 2 of the Act) and **guardianship** (Part 6 of the Act) are two of these best-known types of intervention, but there are various others too.
8. The Act also says how the interventions, once created or authorised, should be supervised in practice. There is a role here for various public bodies and the local sheriff court.
9. Under the 2000 Act, it is worth noting two general powers of the court. First, section 3 of the 2000 Act gives the court broad powers to make any order they see fit relating to the 2000 Act. It seems possible that this power could be used by the court to make a declaration relating to someone's capacity or incapacity, should this be disputed by someone (e.g., a family member).
10. Second, section 14 of the 2000 Act sets out a power to appeal to the court relating to an assessment of incapacity made by anyone other than the court.

Key points of this briefing

11. There is quite a variety of approaches to assessing capacity or incapacity in the 2000 Act.
12. For the person making a legal document known as a **power of attorney** (a concept explained in more detail below), it seems possible to provide in that document that a family member can make the assessment of incapacity. This because the statute is not very detailed or prescriptive on this point.
13. On the other hand, several parts of the 2000 Act require **medical certificates or reports**, or a **certificate granted by a solicitor**, relating to capacity or incapacity.
14. Sometimes these certificates or reports are used as part of a process that involves the court reaching a decision about a possible legal intervention. Sometimes the certificates form part of an (out-of-court) administrative process associated with a possible legal intervention.

How 'capacity' and 'incapacity' are assessed across the different types of legal intervention under the 2000 Act

15. The different types of legal intervention are now considered in more detail.

¹ The 2000 Act, section 1(6) and section 87. Section 87, in turn, refers to the Mental Health (Care and Treatment) (Scotland) Act 2003, section 328.

² Note that these principles (including the need to consider the adult's views) have no counterpart in the Bill, which is potentially significant in policy terms.

Powers of attorney (Part 2 of the 2000 Act)

16. [A power of attorney](#) (PoA) can be used to give the attorney powers in respect of a person's welfare and/or financial affairs.

17. A PoA is created by the adult themselves registering a written legal document (while they still have capacity to do so) rather than by a court process. Legal advice is recommended in relation to that document, but it is possible to draft a PoA without that advice.

Assessing capacity

18. Because the attorney needs to be nominated while the adult still has capacity to make this decision, the **capacity** of the adult proposing to make the PoA must be assessed at the point immediately before they make the PoA.

19. To this end, the PoA document must contain a **certificate** signed by a solicitor, an advocate or registered medical practitioner (i.e., a doctor licensed to practice medicine in the UK).³ Solicitors and doctors signing certificates are the most common in practice.

20. Two things the certificate says are particularly relevant in the context of the Bill. First, the certificate says that the person proposing to make the PoA ('the granter') has been interviewed by the person doing the certifying immediately beforehand. Second, that the individual doing the certifying is satisfied, either based on their own knowledge, or someone they name in the certificate as having knowledge of the granter, that the granter understands the nature and extent of the PoA.

21. Where a solicitor signs the certificate, one scenario is that the person's doctor could be the person with the knowledge of the granter referred to in the certificate.

Assessing incapacity

22. A PoA containing powers in respect of an adult's welfare comes into force when the adult becomes incapable. A PoA containing financial powers comes into force then as well (or indeed at some earlier point if the granter wishes this). Accordingly, deciding the point at which someone becomes **incapable** is also important in the context of PoAs.

23. Under the 2000 Act, the PoA must contain an **incapacity statement**. The statute says that this statement must say that the granter has considered how they want their incapacity determined but does not prescribe any more detail than this. This leaves it open, for example, for family members to determine the adult's incapacity without consulting a third party.

24. Advice from several sources to would-be granters of PoAs is that they might want to go one step further with the incapacity statement than the statute stipulates and set out in detail a) who should make this decision; and b) whether any evidence should be obtained

³ The 2000 Act, sections 15 and 16; Adults with Incapacity (Certificates in Relation to Powers of Attorney) (Scotland) Regulations 2008/56.

to support a decision about incapacity. See, for example, advice from the [Office of the Public Guardian \(Scotland\)](#).

25. As noted earlier in the briefing, not all PoAs will have been made after taking legal advice. It is possible that the quality of an incapacity statement, in terms of the level of detail it goes into, will be quite variable in practice.
26. SPICe has not been able to obtain freely available template PoAs suitable for the Scottish system. This is presumably because providing and adapting those templates is part of the (paid) legal advice which can be given by Scottish solicitors. Accordingly, SPICe has not been able to look in detail at the approaches to the incapacity statement used by solicitors in practice.

Access to funds (Part 3 of the 2000 Act)

27. Under Part 3 of the 2000 Act, [there is an 'access to funds' scheme](#), suitable for situations where the financial affairs of an adult are relatively simple.
28. This allows an individual, local authority or other organisation to apply for legal authority to access and manage the funds belonging to an incapable adult. For example, an access to funds application would allow a person or body to pay the bills or care home fees on behalf of an adult with incapacity.
29. The application can be made directly to the [Office of the Public Guardian \(Scotland\)](#) ('OPG') rather than requiring the involvement of the courts.
30. A **medical certificate** signed by a medical practitioner relating to the person's incapacity must be included in applications to the OPG for access to funds.⁴ Chapter 3 and Annex 2 of the [guidance on Part 3 of the Act](#) contains more information on what is required.

Intervention orders and Guardianship orders (Part 6 of the 2000 Act)

31. Part 6 of the Act makes provision for [intervention orders](#) and [guardianship orders](#). Both require to be applied for through the local sheriff court.
32. An **intervention order** is made by the court to appoint someone to undertake a one-off action or actions on behalf of the adult with incapacity. This can include actions such as selling a house or signing a particular legal document.
33. A **guardianship order** is used in situations where there is a continuous need to be involved in the affairs of an adult with incapacity. It might be applied for, for example, when a PoA cannot be made – because the person never had, or has already lost, capacity.
34. Detailed **medical reports** in a prescribed form must be submitted to the sheriff in any application for an intervention order or guardianship order. The [guidance on Part 6 of the Act](#) (see Annex 2, especially at pp 144-45) sets out the reports which are required.

⁴ 2000 Act, section 24C, 24D, 25 and 27B; Adults with Incapacity (Accounts and Funds) (Scotland) Regulations SSI 2008/51.

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31 August 2023

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The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot