Adults with Incapacity (Scotland) Act 2000
Fact Sheet: Legal Aid

Background

The Act aims to help people (aged 16 and over) who lack capacity to act or make some or all decisions for themselves. It allows carers and others to have authority to do so on their behalf. Arrangements can be made for safeguarding, managing and making decisions about the person's welfare, money and property.

The Act covers people whose incapacity is caused by a mental disorder, such as severe dementia, learning disability, acquired brain injury or severe mental illness. It also covers people who are unable to communicate due to a physical conditions such as a stroke or severe sensory impairment.

The Scottish Legal Aid Board (SLAB) can provide funding for legal advice and 'representation' (solicitors putting their cases in court or other proceedings) for people who qualify. This may be free, or you may have to pay a contribution toward the costs. The rules for legal aid eligibility differ to some extent from those for other civil legal aid cases. This is because an application is being made on behalf of someone who lacks capacity to make some or all decisions for him or herself and it is necessary for someone else to gain authority to act on his or her behalf.

Who can apply for legal aid under the Adults with Incapacity Act?

The adult with incapacity may apply him or herself – an individual may have the ability to instruct a solicitor (remembering that an individual may be capable of making some decisions but not others); or

anyone claiming or having an interest in the adult's welfare or affairs may be able to apply for legal aid. For example costs may be incurred in making an application to the courts or in seeking legal advice.

Two sorts of legal aid are available under the Adults with Incapacity Act.

Advice and Assistance

Advice and assistance will be 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 applicant is someone other than the adult, the financial eligibility test will be assessed on the resources of the adult and not the applicant. A solicitor will be able to advise on eligibility.

Civil Legal aid

Civil Legal Aid will be available without a means-test in respect of applicants for an intervention or guardianship order which includes welfare powers or a mix of welfare and financial powers. In this case the solicitor applies to SLAB
who decides if the application meets the eligibility criteria. If there is no welfare component SLAB has to look at the income and capital of the adult.

It will also be available for all other proceedings, including appeal proceedings under the Act (subject to the usual statutory tests of financial eligibility, probable cause of action and reasonableness).

The SLAB website www.slab.org.uk provides information by region on solicitors registered for legal aid work.

Please note that arrangements for legal aid under the Mental Health (Care and Treatment) Act 2003 are different.

Frequently asked questions

1. I would like some advice from a solicitor about becoming a guardian to my relative who can’t manage things for themselves – can I get help to pay a solicitor?
   - You may be eligible for a form of legal aid called Advice and Assistance

2. How do I apply for Advice and Assistance?
   - You will need to apply to a solicitor registered with SLAB to provide Civil Legal Assistance. You can find out more on SLAB’s website, www.slab.org.uk or telephone 0131 226 7061

3. Does the solicitor look at my income and other assets?
   - No. The solicitor ignores your personal means, but must look at the disposable income and capital of your relative. However this excludes his/her home, household furniture and clothing.

Advice and Assistance

4. What does Advice and Assistance cover?
   - Advice and Assistance allows a solicitor to give you initial legal advice regarding your rights and legal duties, such as how to go about being appointed as a guardian (or intervener under an intervention order if that is appropriate).

5. What happens next if I decide to go ahead with an application for guardianship?
   - If you wish to continue with the assistance of the solicitor, Advice and Assistance can be used to help you make an application for civil legal aid (see below). Before making an application for Civil Legal Aid the solicitor will want to be sure that the guardianship application will meet the SLAB
test that it is ‘reasonable’. The solicitor may therefore seek initial confirmation from your relative’s social worker or doctor that he/she does in fact have impaired capacity. Any correspondence of this nature will be covered under Advice and Assistance, as will the fee for the completion of the Civil Legal Aid.

6 Will Advice and Assistance cover the costs of representation in court?

- No. Advice and Assistance does not allow a solicitor to raise, conduct or defend a court action on your behalf.

7 Even with legal aid for Advice and Assistance, will I have to pay anything towards my solicitor’s bill?

- You may be asked to pay a contribution towards the bill, depending upon the level of your relative’s disposable income and capital. This is unlikely to happen if the application is simply for advice on how to be appointed as a guardian or intervener. Parliament allows SLAB to pay the bill. Your solicitor cannot ask you to ‘top up’ the bill.

- If I do have to pay anything, can I query the size of the bill?

   Yes. Your solicitor can only charge at the Advice and Assistance rate within an upper cost limit approved by SLAB. If you don’t agree with the bill, you can ask an independent official (the Auditor of a Sheriff Court) to assess the bill.

Civil Legal Aid

8 I’d like to apply to the court to be made a guardian – can I get help to pay for a solicitor?

- You may be eligible to receive civil legal aid to cover the costs of making the application and for court proceedings go to court.

9 I’d like to apply to the court for an intervention order to complete the sale of my mother’s house – can I get help to pay for a solicitor?

- You may be eligible to receive civil legal aid.

10 How do I apply for civil legal aid?

- You will need help from a solicitor registered with the SLAB to provide civil legal assistance. Unlike Advice and Assistance, the application is assessed by SLAB.

11 Does SLAB look at my means?
• If you wish to be appointed as a guardian or intervener with either purely welfare powers, or a mix of welfare and financial powers, no means test is applied. If there is no welfare component (e.g., purely financial powers), SLAB has to look at the disposable income and capital of your relative.

12 Does SLAB apply any other tests?

• Yes. SLAB has to decide whether you have a plausible case, and whether it would be reasonable for public funds to support your case.

13 Will I have to pay anything towards my solicitor's bill?

• No contribution is due in a case where welfare powers are sought. A contribution may be payable to SLAB in cases without a welfare component. In some cases, you might be asked to make a payment from any property the adult gets or keeps as a result of the court case. This might happen if you raise a court action on behalf of the adult (for example, a damages claim) once you have been appointed as a guardian or intervener.

14 Who pays my solicitor's bill?

• SLAB pays the bill, at rates approved by the Scottish Parliament.

15 Can my solicitor ask me to pay privately if I get civil legal aid?

• No. The legal aid legislation prohibits a solicitor taking a private payment from a client in receipt of civil legal aid.

16 Can the court order anyone else to pay my court costs?

• The court can order an unsuccessful opponent, to pay the court costs, for example, where the opposition's grounds for objecting are viewed by the sheriff as unreasonable. The legal aid legislation requires those costs to be paid back to SLAB, which uses them to offset the cost of your legal aid. SLAB must still pay your solicitor's reasonable bill, even if the court costs aren't paid.

17 I want to oppose my brother who is applying for welfare guardianship for my mother. Am I eligible for civil legal aid?

• Yes, you may apply for civil legal aid, subject to the tests explained above. You will need to explain why you think the court should appoint you, rather than your brother.

18 The local authority has made an application to be welfare guardian for my mother and I want to oppose this and apply myself—am I eligible for civil legal aid?
Yes, you may apply for civil legal aid, subject to the tests explained above. You will need to explain why you think the court should appoint you, rather than the local authority.

19 I have been granted civil legal aid for my welfare guardianship application but the sheriff decided to appoint a safeguarder and has sent me the bill – will this be covered by civil legal aid?

- It might be. The sheriff has discretion to order the bill for the safeguarder to be paid by you, the estate or another party. SLAB will need to know who was ordered to meet the bill. It will also need to know whether your solicitor asked the court to do this (which would have needed SLAB’s prior authority), or whether the sheriff made the order ‘on his own motion’.

Further information

20 Where can I get more information about legal aid?

- SLAB publishes a range of leaflets for applicants, and you can also find out information from their website [www.slab.org.uk](http://www.slab.org.uk). Your solicitor can also help.

21 Where can I find the names of solicitors who deal with cases in relation to the Adults with Incapacity Act?

- You should contact the Law Society of Scotland (0131 226 7411) for a list of names of solicitors who can help.

22 What should I do if I think my solicitor is not acting correctly in relation to legal aid, for example, charging me an additional fee or seeking to claw back funds?

- You should contact the Audit and Compliance Department at the SLAB.

23 What is ABWOR?

- ABWOR stands for ‘Assistance by way of Representation’. It is a kind of Advice and Assistance. It is part of civil advice and assistance which allows representation in particular types of proceedings approved by Parliament, for example, at the Mental Health Tribunal.