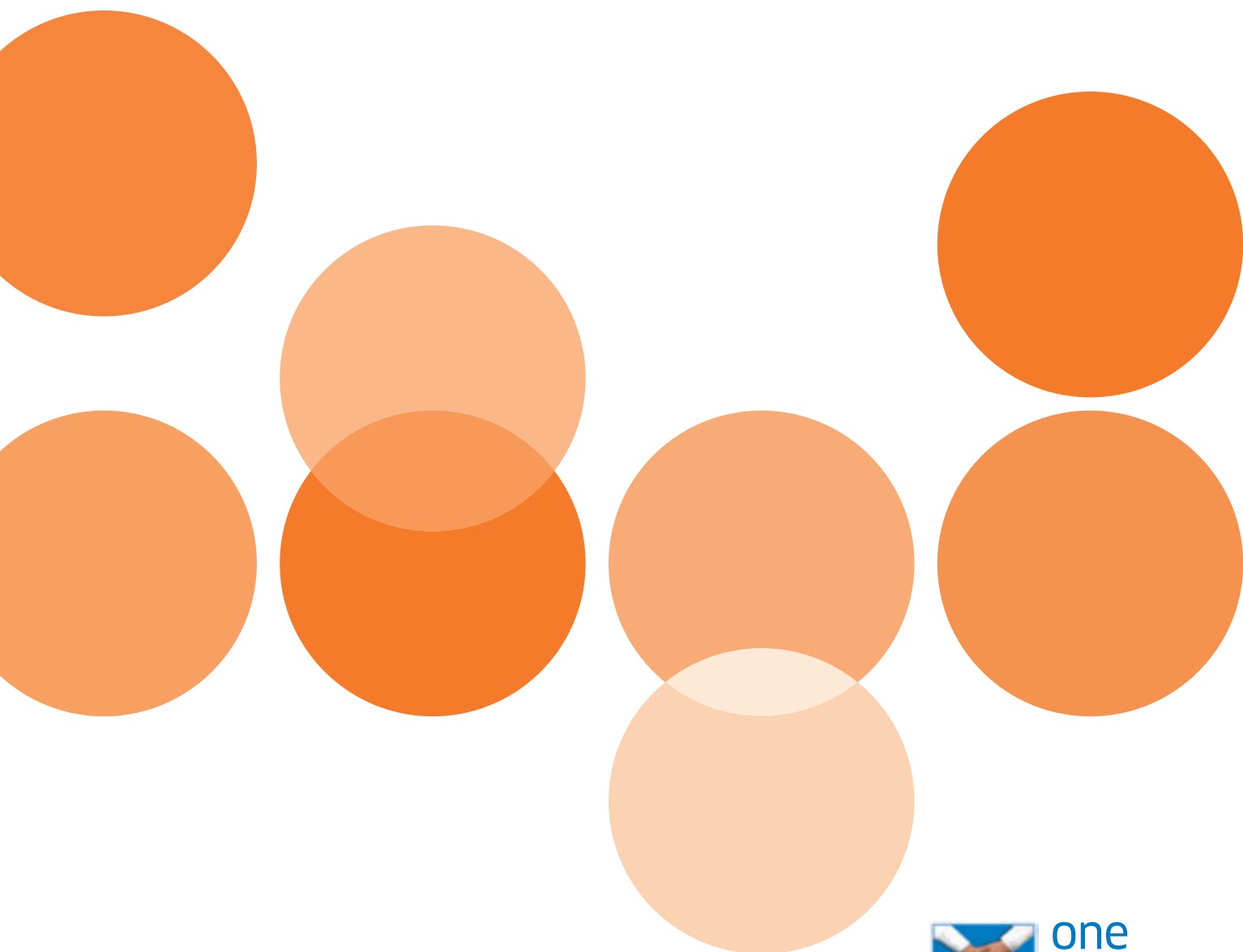


ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000

Code of Practice

Access to Funds

1 April 2008

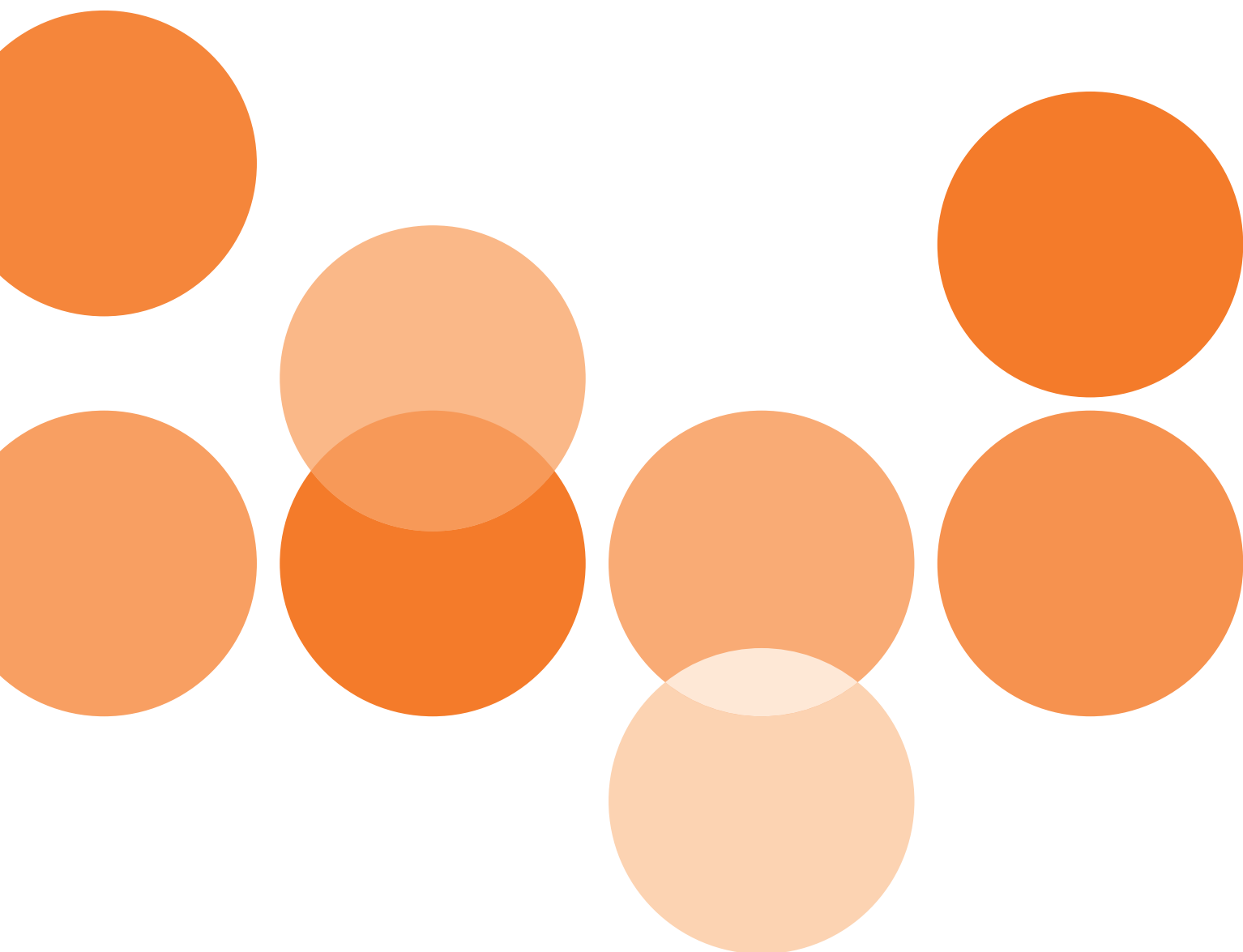


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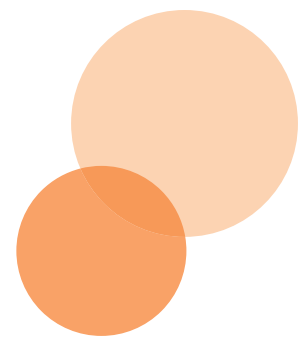
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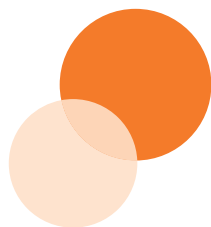
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Introduction



The Adults with Incapacity (Scotland) Act 2000 ('the Act') was introduced to protect individuals with incapacity and to provide support for their families and carers in managing and safeguarding the individuals' welfare and finances. The Act was one of the earliest pieces of legislation passed by the Scottish Parliament. A two-year project was funded by the Executive to monitor how the Act was working. The results were positive, but showed that some changes could be made¹ to streamline procedures and enable more adults and their carers to benefit from the Act. In particular major changes have been made to the Access to Funds scheme to widen access to the scheme and to provide more flexibility in how the adult's funds can be used and managed for his/her benefit.

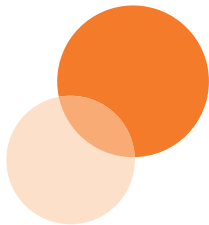
The revised edition of the code of practice for those authorised to access funds, takes into account of changes to Part 3 of the Act, introduced in Part 2 of the Adult Support and Protection (Scotland) Act 2007. It has been prepared in collaboration with the Office of the Public Guardian.

ABOUT THIS CODE OF PRACTICE

This code is for use by both individuals and organisations who have been authorised by the Public Guardian under Part 3 of the Act to withdraw funds from the account of an adult and apply them for the adult's benefit. A person authorised to do so is referred to as the 'withdrawer'. A supplementary document is available for organisations outlining the information required to support their suitability for the purpose of acting on behalf of an adult.

The code will also be of interest to agencies providing information and advice to carers, other family members and service users.

¹ Scottish Executive (2004) Adults with Incapacity (Scotland) Act Learning from Experience



In this code ‘you’ means ‘you’ as withdrawer or, as the text implies, a prospective withdrawer. Although, under the Act, the code strictly applies only when you start to exercise your functions of withdrawer, for completeness it also covers the initial stages, when you are thinking of applying to access the adult’s funds.

The Act uses the expression ‘to intromit with funds’ which simply means to deal with money. This code refers to the ‘access to funds scheme’, meaning the arrangements set out in Part 3 of the Act to intromit with funds.

The Act provides in section 13 that the Scottish Ministers will prepare codes of practice containing guidance for those exercising powers under the Act. Whilst these codes of practice are guidance and therefore not binding, failure to comply with them may be one of the factors considered by the Public Guardian, the Mental Welfare Commission, the local authority or the sheriff in considering matters such as the continuing suitability of the person to exercise those functions, in investigating circumstances in which the adult appears to be at risk or in applications before the court.

Health and social work professionals with duties and responsibilities in relation to the implementation of the Act will also need to familiar with this code.

TERMS USED

- Throughout the code of practice the Adults with Incapacity (Scotland) Act is referred to as the **‘the Act’**.
- **‘adult’** refers to the person aged 16 and over with impaired capacity – also referred to as the person or individual.
- **‘access to Funds’** is a means of managing the funds of an adult funds for his/her benefit. Sometimes referred to as ‘intromission with funds’.
- **‘withdrawer’** – term used for a person or organisation with authority from the Public Guardian to access the funds of an adult for his/her behalf.
- **‘organisation’** refers to any ‘body’ approved or seeking approval to access funds. ‘Body’ is the term used in the Act.
- **‘fundholder’** refers to the bank or building society where the adult has his/her account.
- **‘Certificate of Authority’** – A document issued by the Public Guardian which gives the fundholder authority to do whatever is specified in the certificate, e.g. to provide information about an adult’s account; to transfer funds as directed in the certificate; and the withdrawer authority to use the funds.
- **‘carer’** refers to a partner, spouse, relative or friend who cares, in an unpaid capacity, for an adult.

- **‘primary carer’** means the person who is the main carer (usually a family member or friend) but, where there is no unpaid main carer it could be an organisation mainly engaged in the day to day provision of care for the person.
- **‘named person’** means the person nominated (under the Mental Health (Care and Treatment) (Scotland) Act 2003, by the adult to represent his/her interests or give support. This is automatically the primary carer where the person has not named someone else.
- **‘intimation’** – term used for notifying relevant interested parties, nearest relative carer, primary carer, named person if there is one and anyone else with an interest in the welfare of the adult) of the application and allowing the opportunity for comment or objection.
- **‘proxy’** is the general term used to refer to someone authorised under the Act to make decisions or act on behalf of the adult with impaired capacity. This includes: attorneys; withdrawers under the access to funds scheme, guardians; and people authorised under an intervention order.
- **‘independent advocate’** this is someone employed by an independent advocacy service to support the adult in having his/her views and wishes heard. This is different from a legal advocate who represents someone at court.
- **‘practising solicitor’** is a solicitor holding a practising certificate issued in accordance with Part 2 of the Solicitors (Scotland) Act 1980 (c.46).

Methods of payment

- **Direct Debit** – This is an instruction from a customer to a named institution authorising that institution to collect varying amounts from the customer’s account at regular intervals until cancelled, e.g. to pay mortgage or utility bills. The institution must advise the customer how much and when such payments will be taken.
- **Standing Order** – This is an instruction from a customer to his/her bank to pay a set amount, to a named institution, at regular intervals either for a specific period of time or until cancelled, e.g. transfer set amount monthly to savings account.

If you have any queries about the Access to Funds scheme please contact:

Office of the Public Guardian (Scotland)
 Hadrian House
 Callendar Business Park
 Falkirk FK1 1XR
 Telephone: 01324 678300
 Fax: 01324 678301
 E-Mail: OPG@scotcourts.gov.uk

Chapter 1



ABOUT THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

WHO THE ACT CAN HELP

- 1.1 The Act aims to help people (age 16 and over) who lack capacity to act or make some or all decisions for themselves. It covers people whose incapacity is caused by a mental disorder, such as dementia, learning disability, acquired brain injury, or severe mental illness. It also covers people who are unable to communicate due to a physical condition such as a stroke or severe sensory impairment. The Act supports their carers and others in managing and safeguarding the welfare and finances of the person.
- 1.2 The Act introduced arrangements for making decisions about personal welfare and managing the finances and property of individuals whose capacity to make or carry out specific decisions is impaired. It allows carers and others to have authority to act and make decisions on their behalf.
- 1.3 The law in Scotland generally presumes that adults (those aged 16 or over) are legally capable of making personal decisions for themselves and of managing their own affairs. That presumption can only be overturned on evidence that the person lacks capacity to make a decision. It is important to remember that having a diagnosis of, for example, dementia, does not mean, of itself, that the person is unable to make decisions for them.

What the Act says about someone lacking capacity

- 1.4 The Act recognises that a person may be capable of taking some decisions and actions but not others.
- 1.5 The Act says that a person lacks capacity to make a particular decision when there is evidence that he/she is unable to do so.

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 the decision

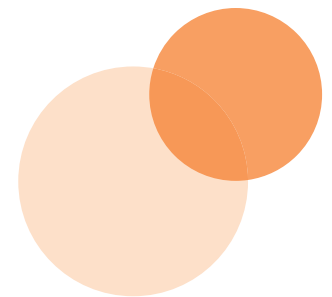
in relation to any particular matter due to mental disorder or inability to communicate because of physical disability.

No one should be treated as unable to make or act on a decision unless all practical steps have been taken to assist him or her. How information is presented can help or hinder someone to make a decision. The person should not be considered as ‘incapable’ simply because he or she has a poor memory or short-term memory loss. For example, someone with dementia may be able to consent to a decision but may not be able to remember a decision made earlier. He/she should be assisted with memory aids such as notes of previous discussions. For further information on communicating with the person with impaired capacity, see Annex 1.

HOW THE ACT CAN HELP

- 1.6 The Act provides the following ways for managing and safeguarding a person’s welfare, financial affairs or both:

Powers of attorney – this is a means by which individuals, whilst they have capacity, can grant someone they trust powers to act as their continuing (financial) and/or welfare attorney, in case capacity is lost at some future point. One or more persons can be appointed.



Access to Funds scheme – this is a way of accessing the adult’s bank or building society account in order to meet his/her normal living costs. An application can be made to the Public Guardian by an individual, individuals or organisation. The person or organisation appointed is called a ‘withdrawer’.

Guardianship order (welfare and/or financial) – may be applied for by one or more individuals acting together or local authority and granted by the sheriff. This is appropriate where the person requires someone to make specific decisions on his or her behalf over the long term. Financial guardianship may be appropriate where the person’s finances are complex.

Intervention order (welfare and/or financial) – may be applied for by an individual or local authority and granted by the sheriff to carry out a one-off action or to deal with a specific issue on behalf of the adult.

Management of (care home/hospital) residents funds – A certificate of authority may be granted to a care home manager by the supervising body (local authority or health board) where the resident lacks capacity to manage his or her own funds and there is no other proxy or person with powers in respect of the funds.

Medical treatment decisions – a doctor is authorised to provide medical treatment and care to someone who is unable to consent, subject to certain safeguards and exceptions. In addition, certain other health care practitioners, if accredited to do so, have authority to provide treatments which they are qualified to administer.

Medical Research involving adults who cannot consent is authorised subject to safeguards and conditions (for further details see Code of Practice for persons authorised to carry out medical treatment or research under Part 5 of the Act).

- 1.7 Where several people are involved in supporting the adult through appointments under the Act or in other ways, e.g. as a Department of Work and Pensions (DWP) appointee, they should collaborate with each other in carrying out their responsibilities.

For details of the above measures under the Act are provided in the relevant codes of practice and guides - see Annex 4.

Principles to be followed

- 1.8 The Act requires the following principles to be applied when deciding which method will be most suitable for meeting the needs of the individual. The principles must also be used whenever decisions need to be made on behalf of the adult. The Act aims to protect people who lack capacity to make particular decisions, but also to support their involvement in making decisions about their own lives as far as they are able to do so. A decision or action should only be taken when the person is unable to do so for him or herself.

Principle 1 - benefit

- Any action or decision taken must benefit the adult and only taken when that benefit cannot reasonably be achieved without it.

Principle 2 - least restrictive

- Any action or decision taken should be the option that restricts the person's freedom as little as possible but at the same time enables the purpose of the action to be achieved.

Principle 3 - take account of the wishes of the adult

- In deciding if an action or decision is to be made, and what that should be, account shall be taken of the present and past wishes and feelings of the adult, as far as they can be ascertained. The person should be offered appropriate assistance to communicate his/her views (for further guidance see Annex 1).

Note: it is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained by any means whatsoever.

Principle 4 - consultation with relevant others

- In deciding if an action or decision is to be made and what that should be, account shall be taken of the views of: the nearest relative and the primary carer of the adult; the adult's named person;² any guardian or attorney with powers relating to the proposed intervention; any person whom the sheriff has directed should be consulted; any other person appearing to have an interest in the welfare of the adult or the proposed action, where these views have been made known to the person responsible – in so far as it is reasonable and practicable to do so.

² 'named person' means the person nominated (under the Mental Health (Care and Treatment) (Scotland) Act 2003, by the adult to represent their interests or give their support. This is automatically the primary carer where the person had not named someone else.

Principle 5 - encourage the adult to exercise whatever skills he or she has and to develop new skills

- Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under the Act shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he or she has concerning property, financial affairs or personal welfare, as the case may be, and to develop new such skills. While this is a legal requirement only for the categories of appointee stated above, it represents good practice for all others with decision making or management powers.

COMMUNICATING WITH THE PERSON

- 1.9 Principle 3 means that you, as the withdrawer, must take account of the person's present and past feelings and wishes so far as possible. Some individuals will be able to express their wishes and feelings clearly, even although they would not be capable of taking the action or decision which you are considering. For example, a person may continue to have opinions about a particular item of household expenditure without being able to carry out the transaction personally.

In some cases special effort may be required to communicate with the person. This might mean using memory aids, pictures, non-verbal communication, advice from a speech and language therapist. (See Guide to Communication in Annex 1.)

Deciding when the adult needs the help of the Act

- 1.10 If you are unsure about the needs of the person you are concerned about or if the Act can help, it is advisable to contact the local authority social work department in the area where the person lives. The local authority has a duty to assess the needs of an adult who may lack capacity due to a mental disorder or severe communication difficulty caused by a physical condition. You can also seek advice and information from the Office of the Public Guardian (Scotland) (OPG) on financial matters and from the Mental Welfare Commission (MWC) on welfare matters. Specialist voluntary organisations may also be able to help (see Annex 4).
- 1.11 A formal assessment of capacity is needed in relation to applications under the Act. For further details on obtaining a medical certificate to accompany an Access to Funds application see chapter 3, paragraphs 3.15-18.

REGULATORY BODIES

1.12 The following statutory bodies provide important safeguards for adults with incapacity: the OPG, the MWC, local authorities and the courts. The OPG is the main body which regulates the access to funds scheme.

The Office of the Public Guardian (Scotland) (OPG)

The Public Guardian has a wide range of powers under the Act, to:

- authorise access to funds, register withdrawers and issue certificates;
- provide information and advice (non-legal) on financial matters in relation to the Act;
- register powers of attorney, intervention and guardianship orders;
- supervise financial guardians and withdrawers;
- supervise continuing (financial) attorneys where ordered to do so by the sheriff;
- investigate complaints against anyone authorised to manage the finances of an adult.

With regard to Access to Funds, the Public Guardian is responsible for giving information and advice to withdrawers about their role and what they need to do. You can ask the Public Guardian for guidance if you need it. The Public Guardian will also provide direction where joint withdrawers disagree.

The Mental Welfare Commission (MWC)

The MWC has an important role in protecting the interests of adults with incapacity due to mental disorder. It provides a range of good practice guidelines and a freephone helpline for service users and carers (see Annex 4).

The Local Authority

Local authorities have a duty to assess the needs of people who may lack capacity to make some or all important decisions for themselves and to provide information to carers who have been appointed as attorneys or guardians. They have a duty to intervene to protect the personal welfare and or finances of an adult when no one else is doing so. For example, if an individual with dementia living at home has no one to help manage his/her finances, the local authority could apply to access funds or arrange for a voluntary organisation to do so.

The Courts

The sheriff is responsible for the appointment of guardians and interveners. The court also deals with appeals under the Act and with serious complaints against those appointed under the Act.

Legal Aid

- 1.13** Legal advice or representation is not needed to apply to access funds or to request financial information from the adult's fundholder because this is authorised by the OPG and not the courts. However, if you feel that powers to make welfare decisions on behalf of the person may be necessary, you should consider applying for a welfare guardianship order through the courts and may wish to engage a solicitor to represent you. Two sorts of legal aid are available under the Adults with Incapacity Act.

- Advice and Assistance

is available, subject to the statutory financial eligibility test being satisfied, to enable people to seek advice from a solicitor on any aspect of the Act. It is the solicitor who applies the financial eligibility test in respect of applications for legal aid for Advice and Assistance. Where the application is being made in respect of the adult with incapacity the financial eligibility test will be assessed on the resources of the adult and not the applicant.

- Civil Legal aid

is available without a means-test in respect of applicants for intervention or guardianship orders which include welfare powers or a mix of welfare and financial powers. In this case the solicitor applies to the Scottish Legal Aid Board (SLAB) who decides if the application meets the eligibility criteria. Where there is no welfare element and the application is for financial powers only, SLAB will look at the income and capital of the adult.

The SLAB website www.slab.org.uk provides information by region on solicitors registered for legal aid work. A fact sheet on the Adults with Incapacity Act and legal aid is available at <http://www.scotland.gov.uk/topics/justice/civil/awi>.

Limitation of liability

- 1.14** Section 82 of the Act provides that no liability shall be incurred by a guardian, a continuing attorney, a welfare attorney, a person authorised under an intervention order, a withdrawer or the managers of a residential establishment for any breach of any duty of care or fiduciary duty owed to the adult if he, she or they have:
- (a) acted reasonably and in good faith and in accordance with the principles; or
 - (b) failed to act and the failure was reasonable and in good faith and in accordance with the principles.

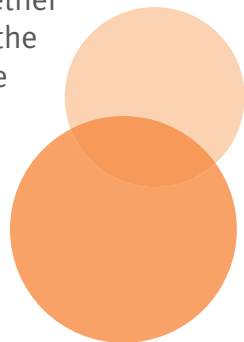
This is a crucial provision which emphasises the importance of anyone exercising powers under the Act being fully familiar with the principles and applying them properly to decisions and actions taken.

HOW DOES THE ACT PROTECT THE ADULT FROM ABUSE?

- 1.15** The Act provides a number of safeguards for adults through the roles and functions of the statutory bodies described above and in other ways. These include checks on the suitability of the proposed withdrawer, guardian or intervener; a formal assessment of the adult's capacity; and the registration of all appointments with the OPG. The Act makes provision for investigations and where complaints are upheld, a range of measures may be taken. In serious cases the OPG, MWC and/or local authority will refer the matter to the sheriff court.

Further information

- 1.16** If you are unsure about the needs of the person you care for and whether the provisions of the Act will help, there are several sources of help: the local authority social work department in the locality of the adult; the Citizen's Advice Bureau, or a specialist voluntary organisations. The OPG will provide advice on financial matters in relation to the Act and the MWC has a helpline to deal with welfare queries where the person has a mental disorder. (Annex 4, Useful Addresses.) You can also consult the Scottish Government's website at:
<http://www.scotland.gov.uk/topics/justice/civil/awi>.



Chapter 2



THE ACCESS TO FUNDS SCHEME

About the scheme

- 2.1 All applications to access funds are made to the Public Guardian who is responsible for granting authority. The Public Guardian supervises withdrawers. (Chapter 3 provides details on how to apply.)
- 2.2 The Access to Funds scheme is a simple method for allowing one or more individuals or an organisation to have access to the bank or building society account/s of an adult with incapacity, to meet his/her living costs. These would include, for example, food, clothes, utility bills, entertainments, or care home fees, etc. It may also be used to make payments which are, or may become due in respect of dependants. The scheme allows for flexibility in how the adult's money can be managed and used for his/her benefit. The scheme does not transfer ownership of funds. Funds continue to belong to the adult but cannot be accessed by him/her once authority is granted to a withdrawer.
- 2.3 In this scheme, funds can only be accessed where they are held in an account in the sole name of the adult. Funds held in a joint account may be able to be accessed in other ways (see paragraphs 2.37 to 39).

- 2.4 Where information about the adult's income and assets is not known, the Public Guardian can authorise banks/building societies to release information about the adult's account/s so that a decision can be made as to the best way forward.
- 2.5 Where the adult does not have a bank or building society account the Public Guardian can authorise an account to be opened to enable an application to be taken forward, provided he/she holds funds; is entitled or may become entitled to receive income or other payments or where some other person holds funds on his/her behalf.
- 2.6 An application to access an adult's funds cannot be authorised if someone else already has authority to do so under Part 3 of the Act. Neither can the access to funds scheme be used when there is a guardian or attorney with powers relating to the funds in question or where an intervention order has been made relating to the funds. If you are not sure if anyone else holds such an appointment in relation to the adult, you should check the position with the OPG who registers such appointments. There is a small fee payable for this service.

Individual/s as withdrawers

- 2.7 An individual can be appointed as a sole withdrawer. An individual withdrawer is liable for any loss of the adult's funds incurred as a result of his/her actions. A withdrawer is not personally liable for any debts incurred by the adult.

Joint withdrawers

- 2.8 More than one individual (joint withdrawers) may be appointed either at the time of the original application or at some later stage if required. The appointment of joint withdrawers allows the sharing of responsibility and the tasks involved.
- 2.9 A joint withdrawer cannot be appointed without the agreement of any other existing withdrawers. Where joint withdrawers are to operate it is important for them to reach agreement on how the arrangement will work and to work together for the benefit of the adult. Joint withdrawers may act individually on the basis of what they have agreed but should consult with each other when new or significant decisions need to be made.

- 2.10 Where joint withdrawers cannot agree on what is best for the adult they may write to the Public Guardian and ask for advice. The Public Guardian will try to find a solution but if this cannot be achieved a direction will be made on the matter. This may be appealed to a Sheriff, whose decision shall be final.
- 2.11 Joint withdrawers are jointly liable for any loss of the adult's funds incurred as the result of the actions of any one withdrawer. A withdrawer is not personally liable for any debts incurred by the adult.

Reserve withdrawers

- 2.12 Where a sole withdrawer is to be appointed that person may, at the time, or at any later time, wish to identify a reserve withdrawer to operate in the event that he/she is temporarily unable to do so. It is a bit like having a substitute available in case of an emergency and is worth considering particularly when a sole withdrawer is to be appointed. A reserve withdrawer cannot be appointed where joint withdrawers exist. However, should circumstances change resulting in only one withdrawer having authority to act that withdrawer can apply to appoint a reserve.
- 2.13 Such a request can be made in the initial application or at any time thereafter. Although identified, the reserve cannot operate while the main withdrawer is available to act. A reserve withdrawer may only act in the following circumstances, provided the Public Guardian approves the request. Such requests must always be in writing:
- where the main withdrawer is aware that he or she will be temporarily unable to act due to a planned event, for example out of the country on business or holiday for a period of time. The main withdrawer will have to specify the period requested; or
 - where the reserve withdrawer becomes aware that the main withdrawer is unable to continue to carry out the function properly (due to illness or other reason). In this situation the Public Guardian will decide the period a reserve can operate for and will keep this under review;
 - if the main withdrawer has died or become incapable during the period of authority, the reserve should immediately notify the Public Guardian of the situation; and
 - if willing to act, the reserve should apply to renew the authority as the main withdrawer.

- 2.14 The main withdrawer and the reserve withdrawer are liable, jointly and severally, for any loss of the adult's funds incurred as a result of the reserve withdrawer's actions. This means that each withdrawer is responsible for the actions of the other. A withdrawer is not personally liable for any debts incurred by the adult.

Organisations as withdrawer

- 2.15 An organisation may make the application. This may be appropriate for statutory, voluntary and private organisations providing services to adults with disabilities and their carers.
- 2.16 Any organisation wishing to apply must demonstrate to the Public Guardian that it is fit and proper to do so and this is done by completion of the 'fitness to access funds' form. Separate guidance is provided relating to this process.
- 2.17 Before an application can be approved the Public Guardian must be satisfied that: the applicant/s is suitable; that the adult lacks capacity to manage his/her money; that the Access to Funds scheme is appropriate and there is no financial guardian or attorney already in place with the powers requested.
- 2.18 The organisation will be appointed as the 'withdrawer' and should make the necessary arrangements with the fundholder to operate the account.

Period of appointment

- 2.19 Withdrawer/s are usually appointed for a period of three years and authority can be renewed if the scheme is still needed to support the adult. Chapter 3 provides further details.

WHAT THE SCHEME ALLOWS YOU TO DO

Assess the adult's assets

- 2.20 If details of the adult's funds or type of account(s) held are unknown the applicant may apply to the OPG for authority for fundholders to provide information about funds. This will enable the applicant to decide whether the Access to Funds scheme is appropriate.

Open an account

2.21 Where an adult does not have a bank or building society account it is possible to apply for authority to open one if:

- the adult is believed to have funds;
- the adult is entitled to some form of income; or
- funds are held on behalf of the adult by some other person.

If satisfied of the need to open an account, the Public Guardian will issue a certificate authorising this to be done. Once opened the withdrawer must provide the account details to the Public Guardian. This account will be referred to as the ‘current account’.

2.22 Where an adult has an account which is not suitable for this scheme, it is possible to apply for authority to open a new account. An example of an unsuitable account could be a 90 day notice account where penalties would apply if regular withdrawals were to be set up.

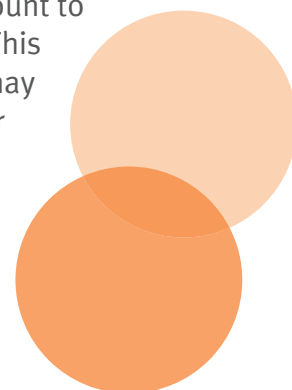
Open a second account

2.23 It is possible to apply to open a further account, if required. This might, for example, be a savings type account which pays a reasonable rate of interest.

2.24 A withdrawer and a fundholder may only open accounts as specifically directed in the certificate of authority issued by the Public Guardian.

Open a designated account

2.25 When an application is approved, the Public Guardian will issue a certificate which allows access to the funds to be used for the purposes agreed in the application. This may simply be to make arrangements for a regular sum to be paid from the adult’s current account to a new account which the withdrawer will need to open. This new account is known as the ‘designated account’ and may be set up in any bank or building society. The withdrawer can then use the funds in the designated account for the purposes set out in the application. Where direct debits or standing orders are already in place these may continue, or others may be put in place.



2.26 When you have your certificate to access funds, you may apply for a cheque book, cheque guarantee card and/or any cash withdrawal card in relation to the designated account. Different fundholders have different arrangements so you may wish to check with the bank/building society you intend to use before you start – so that you can make the arrangements that are convenient to you.

Transfer of funds

2.27 While the access to funds scheme is principally to cater for the day to day needs of an adult it also allows for the movement of funds between accounts which the adult already has and those set up on his/her behalf. Requests to transfer funds must be authorised by the Public Guardian. Transfer of funds is relatively straightforward but there are several options available dependent on whether the adult's accounts are newly opened or already exist at the time of the withdrawers appointment. The scheme aims to allow accounts to be managed as flexibly as possible for the benefit of the adult.

2.28 There is scope within an application to move money from one of the adult's accounts to any other of his/her accounts, including the designated account. Transfer of funds may be used in a number of situations, for example, where:

- the adult has an account paying little or no interest and you wish to place the funds into a higher interest bearing account;
- there are several accounts in existence and you wish to transfer the funds into one account and close the others;
- where an unexpected expense incurred by the adult might arise.

It may be helpful to discuss your intentions with staff at the OPG who will be happy to assist.

Closure of accounts

2.29 It is possible to apply for authority to close any of the adult's accounts and terminate existing standing orders and direct debits.



Request for lump sums

- 2.30** The scheme enables a request for a lump sum to be made. This might be needed, for example, to pay off debts, such as nursing home fees, that have built up because no one has been able to access the adult's funds, or to buy specialist equipment which will benefit the adult. It can also be requested to reimburse monies already spent by you or others on behalf of the adult. The access to funds application form gives specific guidance on how to request a lump sum.

Transfer from financial guardianship to access funds

- 2.31** An existing financial guardian may apply under transition arrangements to become a withdrawer. This will usually be in circumstances where the adult's assets have been reduced and management through the access to funds scheme is a more appropriate form of intervention into the adult's financial affairs in terms of the principles of the Act. Chapter 3 gives more guidance.

Outlays/expenses

- 2.32** The Public Guardian charges fees for applications under the access to funds scheme. The doctor may also charge a fee for providing the medical certificate. Chapter 3 provides further information about medical certificates. These costs can be recouped from the adult's funds as part of a lump sum request.

A withdrawer cannot be paid for acting as such but reasonable out of pocket expenses incurred for the adult's benefit may be claimed from the adult's funds.

Certificates of authority

- 2.33** When any part of an application is granted the Public Guardian will issue a certificate of authority and record details on the Public Register. The certificate will outline exactly what is authorised.
- 2.34** During the lifetime of an access to funds appointment it is possible that several certificates of authority may be issued by the Public Guardian relating to your involvement with an adult. For example you may initially apply to open a bank/building society account and to access the adult's funds. If an additional withdrawer is identified or the level of funds needed has changed a new certificate will be issued.

When the scheme may not be appropriate or necessary

- 2.35** The scheme is not suitable for use where the adult has financial assets of a complex nature, for example, stocks and shares, investment bonds etc to be managed. This will require management through an intervention order or guardianship order, both of which are applied for through the sheriff court.
- 2.36** The scheme may not be appropriate where the adult's only income is in the form of DWP benefit payments. In such cases DWP appointeeship may be adequate. However, the Access to Funds scheme may be helpful if the person has savings.

Joint accounts

- 2.37** As noted earlier, the access to fund scheme relates to funds held in an account in the sole name of the adult. If the adult has a joint account with someone else the fundholder should not freeze the account if it is one which is operable on either signature. The joint account holder should be able to continue to operate it (unless there is a court order in force which would prevent this).
- 2.38** If you are continuing to operate a joint account you will help to protect the interests of the adult and safeguard the adult's funds if you notify the fundholder that the adult has become incapable of managing his or her funds and that you will continue to operate the account. You will then need to discuss with the fundholder any measures that may be appropriate to safeguard against misuse of funds. For example, if the adult in a vulnerable condition is put upon by others to sign over large sums of money, the fundholder could stop such cheques if notified in advance of the adult's incapacity.
- 2.39** If the fundholder refuses to allow such an arrangement you should find out why – it may be for example that the account is not one that allows any one of the joint account holders to operate alone.

Chapter 3



HOW TO APPLY TO ACCESS FUNDS

GETTING STARTED

3.1 How you start depends on what you already know about the adult's needs and finances. If you are the person's carer you may already have all the information you need to make an application. However, where this is not the case it will be important to gain an understanding of the adult's circumstances, in order to estimate his/her living costs and make appropriate arrangements for managing his/her finances.

Understanding of the adult's circumstances

3.2 Others involved with supporting the person may be able to assist. For example, a support worker or relative may be able to tell you about any special dietary needs the person may have, the cost of regular leisure activities or whether the person has any other special needs.

Gathering financial information if you don't already have it

3.3 It is important to find out as much as possible about any arrangements already in place for managing the adult's funds, and about his/her income and savings. This is so you can decide if the Access to Funds scheme is going to be suitable. If you decide to apply you will need details of any accounts which the person may have (he/she might have several accounts).

- 3.4 If the person does not have a bank or building society account you should try to find out from him or her how he or she has been managing and if someone has been helping him or her. Remembering the principles, it's important to involve the person as much as possible in what you are planning to do. If someone else has been assisting the adult with his/her money you should talk to that person about your plans and ask him or her for the information you need for the application.

Making an application

- 3.5 This section sets out what you need to do if you think that the Access to Funds scheme will be the most suitable method for managing the money of the person you want to support. The first section sets out the financial information and banking arrangements required. This is followed by information on what else you need to do to support your application before you send it to the OPG. Annex 2 provides a list of forms that may be relevant to your application.

Financial information and banking arrangements

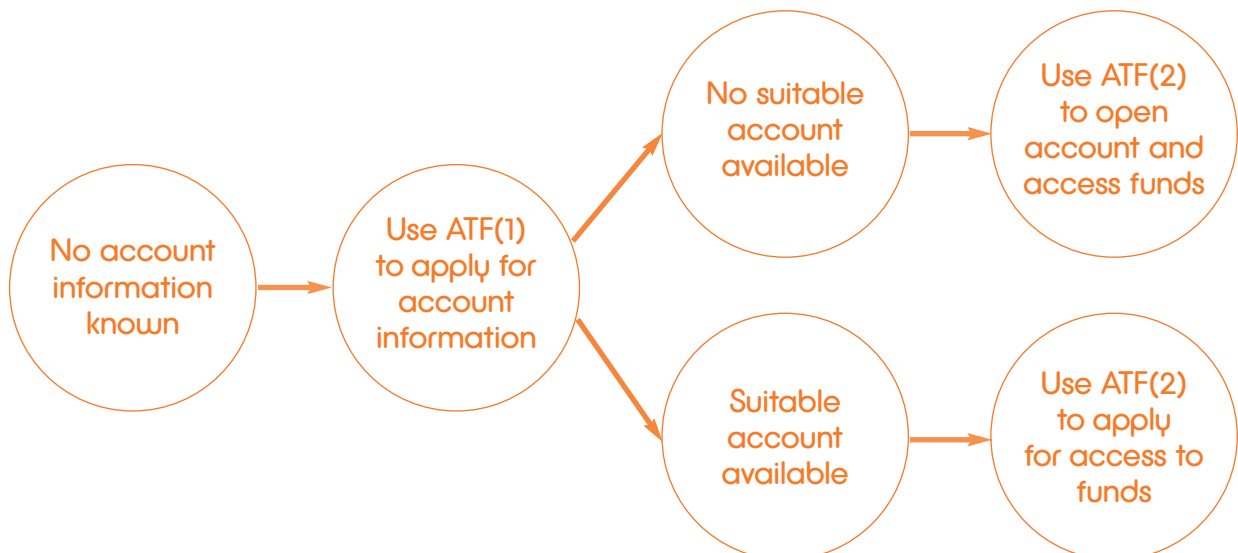
- 3.6 To complete the access to funds application form you need information about any account or accounts held in the adult's name, how much money is in each account and about any regular income and outgoings. If you don't have this information you will need to make a preliminary application to the OPG to request a certificate authorising fundholders to provide you with this information.

Which is your starting point?

- You don't have enough information from the adult, relatives or other sources to make an application but believe that the adult holds funds in an account or accounts in his/her sole name, the first stage in the process for you will be to **apply to the OPG for a certificate authorising fundholder(s) to provide you with the necessary information using form ATF(1)**. You can apply to find out:
 - where accounts are held;
 - the account details;
 - how much is in each account;
 - any other information needed to allow you to apply to access funds.

When the Public Guardian has issued a certificate of authority the fundholder will release the information as authorised in the certificate. Once you have the information you need, you can then decide if the access to funds scheme is suitable and if so move to the next stage of the process as shown below.

- If the adult does not have an account or has an account which is not suitable for the purpose (for example a 90 day notice account), you should apply to open an account in the name of the adult within your application for authority to access funds by completing **Form ATF(2)**. At the same time it is possible to apply to open another account in the name of the adult. If approved the OPG will issue you with a **certificate giving authority to open a suitable account** (and another account if requested). In certain circumstances the Public Guardian may specify in the certificate the type of account to be opened, for example, an interest bearing account.
- Once opened you must provide the account details to the Public Guardian who will then provide you with a further certificate allowing you to open a designated account (chapter 2 provides information about this account) and commence accessing the funds as identified in your application.



- You know that **the adult already has a suitable account in place**, i.e. an account which allows regular withdrawals to be made (without incurring penalties), and you have enough information about his/her income and expenditure, you should move straight ahead with an application for authority to access funds. For this you need to complete **Form ATF(2)**.

ESTIMATING THE BUDGET TO MEET THE ADULT'S NEEDS

Regular expenditure

- 3.7 On the application form ATF(2) you need to identify the estimated expenditure needed to pay for the person's daily living costs. This will, for example, include utility bills, food, clothing, leisure/educational/training activities, care home fees, etc. You may need to include costs relating to any dependants for whom the adult may have responsibility. In the application you need to estimate the sum you will need to have moved from the adult's 'current account' to the 'designated account' on a regular basis. The certificate from the Public Guardian authorises the bank/building society to move the specified sum by a certain date each month (or at what other period is authorised in the certificate).

Day to day living expenses which appear reasonable and appropriate do not require to be supported by evidence of bills, etc. However, the Public Guardian reserves the right to request further information or evidence when considering an application. The Public Guardian may, for example, request evidence if the sums requested appear particularly high.

Use of standing orders/direct debits

- 3.8 Standing orders/direct debits are the most convenient way of paying for regular ongoing costs, such as utility bills, care home costs, etc. and it provides a quick and easy way of showing that such payments have been made since they appear on the monthly bank/building society statement.

If there are existing standing orders/direct debits on an account, they may be continued. You must specify them in the appropriate part of the application form.

You may want to terminate existing arrangements or set them up on a different account. If so, detail what you want to do in the application form. If terminating existing arrangements consider how these payments will be made in the future.

Since the period of authority to Access Funds is normally set at 3 years there is a need to extend your planning over this period and to take account of inflation as far as possible. Guidance on how to do this is provided in form ATF(2).

Lump sums

- 3.9 The access to funds scheme also allows for one off-lump sums to be requested. These could be fairly substantial, for example, to pay long standing debts which have built up because no one has had authority to pay or it can also be requested to reimburse monies already spent by you or others on behalf of the adult. In such circumstances the Public Guardian will ask to see evidence in the form of an invoice requesting payment or evidence of what has been paid. Where the lump sum is requested to make a future purchase of a specialised piece of equipment, such as an orthopaedic chair, the applicant should enclose an estimate of the cost from the proposed supplier.

Section 2.1.5 of the application form ATF2 used for this purpose gives further information. If necessary a lump sum may be applied for at a later time using form **ATF5** or again at renewal stage if required using form **ATF6**.

Arrangements for any less regular expenditure

- 3.10 The scheme allows for flexibility and the estimate may also include other expenditure which is less regular: for example, for a holiday or the cost of attending special events where these have been part of the person's life. This may involve assistance from a support worker or companion which will incur additional costs. These can also be included in the estimate. If it would be helpful you could discuss the matter with staff at the OPG.

Where the adult has several accounts

- 3.11 You may want to operate these to maximise benefit for the adult. If that is the case you are required to identify the accounts and specify what you need to do with each of them. Chapter 2 provides guidance on transferring funds and closure of accounts.

OTHER SUPPORT NEEDED FOR YOUR APPLICATION

3.12 In order to protect the person with incapacity the Public Guardian needs to be sure that:

- you are suitable to become a withdrawer; and
- the adult lacks capacity to manage his/her money; and
- Access to Funds is the most appropriate way to provide support.

This means that some checks are made:

- for individuals – with regard to your suitability to act as a withdrawer, the application form needs to be countersigned;
- for organisations – a countersignatory is not required but the organisation must have been accepted by the Public Guardian as a ‘fit and proper’ body to act;
- individuals and organisations need to give the names and addresses of other people with an interest in the financial affairs and welfare of the adult so that the Public Guardian can notify them about your application and allow them the opportunity to comment or object to the application;
- with regard to the adult’s incapacity to manage his/her finances, a medical certificate must be included with the application.

Countersignatory

3.13 Applications by individuals must be countersigned by someone who:

- believes the information contained in the application form to be true; and believes that the applicant or any other person to be authorised as a withdrawer, is a fit and proper to deal with the adult’s finances; and can comment on the suitability of the person/s to act as withdrawer;
- has known the applicant/persons applying to access funds for at least a year.

- 3.14** There are certain restrictions as to who can sign and these are clearly listed in the ‘declaration of countersignatory’ section of the appropriate application forms, for example, a relative or other person residing with the applicant or the adult cannot countersign the form.

Applications from individuals – must be received by the Public Guardian within 14 days of the form being countersigned.

Applications from organisations – must be received within 14 days of the applicant signing it.

If an application is received outwith the required period, the application cannot be processed and it will be returned to you.

The following forms completed by individual applicants require countersigning:

ATF(1) – Request for account information

ATF(2) – Access to Funds

ATF(3) – Appointment of joint withdrawers

ATF(4) – Appointment of reserve withdrawer

ATF(6) – Renewal of authority where there are changes from the original application

ATF(7) – Transition from guardianship where the former guardian is not to be the withdrawer

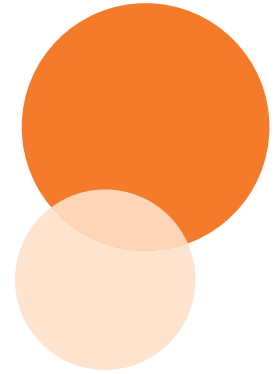
Medical certificate

- 3.15** You will need to contact a medical practitioner (for example the person’s GP) to request an assessment of his/her capacity to manage his/her own money. A copy of the medical certificate (**SSI76**) is issued with application forms **ATF1** and **ATF2**.

A medical certificate in respect of the adult is required at the first point of entry to the scheme which will either be an application for authority to:

- provide information about funds, or
- open a new account and/or access the adult’s funds.

The completed medical certificate in respect of the adult must accompany your first application to enter the scheme.



3.16 Medical certificates are also required in respect of an:

- application for renewal of authority; and
- application for transition from guardianship

but the Public Guardian may waive the need for these except where three years have passed since the last medical certificate was issued.

Please note that the medical assessment and dated certificate have to be recent but there is no specific time limit for the period between completion and submission (within a month would be acceptable).

3.17 The doctor may charge a fee for this medical examination. However, this is a cost which you may recover from the adult's funds as part of your application.

3.18 If you are unsure where the adult is registered with a GP then you should ask the Primary Care Department of the NHS Board of the area in which the adult lives. You will need to explain why you need to know, your relationship to the adult and provide as much information as possible about the adult to allow the request to be considered. Because of data protection legislation you may need to provide some form of documentation to support your request.

Others to be notified

3.19 The Public Guardian is required to send a copy of the application to a number of people as part of the process. You will therefore need to identify:

- the adult
- nearest relative (if known)
- the primary carer (if known)
- the named person (if known)³ and
- any other person who may have an interest in the application.

This complies with principle 4 identified in chapter 1 (consultation with relevant others) which allows these individuals to make comment on the suitability of the application or indeed to object to it if they think it is inappropriate. Chapter 4 provides further information with regard to objections.

³ 'named person' means the person nominated (under the Mental Health (Care and Treatment) (Scotland) Act 2003, by the adult to represent their interests or give their support. This is automatically the primary carer where the person had not named someone else.

- 3.20** Where you are the applicant and also the nearest relative and primary carer for the person, the Public Guardian must send a copy of your application to the chief social work officer of the local authority in which the adult is resident.

Circumstances where the adult may not be notified

- 3.21** Where notification to an adult is likely to pose a serious risk to his/her health, two medical practitioners require to confirm this by assessing the adult and completing **medical certificate SSI No 79** which can be found at the rear of application forms **ATF(1)** and **ATF(2)**. It is not enough to say that the adult would simply not understand the application or that it would upset him/her.
- 3.22** On receipt of such a certificate the Public Guardian will not notify the person about the application. If it has already been completed on request for account information, another such certificate is not needed to accompany the next part of the application process.

If you are not sure if the above applies you should seek the advice of the person's doctor.

- 3.23 Remember the principles:** if you have followed the principles you will have talked with all relevant people about your plans and involved them as far as possible. They don't need to understand the details of the scheme but to know that it is to ensure that the adult's funds are protected and used for his/her benefit.

Period of authority requested

- 3.24** The standard period of authority for an access to funds certificate is 3 years. However, the Public Guardian may reduce or extend the period of validity of a withdrawal certificate and an extension may be without limit of time. If you wish the period to be reduced or extended you will need to provide a valid reason for this, for example, you may wish to extend the period where the adult has a profound and complex learning disability which is unlikely to change over his/her lifetime, or a progressive neurological condition.

It should be noted that any variation to the content of a certificate does not affect the period of validity of the certificate.

Fees

- 3.25** The Public Guardian will charge a fee for processing an application to access funds. However, if this fee is shown as an outlay in the application form it may be reimbursed from the adult's estate once the application is approved.
- 3.26** Details of fees can be obtained by telephoning the office prior to lodging your application or from the website www.publicguardian-scotland.gov.uk
- 3.27** A fee is payable to the OPG in respect of an application to obtain information about an adult's financial position. If you then decide to apply for access to funds no fee is required provided the application is received within four months of the certificate issued allowing you to gain account information. If your entry point commences with an access to funds application a fee will be payable at the same time.

Lodging an application

- 3.28** Applications which require a countersignatory must be received by the Public Guardian within 14 days of the form being countersigned. If the application does not need to be countersigned it must be received within 14 days of completion by the applicant.

APPLYING TO MOVE FROM FINANCIAL GUARDIANSHIP TO ACCESS TO FUNDS

Reason for move

- 3.29** In some instances, where a financial guardian was appointed initially, the management requirements of the estate may have been reduced to such an extent over time that it can be adequately dealt with under the access to funds scheme. If the Public Guardian considers this appropriate then transition from guardianship to access to funds can go forward.

Recall of guardianship/application for access to funds

- 3.30** The transition process provides for an application to recall a financial guardianship and an application for access to funds to be made at the same time. However, access to funds cannot be authorised till the recall of guardianship has been approved. Equally a recall of guardianship will not be concluded until it is confirmed that the access to funds will be approved. This process ensures that the adult is not left vulnerable during the proposed change over.

3.31 Both applications are subject to intimation/notification to allow interested parties to have the opportunity to comment on/object to the proposed action. If satisfied with the applications, and there are no objections, the Public Guardian will issue the recall certificate and the withdrawer's certificate of authority at the same time.

Who can be withdrawer(s)?

3.32 The existing guardian and the proposed withdrawer may or may not be the same person. It could be that the financial guardian is a professional person who wishes to apply for recall and has arranged for a family member or some other person to apply under the access to funds scheme.

3.33 This transitional arrangement allows for joint withdrawers and a reserve withdrawer to be identified if required.

Arrangements for remuneration of the financial guardian

3.34 A financial guardian may be entitled to be remunerated from the adult's estate when his/her account is satisfactorily reviewed. Remuneration is based on the value of the moveable estate at the commencement of the final accounting period so it will be possible to calculate what this figure should be prior to applying for authority under access to funds. If you are the financial guardian, the staff at the OPG can assist and calculate this for you. You should then identify this as a debt due from the adult's estate in the section of the application form requesting a lump sum.

Chapter 4



WHAT HAPPENS TO YOUR APPLICATION TO ACCESS FUNDS?

Examination of application

- 4.1 The OPG will check that the form and appropriate enclosures have been completed properly and lodged within the time frame allowed. If there is a problem a member of staff will contact you, usually by telephone, for clarification. Hopefully any difficulties can be overcome quickly. However, on some occasions it may be necessary to return the form for amendment.
- 4.2 Staff at the OPG will also check to ensure that no other appointments have been made under the Act to deal with the adult's finances. If that is the case the application will be inappropriate and turned down.

Notifying (intimating) others

- 4.3 The term 'intimation' simply means to inform or notify. When the application form has been checked, the OPG will send a copy to the people you have identified in your application and may send it to any one else the Public Guardian considers has an interest in the application.
- 4.4 Where the applicant is both the adult's nearest relative and primary carer, the Public Guardian must send a copy of the application to the chief social work officer of the local authority area in which the adult is resident.

- 4.5 Twenty one days are allowed for someone who has been sent a copy of the application to object to it being granted. If notification is sent to someone who is resident beyond Europe the intimation period will be extended to 42 days.
- 4.6 The adult won't be notified where a request not to do so has been successful (see chapter 3, paragraphs 3.21-23).

The next stage

- 4.7 The Public Guardian will consider the application and provided there is no objection from those who have been notified, and there is no cause for concern, the Public Guardian will issue the relevant certificate.

If someone objects or if the Public Guardian has concerns then the following procedures will apply.

WHAT HAPPENS IF SOMEONE OBJECTS TO MY APPLICATION?

- 4.8 Objections have to be in writing. If the Public Guardian receives an objection to your application you will be sent a copy of the objection and be given an opportunity to respond. If further information is required the Public Guardian will arrange a hearing.

Hearings

- 4.9 A hearing is the opportunity for the Public Guardian to gather as much information as possible to allow a decision to be made relative to the application. You and others may be invited to separate individual hearings which may be held face to face, by letter or by telephone.
- 4.10 If, during the hearing you feel that the matter might be better dealt with by a sheriff, you can ask the Public Guardian to refer the matter to the sheriff to deal with. The decision of the sheriff will be final.

Legal advice

- 4.11 There is no requirement for you to have a solicitor present at a hearing but there is nothing to stop you getting legal advice if you wish. Your solicitor may attend the hearing with you. You may be eligible for legal aid for Advice and Assistance which is based on the adult's resources.

The outcome of a hearing

4.12 After the hearing the Public Guardian can do one of three things, namely,

- grant the application;
- refuse the application; or
- remit the matter to a sheriff to decide.

You will be advised of the decision in writing.

WHAT HAPPENS IF THE APPLICATION IS REFUSED?

Why an application may be refused

4.13 While it is unlikely that the Public Guardian will refuse an application there are occasions when this may happen. For example:

- there may already be another procedure in place to deal with the adult's funds;
- someone successfully objects to the application;
- another form of intervention may be more appropriate.

Where the Public Guardian intends to refuse the application you will be advised of the reason and given the opportunity to appeal.

The appeal process

4.14 If the Public Guardian refuses to grant your application you can appeal to the sheriff. Equally anyone with an interest in the application may also appeal to the sheriff.

4.15 If you or an objector asked the Public Guardian to remit the whole matter to a sheriff to deal with, and the Public Guardian refused to do so, you or the objector can appeal against this decision as well.

4.16 An appeal to a sheriff is a formal procedure which involves attending court hearings. The court will normally be the one nearest to where the adult currently resides. You should contact the sheriff clerk at the court where you intend to appeal for general information.

Chapter 5



AFTER AUTHORITY HAS BEEN GRANTED

BEING A WITHDRAWER

5.1 Being a withdrawer carries with it certain duties which are set out as follows.

Duty of Care

- A withdrawer or other person acting under the Act is held at common law to owe a duty of care to the person with incapacity. He/she must act with due skill and care in exercising his/her powers as a withdrawer. A professional person acting for an organisation as a withdrawer must demonstrate the skill and care that would be expected of a reasonably competent member of that profession.

Fiduciary duty (position of trust)

- A person authorised under the Act has what is known as a ‘fiduciary duty’ to the adult. This means that you are in a position of trust with respect to your authority to access the adult’s funds. If you abuse your position, for example by using the adult’s funds for your own benefit rather than that of the adult, you may be liable to make good the adult’s losses. If you live in the same household as the adult, the use of the adult’s funds for household expenses which benefit you as well as the adult will not count as abuse if in the whole circumstances it is reasonable (for example if it continues existing domestic arrangements). If you act reasonably and in good faith, you will not be liable for any breach of fiduciary duty. As part of your position of trust, you have a general duty to keep the adult’s affairs confidential.

Duty to apply the principles

- The principles should always be applied by withdrawers when faced with important decisions. They provide a helpful guide when you are unsure of what to do. They also provide the ‘standard’ against which the actions of withdrawers or others appointed with powers under the Act may be judged. Chapter 1 at paragraph 1.8 outlines the principles to be followed.

RECEIVING YOUR CERTIFICATE OF AUTHORITY

- 5.2 When you receive your certificate of authority it is advisable to arrange for an appointment with the bank or building society where you set up the designated account.

A fundholder will need to be satisfied that you are the withdrawer named in the certificate. You should always carry a suitable form of identification with you to ensure this does not cause a difficulty. The fundholder may take a little time to set up the procedures you want.


Managing the adult's funds

- 5.3 The certificate of authority will give you permission to open an account called a designated account. This account should be in your own name on behalf of the adult or in the name of the adult but to be operated by yourself. Different fundholders have different methods of recording this information. Your certificate will allow regular funds from the adult's current account to be deposited into this account and from there you will have direct access to use the funds to pay for goods and services but only for the purposes as identified in your application. The designated account which you will open and operate can be set up in any bank or building society. If you wish to make use of internet or telephone banking for the designated account you should discuss this with the fundholder. You may set up direct debits and/or standing orders from this account. The account cannot be used for the receipt or expenditure of funds other than those detailed in your certificate of authority. Chapter 3 provides further information.
- 5.4 As the withdrawer, you may receive a cheque book, cheque guarantee card and/or any cash withdrawal card in relation to your operation of the designated account. This will depend on how the fundholder operates the particular account. You must keep an accurate record of expenditure as well as retaining all bank statements. Bank statements are accessible through accounts operated via internet banking.

- 5.5 It is often difficult to estimate fully for an adult's needs so if you find that you have not estimated enough to cover the adult's costs, or an unexpected expense, such as an urgent repair bill has arisen, you should apply to the Public Guardian for a variation of your withdrawal certificate using form ATF(5).
- 5.6 The Public Guardian has power to authorise the transfer of funds between any accounts in the sole name of the adult and certain other accounts. Chapter 2 provides further information. However, because every situation is different and sometimes complex, it is best to discuss any proposals you may have with a member of staff at the OPG.
- 5.7 As withdrawer, you may not delegate your authority to operate the designated or any other account for which you have responsibility. If you are unable to continue to act as withdrawer, other arrangements will require to be put in place, for example addition of a joint withdrawer or nomination of a reserve to act while you are unable to do so. Chapter 2 provides further information.
- 5.8 None of the accounts over which you have authority must be allowed to become overdrawn. If this happens then the fundholder may recover the overdrawn amount and any charges or interest incurred as a result of the account(s) going into the 'red' from you personally. If you suspect that this may happen you should seek immediate advice from staff at the OPG.

Keeping records

- 5.9 You, as the withdrawer, must keep records of what you have done with the adult's funds over which you have control. However, you will not be expected to keep receipts for every single item, for example, newspapers and general household expenditure, but you should keep receipts for larger items of expenditure. The Public Guardian expects that where you purchase items in excess of £50 you should keep the receipt.
- 5.10 Arrange with the fundholder to receive regular statements for all the accounts over which you have control and you should keep these. If you have set up standing orders/direct debits to pay for certain items this will be evidenced from the bank statements. You may find it useful to record expenditure using the booklet 'A guide for withdrawers' which will be sent with your certificate of authority.

- 
- 5.11 You are accountable to the Public Guardian who can ask you to provide your records and bank statements, etc., at any time. You should keep receipts for items costing £50 and over, and bank statements, etc. for at least one year after your authority expires and ideally for up to five years in the event there may be some enquiry about the way you have handled the funds. The Public Guardian can also ask the fundholder to produce details of accounts authorised under Access to Funds and any other relevant information.

INQUIRIES AND INVESTIGATIONS

- 5.12 The Public Guardian makes random checks on how the access to funds scheme is working and may contact you. However, if the OPG receives a complaint then an inquiry will be made.

If there is a complaint against you

- 5.13 The Public Guardian will review all complaints and will, if considered necessary, investigate the way withdrawers are carrying out their functions. For example, if someone with an interest was concerned that a withdrawer was misusing an adult's funds, perhaps to buy things which were solely for the withdrawer's use, he or she could inform the Public Guardian of his or her concerns.

The Public Guardian will contact you about any complaint received and ask you for your version of the facts. If you have acted in accordance with the authorisation from the Public Guardian and in good faith, have applied the principles in the Act and have kept relevant documents such as bank statements and receipts you should have nothing to fear from such an investigation.

NOTIFYING THE OPG OF CHANGES OF CIRCUMSTANCES

Change of address

- 5.14 A withdrawer must notify the Public Guardian in writing of any change of address of the adult or a withdrawer within seven days of the change. If you do not keep the Public Guardian up to date with any changes it may be possible that vital information does not reach you and if you are out of contact this may well be a valid reason for your authority to be revoked.

Additional joint withdrawer(s)

- 5.15** More than one joint withdrawer can be appointed and this may or may not have been considered and put in place when the original application was made. An application for an additional withdrawer(s) can be made during the period of authority using **form ATF(3)**.
- 5.16** Where an additional joint withdrawer is appointed at a later stage the period of the appointment will be till the date of expiry of the existing withdrawer's certificate.

Reserve withdrawer

- 5.17** A reserve withdrawer can be identified and this may or may not have been considered and put in place when the original application was made. An application to identify a reserve withdrawer can be made during the period of authority using **form ATF(4)**. When someone has agreed to act as a reserve, the OPG should be notified in writing with details of the period of appointment requested.

Variation of transactions

- 5.18** In the original application to access funds the withdrawer is asked to consider and estimate the adult's financial needs over a period of three years. During this period the financial needs of the adult may change considerably: for example, the adult may move from hospital to a care home, or an unforeseen expensive repair might be required. There is an opportunity to apply to vary the withdrawal certificate by amending the regular transfer of funds to the designated account or requesting a lump sum payment and this can be done by the withdrawer(s) using **Form ATF(5)**.
- 5.19** The original period of the authority cannot be changed – for how to renew your authority see paragraph 5.23 below.

Transfer of funds

- 5.20** It may be that in the initial application you did not feel it necessary to move funds between accounts. If there is now a need to do so you should apply using **Form ATF(5)**. Chapter 2 provides further information.

Replacement certificate

- 5.21** Where a variation to the original authority is made a new certificate will be issued and the existing certificate will cease to be valid. The period of authority granted in the original certificate cannot be changed so a new certificate will only be valid for the period as set in the original certificate.
- 5.22** If you lose your certificate of authority you can ask the Public Guardian for a duplicate certificate. There will be a fee payable and the Public Guardian will be able to advise you what the fee will be on request or you can refer to the list of fees on the OPG website at <http://www.publicguardian-scotland.gov.uk/whatwedo/fees.asp>

RENEWAL ARRANGEMENTS

Your period of authority is about to expire

- 5.23** If you apply for a renewal of authority prior to the expiry of the existing certificate you can continue to act until the new application is determined. The Public Guardian will require to be satisfied that the withdrawer(s) have acted appropriately before renewing the authority. You will be asked to provide certain information and evidence with the renewal application. The information requested is identified in the application **Form ATF(6)**.

You are no longer able/willing to act

- 5.24** If you are unable to continue as withdrawer and do not wish to renew your authority you must inform the OPG. The purpose of the scheme is to ensure continuity in the management of funds for as long as is needed by the adult and it would be helpful if you could identify someone else suitable to take over. If no new application is made, the Public Guardian is required to notify the Local Authority.

Who else can apply?

- 5.25** If there is a **joint withdrawer** that person can continue to act but should immediately advise the Public Guardian of this in writing. If there is no joint withdrawer but there is a reserve and if the reserve is willing to be appointed as the main withdrawer, he/she should apply for renewal of the authority.



TERMINATION OF AUTHORITY TO ACCESS FUNDS

5.26 There are a number of reasons why your authority may be terminated or why the scheme is no longer needed. These are outlined below.

The adult's circumstances change

5.27 The 3 main reasons for ending the scheme due to changes relating to the adult: are:

- the adult recovers sufficient capacity to manage his or her own funds. You, or the adult, must apply to the OPG to revoke the certificate, as the grounds for you to have access to the adult's funds no longer apply. A medical opinion will need to be provided, to satisfy the Public Guardian that the adult is now capable of safeguarding his/her own funds;
- the adult's financial circumstances change, for example he or she inherits assets and/or property, access to funds may no longer be appropriate and someone may need to apply for financial guardianship. In such circumstances it would be advisable to discuss the matter with staff at the OPG;
- the adult dies – funds in the designated account are part of the adult's estate. As part of termination of authority to access the adult's funds, you should pay over to an executor, or other person entitled to receive the funds, any balance remaining in the designated account.

The withdrawer's circumstances change

5.28 You may wish to terminate the authority yourself for example if you plan to move some distance away or do not want the responsibility any more. In this case you should notify the Public Guardian. Where there is a joint withdrawer, this person may continue to act as a withdrawer. If it is necessary for someone else to take on the responsibility you have had for managing the person's funds, there may be someone else close to the adult who is able and willing to act as a withdrawer.

5.29 If no other person is prepared to do this you should contact the social work department who will consider how best to respond to the need. The local authority may apply to access funds itself or arrange for another organisation to do so. It is good practice for you to ensure a smooth transition to another withdrawer or other arrangements, as appropriate, so that there is no detriment to the adult.

Termination by the Public Guardian

- 5.30** As the result of an investigation the Public Guardian may suspend or terminate an authority to withdraw. In such an instance, the Public Guardian must immediately advise you, any other joint withdrawer, any reserve withdrawer, the fundholder of the designated account and any other person the Public Guardian thinks fit, of this decision.

If there is a reserve withdrawer, his/her authority is also suspended or terminated.

A joint withdrawer whose authority has not been suspended or terminated will remain able to act as a withdrawer.

If the authority is withdrawn you may be given an interim certificate of authority to cover a period up to 4 weeks so that payments may continue and hardship can be avoided.

Appeal

- 5.31** You can appeal to the sheriff against a decision of the Public Guardian to suspend or terminate your authority. The clerk to the sheriff court can give you general information. You can also appeal against a decision to reduce or extend the period of authority.

Other circumstances for termination

- 5.32** Your authority to access the adult's funds is automatically terminated if:
- a guardian is appointed with powers which cover management of the same funds; or
 - an intervention order to access the same funds is granted.

The Public Guardian will be aware of these changes because she is responsible for keeping the registers relating to these matters. You will be notified if your authority comes to an end.

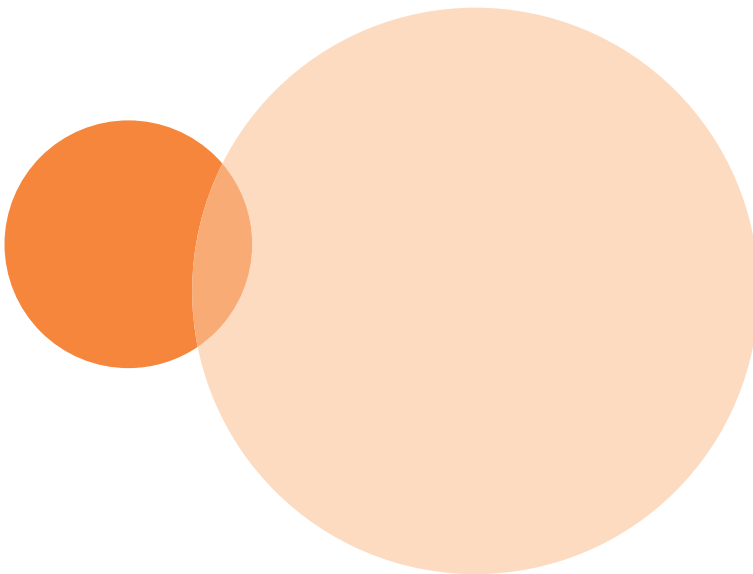
Liability to repay funds

5.33 If you continue to act in good faith using the authority to withdraw because you are not aware that it has been terminated you will not be liable to repay funds withdrawn. However, if you misuse any funds, or continue to use the power to withdraw once you know that it is terminated, you will be liable to repay the funds with interest.

Further advice and information

5.34 If you are unsure of what to do in a particular situation you can seek advice on:

- Financial matters from the OPG.
- Welfare matters from the local authority social work office where the adult lives; or contact the Mental Welfare Commission.
- You may also find it helpful to talk matters through with a specialist voluntary organisation or advice agency. See Annex 4 for details of the above.



Annex 1

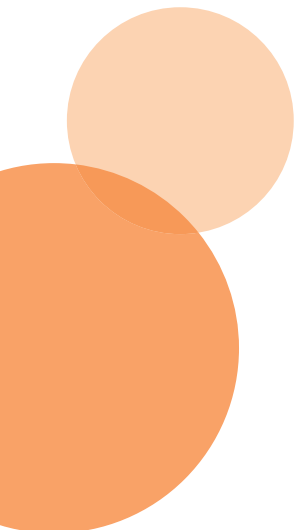


A GUIDE TO COMMUNICATING WITH THE PERSON WITH IMPAIRED CAPACITY

The Act says that the person's present and past feelings and wishes must be followed as far as possible. Some adults will be able to express their wishes and feelings clearly, even although they would not be capable of taking the action or decision which you are considering. For example, the adult may continue to have opinions about a particular item of household expenditure without being able to carry out the transaction personally. In other cases special effort may be required to communicate with the adult. This might mean using memory aids, pictures, non-verbal communication, advice from a speech and language therapist, or an independent advocate.

In communicating with the adult the following points may be helpful:

- take time to explain to the adult what decision requires to be made and what issues are involved;
- use simple language;
- choose a time of day when the adult is alert and ready for a discussion;
- choose a quiet location where interruptions are unlikely;
- use any aids which might be helpful, such as pictures or videos;
- where there are language or speech difficulties, seek assessment and support from a speech and language therapist;

- 
- use appropriate visual aids or sign language for those with hearing difficulties;
 - ensure that any mechanical devices such as hearing aids, or voice synthesiser, are used properly to assist communication;
 - in extreme cases of communication difficulties, seek advice from the adult's doctor about what kinds of specialised assistance might be available;
 - maximise the help of others who know the adult and who are trusted by the adult, for example relatives, friends, GP, the adult's named person (if there is one), to ascertain whether the adult has recently expressed views on the matter in question; or to help you to explain the matter to the adult and seek the adult's views; but be careful to ensure that they are helping to communicate the adult's views without imposing their own. (Their own views may also be important, but that is a separate matter.);
 - use the services of an advocacy project which supplies volunteers or other staff to promote independently the rights, views and wishes of people who have difficulty in expressing these for themselves. For further information see Annex 4;
 - if all efforts fail, be prepared to abandon the attempt and try at another time.

For further information on communication and assessing capacity see: *Communication and Assessing Capacity: a guide for social work and health care staff*. Carers and others involved with supporting the person with incapacity may also find this helpful. This is a web based publication only, available at: <http://www.scotland.gov.uk/Topics/Justice/Civil/awi/resources/publications/professional/assessingcapacityguide>

Annex 2



LIST OF APPLICATION FORMS RELATING TO ACCESS TO FUNDS

The forms you need to complete will depend on your starting point and the financial arrangements needed. The forms are self explanatory and guidance notes on completion of the forms are built in. However, if you are unsure of anything you should contact the Office of the Public Guardian where staff will be happy to assist. A full list of the forms and what they are for is given below for easy reference.

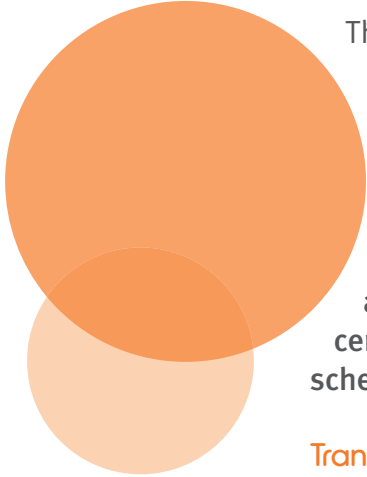
Application forms can be obtained direct from the Office of the Public Guardian. The forms can also be obtained from the Public Guardian's website: www.publicguardian-scotland.gov.uk.

FORMS FOR MAKING AN APPLICATION TO ACCESS FUNDS

Request account information - Form ATF(1)

This form requires to be completed by applicants who propose to use the access to funds scheme but do not have sufficient financial information available to allow them to progress an application or decide if the scheme is suitable.

Medical Certificate (to be completed by a medical practitioner) to accompany Form ATF(1) – copy issued with application form.



Open accounts and/or Access to funds - Form ATF(2)

This form requires to be completed by **all applicants**, who wish to open/or and operate the access to funds scheme on behalf of an adult. The main purpose of the access to funds scheme is for authority to use the adults funds for his/her benefit. The application form gives examples of how this should be done.

Medical Certificate (to be completed by a medical practitioner) to accompany Form ATF(2) – copy issued with the application form. Note that certificate is not required to accompany form ATF(2) if your entry point to the scheme was using form ATF(1).

Transition from guardianship - Form ATF(7)

This form should be used where there is a guardian with powers relating to the property and financial affairs of an adult and it is felt that the affairs can be properly managed using a lesser form of intervention, i.e. access to funds scheme.

FORMS FOR APPLICATIONS THAT CAN BE MADE AFTER YOU HAVE BEEN AUTHORISED TO ACCESS FUNDS

Additional joint withdrawer(s) - Form ATF(3)

This form should be used where an access to funds is already approved and the applicant wishes additional persons to be appointed or some other person wishes to be appointed with the approval of the main withdrawer.

Addition of reserve withdrawer - Form ATF(4)

This form should be used where an access to funds is already approved and the main withdrawer wishes to identify a reserve withdrawer.

Variation of basic or other financial transactions - Form ATF(5)

This form should be used where an access to funds is already approved and there is a need to vary the existing financial arrangements or to carry out other financial transactions not identified in the original application.

Renewal of authority to intromit - Form ATF(6)

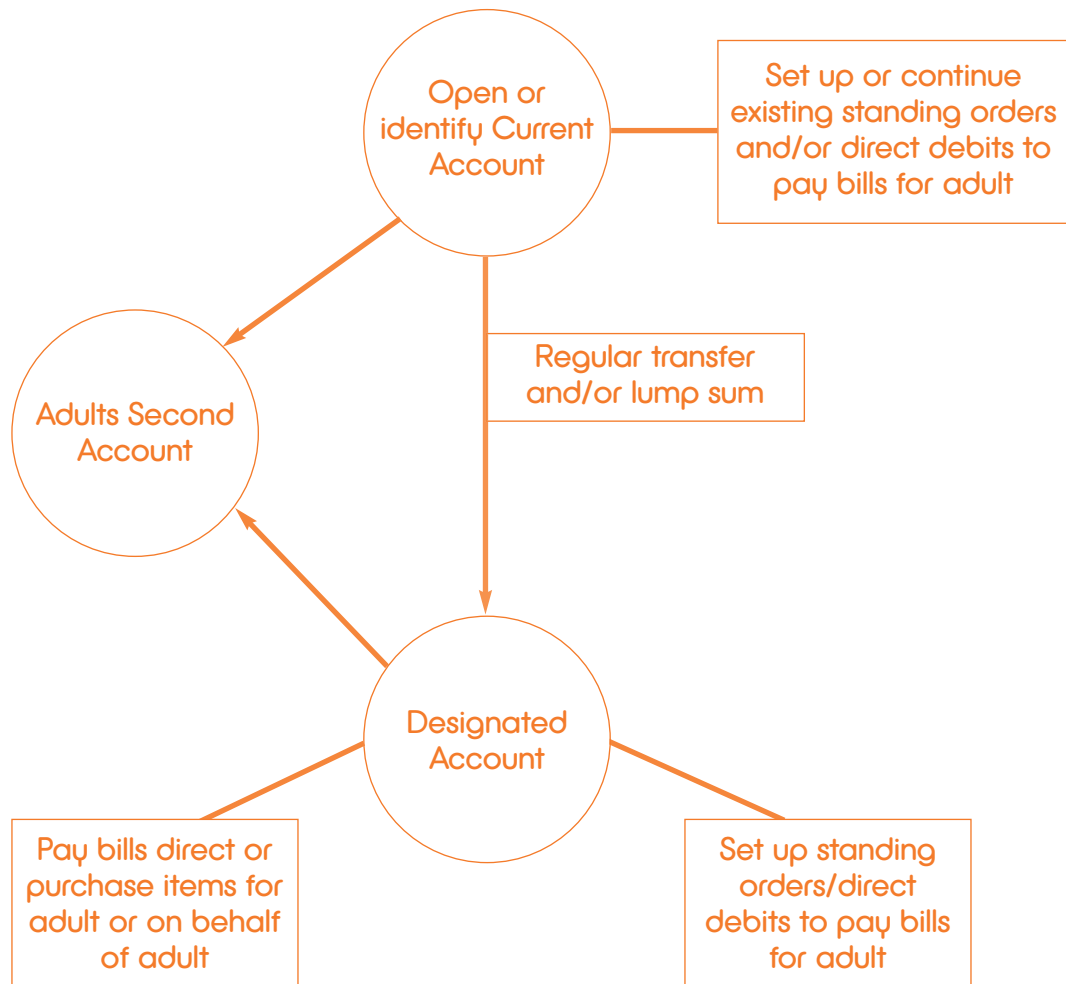
This form should be used where an access to funds is already approved and the period of authority is about to expire or an appointed reserve withdrawer is aware that the existing withdrawer is no longer able or capable of acting as withdrawer to the adult.

Annex 3



BASIC FINANCIAL TRANSACTION FLOW CHART

The chart below provides an overview of the authority the legislation allows with regard to the more basic transactions which can be applied for. Basic transactions are fully described in the appropriate application forms. You will only be allowed to carry out the transactions as specifically requested by you and identified in your certificate of authority, ie arrange regular transfer and, if appropriate, one off lump sum, from current account to designated account. Standing orders/direct debits can be set up on the current and/or designated accounts to pay for goods and services on behalf of the adult and funds in the designated account may be used to pay for goods and services as requested in the application to access funds.



To note: The scheme also allows for funds to be transferred from any account in the adult's sole name to any of the accounts above and to any other account – see paragraph 2.27-8.

Annex 4



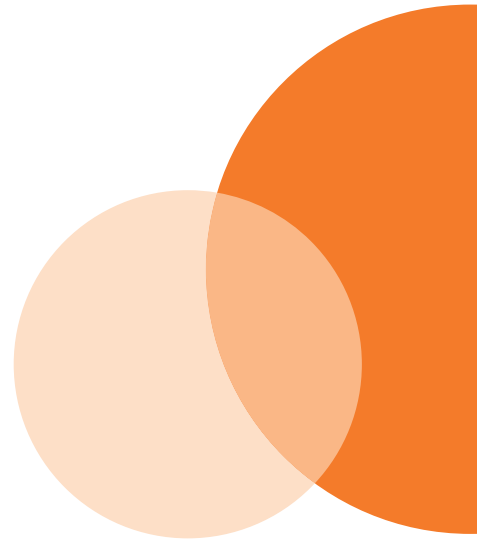
USEFUL ADDRESSES

Office of the Public Guardian (Scotland)
Hadrian House
Callendar Business Park
Callendar Road
Falkirk FK1 1XR

Enquiry line: 01324 678300

www.publicguardian-scotland.gov.uk

For information and advice about matters covered by the Act. The OPG's focus is primarily on financial matters. If they cannot assist directly with queries on other matters relating to adults with incapacity (e.g. welfare, health, care) they will point you to other agencies who will be able to help. The OPG does not provide legal advice. All OPG publications, including forms and guidance notes can be downloaded. Hard copies are available on request.



Mental Welfare Commission for Scotland
K Floor
Argyle House
3 Lady Lawson Street
Edinburgh EH3 9SH
0131 222 6111

www.mwscot.org.uk

Helpline: 0800 389 6809

The Commission provides advice on welfare matters in relation to AWI and free good practice guides – see website for further information.

Scottish Government
Civil and International Justice Directorate
Law Reform
Area 2 W
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Tel: 0131 244 3581

<http://www.scotland.gov.uk/topics/justice/civil/awi>

Adults with Incapacity Act Codes of Practice and other publications are listed on, and can be downloaded from, the website. Information about obtaining hard copies of these documents is available on the website or by calling 0131-244 3581.

Local Authority

To contact your local authority on matters relating to welfare/personal care issues and the Act you should ask for the social work department or community services department at the local council offices in the area where the adult lives. The address is in the phone book.

Sheriff Courts

The address and telephone number of the local sheriff court where the adult lives will be in the telephone directory. You can also find details of the local sheriff court by accessing the Scottish Courts website, www.scotcourts.gov.uk/

Department for Work and Pensions

There is a free Benefit Enquiry Line for People with Disabilities on 0800 88 2200 (textphone users 0800 24 33 55). From the local authority you can also get details of the local welfare rights office that will give you advice and help with benefits. You will find useful information and guidance for disabled people and carers on the Department for Work and Pensions website – www.dwp.gov.uk

Care Commission
Headquarters
Compass House
11 Riverside Drive
Dundee DD1 4NY

01382 207100

www.carecommission.com

The Care Commission is an independent body which regulates care services in Scotland. It inspects and investigates complaints in relation to care homes; short break/respite care services; housing support; adult placement schemes; support services; care at home; nursing agencies; and hospice care. There are national care standards for all these services.

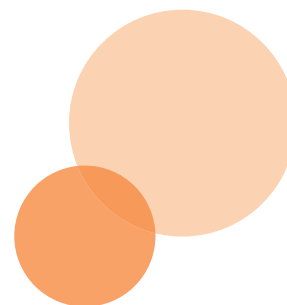
Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh
EH3 7YR

0131 226 7411

Client Relations Helpline: 0845 113 0018

www.lawscot.org.uk/Public-Information/

The Law Society is the governing body for solicitors. It provides information to the public on where to find and what to expect from solicitors. The Law Society's Client Relations Office has a legal responsibility to handle complaints against Scottish solicitors. To discuss a complaint, or if you need more information, contact the Client Relations Helpline.



Scottish Legal Aid Board
44 Drumsheugh Gardens
Edinburgh EH3 7SW

0131 226 7061

Legal Aid Helpline: 0845 122 8686

www.slab.org.uk

Provides advice and information on entitlement to legal aid for applications in relation to the Adults with Incapacity Act; and a list of solicitors registered for legal aid work.

Citizens Advice Bureau – you will find the address of your nearest CAB in your phone book or at www.cas.org.uk

Scottish Independent Advocacy Alliance
Melrose House
69a George Street
Edinburgh
EH2 2JG

0131 260 5380

www.siaa.org.uk

This website will provide a link to the Independent Advocacy Service Directory for Scotland.

Alzheimer Scotland – Action on Dementia
22 Drumsheugh Gardens
Edinburgh EH3 7RN

Office: 0131 243 1453

Freephone 24hr Dementia Helpline 0808 808 3000

www.alzscot.org

Provides a free guide for carers and people with dementia in Scotland: ‘Dementia: Money and Legal Matters’. The website also provides information about the different kinds of powers of attorney and how to set them up. You can call the Dementia Helpline to arrange for a copy to be sent to you.

ENABLE
6th Floor
7 Buchanan Street
Glasgow G1 3HL
0141 226 4541
www.enable.org.uk

Supports people with learning disabilities of all ages by campaigning, providing information, legal advice, training and other services.

Capability Scotland – Advice Service
11 Ellersley Road
Edinburgh EH12 6HY
0131 313 5510
www.capability-scotland.org.uk

Provides advice and information and local services for people with a range of disabilities, their families and carers.

Scottish Association for Mental Health
Cumbrae House
15 Carlton Court
Glasgow G5 9JP
Tel: 0141 568 7000
www.samh.org.uk

Provides information, legal advice and support to people with mental health issues.

SENSE Scotland
43 Middlesex Street
Kinning Park
Glasgow
G41 1EE
0141 429 0294
www.sensescotland.org.uk

Works with children and adults who have communication support needs because of deafblindness, sensory impairment, learning and physical disabilities.

PAMIS
Head Office
Springfield House
15/16 Springfield Road
University of Dundee
Dundee DD1 4JE

01382 385 154

www.dundee.ac.uk/pamis

PAMIS works with people with profound and multiple learning disabilities, their family carers and professionals who support them.

Headway Scotland

Tel. 0131 537 9481

www.headway.org.uk

Headway provides: support and help to people affected by brain injury through a network of local groups and branches; information and advice; carer support; and a range of services (which vary from area to area).

Chest, Heart and Stroke Scotland (CHSS)

65 North Castle Street

Edinburgh

EH2 3LT

0845 077 6000

www.chss.org.uk

e-mail adviceline@chss.org.uk

Adviceline: 0845 0776000

CHSS aims to improve the quality of life for people affected by chest, heart and stroke illness through medical research, advice and information and support in the community.



**The Scottish
Government**

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website: www.scotland.gov.uk

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