

# Dementia and the law in Scotland

There are several laws which aim to enable decision making and protect the rights of vulnerable adults, including people with dementia. These are the Adults with Incapacity (Scotland) Act 2000; the Mental Health (Care & Treatment) (Scotland) Act 2003; and the Adult Support & Protection (Scotland) Act 2007. There is a short description of the main points of each of these laws below.

## Adults with Incapacity (Scotland) Act 2000

This Act is the main law supporting people with dementia and their carers.

### This Act brought in:

- new ways for people to make their own choices about who will handle their affairs if they can't do it themselves
- new safeguards to protect the interests of people with dementia who become unable to act or make important decisions for themselves
- new measures to give a carer authority to make decisions about and manage a person's money, property, welfare and health care.

The use of the Act is regulated by the Sheriff Courts, the Office of the Public Guardian, the Mental Welfare Commission and local authorities (local councils).

### Principles of the Adults with Incapacity Act

The Act does not see incapacity as 'all-or-nothing'. It recognises that a person might be unable to take some kinds of decision, but still be able to decide on other things. For example, someone who has a problem

handling money may still be able to decide what she wants to buy.

### What "incapacity" means under the Act

For the purposes of the Act, 'incapable' means incapable of:

- acting on decisions; or
- making decisions; or
- communicating decisions; or
- understanding decisions; or
- retaining the memory of decisions

in relation to any particular matter due to mental disorder or inability to communicate because of physical disability.

This means that no one should be treated as unable to make or act on a decision unless all practical steps have been taken to assist her.

The Act is based on several fundamental principles. These principles are a set of rules which must be followed by anyone making a decision on behalf of someone with dementia.

The principles are:

- **Benefit:** any action taken under the Act must only be done if it benefits the adult with incapacity (in this case, the person with dementia), and this benefit cannot be achieved any other way.
- **Minimum intervention:** someone can only take an action under the Act if there isn't a simpler way to get the same result which would be less likely to take responsibility away from the adult.
- **Present and past wishes:** anyone taking action on behalf of the adult must take account of the adult's wishes by asking her, if possible. They must also consider

past wishes; for example, by asking those (such as family, friends and professionals) who knew the adult before she was ill. A person may have set down some of her wishes in the form of an 'advance statement' or 'living will'

- **Consultation:** the adult, the adult's nearest relative and her main carer must also be consulted about any action, as far as is reasonable and practical. So must anyone appointed by the person with dementia to look after her affairs (by granting a power of attorney) or appointed by the court (guardians or interveners), and anyone else with an interest in the person, which might include a friend or professional. The "nearest relative" is generally, in order of precedence, the spouse (husband or wife), civil partner or cohabiting partner (including same-sex partners) where the relationship has been for a period of not less than six months, oldest child, parent, brother or sister, grandparent, grandchild, uncle or aunt.
- **Exercising and developing skills:** the person whose affairs are being looked after must be encouraged and helped to do as much as she is capable of in relation to her property, financial affairs and personal welfare.

The Act provides various ways to safeguard a person's welfare and manage her financial affairs. These include **Power of Attorney, an Access to Funds scheme, Guardianship and Intervention orders**. It also allows for arrangements to be made to manage a limited amount of funds for residents in care homes or long-stay hospitals. The Act covers decisions about medical treatment and consent to take part in research.

## Mental Health (Care & Treatment) (Scotland) Act 2003

This Act covers situations when someone can be taken to a psychiatric hospital or clinic or treated for mental illness against her will, what rights she has and what

safeguards are in place to protect these rights. It is unusual for someone with dementia to be treated under this Act but it may be of benefit and necessary in certain circumstances. Treatment under the Mental Health Act should not be regarded as stigmatising. It gives added protection where the person is unable to give informed consent and is resisting other forms of intervention to the extent that she may harm herself or others. A short Introduction to the Act and the Code of Practice that goes with it are available from the Scottish Government.

## Adult Support & Protection (Scotland) Act 2007

This Act gives further protection to people with dementia who may be vulnerable to harm through severe self-neglect or harm by others. Harm might be physical, psychological, sexual, financial or deliberate neglect. A person with dementia can be susceptible to undue pressure from others to do things she would not otherwise have agreed to.

The intention of the Act is to help identify and support adults known (or suspected) to be at risk and to achieve a balance between reducing the risk of harm to them and enabling them to assert their rights as individuals to live their lives as they choose. The Act recognises that harm can be unintentional, and a local authority making enquiries under the Act may be able to identify a need for practical and/or emotional support to be provided to the person and/or her carer.

A local authority can only use the Act if it is satisfied that the person:

- is unable to protect herself, her property, rights or other interest because of a disability, mental disorder or physical or mental infirmity, and
- is more at risk than someone who is not affected by disability, mental disorder or physical or mental infirmity, and
- is at risk of harm.

This is known as a three point test, in that all three parts of the test need to be met before the Act applies. In some circumstances it could apply to someone who has dementia. Under this Act local authorities have a legal responsibility to make inquiries or investigate situations where an adult is known or thought to be at risk of harm to establish whether or not further action is needed to stop or prevent harm occurring.

The Adult Support & Protection Act has a number of guiding principles similar to those in the Adults with Incapacity (Scotland) Act 2000 – considering benefit to the adult, minimum intervention, the adult's past and present wishes, consulting with the adult, her primary carer and nearest relative.

### **Other guiding principles include:**

- the importance of the adult taking an active part in the performance of any function under the Act;
- providing the adult with the relevant information and support to enable her to participate as fully as possible;
- the importance of ensuring that the adult is not treated less favourably than another adult in a comparable situation; and
- the adult's abilities, background and characteristics (including their age, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage).

These principles only apply to the local authority or any other public body acting under the Act – they do not apply to the adult or anybody acting on behalf of the adult (such as an advocate, attorney or legal representative).

A Short Introduction to Part 1 of the Act setting out its main features and provisions may be found at: [www.scotland.gov.uk/Topics/Health/care/adult-care-and-support/legislation/Resources](http://www.scotland.gov.uk/Topics/Health/care/adult-care-and-support/legislation/Resources)

Anyone concerned that a person with dementia is being harmed or is at risk of harm can report their concerns to the local authority.

## **Your rights as a person with a diagnosis of dementia**

No one can have authority to make decisions on your behalf that you can make for yourself. The law states that everyone is presumed to have capacity unless there is evidence that they can no longer look after their own interests. Having a diagnosis of dementia does not mean you are unable to make some or all major decisions for yourself. This is why the law says that if someone wishes to apply to manage any of your affairs on your behalf, it is necessary for a doctor to assess your capacity in relation to the specific decisions to be made. Anyone acting on your behalf must follow the principles of the Adults with Incapacity Act. Your rights are very well explained in the DVD 'Making Decisions – Your Rights: People with Dementia'. This is free from the Scottish Government on 0131 244 3581.



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