



# Adults with Incapacity (Scotland) Act 2000

2000 asp 4

## PART 5 **S**

### MEDICAL TREATMENT AND RESEARCH

#### 47 Authority of persons responsible for medical treatment **S**

- (1) This section applies where [<sup>F1</sup>any of the persons mentioned in subsection (1A)]—
- (a) is of the opinion that [<sup>F2</sup>an adult] is incapable in relation to a decision about the medical treatment in question; and
  - (b) has certified in accordance with subsection (5) that he is of this opinion.

[<sup>F3</sup>(1A) The persons are—

- (a) the medical practitioner primarily responsible for the medical treatment of the adult;
- (b) a person who is—
  - (i) a dental practitioner;
  - (ii) an ophthalmic optician;
  - (iii) a registered nurse; or
  - (iv) an individual who falls within such description of persons as may be prescribed by the Scottish Ministers,

who satisfies such requirements as may be so prescribed and who is primarily responsible for medical treatment of the kind in question.]

- (2) [<sup>F4</sup>. . . The [<sup>F5</sup>person who by virtue of subsection (1) has issued a certificate for the purposes of that subsection] shall have, during the period specified in the certificate, authority to do what is reasonable in the circumstances, in relation to [<sup>F6</sup>. . . [<sup>F7</sup>the medical treatment in question] , to safeguard or promote the physical or mental health of the adult.

[<sup>F8</sup>(2A) Subsection (2)—

- (a) does not affect any authority conferred by any other enactment or rule of law; and

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- (b) is subject to—
  - (i) the following provisions of this section;
  - (ii) sections 49 and 50; and
  - (iii) sections 234, 237, 240, 242, 243 and 244 of the 2003 Act.]
- (3) The authority conferred by subsection (2) shall be exercisable also by any other person who is authorised by the [F<sup>9</sup>person on whom that authority is conferred] to carry out [F<sup>10</sup>the medical treatment in question] and who is acting—
  - (a) on his behalf under his instructions; or
  - (b) with his approval or agreement.
- (4) In this Part “medical treatment” includes any procedure or treatment designed to safeguard or promote physical or mental health.
- (5) A certificate for the purposes of subsection (1) shall be in the prescribed form and shall specify the period during which the authority conferred by subsection (2) shall subsist, being a period which—
  - (a) the [F<sup>11</sup>person who issues the certificate] considers appropriate to the condition or circumstances of the adult; but
  - (b) [F<sup>12</sup> does not exceed—
    - (i) one year; or
    - (ii) if, in the opinion of the person issuing the certificate any of the conditions or circumstances prescribed by the Scottish Ministers applies as respects the adult, 3 years,
 from] the date of the examination on which the certificate is based.
- (6) If after issuing a certificate, the [F<sup>13</sup>person who issued it] is of the opinion that the condition or circumstances of the adult have changed he may—
  - (a) revoke the certificate;
  - (b) issue a new certificate specifying such period [F<sup>14</sup> not exceeding—
    - (i) one year; or
    - (ii) if, in the opinion of that person any of the conditions or circumstances prescribed by the Scottish Ministers apply as respects the adult, 3 years,
 from] the date of revocation of the old certificate as he considers appropriate to the new condition or circumstances of the adult.
- (7) The authority conferred by subsection (2) shall not authorise—
  - (a) the use of force or detention, unless it is immediately necessary and only for so long as is necessary in the circumstances;
  - (b) action which would be inconsistent with any decision by a competent court;
  - (c) placing an adult in a hospital for the treatment of mental disorder against his will.
- (8) F<sup>15</sup> .....
- (9) Subject to subsection (10), where any question as to the authority of any person to provide medical treatment in pursuance of subsection (2)—
  - (a) is the subject of proceedings in any court (other than for the purposes of any application to the court made under regulations made under section 48); and
  - (b) has not been determined,

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medical treatment authorised by subsection (2) shall not be given unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition.

(10) Nothing in subsection (9) shall authorise the provision of any medical treatment where an interdict has been granted and continues to have effect prohibiting the provision of such medical treatment.

[<sup>F16</sup>(11) In subsection (1A)—

“dental practitioner” has the same meaning as in section 108(1) of the National Health Service (Scotland) Act 1978 (c. 29);

“ophthalmic optician” means a person registered in either of the registers kept under section 7 of the Opticians Act 1989 (c. 44) of ophthalmic opticians.]

#### Textual Amendments

- F1** Words in s. 47(1) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(a)(i)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F2** Words in s. 47(1)(a) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(a)(ii)**, 43; S.S.I. 2002/492, **art. 3(c)**
- F3** S. 47(1A) inserted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(b)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F4** Words in s. 47(2) repealed (5.10.2007) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 77(2)**, 79, **Sch. 2**; S.S.I. 2007/334, **art. 2(b)**, Sch. 2 (with savings in arts. 4-6)
- F5** Words in s. 47(2) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(c)(i)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F6** Word in s. 47(2) repealed (5.10.2007) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 77(2)**, 79, **Sch. 2**; S.S.I. 2007/334, **art. 2(b)**, Sch. 2 (with savings in arts. 4-6)
- F7** Words in s. 47(2) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(c)(ii)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F8** S. 47(2A) inserted (5.10.2007) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 77(1)**, 79, **Sch. 1 para. 5(d)**; S.S.I. 2007/334, **art. 2(b)**, Sch. 2 (with savings in arts. 4-6)
- F9** Words in s. 47(3) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(d)(i)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F10** Words in s. 47(3) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(d)(ii)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F11** Words in s. 47(5)(a) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(e)(i)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F12** Words in s. 47(5)(b) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(e)(ii)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F13** Words in s. 47(6) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(f)(i)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F14** Words in s. 47(6)(b) substituted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(f)(ii)**, 43; S.S.I. 2005/492, **art. 3(c)**
- F15** S. 47(8) repealed (5.10.2007) by Adult Support and Protection (Scotland) Act 2007 (asp 10), **ss. 77(2)**, 79, **Sch. 2**; S.S.I. 2007/334, **art. 2(b)**, Sch. 2 (with savings in arts. 4-6)
- F16** S. 47(11) inserted (19.12.2005) by Smoking, Health and Social Care (Scotland) Act 2005 (asp 13), **ss. 35(2)(g)**, 43; S.S.I. 2005/492, **art. 3(c)**

## 48 Exceptions to authority to treat **S**

(1) <sup>F17</sup> .....

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- (2) The Scottish Ministers may by regulations specify medical treatment, or a class or classes of medical treatment, in relation to which the authority conferred by section 47(2) shall not apply and make provision about the medical treatment, or a class or classes of medical treatment, in relation to which that authority does apply.
- (3) Regulations made under subsection (2) may provide for the circumstances in which the specified medical treatment or specified class or classes of medical treatment may be carried out.

#### Textual Amendments

**F17** S. 48(1) repealed (5.10.2005) by [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(asp 13\)](#), ss. 331, 333(2)-(4), [Sch. 5](#); S.S.I. 2005/161, [art. 3](#)

### 49 Medical treatment where there is an application for intervention or guardianship order **S**

- (1) [<sup>F18</sup>Subsection (2) of section 47] shall not apply if, to the knowledge of the [<sup>F19</sup>person on whom authority is conferred by that subsection], an application for an intervention order or a guardianship order with power in relation to any medical treatment referred to in that subsection has been made to the sheriff and has not been determined.
- (2) Until the application has been finally determined, medical treatment authorised by section 47(2) shall not be given unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition.
- (3) Nothing in subsection (2) shall authorise the provision of any medical treatment where an interdict has been granted and continues to have effect prohibiting the provision of such medical treatment.

#### Textual Amendments

**F18** Words in s. 49(1) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(3\)\(a\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)

**F19** Words in s. 49(1) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(3\)\(b\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)

### 50 Medical treatment where guardian etc. has been appointed **S**

- (1) This section applies where a guardian or a welfare attorney has been appointed or a person has been authorised under an intervention order with power in relation to any medical treatment referred to in section 47.
- (2) The authority conferred by section 47(2) shall not apply where—
  - (a) subsection (1) applies;
  - (b) the [<sup>F20</sup>person who issued the certificate for the purposes of section 47(1)] is aware of the appointment or, as the case may be, authorisation; and
  - (c) it would be reasonable and practicable for that [<sup>F21</sup>person] to obtain the consent of the guardian, welfare attorney or person authorised under the intervention

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order, as the case may be, to any proposed medical treatment but he has failed to do so.

- (3) Where the [<sup>F22</sup>person who issued the certificate for the purposes of section 47(1)] has consulted the guardian, welfare attorney or person authorised under the intervention order and there is no disagreement as to the medical treatment of the adult, [<sup>F23</sup>the medical practitioner primarily responsible for the medical treatment of the adult (in a case where the person who issued the certificate was someone other than that practitioner) or any person having an interest] in the personal welfare of the adult may appeal the decision as to the medical treatment to the Court of Session.
- (4) Where the [<sup>F24</sup>person who issued the certificate for the purposes of section 47(1)] has consulted the guardian, welfare attorney or person authorised under the intervention order and there is a disagreement as to the medical treatment of the adult, the [<sup>F25</sup>person who issued the certificate] shall request the Mental Welfare Commission to nominate [<sup>F26</sup>a practitioner who the Commission consider has professional knowledge or expertise relevant to medical treatment of the kind in question (the “nominated practitioner”)] from the list established and maintained by them under subsection (9) to give an opinion as to the medical treatment proposed.
- (5) Where the [<sup>F27</sup>nominated practitioner] certifies that, in his opinion, having regard to all the circumstances and having consulted the guardian, welfare attorney or person authorised under the intervention order as the case may be and, if it is reasonable and practicable to do so, a person nominated by such guardian, welfare attorney or person authorised under the intervention order as the case may be, the proposed medical treatment should be given, the [<sup>F28</sup>person who issued the certificate for the purposes of section 47(1)] may give the treatment or may authorise any other person to give the treatment notwithstanding the disagreement with the guardian, welfare attorney, or person authorised under the intervention order, as the case may be.
- (6) Where the [<sup>F29</sup>nominated practitioner] certifies that, in his opinion, having regard to all the circumstances and having consulted the guardian, welfare attorney or person authorised under the intervention order as the case may be and, if it is reasonable and practicable to do so, a person nominated by such guardian, welfare attorney or person authorised under the intervention order as the case may be, the proposed medical treatment should or, as the case may be, should not be given, the medical practitioner primarily responsible for the medical treatment of the adult, or any person having an interest in the personal welfare of the adult [<sup>F30</sup>(including, where the certificate issued for the purposes of section 47(1) was issued by another person, that person)] , may apply to the Court of Session for a determination as to whether the proposed treatment should be given or not.
- (7) Subject to subsection (8), where an appeal has been made to the Court of Session under subsection (3) or an application has been made under subsection (6), and has not been determined, medical treatment authorised by section 47(2) shall not be given unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition.
- (8) Nothing in subsection (7) shall authorise the provision of any medical treatment where an interdict has been granted and continues to have effect prohibiting the giving of such medical treatment.
- (9) The Mental Welfare Commission shall establish and maintain a list of [<sup>F31</sup>practitioners] from whom they shall nominate the [<sup>F32</sup>practitioner] who is to give the opinion under subsection (4).

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- (10) In this section any reference to—
- (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
  - (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter’s personal welfare and having effect during the granter’s incapacity.

#### Textual Amendments

- F20** Words in s. 50(2)(b) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(a\)\(i\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F21** Words in s. 50(2)(c) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(a\)\(ii\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F22** Words in s. 50(3) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(b\)\(i\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F23** Words in s. 50(3) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(b\)\(ii\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F24** Words in s. 50(4) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(c\)\(i\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F25** Words in s. 50(4) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(c\)\(ii\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F26** Words in s. 50(4) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(c\)\(iii\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F27** Words in s. 50(5) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(d\)\(i\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F28** Words in s. 50(5) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(d\)\(ii\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F29** Words in s. 50(6) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(e\)\(i\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F30** Words in s. 50(6) inserted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(e\)\(ii\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F31** Words in s. 50(9) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(f\)\(i\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)
- F32** Words in s. 50(9) substituted (19.12.2005) by [Smoking, Health and Social Care \(Scotland\) Act 2005 \(asp 13\)](#), [ss. 35\(4\)\(f\)\(ii\)](#), 43; S.S.I. 2005/492, [art. 3\(c\)](#)

## 51 Authority for research **S**

- (1) No surgical, medical, nursing, dental or psychological research shall be carried out on any adult who is incapable in relation to a decision about participation in the research unless—
- (a) research of a similar nature cannot be carried out on an adult who is capable in relation to such a decision; and
  - (b) the circumstances mentioned in subsection (2) are satisfied.
- (2) The circumstances referred to in subsection (1) are that—
- (a) the purpose of the research is to obtain knowledge of—

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- (i) the causes, diagnosis, treatment or care of the adult's incapacity; or
    - (ii) the effect of any treatment or care given during his incapacity to the adult which relates to that incapacity; and
  - (b) [<sup>F33</sup>Subject to subsection (3A),]the conditions mentioned in subsection (3) are fulfilled.
- (3) The conditions are—
- (a) the research is likely to produce real and direct benefit to the adult;
  - (b) the adult does not indicate unwillingness to participate in the research;
  - (c) the research has been approved by the Ethics Committee;
  - (d) the research entails no foreseeable risk, or only a minimal foreseeable risk, to the adult;
  - (e) the research imposes no discomfort, or only minimal discomfort, on the adult; and
  - (f) consent has been obtained from any guardian or welfare attorney who has power to consent to the adult's participation in research or, where there is no such guardian or welfare attorney, from the adult's nearest relative.

[<sup>F34</sup>(3A) Where the research consists of a clinical trial of a medicinal product, the research may be carried out—

- (a) without being approved by the Ethics Committee, if a favourable opinion on the trial has been given by an ethics committee, other than the Ethics Committee, in accordance with regulation 15 of the Medicines for Human Use (Clinical Trials) Regulations 2004; <sup>F35</sup> . . .
- (b) without the consent of any guardian or welfare attorney, or the adult's nearest relative, if—
  - (i) it has not been practicable to contact any such person before the decision to enter the adult as a subject of the clinical trial is made, and
  - (ii) consent has been obtained from a person, other than a person connected with the conduct of the clinical trial, who is—
    - (A) the doctor primarily responsible for the medical treatment provided to that adult, or
    - (B) a person nominated by the relevant health care provider.
- <sup>F36</sup>(c) [ without the consent of any guardian or welfare attorney, or the adult's nearest relative, if—
  - (i) treatment is being, or is about to be, provided for an adult who is incapable in relation to a decision about participation in the research as a matter of urgency;
  - (ii) having regard to the nature of the clinical trial and of the particular circumstances of the case it is necessary to take action for the purposes of the clinical trial as a matter of urgency;
  - (iii) it has not been reasonably practicable to obtain the consent of any such person;
  - (iv) it has not been reasonably practicable to obtain the consent of any of the persons mentioned in paragraph (b)(ii)(A) or (B); and
  - (v) the action to be taken is carried out in accordance with a procedure approved by the Ethics Committee or any other ethics committee or by an appeal panel appointed under Schedule 4 of the Medicines for Human Use (Clinical Trials) Regulations 2004 (S.I. 2004/1031) at the time it gave its favourable opinion in relation to the clinical trial.]]

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- (4) Where the research is not likely to produce real and direct benefit to the adult, it may nevertheless be carried out if it will contribute through significant improvement in the scientific understanding of the adult’s incapacity to the attainment of real and direct benefit to the adult or to other persons having the same incapacity, provided the other circumstances or conditions mentioned in subsections (1) to (3) are fulfilled.
- (5) In granting approval under subsection (3)(c), the Ethics Committee may impose such conditions as it sees fit.
- (6) The Ethics Committee shall be constituted by regulations made by the Scottish Ministers and such regulations may make provision as to the composition of, appointments to and procedures of the Ethics Committee and may make such provision for the payment of such remuneration, expenses and superannuation as the Scottish Ministers may determine.
- (7) Regulations made by the Scottish Ministers under subsection (6) may prescribe particular matters which the Ethics Committee shall take into account when deciding whether to approve any research under this Part.
- (8) In this section any reference to—
- (a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;
  - (b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter’s personal welfare and having effect during the granter’s incapacity.
- [<sup>F37</sup>(9) In this section—
- “clinical trial on a medicinal product” means a clinical trial as defined by regulation 2(1) of the Medicines for Human Use (Clinical Trials) Regulations 2004;
- “an ethics committee” has the meaning given by that regulation;
- “person connected with the conduct of the trial” and “relevant health care provider” have the meanings given by Schedule 1 to those regulations.]

#### Textual Amendments

- F33** Words in s. 51(2)(b) inserted (1.5.2004) by [The Medicines for Human Use \(Clinical Trials\) Regulations 2004 \(S.I. 2004/1031\)](#), reg. 54, **Sch. 10 para. 21(a)**
- F34** S. 51(3A) inserted (1.5.2004) by [The Medicines for Human Use \(Clinical Trials\) Regulations 2004 \(S.I. 2004/1031\)](#), reg. 54, **Sch. 10 para. 21(b)**
- F35** Word in s. 51(3A)(a) repealed (12.12.2006) by [The Medicines for Human Use \(Clinical Trials\) Amendment \(No.2\) Regulations 2006 \(S.I. 2006/2984\)](#), **reg. 3(a)**
- F36** S. 51(3A)(c) inserted (12.12.2006) by [The Medicines for Human Use \(Clinical Trials\) Amendment \(No.2\) Regulations 2006 \(S.I. 2006/2984\)](#), **reg. 3(b)**
- F37** S. 51(9) inserted (1.5.2004) by [The Medicines for Human Use \(Clinical Trials\) Regulations 2004 \(S.I. 2004/1031\)](#), reg. 54, **Sch. 10 para. 21(c)**



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## **52 Appeal against decision as to medical treatment S**

Any decision taken for the purposes of this Part, other than a decision by a medical practitioner under section 50, as to the medical treatment of the adult may be appealed by any person having an interest in the personal welfare of the adult to the sheriff and thence, with the leave of the sheriff, to the Court of Session.

**Changes to legislation:**

There are currently no known outstanding effects for the Adults with Incapacity (Scotland) Act 2000, PART 5.