



Reply to questionnaire for the country reports – Scotland

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Preliminary Note 1: Abbreviations

“1968 Act”:	Social Work (Scotland) Act 1968
“1995 Act”:	Criminal Procedure (Scotland) act 1995
“2000 Act”:	Adults with Incapacity (Scotland) Act 2000
“2003 Act”:	Mental Health (Care and Treatment) (Scotland) Act 2003
“2007 Act”:	Adult Support and Protection (Scotland) Act 2007
“CRPD”:	United Nations Convention of 13 th December 2006 on the Rights of Persons with Disabilities
“UN Committee”:	UN Committee on the Rights of Persons with Disabilities
“EAP3J Report”:	The final report of the Essex Autonomy Three Jurisdictions Project at http://autonomy.essex.ac.uk/eap-three-jurisdictions-report (the three jurisdictions referred to are those within the United Kingdom, which provide significant differences and interesting contrasts)

Preliminary Note 2: Sources, further information

The answers provided here are brief and generalised, therefore not fully accurate in detail. The most recent overview of relevant Scots law, written primarily for readers outside Scotland, is Chapter 12 of “Mental Capacity Law & Practice”, Jordans, 2015, section entitled “Scotland”, pp473-500. See also Chapter 12 of “The International Protection of Adults”, Oxford University Press, 2014. For the most recent broad overview of relevant Scots law, covering the 2000 Act, 2003 Act and 2007 Act, see “Adult Protection and the Law in Scotland”, 2nd edition, Smith and Young, Bloomsbury Professional, 2016. “Adult Incapacity”, Ward, Greens, 2003 as updated by “Adults with Incapacity Legislation”, Ward, Greens, 2008 remain the standard legal textbooks on the subject.

1. What legislation is relevant for the protection of adults? (If applicable, differentiation between federal law or the law of individual federal states)

The principal Scottish statute providing for existing or potential future incapability of adults is the 2000 Act. Note that “incapacity” is explicitly defined as being derived from “incapable”, not from “incapacitated”. The protection of adults who are at risk is covered by the 2007 Act. Mental health law is covered in the 2003 Act. Provisions relevant to adult incapacity are contained in many other laws and statutes, one of particular importance being section 13ZA of the 1968 Act.

2. What are the types of formal measures that exist to support people with disabilities in exercising their legal capacity? (Especially private mandates or legal representatives appointed by a court/authority)

Measures may be categorised as:

- A. Autonomous/anticipatory measures
- B. Responsive measures
- C. Third party measures

The principal individual measures (this list not being exhaustive) are:

- A1 Continuing (i.e. property and financial) and/or welfare powers of attorney (2000 Act)
- A2 Joint accounts (where one holder of a joint account loses capacity, the other may continue to operate it unless the terms of the account state otherwise – 2000 Act)
- A3 Advance directives and advance statements (common law, also see 2003 Act in mental health matters)
- B1 Access to funds (a simplified system permitting access to funds to pay costs and expenses – 2000 Act)
- B2 Management of residents' finances (2000 Act)
- B3 Authority to treat, and authority for medical research (2000 Act)
- B4 Intervention orders (2000 Act)
- B5 Guardianship orders (2000 Act – a guardianship order may also be made under the 1995 Act)
- B6 Provision of services to incapable adults, including moving an adult to residential accommodation provided under the 1968 Act (section 13ZA of 1968 Act, inserted by 2007 Act)
- B7 Miscellaneous common law provisions relevant to personal welfare (including healthcare) matters include *parens patriae*, principle of necessity, and appointment of curators *ad litem*
- B8 Miscellaneous statutory provisions for management of funds and assets include those for social security benefits, vaccine-damage payments, court management, criminal injuries compensation and other miscellaneous statutory methods
- B9 Informal management techniques include *negotiorum gestio*, informal voluntary arrangements, and bare trusts
- B10 Other relevant management methods include appointment of judicial factors, and appointment of curators *ad litem*
- C1 Trusts, both *mortis causa* and *inter vivos*
- C2 Nominations
- C3 Gifts and bequests
- C4 Provisions for management of particular assets and informal techniques as for B8-B10 above

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3. Who decides on the appointment of a supporter/legal representative and what are the requirements for the respective measures?

All category A measures:	The adult
B1:	Public Guardian
B2:	Relevant authority
B3:	Medical practitioner; in case of dispute, medical practitioner nominated by Mental Welfare Commission for Scotland; upon further appeal, the court
B4 and B5:	Court
B6:	Local authority
B7:	For examples quoted, the court
B8:	For most of these examples, relevant Government department or relevant authority
B9:	-
B10:	For examples quoted, the court
All category C items:	The third party who provides the funds or assets

4. Who is involved in the procedure of determining the need for support in legal affairs and in what capacity?

Category A measures: Determined by the adult except that (1) welfare attorneys may only act in matters in which the adult is at the time either incapable or reasonably believed to be incapable, and (2) under A2, where both or all signatures were previously required, objective independent evidence of incapability is likely to be required

- B1: The adult, a single medical certificate of incapacity, independent certificate of suitability, intimation to nearest relative, primary carer, anyone else whom the Public Guardian considers to have an interest
- B2: Managers, single medical certificate, intimation to adult and adult's nearest relative
- B3: Medical practitioner, in cases of dispute practitioner nominated by Mental Welfare Commission; must follow principles (see answer 6 below)
- B4 and B5: Two medical certificates, separate report as to suitability, etc., intimation to adult, named person, nearest relative, primary carer, Mental Welfare Commission, Public Guardian, local authority, others (or some on foregoing list depending upon type of application)

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B6: The adult, named person, nearest relative, primary carer, any guardian or attorney with relevant powers, any other person directed by the court to be consulted, or appearing to have an interest in the matter

B7 – B9: None specified by statute

B10: For appointments in litigation, the parties to that litigation

C1 – C4: None specified by statute

5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of/limited) legal capacity?

There is no procedure for incapacitation. A court may determine retrospectively that an adult lacked adequate capacity for a particular act or transaction. Generally, measures in category B may only authorise acts of which the adult has been shown to be incapable. Once that has been shown, incapacitation in practice applies under measures concerning finances and property, subject to the principles of the 2000 Act (see answer 6 below).

6. What are the responsibilities of a supporter/representative and what are the obligations and principles he/she must comply with?

In addition to particular responsibilities placed upon particular appointees, everyone with any role in relation to an adult under the 2000 Act must comply with the principles in section 1 of that Act. Note that in contrast to many other jurisdictions (including England & Wales) a “best interests” test was explicitly rejected for Scottish adults. The principles refer to an “intervention” (but this can include a decision to do nothing). Anyone responsible for authorising or effecting any intervention must be satisfied that it will benefit the adult, and that such benefit cannot reasonably be achieved without the intervention. Any intervention must be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention. Account must be taken of the present and past wishes and feelings of the adult (this is an absolute obligation, and includes doing so by any possible means of communication). Insofar as it is reasonable and practicable to do so, account must also be taken of the views of the nearest relative, named person and primary carer; any guardian or attorney; any person whom the court has directed must be consulted; and any other person appearing to have an interest in the matter. Guardians, attorneys and managers of establishments must encourage the adult to exercise skills, and to develop new skills, in matters covered by the relevant measure.

7. What role do family members play and what are the requirements imposed on them?

Scots law contains no provisions for *ex lege* representation. The nearest relative (defined in legislation) must be consulted regarding any intervention (see answer 6 above) and relevant measures under the 2000 Act must be intimated to the nearest relative. Other relatives may require to be consulted, and to have proposed measures intimated, in accordance with the principles (see answer 6 above).

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8. What role do volunteers play and what are the requirements imposed on them?

The principles (see answer 6 above) and requirements for any particular measure apply to persons acting voluntarily as much as they apply to those acting professionally.

9. Are there professional supporters/legal representatives and what requirements/qualifications do they have to satisfy?

Professionals may be appointed. Under the 2000 Act, the principles and specific requirements for measures apply to them. In addition, professionals must exercise the standards of competence and care required of their professions.

10. Who bears the costs for procedures and the supporter/legal representative?

Legal Aid is automatically available for relevant court procedures where welfare powers are sought (whether or not in addition to financial powers). Guardians, and appointees under intervention orders, acting in property and financial matters may be remunerated as determined by the Public Guardian. Any questions of remuneration of attorneys are matters for the adult who grants the power of attorney.

11. How are supporters/legal representatives supervised and what is done to ensure that the rights, the will, and the preferences of the adult concerned are respected? (cf. Art. 12 section 4 UN CRPD)

Supervision of an attorney may be ordered by the court. Persons exercising financial or property powers under the 2000 Act (apart from attorneys) are supervised by the Public Guardian. Persons exercising welfare powers are supervised by the local authority. The local authority (in welfare matters) and Public Guardian (in property and financial matters), as well as the Mental Welfare Commission, investigate complaints, and also any situation of risk to an adult. Any person claiming an interest (including the adult) may ask a court to give directions to anyone exercising functions; and may apply for measures or appointments to be revoked, or appointees put under supervision. The principles (see answer 6 above) are designed to ensure respect for the adult's rights, will and preferences, but see answer 13 below.

12. Who decides on deprivation of liberty and involuntary medical measures and what requirements does this decision underlie? Is there a distinction between self-endangerment and endangerment of others?

In the mental health field, matters are decided (except for short-term emergency provisions) by the Mental Health Tribunal for Scotland. Provisions apply to both self-endangerment and endangerment of others, though of course individual outcomes may differ. Under the 2000 Act, a granter may in principle empower an attorney to authorise deprivation of liberty (though this is not explicitly covered in the Act); and there is a procedure to allow the competent decisions of a guardian to be enforced. See however answer 13 below.

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13. Additional comments (elements of your country's system that may be of interest and are not covered above)

A process of review by Scottish Government of the 2000 Act, the 2003 Act and the 2007 Act is underway. The review includes compliance with CRPD, and compliance with Article 5 of the European Convention on Human Rights, but the scope of consultation – which closed on 31st March 2016 – is unlimited. The results of consultation have been published and are being considered by Scottish Government officials.

The EAP3J Report found that the 2000 Act is remedially non-compliant with CRPD. Relevant results and recommendations in the EAP3J Report have been passed to Scottish Government.

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