

**Comparison of The Adult Support and Protection  
(Scotland) Act 2007 (ASP) with The Adults with Incapacity  
(Scotland) Act 2000 (AWI) and The Mental Health  
(Care and Treatment) (Scotland) Act 2003 (MHCT)**

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*Each table provides short extracts from the Acts for comparison purposes. These have been rephrased for ease of understanding. You should therefore refer to the relevant provisions in each Act, any associated regulations and the code of practice where required. While we have done our best to see that the information contained was accurate and up to date at the time of publication we cannot guarantee this. If you have any questions, you should discuss these with your solicitor or other appropriate adviser.*

**Who is subject to the provisions of the ASP, AWI and MHCT**

<b>ASP</b>	<b>AWI</b>	<b>MCHT</b>
<p><b>Adults at risk</b> are defined as adults (16 and older) who-</p> <ul style="list-style-type: none"> <li>• are unable to safeguard their own well-being, property, rights or other interests;</li> <li>• are at risk of harm; and</li> <li>• because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected. (s3)</li> </ul> <p>An adult is at risk of harm if-</p> <ul style="list-style-type: none"> <li>• another person’s conduct is causing (or is likely to cause) the adult to be harmed; or</li> <li>• the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm. (s3)</li> </ul> <p>‘Harm’ includes all harmful conduct and, in particular, includes—</p> <ul style="list-style-type: none"> <li>• conduct which causes physical harm;</li> <li>• conduct which causes psychological harm (for example: by causing fear, alarm or distress);</li> <li>• unlawful conduct which appropriates or adversely affects property, rights or interests (for example: theft; fraud, embezzlement or extortion);</li> <li>• conduct which causes self-harm. (s53)</li> </ul>	<p><b>Adults with incapacity</b> are defined as adults (16 and older) incapable of-</p> <ul style="list-style-type: none"> <li>• acting; or</li> <li>• making decisions; or</li> <li>• communicating decisions; or</li> <li>• understanding decisions; or</li> <li>• retaining the memory of decisions,</li> </ul> <p>by reason of mental disorder (as defined in MHCT) or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if this physical disability incapable of being made good through human or mechanical aid) (s1)</p>	<p><b>Mentally disordered children and adults.</b> ‘Mental disorder’ defined as any—</p> <ul style="list-style-type: none"> <li>• mental illness;</li> <li>• personality disorder; or</li> <li>• learning disability.</li> </ul> <p>However, a person is not mentally disordered by reason only of sexual orientation; sexual deviancy; transsexualism; transvestism; dependence on, or use of, alcohol or drugs; behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; acting as no prudent person would act. (s328)</p>

### Short overview of Orders, Warrants and Certificates

ASP	AWI	MHCT
<p>N.B. No order under this Act grants a power of detention.</p> <p><b>Warrant for entry</b> - the sheriff or justice of the peace may grant a warrant for entry in relation to a visit where he/she is satisfied that where the council officer has, or reasonably expects to be, refused entry to premises or is otherwise unable to enter the place concerned. Authorises a council officer to visit the specified place together with a constable; and a constable to do anything, using reasonable force where necessary, in order to fulfil the object of the visit. A warrant for entry expires 72 hours after it is granted. Or, where granted by a JP, 12 hours. (s37,s38, s40)</p> <p><b>Assessment order</b> - allows a council officer to conduct a private interview, and a health professional to conduct a medical examination in private. The adult must be informed of their right to refuse. This order would be necessary only if it were not possible to carry out the interview or examination at the place of the visit. A warrant for entry will also be granted. Valid from the date specified in the order and expires 7 days after that date. Only be granted by a sheriff. <b>(s11-13, s38)</b></p> <p><b>Removal order</b> – allows the council to remove the adult at risk to a specified place in order to assess their situation and to support and protect them. The adult must be moved within 72 hours of the order being made and expires up to 7 days after the day the adult is moved. Application can be made to vary or recall a removal order. A warrant for entry will also be granted. A removal order expires 7 days (or such shorter period as may be specified in the order) after the day on which the specified person is moved in pursuance of the order. Application may be made to a Justice of the Peace under certain circumstances. In this case</p>	<p>N.B. No order under this Act grants a power of detention.</p> <p><b>Intervention Order</b> - The sheriff may, on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult, if he is satisfied that the adult is incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application relates, make an order. An intervention order may direct the taking of any action and authorise the person nominated in the application to take specified action or make a decision in relation to the property, financial affairs or personal welfare of the adult. <b>(s53-56)</b></p> <p><b>Guardianship Order</b> - An application may be made by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult to the sheriff for an order appointing an individual or office holder as guardian in relation to the adult's property, financial affairs or personal welfare. An order appointing a guardian may confer</p> <ul style="list-style-type: none"> <li>• power to deal with particular matters in relation to the property, financial affairs or personal welfare of the adult;</li> <li>• power to deal with all aspects of the personal welfare of the adult, or specified aspects;</li> <li>• power to pursue or defend an action of declarator of nullity of marriage, or of divorce or separation;</li> <li>• power to manage the property or financial affairs of the adult, or specified parts;</li> <li>• power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.</li> </ul> <p><b>(s57-79)</b></p>	<p><b>Warrant to enter premises</b> - the sheriff or justice of the peace must grant a warrant where he/she is satisfied that it is necessary to enter the premises for the purposes of pursuing the local authority's duty to inquire and the MHO cannot obtain entry to the premises or reasonably believes that he/she will not be able to access the premises. Authorises the MHO, any other specified person and any constable to enter the premises. The warrant authorises the constable to open lockfast places. (s35)</p> <p><b>Warrant for access to medical records</b> – allows a medical practitioner to gain access to a person's medical records where this is necessary and the MHO cannot obtain the consent of that person to accessing their medical records. (s35)</p> <p><b>Warrant to detain a person for the purpose of carrying out a medical examination</b> –where it is necessary for a medical practitioner to carry out a medical examination of the person and the MHO cannot obtain the consent of that person to the medical examination. Authorises that person's detention for a period of up to 3 hours.(s.35)</p> <p><b>Removal Order – this order</b> authorises the MHO, any specified person and any constable to enter the patient's premises and the patient's removal to a place of safety. The constable may open lockfast places. The person must be moved within 72 hours of the order being made and the order allows the person to be detained for up to 7 days. Application can be made to a justice of the peace in specified circumstances. An application may be made to vary or recall the removal order. Warrant for entry also granted.(s293, s294)</p> <p><b>Removal from a public place</b> - If someone in a public place appears to have a mental disorder,</p>

the adult must be moved within 12 hours and the order may only be granted for up to 24 hours. **(s14-18 and s39-40)**

**Banning and temporary banning orders -**

these orders will only be granted where the adult at risk is in danger of being seriously harmed. The order bans the subject of the order from being in a specified place and may have other conditions attached to it. A banning order may also

- ban the subject from being in a specified area in the vicinity of the specified place;
- authorise the summary ejection of the subject from the specified place and the specified area;
- prohibit the subject from moving any specified thing from the specified place;
- direct any person to take measures to preserve any moveable property owned or controlled by the subject which remains in the place while the order has effect;
- require or authorise any person to do, or to refrain from doing, anything else which the sheriff thinks necessary for the proper enforcement of the order.

The sheriff may grant a temporary banning order pending determination of an application for a banning order. A banning order may last for a up to 6 months. Any decision to grant or refuse to grant a banning or temporary banning order can be appealed to the sheriff principal. **(s19-34)**

and be in need of care and treatment, then the police can take that person to a place of safety for up to 24 hours to allow an assessment.(s.297)

**Authorised Person's Order** - the purpose of a warrant to enter premises issued under section 292 of the Act is to allow a person to enter premises where that person has already been given authority under another section of the Act or associated regulations to take (or retake) a patient to any place or into custody. Warrant for entry also granted. (s.292)

**Nurse's Power to Detain a Patient Pending a Medical Examination** - empowers certain nurses to detain an informal patient who is in hospital receiving treatment for a mental disorder. (s299)

**Emergency detention** - This would allow someone to be detained in hospital for up to 72 hours where hospital admission is required urgently to allow the person's condition to be assessed. It will only take place if recommended by a doctor. Wherever possible, the agreement of a MHO should also be obtained. **(s36-37)**

**Short-term detention** - This would allow someone to be detained in hospital for up to 28 days. It will only take place where it is recommended by a psychiatrist and agreed by a mental health officer. **(s44)**

**Compulsory Treatment Order (CTO)** - Has to be approved by a Tribunal. Lasts 6 months initially but could then be extended. Either hospital or community based. If it is based in the community, then it could include various conditions. The Tribunal may review decisions or try to have the requirements in a CTO changed.(Part 7)

**People involved in criminal proceedings:**

Please refer to the Volume 3 of Code of Practice - Compulsory powers in relation to mentally disordered offenders.

### The Principles

ASP	AWI	MHCT
<b>Intervention must:</b> <ul style="list-style-type: none"> <li>• benefit the adult;</li> <li>• be the least restrictive option;</li> </ul> (s.1)	<b>Intervention must:</b> <ul style="list-style-type: none"> <li>• benefit the adult</li> <li>• be the least restrictive option;</li> </ul> (s1)	<b>Intervention must:</b> <ul style="list-style-type: none"> <li>• benefit the adult</li> <li>• be the least restrictive option;</li> </ul> (s1)
have regard to the adult's wishes and feelings (past and present); (s2)	take account of adult's wishes and feelings (past and present); (s1)	have regard to the present and past wishes and feelings of the patient ; (s.1)
have regard to the views of adults nearest relative, primary carer, guardian or attorney and any other person with interest in the adults well-being or property; (s2)	take account of views of adult's nearest relative, primary carer, guardian or attorney, person(s) identified by Sheriff and any other person with interest in adults welfare or the intervention; (s.1)	have regard to the views of the patient's named person; any carer of the patient; any guardian of the patient; and any welfare attorney of the patient, (s1)
No equivalent principle	adults should be encouraged to use existing skills or develop new skills. (s1)	No equivalent principle
ensure the adult can participate as fully as possible, and provide information to facilitate this; (s2)	No equivalent principle.	the importance of the patient participating as fully as possible and the importance of providing such information and support to the patient as is necessary.( s1)
that the adult is not treated less favourably than the way in which a person who is not an adult at risk might be treated in a comparable situation; (s2)	No equivalent principle.	That the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation. (s1)
take account of the adult's abilities, background and characteristics. (s2)	No equivalent principle.	have regard to the patient's abilities, background and characteristics, including, the patient's age, sex, sexual orientation, religious persuasion, racial origin, cultural and linguistic background and membership of any ethnic group. (s1)
No equivalent principle.	No equivalent principle.	have regard to the range of options available in the patient's case. (s1)
No equivalent principle.	No equivalent principle.	the needs and circumstances of any carer relevant to the discharge of the function and of which the person is aware; and providing information to any carer as might assist the carer to care for the patient. (s1)
No equivalent principle – but see section 6 of the Act – support services	No equivalent principle.	the importance of the provision of appropriate services to the person who is, or has been, subject to the certificate or order (s1)
No equivalent principle	No equivalent principle	<b>Under 18</b> – welfare of the child (s2)

**Duty to investigate/inquire**

<b>ASP</b>	<b>AWI</b>	<b>MHCT</b>
<p><b>Councils (s4)</b></p> <p>A council must make inquiries about a person’s well-being, property or financial affairs if it knows or believes that the person is an “adult at risk” and that it might need to intervene (by way of this Act or otherwise) in order to protect the person’s well-being, property or financial affairs.</p>	<p><b>Local Authorities (s10)</b></p> <p>Local authorities will investigate any complaints relating to the personal welfare of an adult made in relation to welfare attorneys, guardians or persons authorised under intervention orders. They will investigate any circumstances made known to them in which the personal welfare of an adult seems to them to be at risk.</p> <p><b>Public Guardian (s6&amp;7)</b></p> <p>The Public Guardian will investigate complaints relating to the property or financial affairs of an adult in relation to continuing attorneys, intromissions with funds and guardians or persons authorised under intervention orders. The public guardian will investigate where the property or financial affairs of an adult seem to him to be at risk.</p> <p><b>Mental Welfare Commission (s9)</b></p> <p>Where unsatisfied with any investigation made by a local authority into a complaint, or where the local authority have failed to investigate the complaint, the MWC will investigate relating to welfare attorneys; guardians or persons authorised under intervention orders. They will also investigate any circumstances in which the personal welfare of the adult appears to be at risk.</p>	<p><b>Local Authority (s33)</b></p> <p>Where it appears to a local authority that a person in their area aged 16 years or over has a mental disorder and any of the following circumstances apply, the authority shall cause inquiries to be made. The circumstances are-</p> <ul style="list-style-type: none"> <li>• that the person may be, or may have been, subject, or exposed, at some place other than a hospital to ill-treatment; neglect; or some other deficiency in care or treatment;</li> <li>• that the person’s property may be suffering, or suffered, loss or damage; or may be, or may have been, at risk of suffering loss or damage;</li> <li>• that the person may be living alone or without care and unable to look after himself or his property or financial affairs;</li> <li>• that the person is not in hospital and, because of the mental disorder, the safety of some other person may be at risk.</li> </ul>

**Duty to Co-operate**

<b>ASP</b>	<b>AWI</b>	<b>MHCT</b>
<p>(s5) The following bodies must co-operate with a council making inquiries, and with each other, so far as consistent with the proper exercise of their functions and where such co-operation is likely to enable or assist the council making those inquiries-</p> <ul style="list-style-type: none"> <li>• the Mental Welfare Commission for Scotland;</li> <li>• the Care Commission;</li> <li>• the Public Guardian;</li> <li>• all councils;</li> <li>• chief constables of police forces;</li> <li>• the relevant Health Board; and</li> <li>• any other public body or office-holder as the Scottish Ministers may by order specify.</li> </ul> <p>Where a public body or office-holder of the above knows or believes that a person is an adult at risk and that action needs to be taken (under this Act or otherwise in order to protect that person from harm then they must report the facts and circumstances of the case to the council for the area in which it considers the person to be.</p>	<p>Local authorities, the Public Guardian and the Mental Welfare Commission shall consult each other on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest. (s6, s9 &amp; s10)</p> <p>The Public Guardian, Mental Welfare Commission and local authority shall provide each other with such information and assistance as may be necessary to facilitate the investigation. (s12)</p>	<p><b>(s34)</b> Where it appears to the local authority that the assistance of certain persons—</p> <ul style="list-style-type: none"> <li>• is necessary for the purposes of the inquiries; or</li> <li>• would assist the inquiries;</li> <li>• the authority may request that person to provide the assistance specified in the request.</li> </ul> <p>These persons are-</p> <ul style="list-style-type: none"> <li>• the Commission;</li> <li>• the Public Guardian;</li> <li>• the Scottish Commission for the Regulation of Care;</li> <li>• a Health Board; and</li> <li>• a National Health Service trust.</li> </ul> <p>When receiving such a request, the person must comply with the request in so far as complying with the request—</p> <ul style="list-style-type: none"> <li>• would be compatible with the discharge of the person's functions (whether under any enactment or otherwise); and</li> <li>• would not prejudice unduly the discharge by the person of any of those functions.</li> </ul>

**Entry to premises - /visits**

<b>ASP</b>	<b>AWI</b>	<b>MHCT</b>
<b>Warrant for Entry (s37-40)</b>	No provision under this Act.	<b>Warrant for Entry (s35)</b>

**Medical assessment/examination/treatment**

<b>ASP</b>	<b>AWI</b>	<b>MHCT</b>
<p><b>Medical Examination</b> - A health professional, when accompanying the council officer on a visit, may undertake a private medical examination of a person whom the officer knows or believes to be an adult at risk. The adult must be informed of their right to refuse (s9)</p> <p><b>Assessment Order (s11-13)</b></p>	<p><b>Authority of Persons Responsible for Medical Treatment (s47-52)</b></p> <p>(Medical treatment includes any procedure or treatment designed to safeguard or protect physical or mental health. It could therefore be argued that examination and assessment of capacity falls within Part 5 of the AWI.)</p> <p>Where the medical practitioner primarily responsible for the medical treatment of an adult is of the opinion that the adult is incapable in relation to a decision about the medical treatment in question and has certified this, then the medical practitioner shall have authority to do what is reasonable in the circumstances during the period specified. (s47)</p> <p><b>Proxies</b></p> <p>Guardians, welfare attorneys and people authorised under intervention orders, if such powers were sought and agreed when the proxy was appointed, may also consent to medical treatment. (s50)</p> <p><b>Treatments which attract further safeguards</b></p> <p>There are several exceptions to the general authority to treat. Reference should be made to the code of practice, the Act, associated regulations and guidance issued by the Scottish Government (CEL 11 (2008))</p>	<p><b>Warrant for Medical Assessment (s35)</b></p> <p><b>Short-term detention (s44)</b></p> <p><b>Compulsory Treatment Order (CTO)</b></p> <p><b>Subject to criminal procedures – refer to Act, regulations and code of practice.</b></p> <p><b>No authority to treat:</b></p> <p>The following measures do not authorise treatment without the patient’s consent:</p> <ul style="list-style-type: none"> <li>• an emergency detention certificate issued;</li> <li>• a nurse's power to detain;</li> <li>• powers relating to removal from a public place to a place of safety;</li> <li>• a warrant granted under section 35;</li> <li>• a removal order ; and</li> <li>• an order under section 60C of the 1995 Act, where an acquitted person may be detained for medical examination.</li> </ul> <p>The exception is that a patient detained under an emergency detention certificate may be given urgent treatment administered under the provisions of s243 without their consent, or they are being treated under AWI.</p> <p><b>Treatments which attract further safeguards</b></p> <p>Reference should be made to the code of practice, Part 16 of the Act and associated regulations for further detail.</p>



**Examination of records**

<b>ASP</b>	<b>AWI</b>	<b>MHCT</b>
<p><b>Examination of Records (s10)</b></p> <p>A council officer may require records, or copies of records, relating to a person known or believed to be an adult at risk to be handed over. The council officer (or other person whom the officer considers appropriate) may then examine these records, except if they are medical records in which case they must be examined by health professional.</p>	<p><b>Office of the Public Guardian (s 81A)</b></p> <p>The Public Guardian may, when carrying out an investigation or inquiries, require certain persons to provide:</p> <p>(1) the person's records of the exercise of the person's powers in relation to the adult; and</p> <p>(2) such other information relating to the exercise of those powers as reasonably required,</p> <p>(3) require any person who holds (or who has held) funds on behalf of the adult to provide records of the account and such other information relating to those accounts as reasonably required.</p> <p>The persons are a continuing attorney, a withdrawer with authority to intromit with funds, a person authorised under an intervention order or the adult's guardian.</p>	<p><b>Warrant for Medical Records (s35)</b></p>

**Banning orders/Interdicts**

<b>ASP</b>	<b>AWI</b>	<b>MHCT</b>
<p><b>Banning Order and Temporary Banning Order (s19-34)</b></p>	<p>None</p>	<p>None</p>

**Urgent action**

<b>ASP</b>	<b>AWI</b>	<b>MHCT</b>
<p>N.B None provide for detention</p> <p><b>Visit (s7, s36)</b></p> <p><b>Interview (s8)</b></p> <p><b>Medical examination (s9)</b></p> <p><b>Warrant for Entry in relation to visit (s37, s38, s40)</b></p> <p><b>Assessment Order (s11-13)</b></p> <p><b>Removal Order (s14-18)</b></p>	<p>No provisions under this Act.</p>	<p>N.B – all provide for detention</p> <p><b>Warrant to enter premises (s.35)</b></p> <p><b>Warrant for access to medical records (s35)</b></p> <p><b>Warrant for medical examination (s35)</b></p> <p><b>Removal Order (s293)</b></p> <p><b>Removal from Public Place (s297-298)</b></p> <p><b>Authorised Person's Order (s292)</b></p> <p><b>Emergency Detention Certificate (s36-37)</b></p> <p><b>Short Term Detention Certificate (s44)</b></p>

**Financial interventions**

<b>ASP</b>	<b>AWI</b>	<b>MHCT</b>
<p>No specific provisions under the Act. However, note that the definition of 'harm' includes unlawful conduct which appropriates or adversely affects property, rights or interests (for example: theft; fraud, embezzlement or extortion). (s53)</p>	<p><b>Intromit Accounts (25-34)</b></p> <p>An individual (which does not include a person acting in his capacity as an officer of a local authority or other body established by or under an enactment) may apply to the Public Guardian for authority to intromit with funds held by a person or organisation on behalf of an adult who is incapable and is the sole holder of an account in his name.</p> <p><b>Management of Residents Finances (s35-46)</b></p> <p>Any residential or other establishment in respect of which there is no requirement to register under section 61 of this Act may apply for registration for the purposes Management of Residents' Finances.</p> <p>In managing these matters, the managers of an authorised establishment shall act only for the benefit of the resident and have regard to the sentimental value that any item might have for the resident, or would have but for the resident's incapacity.</p> <p><b>Intervention Order (s53-56)</b></p> <p><b>Guardianship Order (s57-79)</b></p>	<p>No specific provisions under the Act. However, note that a local authorities duty to inquire includes a situation where it appears to the local authority that because of the mental disorder, the person's property</p> <ul style="list-style-type: none"> <li>• may be suffering, or may have suffered, loss or damage; or</li> <li>• may be, or may have been, at risk of suffering loss or damage. (s33)</li> </ul>

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