Adults with Incapacity (Scotland) 2000 Act (AWI)

Compendium of Guidance

JULY 2024

Falkirk Health and Social Care Partnership

Falkirk Council

CONTENTS

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Chapter 1: Introduction, Principles and Communication

Introduction

The Adults with Incapacity (Scotland) Act 2000 (AWI or Act) was one of the first major pieces of social legislation of the then newly devolved Scottish Parliament. The purpose of the AWI Act is to provide for decisions to be made on behalf of adults who lack legal capacity to do so themselves because of mental disorder or inability to communicate. The decisions concerned may be about the adult's property or financial affairs, or about their personal welfare, including medical treatment.

Over the course of 2020-2022 the AWI has been the subject of review, as part of the Scottish Mental Health Law Review, often referred to as the Scott Review. The recommendations of the Review can be found here. Chapter 8 relates to the AWI. The Review recommended an early revision of the AWI to allow early incorporation of some of the recommendations. In June 2023, the Scottish Government published its response to the Scott report; although the response lacks specificity the implication is that the Government are accepting of the recommendations, certainly those in respect of the AWI, including that for an early revision of the Act. They have given 2023-2026 as an indicative timeframe. Changes recommended by the Review are referred to in the respective chapters to follow. This compendium will be updated as we are made aware of any updating of the AWI.

The AWI Principles

In section 1 of the AWI there are a set of principles which anyone, when dealing with a person with incapacity, is required to respect.

On paper the principles are, of course, in the form of a list but there is no priority, ALL are equally as important; one is obliged, by law, to respect them ALL; it is not sufficient to think because you meet one, e.g. the principle of benefit which appears first, you do not need to look at any of the others.

Principle 1: Benefit

The first listed principle is that of 'benefit.' What the Act says is "*Every action has to benefit the incapable person AND cannot reasonably be achieved without the intervention.*"

What does this mean?

- There are two parts to this requirement 1) that the action must benefit the person AND 2) that one cannot achieve the result without the action.

- Benefit is not defined in the Act, so it may for example be direct or indirect, physical, or emotional for instance.

- The requirement is that the action must BENEFIT the person; specifically, the wording does not refer to 'best interest.' Evaluate the action you are thinking of against both benefit and best interest, to satisfy yourself that there is a benefit for the individual and not just that you think it is in their best interest.

- Occasionally it is not possible to discern a positive benefit, and in which case it can assist to look at it from the other angle, it may be possible to see a detriment without the intervention, therein lies the benefit.

Examples of Benefit

Direct
The incapable person benefits personally from the intervention, so for example, you may use their funds to pay for them to have a holiday.

Indirect
The incapable person's funds are used to pay for her family, with whom she lives, to go on holiday – she has respite care for this period. The holiday allows the family to refresh, recharge their batteries, spend precious time together without the day to day demands of caring. This sustains their ability to give loving care to the incapable person, in a family environment, for longer than may otherwise have been possible. The benefit to the incapable person in this use of their funds is indirect.

Physical
The spend is on a fancy new bed for the person, one of these which is automated and where the sections all move independently. This improves the person's sleep, posture, mobility, independence – so an example of physical benefit.

Emotional
The improvements in physical health and independence from the new bed may also improve the person's mental well-being i.e. they gain an emotional benefit as well as a physical benefit.

Principle 2: Least Restrictive Intervention

This principle states "In achieving what is required the action has to be least restrictive option in relation to the freedoms of the person, consistent with the purpose of the intervention."

What does this mean?

- There is a tendency to think, "the intervention must be the least restrictive" and forget that there is more to the sentence. Yes, the intervention must be the least restrictive, but it must achieve its purpose.

- Thus, a heavily restrictive option may nonetheless be the least restrictive IF it is the only way of achieving whatever is necessary.

- The intervention must be least restrictive in relation to the person's "freedoms." Freedoms is interpreted widely; it does not just relate to freedom i.e. being restricted in where one can go, it refers to freedom in any sense, for instance, freedom of expression, of will, of not being controlled, of not being restricted by circumstance.

Example of Least Restrictive Intervention

Using the above example of the family holiday, the outcome to be achieved is rest and recuperation (R&R) for the family. Keeping spend to a minimum may not offer a break which achieves the necessary R&R. Spending on an all-expenses paid 5* trip may offer the R&R but is not the least restrictive way of achieving this. A holiday that finds a compromise between these two would be ideal.

Principle 3: Take account of the present and past wishes of the person, as far as these are ascertainable.

- Before taking any action, you *must* take account of the wishes, past or present, of the person and give respect to these in your decision making.

- The reference to 'as far as these are ascertainable' requires effort to be made for you to ascertain their views. It is not sufficient to assume because of the person's incapacity you will not be able to ascertain their views. The chapter on Supported decision making offers more on supporting a person to offer their autonomous opinion on a given matter.

- The United Nations Convention on the Rights of Persons with Disability (UNCRPD) requires you also to take account of the will and

preferences of the person (the word 'Will' refers to their intentions or desires not their legal bequests on death). The chapter on Respecting rights, will and preferences offers more on this.

Principle 5: Encourage participation (support and develop skills)

For ease, this fifth principle is included ahead of the fourth. To comply with the fifth principle, you must '*encourage the incapable person to exercise whatever skills they have, as well as encourage them to develop new skills;*' both are aimed at facilitating the person to make his own decisions wherever this is possible.

Principle 4: Take account of the views of relevant others, as far as is reasonable and practicable.

This principle/requirement can be the most problematic and difficult to comply with. This should not be a reason to overlook it.

- You must take account of the views of relevant others – BUT only in so far as is reasonable and practicable to do so. By way of example, if you think a long-lost relative may have relevant views but you do not know where they are it would be unreasonable to expect you to get a Private Investigator to find this person just so you could get their views – this may sound extreme, but it is drawn from a real situation.

- "Relevant others" is not defined, so you need to decide who falls into this category. It is not restricted to immediate /direct / blood family, it can include wider family, including [but not limited to] stepchildren, adopted family, in laws and friends. A failure to include a relevant other will place you in breach of this legal requirement.

- Estranged direct family create a lot of debate; on the one hand they are relevant others as they are a direct relative but are they relevant in so far as this requirement, to take into account their views? The other principles can help determine this – for example, if the estranged person is likely to know past wishes of the person, which you feel may assist you determining what action to take now then the estranged family member may well be considered a relevant other. If, however, they have been absent for such a period, or had such a distant relationship, as to not be able to meaningfully assist then it is less likely they would be held to be a relevant other.

- Close friends also create debate, they may not traditionally be seen as 'relevant others' as they are not related, so you may not think you do not have to include them, but they may know the wishes and feelings of the person more intimately than a family member, as people can

be more inclined to reveal inner or true thoughts to a close friend, thoughts they may choose to keep secret from, or not burden a relative with. You should consider including these friends therefore to assist you with complying with the other principles.

Communication and Confidentiality

This section is addressed primarily to attorneys, guardians, or primary carers.

There are a range of Codes of Practice, in respect of each area of the AWI. The Codes are, as the name suggests, codes of best practice, there is no legal requirement to follow them, but in the event of a challenge there is a robustness in knowing what the code requires and to be able to say this has been respected.

The Codes place a duty on the attorney or guardian to communicate with relevant people. It does not say about what, how frequently, or what format this should take. A guide is to follow the practice of the now incapable person. For instance, if the person was in the habit of a weekly telephone call with someone, consider keeping this weekly update going – either facilitating this with the now incapable person or, if this is no longer possible, updating the person yourself on a weekly basis. Or, if the now incapable person was in the habit of posting on Facebook a picture of a grandchild's visit, for instance, then consider reminding them to do this, or do this on their behalf – so it keeps Face book friends and family equally as up to date with things as previously.

Things can become more problematic over more confidential matters; family (usually) may want to know a higher level of financial or medical information, for instance, than you wish to give them. The largest cause of complaint about how an attorney, or guardian, is exercising the role has its root cause in poor communication; the main subgroup of which is the attorney or guardian not telling a family member something which they wish to know, or believe they have a right to know, because the attorney or guardian believes its confidential.

Deciding what is confidential, or what may be shared, can be one of the hardest decisions, sadly, there is no easy answer. It's not a case of X information is confidential, so cannot be shared, whereas Y is not confidential and so can be shared.

You should consider if you have a legal obligation or duty – to either share the information being requested, or to maintain confidentiality.

Does the other person have a duty of confidentiality? It may be easier for you to decide to give a higher level of information if the person to whom

you are giving it is obliged to keep that information confidential, for example, under their professional code or legal duty.

Does the other person have a statutory authority? If the person asking you for information which you consider confidential has a legal right to this information, then you cannot use confidentiality as a reason for not disclosing this.

As with any decision, in the first instance the person should be supported to make the decision themselves – as to whether they wish this information shared with this person. If, despite support, the person is not able to reach an autonomous decision the guide is what the now incapable person would have offered to them had they been able to make this decision.

If they were a private person and would not have shared this detail, then there is no obligation for the attorney, guardian, or carer to share this – indeed this could be seen as a breach of the person's confidentiality. If, however, they were open and would have shared this level of detail with the person now inquiring, then to withhold this may be a breach of respect for the now incapable person's preferences.

The principles of the AWI should be used to assist the decision – to share, or not. For example, is there a 'benefit' for the person in sharing, or maintaining confidentiality, on the information? Is the decision the least restrictive option? What are the views of relevant others?

It is a case of balancing what is to be achieved by sharing and the harm that could result from not sharing. Keep records of your thought process and conclusion.

Even if the decision to not to give the level of detail, there is still a duty to communicate, so relevant others should be offered a general level of information and updating.

If an attorney, guardian, or carer is unsure what to do for the best, even having applied the principles to the decision, then they should feel free to ask the Local Authority, Office of the Public Guardian, or Mental Welfare Commission for advice on how best to proceed.

Chapter 2: Power of Attorney

This chapter contains three subsections:

2.1 General information
2.2 Interpreting a Scottish Power of Attorney
2.3 Frequently asked questions [of those collaborating with attorneys]

2.1 General Information

What is a power of attorney?
A power of attorney (PoA) is a legal document which authorises the person, or persons, appointed, called attorneys to support, and if necessary, act for, the person who has granted the PoA should that person lose the mental capacity to act for themselves.

Granting of power of attorney
One sometimes hears a person saying, for example, "I've got to get power of attorney for Mum." It is not a case of 'getting' a PoA but rather being given it. A person, whilst still mentally able, grants a power of attorney, to a person or persons of their choosing.

Appointment of attorneys
An attorney can be anyone of the granter's choosing, a family member, friend or even a solicitor. They can nominate just one person, called a sole attorney, or multiple people. The PoA document will tell you what powers the attorney have been granted i.e. property and finance, welfare, or any combination and to whom. You are entitled to ask for and see the PoA document if the attorney is seeking to rely on it.

If there are multiple attorneys you should check whether the PoA permits each of them to act independently of the other(s), or whether they must act jointly. If they are required to act jointly and there is currently only one of them giving you a say so on something you will need to consult, and get the authority of, the other named attorney/s. If, however, the attorneys are permitted to act independently of each other then you can take the say so of just one of them, this can be any one of them i.e. it does not have to be the first named attorney. There is no ranking, all named attorneys are equal.

The document may name a substitute attorney, this is a replacement who may take over the role if one of the original attorneys is no longer able to fulfil the role. The original Certificate of Registration will not name the substitute; if they are to assume the post the Certificate will be reissued and will then name them. If a substitute takes over the role this is a permanent replacement, the original attorney cannot step back in.

Public register
If you are unsure whether the PoA presented to you is valid you can contact woodlandsswmht@falkirk.gov.uk- where this can be verified. Similarly, if you are presented with a Guardianship Order this can be confirmed as valid by contacting awiadmin@falkirk.gov.uk.

Alternatively, you can ask the OPG for a search of the public register, you should complete a request form for this. There is no charge for this and as the information is 'public' you do not need to say who you are or why you are asking. The information on the public register is limited but will tell you if there is a PoA granted by person A and who the attorney(s) is/are.

Determination of incapacity
In respect of welfare powers, which cannot commence unless or until the person is incapable of the decision to be made, or action to be taken, the PoA must include a statement as to how the person wishes their incapacity to be determined. This may be when the attorneys believe this to be the case, or it may require the attorneys to have this confirmed by professional opinion (usually medical opinion). If professional opinion is required then, even if registered with the OPG, the PoA is not technically in force until that professional opinion is obtained.

Obligations of an attorney
In a snapshot the obligations of an attorney (or guardian) are to:

- Put the incapable person at the centre
- Respect the powers in the PoA/guardianship order
- Encourage the person's participation (advocacy)
- Support the person's own decision making
- Only act if the person is incapable [of the decision]
- Act as proxy for the person – i.e. as they would have chosen to act
- Ensure action is for the person's benefit
- Is least restrictive alternative
- Take account of the person's wishes and feelings present and past
- Respect the person's rights, will and preferences
- Take account of views of others
- Communicate with others
- Act in accordance with the Code of Practice
- Act with honesty, integrity, and fiduciary responsibility
- Recognise [and manage] conflict of interest
- Maintain record of actions

If you feel an attorney is not acting in accordance with these obligations you can report your concerns to the local authority (for welfare matters), or to the Office of the Public Guardian (for property and finance concerns). You do not need hard evidence i.e. actual proof, just relay to them why you feel the attorney is not complying with their obligations.

2.2 Interpreting a Scottish Power of Attorney

You are approached by A [an attorney], who says they are power of attorney for G [the granter of a PoA]. A says they have the power to act / make decisions on G's behalf. You have never met A before and wish to check the situation.

The checklist below will guide you through this process.

1. Ask A for a copy of the power of attorney.

- An attorney who wishes to rely on their power as attorney will have a copy, or will have access to a copy, of the PoA. Be wary of anyone who says they do not have a copy, cannot find it, will bring it tomorrow but does not etc.

- It is not uncommon for a person acting as DWP appointee – (someone appointed by the DWP to manage the person's DWP benefits) - to refer to themselves as the attorney. This is, most frequently, a misunderstanding on their part about the differing roles, rather than any deliberate attempt to pass themselves off as the attorney.

2. Check that there is a Certificate of Registration on the front of the PoA, which shows the PoA is registered with the OPG?

    - If yes, move to point 3.
    - If no, the PoA is not registered, so is not effective, so you cannot go any further with A.
    - If you are not sure you can request a public register search, see above. The public register will tell you if there is a PoA registered and if the person you are dealing with is indeed appointed as attorney, it does not however offer you any detail on the powers that are granted to the attorney.

3. Check the person you are dealing with, and who is claiming to be the attorney, is named on the Certificate and in the PoA itself, in the first paragraph.

    - If no, they are not the attorney, and you can proceed no further with them.

4. If yes, check how the attorney is appointed.

    - Are they a sole [the only] attorney? In which case you can continue.

- If someone else is also appointed, as well as A, is either attorney permitted to make and action decisions? You will see this from the wording in the opening of the PoA. If the attorneys are permitted to act independently (technically called jointly and severally) you can continue with A alone.
- If someone else is appointed as well as A and both/all attorneys are required to act jointly then you will need to have the agreement of the other attorney(s) too. They do not all have to be present you can obtain their say so by a conversation with them.

5. Assuming the PoA allows A to work on his own, you need to check A has the necessary power to progress whatever the matter is.

    - The PoA will list the powers – the list of powers sits behind the Certificate of Registration. There is also, in most cases, a 'catch all' power (called a plenary power), which tends to come before all the listed powers, and which says something like 'everything I would otherwise have been able to do myself.'

    - So, to check if the attorney is authorised to conduct the element of business in question, check within the listed powers to see if the attorney has an express power which would cover the matter and if not check to see if they have a plenary power that they, and you, can rely on.

    - If you can see no relevant power, you may wish to check with your legal dept/advisors. Until you are satisfied that the attorney has due authority you cannot progress matters with them.

    - Assuming A does have the relevant authority, you are 'good to go' but before you do you must check

6. Is the granter [of the power of attorney] incapable, in respect of the decision to be made?

    - If not, i.e. they have capacity to make the decision personally, then the person themselves should be your contact not the attorney. See the chapter on Determining Capacity.

    - If yes, i.e. they are incapable in respect of the decision to be made, has every support been given before you reach this conclusion. See the chapter on Supported Decision Making.

7. Check if the attorney/s can determine incapacity, see above, or if professional opinion is required. If the latter, do they have this?

8. Is the attorney acting in compliance with the Code of Practice?

9. Does the decision respect the AWI principles See chapter 1.

10. Does the decision respect the rights, will and preferences of the person (G) ? See the chapter on rights, will and preferences.

11. If you feel the answer to these latter questions (7,8,9,10) is "no" then you should not proceed without challenge,

    If you feel the answer to these latter questions is "yes" then you may progress matters with A.

12. You should maintain clear records on any/all decisions, irrespective of the outcome.

Once you have satisfied yourself that the PoA is all in order ask the attorney for permission to take a copy of it for G's file. This will save colleagues having to do this check every time.

You are not obliged to do what the attorney says simply because it is the behest of the attorney. See the chapter on managing conflict .

2.3 Frequently Asked Questions

Q: Does the PoA have to be activated before it can be used?

An attorney with financial powers can start assisting the granter with financial and property affairs immediately, under their instruction, but cannot make any decisions about welfare matters unless or until the person lacks capacity in relation to that decision. There is no activation process as such, but the PoA needs to be registered with the Office of the Public Guardian (OPG) before it can be used. On registration, the OPG issue a Certification of Registration on which there is a crest and the Public Guardian's signature, this is attached to the front of the PoA document. Seeing this will indicate that it has been registered.

Q: I've been presented with a photocopy of the PoA do I need to see the original?

It is preferable to see the original, scan and upload it to system as a document. A photocopy is acceptable if the original is not available. The original should be returned immediately to the attorney as there will be many other organisations who also wish to see the original.

The Attorney may present you with an Endorsed Copy, this is a formally authenticated copy of the original, not a photocopy – the granter themselves, the Public Guardian, a solicitor, or notary public can formally endorse a copy. Endorsing a copy is authenticating it as a true copy of the original. The law places an Endorsed copy on equal footing to the original, so if you are presented with an Endorsed version then you do not need to ask to for/see the original.

Q: Do I need to see ID of the person claiming to be the Attorney? If so, what ID is acceptable?

If you know the identity of the person claiming to be attorney and you see the PoA, so see them named as attorney, then you do not need to do anything formally to confirm their ID. If however, you see the names of the nominated attorneys but don't know if the person in front of you is one of those so named then it is good practice to get some photographic ID from them (anything which shows the person's name and face is sufficient), and ask their permission to take a copy of this and hold it on the patient's file. If you already have attorney ID on file, you do not need to ask for it on each occasion.

Q: How do I know if the powers cover what I need to do?

The PoA document lists the powers. If there is not a specific power which covers what you want, then have a look to see if there is a plenary (catch all) power.

You cannot imply things into a given power i.e. assuming it was meant to cover or include something even when it does not say such, but by the same token, it is not possible for a PoA to cover every single eventuality, so the absence of an express power does not necessarily mean that the attorney does not have permission to agree whatever the issue is on the person's behalf. Have a look for generic powers of a like nature. If you remain uncertain you should seek legal advice.

Q. What if there are no powers covering what the attorneys need to do?

If you have concluded that there is not a relevant power on which the attorney can rely, to authorise whatever it is they are seeking to do – and there is no plenary power on which they, and you, can rely you will need to seek an alternative method of authorising the issue, for example by way of a section 47.

If the person still has sufficient capacity when this omission is noted, they should be advised to have the PoA amended to add a relevant power in.

Q: How do I know if the PoA is still valid?

If you have concerns that a PoA may no longer be valid you can ask for a public register check. See above. The public register will tell you if there is a PoA registered and who the attorney is/are, it does not however offer you any detail on the powers that are granted to the attorney.

Q: Can an Attorney under a continuing [financial] PoA act even though the granter has capacity and is also acting personally in relation to her/his own affairs?

Unless there is anything in the document which indicates commencement of the financial powers are deferred until capacity is lost, which is unusual, financial powers commence as soon as the PoA is registered with the OPG.

The granter however remains in charge, the attorney would only act at the granter's behest.

Q: Where the Attorney is acting in relation to a welfare power, do we need to see evidence of incapacity?

If the PoA requires medical opinion before the welfare powers can commence then yes. If the PoA allows for the attorney to make the decision on incapacity, or is silent on this, then medical opinion is not required.

Q: Would I be in breach of data protection laws to talk to the attorney?

This will depend. For example,

- If you are talking about an issue over which the attorney has no powers, then yes.
- If you are talking about a welfare matter over which the attorney does have powers, but the granter is not yet incapable then yes.
- If you are talking about a financial matter over which the attorney has powers, then no (assuming the commencement of the PoA for financial matters has not been deferred)
- If you are talking about a welfare matter power over which the attorney has powers and the granter is now incapable, then no.

Q: Can an attorney agree something which benefits himself, or his family?

An attorney is permitted to make a decision which [coincidentally also] benefits himself so long as all the other factors of the AWI are complied with – that is, in brief, that the decision also benefits the incapable person, it is the least restrictive intervention in the circumstances, the person has been supported to make their own decision on the matter, it is a decision

which may have been the sort of decision the person would likely have made had they been able to do so, others' views have been sought on this.

Q. What do I do in the event of disagreements?
See chapter 11

Chapter 3: Intervention order and guardianship

This chapter contains six subsections:

3.1 Introduction

If a person needs property or financial affairs managing, or if they need welfare decisions, or actions, taking on their behalf, when they have lost mental capacity to do so personally, and where they have not already granted power of attorney to someone to do this for them in this eventuality, someone will need to apply to the court to be that person's property and financial, or welfare guardian.

A financial guardianship should only be sought if there is no alternative way of administering the financial affairs of the person, for example by way of access to funds, or under the DWP Appointee ship scheme. More information is available in Mental Welfare Commission's Good Practice Guide Money Matters

Welfare
There are certain treatment decisions that cannot be given to / taken by a welfare guardian, for example consent to ECT. Outside of this, a welfare guardian can be granted powers to make/take whatever health care decisions/actions the court agree is necessary – see below, application process.

Property?
Property does not just refer to a home, be this a first, second or holiday home but can be any form of property for example cars, jewellery, artwork, stamp collections etc. A person's IT devices, including their mobile phone are also their property, as is all the information contained therein. The guardian may need passwords for access to these devices, which they have no right to as a matter of course. You should ensure there are relevant and sufficient powers to allow the guardian authority to such property where this is necessary and appropriate.

Finances
Refers to liquid assets i.e. money, in any form of account, or things that can be liquidised, for example stocks and shares i.e. things that are not currently money but can be realised / converted into a liquid asset. Financial powers

are required for anything that relates to money, for example paying care fees, or the purchase of a vehicle.

Intervention order or guardianship?
An intervention order (IO) is suitable for something which has a natural completion date, whereas guardianship is for things that are ongoing. For example, agreeing a tenancy could be done under an IO, as once the tenancy is agreed the matter is complete. A sale of property and division of proceeds could be done under an IO as, once the sale and division are complete the matter comes to an end. It does not matter how long it may take to get the property marketed and a sale agreed. There is no time limit on an IO, it is the natural completion of the issue which brings the IO to a close. However, in the example of sale of property, if there is ongoing administration required of the proceeds of sale then this will require a guardianship, i.e. the matter being ongoing is then no longer suitable for an IO.

3.2 Application process

The applicant may be the private individual, a family member or friend, who is seeking to be appointed as financial or welfare guardian. Although the person can make the application personally, as it is a fairly complex court process typically a solicitor is instructed to lead the application on their behalf.

If there is no-one able to act as guardian for the person, the AWI(S)A 2000 obliges the local authority to make the application. In this situation the Chief Social Work Officer will typically be nominated as welfare guardian and a local solicitor appointed as financial guardian.

The application for an IO or guardianship is the same and is to the Sheriff Court which covers the area where the now incapable person lives. If you're not sure which court this is, the website of the Scottish Courts and Tribunals Service has a facility for you to enter the post code to check. The application must be in a certain format and be accompanied by three reports, two from doctors, one of whom must be a consultant psychiatrist (referred to as a section 22 doctor) and a third from a mental health officer. These reports all must be within a set time of each other and of the accompanying covering application.

Legal Aid
If the application contains any welfare powers, it will qualify for non-means tested legal aid. This means that the costs of the court application process, including those of the legal advisor if this is a private application, will be covered by legal aid, irrespective of how much money the incapable person has. There is tendency to think of this as 'free,' but it is only the costs of the

court element which are covered, any advice before that and the work after that will have a cost.

If a private application is only for property and financial powers, then there is a means test. The test is based on the means of the incapable person. If the person has a lot of money, then they will have to pay the full cost of the application themselves, if they have very little then they may get it 100% funded by legal aid– and proportionately anything in between.

There can be a temptation to add in a welfare power, even when this is not truly needed, just to get the non means tested legal aid. It is unlawful to include powers that are not needed, additionally, the Legal Aid Board can decline to offer the non-means tested support if they do not see the need for the welfare element.

Time
The guardianship process from start to finish can take a lengthy period, even upwards of six months. The applicant (be this a private individual or the local authority) should be alert to this and progress the application as soon as it becomes obvious this will be necessary, as decisions cannot be made for the person until the guardianship order is in place. For example, if the person is in hospital, ready for discharge but they need to go to a care home and cannot consent to this because they lack capacity, a guardianship order will likely be required to authorise this. The person cannot be discharged until the order is in place.

Duration
The order can be for whatever period is considered appropriate. Typically, it is for 3 years in the first instance with a three- or five-year renewal. The order can be for an indefinite period, e.g. where the person's capacity is unlikely to improve. However, it is generally considered inappropriate to place an indefinite order over a younger person, even where there is little prospect of their capacity recovering, as this places a restrictive order over them without any formal opportunity for review, which is contrary to the requirements of the United Nations Convention on the Rights of Person's with Disabilities. Article 12.4 of the Convention requires a restrictive order to be reviewed regularly by a judicial or independent administrative body.

Who can be appointed?
Anyone who can demonstrate to the Sheriff that they are the right person to act as guardian. Typically, it is a family member or good friend. As mentioned, as a last resort it can be the local authority.

There is no limit on the number of guardians that can be appointed but typically it is two people, who can act together or individually. Usually too, there are welfare powers, as well as property and finance. Both sets of powers are within the same guardianship order and usually both guardians,

if two are appointed, can make decisions about both aspects, welfare, property, and finance. That said, the powers can be split, with one guardian taking welfare decisions and the other doing property and finance. The Sheriff will make the decision as to how best it may work in the circumstances and order the guardianship accordingly, but your application will say how you think it will work best and you will have the chance to explain this to the Sheriff. In most cases the Sheriff goes with what has been asked for.

Caution
This is pronounced kay-shun. The easiest way to think about it is as a type of insurance which protects the estate should anything go awry, and money is lost. The Sheriff will decide if caution is required, usually this is the case. There are several companies who offer this specialist form of product, it is relatively cheap and quick to obtain. The website of the Office of the Public Guardian has more information. If you are required to get caution you will have to have this in place before you will be issued with your formal Certificate of Appointment (more about this in the next section).

3.3 The Public Guardian

The Public Guardian is part of the Scottish Courts and Tribunals Service, her role is to support, but also to supervise, those appointed as financial guardians(FG). The website of the Office of the Public Guardian (OPG), of which the Public Guardian is in charge, has a lot of valuable information.

Once the Sheriff has made a decision on who is to be appointed as FG, the order is sent to the OPG for registration. An FG is not permitted to act until the OPG has issued a Certificate of Appointment. This will take a few months. The OPG require from the FG an inventory of the property and finances they will be administering, together with a plan for how the FG intends to manage things, for the benefit of the incapable person, to meet their needs (see chapter 2).

The Certificate will be issued once the OPG has received the inventory and management plan and 'signed things off.' If there are things that the FG needs to do as a matter of urgency, they should let the OPG know, they may be able to offer an interim Certificate of Appointment.

Ongoing Supervision
An FG is supervised annually by the Public Guardian, this is a legal requirement. At the end of year one they will usually have to submit a detailed record of their actions in the year, update the inventory if there are any changes e.g. if they have sold a house within year one, update the management plan if there are any changes e.g. if the person has now gone into care and funds are needed to be released to meet care costs. In year two, if things are more stable, the Public Guardian may decide less detail is

required, the FG will be advised when year one's accounts have been reviewed.

Payment – there is a charge for submission of the inventory and management plan, the Public Guardian makes a charge for annual review of accounts. The fee varies according to the size of the estate. The table of fees can be found on the OPG website. The payment comes from the incapable person's funds.

If the guardianship allows for the FG to be paid, payment also varies dependent on the level of estate.

3.4. Managing money.

3.4.1 Inventory and Management plan

The first responsibility of a [financial] guardian is to submit an inventory to the Public Guardian of the estate which they are administering. They have up to four months to do this. It is recognised that it may take longer than this to 'get to the bottom' of what estate is where, the inventory is a live document so if/as new estate is found, estate which is not already included this can be added.

The management plan is, as the name suggests, a plan for the [financial] guardian intends to manage the estate they are administering, for the benefit of the person. The Public Guardian's website offers guidance on the type of things a guardian should include in the management plan. As with the inventory, the guardian has four months to submit this, but it too is a live document so if it becomes evident at some later stage that funds will need to be used in a different way to that already stated the management plan can be adjusted accordingly.

The guardian's 'Certificate of Appointment' will only be issued once the Public Guardian has signed off the inventory and management plan. If the guardian does need to do substantive financial business sooner than this they can speak with the Public Guardian, they may be permitted an interim Certificate of Appointment.

3.4.2 Account in name of person

If the person does not already have an account in their own name which the guardian can operate, it can be tedious to open one, but the guardian should persevere with this. There should be a clear trail of money which belongs to the person. Where the guardian is a family member it may seem easier for them to simply place the person's money into an account in their [the guardian's] name, but this money is then legally the guardian's. If anything happened to the guardian unexpectedly the incapable person's

money, then forms part of the guardian's estate. There are instances of incapable people being significantly disadvantaged by such situations.

3.4.3 Spending v saving

The guardian should try to find a balance between spending and saving. They may become consumed by a need to save, especially if they are anxious about what the future may hold and how much they may need to spend on care for example. It is important to be prudent, but it also the guardian's responsibility to ensure the person's money is used for their enjoyment of life today.

As may be the case with any household there can be peaks and troughs, where you find you are shelling out a lot for a whole range of things, then comes a period when you may be able to save a bit. As with managing one's own budget a guardian should anticipate expenditure that will, or may, be due and make allowance for this when considering spending.

Switching Services
Guardians often ask, 'if I can get better deals e.g. on energy or phone services by switching companies am I obliged to do so'? If the person was themselves someone who switched regularly to get the best deal the guardian should be mindful of this and watch the deals for something that may be of value, but it is not an absolute, if they are managing appropriately the supplier and service that they do have.

Inheritance Tax Planning (IHT)
A guardian should take proper IHT advice where they feel the estate would value from this.

Funeral plans
It is perfectly appropriate for a guardian to purchase a funeral plan.

3.4.4 Independent financial advice

Independent financial advice is required where the person has more than £50,000 in their estate, not counting any house they own. A record should be maintained of the advice given and decisions made consequent to this.

Investment
A guardian is permitted to invest monies if this can be justified as for the benefit of the person, but they cannot tie money up that can be anticipated as needed e.g. for payment of care home fees.

3.4.6 Deliberate Deprivation of Asset

This refers to a situation when someone intentionally reduces the amount in the estate to lower the overall value. If, on assessment, the local authority concludes that there has been a deliberate reduction in the asset value, they may calculate assessments as if the person still owned the asset.

Examples of potential deliberate deprivation of asset are: divesting the estate of money, e.g. by giving unusually large sums to family members, making a large donation to a charity, moving money into a protected trust; selling a house and disseminating the proceeds; selling a house for substantially less than market value; or giving away items which could make reasonable sums of money if sold.

3.4.7 Retention of receipts

Receipts for anything included in the management plan should be retained, as should receipts for single items of expenditure over £100, even for items not on the management plan.

Annually, a guardian is required to submit accounts to the Public Guardian, this is part of the ongoing supervision (mentioned above). Along with accounts the guardian will be asked for receipts, as evidence of how they have administered things.

3.4.8 Shared benefit

It is said that the guardian should not be using the person's funds to benefit themselves. It can be hard to know what this means, particularly for example if the guardian and adult live in the same property so have shared expenses. A rule of thumb is to share expenses proportionately. For example, if the household is a family of four plus the adult who lives with them, the household bills should be split five ways. If the guardian, as homeowner, pays the bill they may reimburse their own household from the adult's estate for the one fifth the adult is due. They can reimburse for additional expenditure which they incur, which they would not have had if the person did not live with them – where this can be justified.

The efficacy of buying a vehicle from the person's funds, from which the guardian will benefit, comes up regularly. The principles should be used to guide decision making. If there is discernible benefit for the person, which cannot be achieved without the purchase of the vehicle, then the purchase may be considered appropriate. The principle of least restriction is also of relevance e.g. if the vehicle is of high value, when the adult has modest means there may well be a cheaper way of achieving the same outcome. Proportionality is also relevant here too, e.g. if the vehicle is only going to be

used once a year to benefit the adult but the guardian will have use of it every day this is a disproportionate use of the adult's finances.

It is not possible to be specific, or to offer exhaustive advice, as there are so many situations which arise, and each should be considered on its own merits. A guardian can be advised to use the OPG helpline service for advice on financial spend.

3.4.9 Benefit entitlements

Benefits could be things like, universal credit, personal independence payment (or its successor, adult disability payment), tax credit, attendance allowance, pension credit or housing benefits. It is not possible to offer definitive advice here about what benefits a person may be entitled to as these will vary depending on situation. There is a full list on the GOV.UK website of the extensive range of benefits to which one may be entitled. Advice can be sought from a Welfare Rights Officer, various charities have such a person, as do the Citizen's Advice service.

3.4.10 Gifting

Routine gifts

In deciding on gifts, the guide is the previous behaviour of the person; a guardian should continue gifting at a level which is reflective of the level the person had chosen to gift and in the same pattern. For instance, if the person gave £100 at Christmas and birthdays to each grandchild then this should be continued. If they gave £200 to one grandchild and £100 to the others this pattern too should be respected, even if the guardian does not agree with the fact that one grandchild is being treated preferentially; this was the adult's choice, the guardian should act as the person has been doing not substitute their own choice by changing the pattern of gifting. There is more about this in the chapter on supporting decision making.

In saying this the guardian should bear in mind the overall value of the person's estate, their income and outgoing commitments and only maintain their pattern of gifting if this is financially viable.

One-off gifts

Did the person give one-off gifts, or would they have done had the situation arisen? For example, a higher amount than usual for an 18th or 21st birthday. The guardian can do likewise, if there are sufficient funds, maintaining a level and pattern of gifting consistent with what the person was doing, or would have done.

What about a one-off gift of higher value? The usual discussion is around weddings. Decisions on this will depend on the value of the proposed gift, the pattern of previous gifting, the value of the estate and the needs of the person. The questions the guardian should ask himself are:

- Can the person input to this decision at all?
- What would they have chosen to do?
- What was their pattern of gifting behaviour?
- Am I respecting this?
- Can the estate afford it – both now and in the future?
- Would it deprive the person of funds they themselves may need?
- Would it create a reduction in the estate value which may be to the disadvantage of potential beneficiaries? This is only relevant if this would be contrary to the wishes of the person.
- Is the gift of a value that would constitute a deliberate deprivation of assets?

In any gifting situation the guardian should ensure they are not incurring, or creating, a tax implication for the donor or recipient; and if so that this is managed properly.

University or school fees?

Another question which comes up regularly is if it is okay to pay university or school fees from the incapable person's funds – we assume in this that the person can afford it and, let us say, had expressed a clear intention to cover these fees. On the face of it this may sound permissible as the guardian is respecting the person's wish, doing what they themselves would have done. However, the person's decision was based on their needs as was then, if they have now lost capacity, it is foreseeable that they will need care and, if they have sufficient funds to pay for education fees, then this care would need to be self-funded. Use of their funds for education may then be considered a deliberate deprivation of assets. There may also be tax implications which need to be considered.

Consequently, before making any commitment of this sizeable nature a guardian is advised to 'do their homework.' They may wish to take financial or legal advice; they may wish to speak to the Office of the Public Guardian or may even need to get permission from the Court.

3.4.11 Dealing with banks and like institutions

Many guardians relay tales of woe about dealing with banks and similar institutions.

The advice for guardians here is:

Make an appointment to talk to the bank/institution about your situation. Do not just walk in expecting to have this conversation, this is a specific discussion and will take some time.

When you attend for the appointment, as well as the guardianship order take proof of your identification with you, something with your name and picture on it and a recent utility bill. You can ask when making the appointment what they will accept. They need this to prove you are who you say you are, that you are the person nominated on the guardianship order and so to meet the anti-money laundering regulations that financial establishments are legally obliged to comply with.

Make a list of the questions you want to ask. Here are some thoughts.

- What accounts are there if you do not know.
- What are the 'rules' relating to these accounts?
- How have these been being used over recent months?
- What may they require if you were to close or consolidate any of the accounts?
- How much notice do they need for any changes?
- Can you have online access?

Even once everything is up and running if you need to do something specific do not expect to go into the bank and deal with the person's estate in the same way as you would your own. Plan ahead.

Make sure you are prepared for any conversation with the bank, or similar organisation. As has been said before, make sure you know the layout of the document, know what your powers are, know what you are permitted to do and not. Ensure you have relevant paperwork with you. Take the guardianship order with. Do not assume that because you have provided a copy previously the organisation will necessarily have this to hand for your meeting. It is helpful for you to have a copy or scanned image with you for your own use.

Plan for any specific situations especially where these are a one-off. For example, if you are selling the person's home do not expect this to proceed as if you were selling your own. Ask the solicitor or agent for advice what you/they will need, to ensure you are fully prepared.

In summary, "be prepared" is the motto.

3.4.12 Record keeping

A guardian is obliged to keep records and may have to submit these for inspection to support decisions they have made. Records should bear out matters included in the management plan and receipts for items

purchased should tally with the records. You may wish to remind a guardian to make a record note where you have been involved with them in key decision making.

Records can be retained in whatever form the guardian prefers. The key thing is that they are in an order which allows information to be readily available if this were needed.

If a guardian is not sure what things to record information can be found here.

3.5 Managing property

"Property" can refer to anything the granter, possesses, for example a car, works of art, or jewellery, even a social media account is the property of its owner. There is a small section in at the end on managing this sort of property but as most questions arise in respect of what is called heritable property i.e. a house, much of this section addresses the management of this form of property.

3.5.1 Selling a House

The following section has been written as if the house to be sold is the person's home, their dwelling house as the law refers to it. The AWI does not offer a definition of 'dwelling house.' The general guide is to assume it is a 'dwelling house' if it was the place where the person lived day to day, even if they are no longer actually living (dwelling) in it.

Typically, a guardian is in a position of selling a home when the person has moved to alternative accommodation, most usually into care, and there is no prospect of them returning to the house. They may have to sell the house to release funds but, even if not, they may prefer to sell it to avoid it incurring costs or falling into disrepair.

It is hard to give specific advice on decisions surrounding the sale of a house as this will be determined by the circumstances. General advice is for the guardian to gain a full understanding of the whole situation before making any decisions.

Here are some things a guardian may wish to consider which may help them decide on selling, or retaining, the house.

- What are the views of the person if they can offer these?
- Is there any steer from a Statement of Advance Choice?
- What is the long-term care plan for the person?

- Do they own this home outright, or is there any mortgage, or other debt, loan, or security, outstanding against it?

- Do they own this home in their sole name?

- Are any rights given to anybody over the home?
  For example, there may be a person living in the home who has been given a right to remain there.

- Where is the property?
  The frequency of visits to the property to check it may be a factor in any decision to sell or keep.

- What are the person's financial commitments at this point and for the foreseeable future?

- How much money is in the estate other than the house?
  Where and how is this held? I.e. does the house need to be sold at this point?

- Is there a Will, what does this say about the house?

- A sale of a house changes it from property to money; does this have any implications for the estate, or potential beneficiaries of the estate?

- What commitments does maintaining the house bring?

- What are the costs of maintaining these commitments?

- Can it be insured?
  The current Insurer will need to be advised that the house is empty, they may no longer wish to offer insurance. One can get specialist insurance for empty properties, but if this is proving difficult or expensive this may influence a decision on sale.

- Is it at risk of squatters or being vandalised?
  This may influence a decision on sale.

- Are there broader implications from the sale of the house?
  For example, the family all live distant but can visit regularly as they have the house as a base, if this was sold would it limit the family's ability to visit.

- What is the housing market doing?
  Would holding on to the house make financial sense or is an early sale more advisable?

- What are the views of relevant others?
  There may be someone, another family member or close friend, who has a piece of information which is relevant to the decision.

- Is specialist advice needed?

- Is the guardian making an objective decision?
  It is easy for a family guardian to allow sentiment and subjectivity to influence a decision.

You will see from this that making a decision on the person's home is a significant decision and not one that should be made without very careful and full consideration.

Value of sale?
Once a decision has been made to sell the home a question which often arises is, can we sell to a family member? And often, can we sell it for reduced value to that family member?

There is nothing which says a sale cannot be to a family member. It is advisable to check with other family members that they are ok with this. Even if selling to a family member it is advisable to do this through a legally contracted agreement, to avoid any suggestion that this was a gift, with implications that may arise from this.

As to the sale price, the guardian is not having to market the property, or potentially upgrade it for sale so a moderate reduction to reflect these savings is acceptable but beyond this would potentially bring the transfer into the category of a gift, with its implications (see section on gifts), as well potentially as being seen as a deprivation of assets. An official valuation and home [information] report should be sought so that the sale is as impartial as would be the case to an independent third party.

Consent of Public Guardian
The consent of the Public Guardian is required to the sale of the person's dwelling house, both in principle and as to the sale price.

The Public Guardian's consent (be this in principle or as to price) is not required for the sale of second, or other, homes of the person.

3.5.2. Keeping the House?

If, after careful consideration and discussion, the decision is to keep the house, then the guardian needs to ensure it is safeguarded. Here are some things a guardian should be advised to consider:

- Does the heating need to be kept on, albeit on a low level?
- Does the water need switching off to prevent leaks and bursts?
- Are the windows and doors secured? Do they need boarding up?
- Is there an alarm, electricity supply to this needs to be kept on.
- If there is not an alarm, would it be prudent to have one fitted?
- Are any other security measures needed?
- Ensure a regular check is made on the property – especially so if there has been a period of severe weather or storms.
- Ensure any repairs are carried out in a timely manner.
- Keep the garden maintained – to give the house an appearance of one that is lived in / cared for and not abandoned.
- What possessions do you wish to leave in / remove from the house?
- Do you need to tell neighbours, a neighbourhood watch scheme or even the local police that the property is empty? Should neighbours be asked to keep 'a weather eye' and contact the guardian with any concerns?
- Can the house and any remaining contents be properly insured?

3.5.3 Renting the Property?

A guardian needs to be fully aware of the legal implications of renting, including that they, on behalf of the incapable person, become a landlord, with the stringent responsibilities this brings. Legal advice is therefore recommended. There should be a legally enforceable lease agreement, even if renting to a family member.

3.5.4 Managing other types of property

As was mentioned at the outset of this section "property" is anything the person owns, any of their possessions. The management of small items, for example a television or kitchen appliances are rarely problematic. Even decisions about some larger items – for example, a car – tend to go smoothly. Challenges arise more frequently with items of value, for example expensive jewellery, pieces of art, family heirlooms, or with items which may have lower financial worth but where there is sentimental value.

A guardian should use the principles and supported decision making as a guide to informing decisions about the management of items of property. As an example, let us use a £10,000 diamond engagement ring which the guardian is thinking of selling, assuming they have the power to do so. They need to establish:-

- Is the person capable and able to make their own decision about this?

- Can s/he be supported to offer their views?

- If one cannot get to an appreciation of their current view, do we know what their past views were?

- What may be a best interpretation of their view? For example, were they still wearing the ring on a regular basis, or has it been in a drawer for years? Do we know how much sentimental value attaches to this ring? Is there a Will which may assist? They may have bequeathed this item specifically to someone, so to now sell this, unless it is critical to have to do so, would be to disrespect their preferences. Even if there is no Will is there any history which would assist, for example that this ring is always passed to the first daughter. Is there a Statement of Advance Choice which may offer their view, or from which you can draw a best interpretation?

- Is there a benefit to the person in selling this ring? See principles. This will depend on the circumstances.

- The wider circumstances should also be part of the guardian's consideration, for example if the ring, although valued at £10,000, is of an old-fashioned design it may be unlikely to sell or may sell but for significantly less than its actual value or may take a longer time to sell than we have.

- Is sale of the ring the least restrictive way of achieving the outcome? Can the outcome be achieved without the sale? See the principles.

- What are the views of relevant others (also one of the principles)?

This systematic approach will assist the guardian to make an objective decision, in what can be subjective circumstances. A clear record should be made of the factors considered, the outcome reached and thereafter the action taken.

3.6 General obligations of a guardian

- To respect the principles when making decisions or taking actions.

- To visit the person, the expectation is at least twice per year.

- To support the person to make an autonomous decision on the given issue, before making a decision on the person's behalf. There is more on this in the chapter on supported decision making.

- To consider the person's human rights when making any decisions / taking any actions on their behalf.

- To respect the person's will and preferences. There is more on this in the chapter on respecting rights, will and preferences.

- To act as they believe the person would have chosen to act had they been able to do so. To not substitute their decision for that which the person would have made had they been able. This is also covered in the chapter on respecting, rights, will and preferences.

- To regard the Code of Practice. The Code is not a legal document but, as it names suggests, it is a code of best practice. A guardian should endeavour to act in accordance with it.

- To keep records. See 3.4.12 above.

- To undertake regular review of decisions and actions - to ensure these remain appropriate in changing circumstances.

- To have close contact with an opposite guardian – i.e. if the guardian is only appointed for welfare or for property/finance they must have close contact with the person appointed as the opposite guardian, assuming there is such a guardian appointed.

- To communicate with others - failure of communication is the root cause of most of the complaints about guardians. Guardians should consider who needs, or ought, to be told what/when to keep open communication with relevant people.

- Retain accountability – a guardian may delegate tasks to others, but they cannot delegate accountability.

If you have concerns about the decisions a guardian is making you can report these to the local authority (for welfare matters), or to the Office of the Public Guardian (for property and finance concerns). You do not need hard evidence i.e. actual proof, just relay to them why you feel the guardian is not complying with their obligations. See also chapter 11 on managing conflicts.

Chapter 4: Capacity

4.1 General Information

4.1.1 Presumption of Capacity

The start point should be one of presuming the individual has capacity, to make whatever the decision it is that is required to be made. You must not assume that an individual lacks capacity to make a decision solely, for example, because of their age, any disability, appearance, behaviour, medical condition (including mental illness), their beliefs, or their apparent inability to communicate.

You are required to give a person all appropriate help and support to enable them to make their own decisions, or to maximise their participation in any decision-making process. See the chapter on Supporting Decision Making.

4.1.2 What is capacity?

In law, capacity is a measure of someone's competency or fitness. That may make you think it is binary, either that someone has capacity, or they do not – oh for it to be that simple. Capacity is not all or nothing, it is not black or white, there is often a large grey area. Capacity is not linear, with capacity at one end and incapacity at the other, where, at some point on that journey, one passes from capacity to incapacity. A person may be capable, on some days (or time of day) of making some decisions, then not capable on another day of making the same decisions and vice versa.

Capacity cannot be measured on a complexity scale. It is not a case of identifying the point beyond which the person loses capacity – that they may be able to make lower grade decisions but incapable of making more complex decisions. Some people may be able to make a higher cognitive decision whilst at the same time being apparently incapable of making a more basic decision. It is so variable, affected by many factors, such as time of day, emotion, pain, previous experience etc.

4.1.3 Capacity is Decision Specific

Capacity is decision specific and should be assessed concurrent with the decision which has to being made. There should be no assumption that the person cannot make the decision just because they typically cannot.

4.1.4 Unwise Decisions

We may not always agree with a decision that a person makes, we may think it unwise, risky, not thought through properly, but if the person is capable [of making this decision] then any one of us is permitted to make an unwise decision. There should be no assumption that someone must be incapable because they are making a decision which most people would see as unwise.

4.2 The Legal Definition

This is set out in section 1(6) of the AWI.

There is what is sometimes referred to as a 'gateway entry' which is, that the person must have a mental disorder or impairment of the mind or brain, at the time the decision needs to be made. Thus, the AWI cannot / does not apply to someone who does not meet this entry threshold. Thereafter the definition is that a person is incapable if they cannot:-

- Understand the decision
- Make a decision
- Retain the memory of the decision
- Communicate the decision
- Act – be this on the decision or otherwise to safeguard their interests

It only requires one of these factors to be absent for the person for be considered incapable i.e. one or more of them may be present but the person could still be incapable because one is absent.

4.3 Assessing Capacity

The AWI permits only a practicing doctor or lawyer to formally assess capacity. However, we are all assessing capacity all the time, even if we do not realise it. I shall call this type of day-to-day informal assessment determining or considering capacity to distinguish it from the formal assessment.

Determining capacity isn't easy, people with many years' experience will still encounter difficulty in some cases. Even if we are considering capacity informally, we are still applying the legal test set out above, without necessarily realising it.

Example: think of a time when you have thought – 'X isn't capable.' Unpack this, what is it that has led you to reach this conclusion? – it is because they aren't following what you are saying, or aren't remembering what you said, or are reaching a different decision each time, or don't seem to appreciate

even that there is a decision to be made. These are all elements of the formal legal definition.

Move this now to a conscious consideration of capacity, it is still a case of applying the legal test above to the decision – capacity being decision specific.

Formal Assessment

There are some occasions when a formal assessment is required by law, e.g. before granting a PoA, or to support a guardianship application but on most occasions when a consideration of capacity is required an informal determination of this will be sufficient.

Chapter 5: Independent Advocacy

What is Independent Advocacy?

"Independent advocacy is about speaking up for, and standing alongside individuals or groups, and not being influenced by the views of others. Fundamentally it is about everyone having the right to a voice: addressing barriers and imbalances of power, and ensuring that an individual's human rights are recognised, respected, and secured" *Scottish Independent Advocacy Alliance*.

Forth Valley Advocacy are members of Scottish Independent Advocacy Alliance who are the national intermediary organisation supporting, promoting, and advocating independent advocacy across Scotland. There are three principles that underpin the work of Forth Valley Advocacy:

1. Independent advocacy is loyal to people it supports and stands by their views and wishes.

2. Independent advocacy ensures peoples voiced are listened to and their views taken into account.

3. Independent advocacy stands up to injustice, discrimination, and disempowerment.

Establishing an effective advocacy relationship, gaining trust, and obtaining views takes time. Consequently, when making a referral to Forth Valley Advocacy in relation to AWI legislation, this should be done at the earliest stage possible (see information below on how make a referral). It is important to seek consent for the referral from the person, where this can be obtained. We refer to the person as our Advocacy Partner.

As well as seeking consent for referral to advocacy, the staff member completing the assessment should ensure that the person is aware of any relevant legislation potentially being used, such as an AWI Case Conference being held, 13ZA being considered, a Guardianship application being discussed, or a renewal Case Conference being held. It is not the role of the Advocacy Worker to introduce 13ZA or Guardianship (for instance) to the Advocacy Partner and specifically that its use is being considered in their case.

Instructed Advocacy

Where an Advocacy Partner consents to independent advocacy and can express their views and wishes, the Advocacy Worker will meet with the individual to help them to understand why (for instance) 13ZA or Guardianship is being considered and to obtain their views, should they wish to share these. This process often takes a number of meetings, over several weeks.

Where the person can express their views, the relationship is between Advocacy Partner and Worker only. Family, friends, or extended networks will not be asked to contribute or share their own views or opinions.

In accordance with Confidentiality and GDPR, the Advocacy Worker will only share information that the Advocacy Partner has consented to being shared.

Non-Instructed Advocacy

A non-instructed approach to advocacy is adopted where a person is not able to express their views and wishes, for whatever reason.

The Advocacy Worker will discuss with family, friends, and extended networks any known past wishes expressed by the Advocacy Partner. Their views on the person's likely current wishes would be taken.

Observations and information gathering can take a considerable amount time. On completion a statement is prepared and forwarded to the referrer.

Contact for referrals

Referrals to Forth Valley Advocacy can be made on the telephone: 01324 320986 or by completing a referral form on the website as per link below, stating whatever relevant AWI legislation circumstance the referral relates to - i.e. whether an AWI Case Conference is being held, if 13ZA is being considered, if it is a renewal of Guardianship, or something else: https://www.forthvalleyadvocacy.com/referral

Chapter 6: Supported Decision-Making

6.1 Background

You will hear 'supported decision making' (SDM) referred to in various ways - as supported decision making, or as support for decision making, or as supporting decision making, or as support for autonomous decision making, or even as support for the exercise of legal capacity. Whichever way it is referred to it all amounts to the same thing in practice - offering support to an individual to assist them to make their own decisions, or to take action on decisions they have made. Everyone has a right to make their own decisions, as far as they are able.

The requirement to support a person to exercise that right comes from the United Nations Convention on the Rights of Persons with Disabilities. For ease this is abbreviated to the UNCRPD. The UK has ratified the UNCRPD; in non-legal terms this means we have agreed to respect the requirements of the Convention. The Convention sets out a framework for the respect, as a nation, we are expected to show a person with a disability. Disability includes a person with an intellectual disability, cognitive or volitional impairment. In short, if you are dealing, in any way, with a person under the Adults with Incapacity Act you are obliged to respect the requirements of the UNCRPD.

You may wish to read the Mental Welfare Commission's good practice guide on supported decision making.

6.2 Decision Making Ability

Assessment of decision-making ability should not be conflated with assessment of capacity, they are distinct, someone may be, by definition, incapable but may nonetheless be able to make a decision on a given matter, albeit with support. Decision making ability may vary by decision so should be assessed (considered) for each decision.

6.3 Factors Affecting Decision Making

There are a myriad of things which impact on anyone's ability to make a decision. Here we look at some of the more common ones.

Experience and Confidence
If you have had a positive experience with a particular decision this may give you confidence to make a decision of a similar nature and, conversely, if you've had a bad experience, you may lack the confidence, or be hesitant, to make a similar decision at a later date.

Understanding
If you do not have all the information, do not recognise the importance of the situation, do not appreciate the risks, benefits, or rewards you will not be able to make, or make a carefully considered, decision.

Emotion
If you are in a difficult emotional time, you may find it hard to make a decision, or make a well-judged decision. If you are stressed or anxious about a matter your decision-making ability will be affected.

Other people
You may feel inclined to make a decision to please, or maybe annoy, someone else. You may feel pressured by someone. Someone whose views you value may put you off a decision you may otherwise have made or may spur you on.

Time of Day
We may naturally be better at making decisions at a particular time of day; or we may be affected by external factors. For example, a parent under pressure in the morning to get the kids up, dressed, lunches sorted, off to school may be better waiting until later in the day to consider a key matter.

Pain
We will be less equipped to make good judgments if we are in pain. Medical treatments may impact on our ability.

Money
A lack, or even an excess, of money may influence a decision.

Lack of Support
You may feel you wish to chat the decision through with someone but have no-one, or no-one suitable, available.

Environment
A calm, quiet, environment may assist decision making – many people say they make their best decisions in the bath, or in bed. For others, background noise helps them think.

Tiredness
Your decision-making ability will be affected by tiredness e.g. from lack of sleep, or at the end of a hard week's work, or after a long drive.

Lack of Concentration
You will find decision making harder if your thought process is being interrupted or if you are being distracted or lack concentration for other reasons.

This list is by no means exhaustive, it would be easy to go on; but there is sufficient to demonstrate just how many factors influence decision making.

6.4 Supporting Decision Making

The following things are relevant when maximising a person's ability to make a decision for themselves. You may wish to think about involving independent advocacy in this process if you have not already done so. That said, it is for us all to ensure a person's ability to make an autonomous decision is maximised.

Elimination of the obstacles to decision making, wherever possible
To support someone in their decision making successfully requires you first to get to an optimal position on all the factors that impact on the person's ability to make a decision, some of which are outlined above. So, for example, make sure they are pain free, not overly tired, in a familiar environment etc.

Be clear about the decision to be made
Make sure it is clear to the person you are supporting, in easy-to-understand terms, what the matter is you are asking them to consider and decide on.

Take time
Ensure you take sufficient time when supporting a person with their decision making. The time necessary will vary person by person and depending on the issue – be guided by the individual.

Your approach

- Stay calm, have patience
- Build trust
- Use touch
- Maintain eye contact, be on the same level as the individual
- Have open body gestures, smile.
- Be matter of fact and relaxed
- Remain objective – ensure you are not inadvertently influencing the person's decisions by your words or gestures.
- Speak at a steady rate and normal volume
- Make sure your comments/questions are clear /unambiguous
- Use language the person understands
- Use short sentences
- If the person is struggling for words, do not be tempted to offer them a range of options hoping one of these may be the one they are searching for
- Listen actively, be observant – a change in the person's body position or facial expression may indicate something different to the words they are conveying.

- If you do not understand apologise and ask the person to repeat it.
- Check your understanding of what they have said by repeating back and rephrasing what you believe yourself to have heard / understood.
- Be alert to the person's emotions, acknowledge these.

The process

- Offer only as much support as is needed
- Explain things in simple terms,
- Break the matter into 'bite sized chunks, offer the person choices/options.
- Focus on one decision at a time, do not expect more than a couple of decisions to be made within the same time frame.
- Use, and encourage the person to use, simple gestures if this helps, e.g. thumbs up, down, pointing, head or eye movements, mimes,
- Use drawings, pictures, recordings etc if this will be better for the individual than words or will complement the words.
- In any event, keep paper and a pen handy, be this for you or the individual
- Writing down key words can assist with the focus of the conversation
- Writing down choices can assist
- Will past examples assist?
  Has the person had to make a decision of a like nature previously which you can discuss with them? Although remembering that circumstances can change and just because one made a decision one way in the past does not mean that one will make that same decision on another occasion.
- Can someone else help?
  No one person has the monopoly on supporting another's decision making - even if this person is appointed as their attorney, or guardian. There may be others who can assist, for example a long-term friend or a daughter rather than a son, if they have had closer dealings with the parent over the years in respect of matters like the one on which a decision now needs to be made.
- Can it wait?
  As has been touched on above, a person may be better able to make a decision on some occasions than others, if they are struggling today can the decision wait until later / for another day?

Once a decision has been arrived at the supporter should:

- Respect the person's decisions.
- Facilitate action, if required, to allow the decision to be met

6.5 Best Interpretation Decision Making

Sometimes, no matter how much one optimises the decision-making environment and offers every support, including via independent advocacy,

the person will not be able, on that occasion, to make a decision personally. Someone will then have to make a decision for that person – this should be a decision which is the best interpretation of the decision the person themselves would have made – it is not the decision the now decision maker thinks is right. Do not confuse best interpretation and best interests.

To make a best interpretative decision you would consider such things as:

- What are, or what do we know/can we glean about their current preferences?

- Can we glean anything from current behaviours? Is their mood, their tone or pitch of voice, their attitude, even their physiological responses telling us anything about their current will or preference?

- What do we know about, or have we asked about, past decisions of a similar, or comparable, nature.

- What would their past preferences have been?

- Is there a Statement of Advance Choice which may assist with best interpretation decision making?

- Can anyone else offer a view? Talk to trusted family, and friends.

- What do we know, or have we asked about, the person's values and beliefs, so that a best interpretation decision can respect these.

- Can we obtain information from other sources, e.g. a will.

- Is the decision to be made using best interpretation one which has clear benefit and is least restrictive? (in compliance with AWI principles)

- It is appropriate to take account of the impact of the decision on others, e.g. on unpaid carers, or others who may share a home with the incapable person.

- Ensure you record the process, especially if the person's wishes cannot be established or the views of someone involved are not going to be followed.

Chapter 7: Respecting rights, will and preferences

7.1 Introduction

When dealing, in any way, with a person under the Adults with Incapacity Act there is a requirement of us to respect that person's human/legal rights, their will* and their preferences.

*In this context "will" means the person's motivation, determination, intention, or drive. It does not refer to any other form of 'Will,' for example a legal bequest on death, or a living will.

7.2 Rights

There are a range of legal rights that any one of us are equally entitled to, without discrimination, no matter what our nationality, place of residence, sex, nationality or ethnic origin, colour, religion, language, or any other status.

Examples would be right to life, liberty, freedom of opinion and expression, right to education, to equality, to a fair trial, to privacy, to family life, to freedom of belief and religion.

These Rights are guaranteed by law, in the forms of various Acts, treaties, conventions and principles. Human rights law is a vast, and extremely complex, subject; it is not the intention of this Fact Sheet to give you, even an abridged, tutorial on this.

So, what do you need to know? That a person with cognitive impairment, even if this is total incapacity, loses none of their human rights and that the UNCRPD[1] requires us to respect these rights when working with, or for, that individual.

7.3 Will and Preferences

In many references you will see 'will and preference' linked together, as if they are a single entity. It is important to remember that they are distinct.

Will is, as the dictionary definition would suggest, a sense of determination, a drive, a motivation, an intention.

Preference is a choice, a partiality.

A will, or preference, can be expressed in many ways e.g. words, tone of voice, behaviour, mood, posture, facial expression, eye movement, self-

[1] United Nations Convention on the Rights of Persons with Disabilities

harm; some of these are intentional, some may be unintentional. The expression [of will, or preference] may be in an uncontrolled physiological response e.g. increased breathing rate, headache, needing the toilet more frequently, or being sick. You may need to watch and listen carefully to recognise a will, or a preference, being expressed.

7.4 Respecting will and preferences in practice

The requirement is for us to 'respect' a person's will and preferences (as well as their rights). It is the person's views which must be central to decisions that we make – you may wish to read the information in the previous chapter on Supported Decision Making.

To 'respect' does not mean there has to be unqualified deference to the person's will and preferences, i.e. that we must go with whatever the person's will or preference is, unquestioningly; but their views cannot be ignored. We must give genuine consideration to the will and preferences of the person, and as far as possible, give effect to these.

Best Interpretation decision-making

There may be occasions when, despite every support, the person is not able to express their will or preferences on a given matter. If a decision must be made, now, i.e. the decision cannot reasonably be deferred, then one must determine what the best interpretation of the person's preferences may have been. There is information on making a decision based on best interpretation within that section in the chapter above on Supported Decision Making.

Chapter 8: Deprivation of Liberty (DoL)

8.1 Introduction

The Scottish Law Commission researched and reported their views on DoL in 2014. More latterly (2022) the Scottish Mental Health Law Review has been invited to make recommendations on DoL (see chapter 8, page 262 of their report). As the time of writing (April 2023) we have yet to hear the Government's response to the Review's recommendations and so which, if any, they wish to accept. What follows therefore is the current position, as far as one can state it.

8.2 What is Deprivation of Liberty?

The accepted definition of DoL is when a person is under "continuous supervision and control and not free to leave." We have yet to have this confirmed in Scottish law and to have any detail behind what this means in practice. It is generally accepted however that "continuous supervision" does not mean one to one eyes on care; "control" does not mean, and is something more than, physical or chemical restraint; and "not free to leave" does not mean behind a locked door, rather it refers to the voluntariness of the person remaining, the person consenting to remain in the place in which they are residing.

Assent, or compliance, is not the same as consent. For example, a person in a care home may seem quite content to remain, but if they do not understand that they are not free to leave because there is a coded door pad, to which they do not know the code, nor could input the code even if they did, they are 'assenting' to remaining not consenting.

8.3 Scottish Mental Health Law Review (SMHLR) recommendations

The most recent recommendations on DoL are those of the SMHLR. They recommend that a DoL must:-

- be justifiable i.e. that the DoL is necessary for the safety or protection of the person.
- be proportionate – i.e. that the deprivation can only be to the extent needed to achieve the protection required.
- be in place only as long as is needed for the protection required.

- benefit the person (not the system) – for example, a person in hospital who cannot consent to a move to a care home, cannot be moved to that care home, if this deprives them of their liberty, simply to free up the hospital bed.
- be authorised.

8.4 Authorisation

As well as authorisation being required to move/transfer a person to a situation in which they are deprived of their liberty, authorisation will be needed to maintain the person in that situation and to return them there should they decide to leave, assuming this is required for their protection, is justifiable and that the person is not in a position that they can of their own will choose to leave.

An explicit power within a welfare guardianship can authorise a DoL but the SMHLR have recommended that such powers should only be granted where the need for a DoL is reasonably foreseeable i.e. DoL authority should not become a power that is granted as a matter of routine.

Where a DoL was not reasonably foreseeable, a variation to the guardianship, or an intervention order, could be used to offer the additional authority.

The SMHLR recognise that DoL authorisation may be needed with urgency and recommend a system which allows for this, acknowledging that the current guardianship process will not lend itself to authorising DoL in the way they envisage. The Review itself says no more on the system required as it is for the Government, if they accept this recommendation, to determine what that system should be.

The SMHLR recommend that a granter of a PoA can give advance consent to being deprived of their liberty, by inclusion of an express clause within the PoA. Again, this would need to cover transfer, maintaining and returning. The recommendation is that, for clarity, the clause is prescribed i.e. that the law would state what the wording needs to be. The SMHLR do not offer a form of words, it is for the Government, if they accept this recommendation, to determine what the prescribed wording should be.

The SMHLR suggested that some adjustment of Section 47 of the AWI – which authorises medical treatment, commonly referred to as “an AWI”, may offer at least an interim solution. Again, if the Government accept this recommendation, it is for them to agree the adjustment that needs to be made to extend section 47 to allow it to authorise a DoL.

8.5 Appeal and Review

The SMHLR recommend, howsoever a DoL is authorised, that there should be an accessible appeal process. This would allow anyone with an interest, crucially including the person themselves who may be, or about to be, deprived of their liberty, to challenge the position.

The SMHLR recommend, howsoever a DoL is authorised, that the position is subject to regular review by an independent body. They make no comment on how this would work in practice or on whom the independent body should be as this too is a matter for the Government to determine if they accept this recommendation.

Next Steps

It is accepted that this whole DoL issue needs attention with urgency. The SMHLR recommend, as an interim measure, an amendment to the AWI to address those recommendations made by them, which are accepted, and which can, or need to, be addressed more simply or more quickly.

Chapter 9: Section 13ZA Social Work (Scotland) Act 1968

9.1 What does 13ZA actually say?

For ease of application here, the following wording extracts the key elements of 13ZA. You are advised to read the Act itself if you wish to see the full wording.

'Where a local authority has decided that an adult's needs call for the provision of a community care service; and it appears to the local authority that the adult is incapable in relation to decisions about the service, the local authority may take any steps which they consider would help the adult to benefit from the service. Steps that may be taken by the local authority include moving the adult to residential accommodation.'

9.2 Why are there anxieties about the use of 13ZA?

- A move of a person to care home, where they are unable to consent to this (which must be the case if you are considering using 13ZA) and where they are under continuous supervision and control and not free to leave is likely to constitute a deprivation of liberty (DoL). Case law has shown that a DoL requires legal authorisation. You can find information about DoL in chapter 8.
- The comments of the Government and the Mental Welfare Commission, shown below, do not completely rule out use of 13ZA for such a transfer but neither do they wholly endorse its use, which leaves anxiety about whether, when and to what extent 13ZA can be used.
- The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) requires a person to be supported to make an autonomous decision, if possible. 13ZA does not oblige the Local Authority to offer such support. You can find more information about Supported Decision Making in chapter 6.
- The UN reproves substituted decision making. Allowing a Local Authority to take any such steps *they* consider would help the person is clear substitute decision making.
- If a person cannot be supported to make an autonomous decision the UN requires the decision to be a best interpretation of that which the person would have made had they been able. There is no

requirement in 13ZA to consider what the person's own views on the matter would have been. There is information about best interpretation decision making in the section on this in chapter 6.

- The UNCRPD requires an independent review of measures taken; Section 13ZA has no requirement for an independent review.

9.3 What the Government and MWC say about Section 13ZA

Scottish Government commentary on use of 13ZA states

"[use of] Section 13ZA to facilitate a discharge from hospital to a care-home setting provides a level of legal authority for the move but does not give authority for a person to remain/be held there. Additional powers, such as Welfare Guardianship, are required for this and should be sought as soon as possible."

The Mental Welfare Commission comment

"If services are satisfied that a person who cannot consent will be deprived of their liberty, it is necessary to consider what lawful authority justifies that deprivation including the application of s.13ZA".

9.4 How can 13ZA be used properly?

1. Complete an appropriate health and social care needs assessment.
2. Support the person to make an autonomous decision, remove barriers to autonomous decision making, where this is possible.
3. Involve Independent Advocacy if/as required.
4. Establish the person's preferences if they are unable to make, or communicate, an autonomous view, despite every support.
5. Discuss the situation and proposed care support with relevant other practitioners, including use of 13ZA to achieve this. This can be done by way of an AWI case conference.
6. Discuss the situation and proposed care support, with relevant family members including the use of 13ZA to achieve this. Family and the person should be invited to any case conference.
7. Ensure there is a clear benefit from the use of 13ZA and that this benefit cannot be achieved in a way which offers lesser restriction on the freedoms of the person i.e. that the use of 13ZA complies with these principles of the AWI.

8. Make a full record of the decision-making process – the use of the 13ZA form will ensure this.
9. Commence a guardianship process in early course if required.
10. If possible, have an independent review of the decision to use 13ZA.

9.5 When can 13ZA not be used?

13ZA cannot be used when:

- The adult has a Guardian or Attorney with relevant powers.
- An intervention order has been lodged, or granted, relating to the relevant care plan actions.
- An application has been lodged for a welfare guardianship relating to the relevant care plan actions.
- Where the person is opposed to the actions proposed.
- Where there is disagreement between the professional teams involved as to the proposed care plan, or the use of 13ZA to achieve this.
- Where there is disagreement between family members as to the proposed care plan, or the use of 13ZA to achieve this.
- Where there is disagreement between family members and the practitioner team as to the proposed care plan, or the use of 13ZA to achieve this.
- Where the person is unable to adhere to the support/care/treatment plan in place.

9.6 FAQ

Who completes the assessment?

The person with day-to-day responsibility for the person's care planning, for example an allocated Social Worker or Care Manager.

When should the assessment be completed?

As soon as onward care is foreseeable, and it appears that the person will not be able to consent to the proposed care package.

When should I involve independent advocacy?

Again, as soon as onward care is foreseeable and it appears that the person will not, or may not, be able to input to the decision-making process.

Is an AWI case conference required when use of 13ZA is being considered?

Individual circumstances will inform this. It is considered best practice to hold a case conference. The views of all relevant parties must be taken into account, and it may be easier to obtain these by way of a case conference to which all relevant parties, including the adult, are invited. This may particularly be the case where the views of all parties are not already known from ongoing discussions. Where the views, of all parties, are already clear, convening a case conference may create unnecessary delay in the provision of services. A case conference should be convened if any party requests this, or where there are complex circumstances. If there is any doubt, convene a case conference.

Should legal be invited to an AWI case conference?

If you have a sense that legal advice may be required, albeit in due course, then you should contact legal soonest, to allow them opportunity to become familiar with the case and so to advise appropriately.

If I'm using 13ZA, what do I do about guardianship?

If there is a guardianship application in progress, you can continue to use 13ZA until the guardianship application is lodged i.e. until the paperwork is submitted to court. If there is no guardianship in progress, and if there is likely to be a deprivation of liberty because of the move under 13ZA, you should begin the guardianship process within the care setting, running this alongside your use of 13ZA. Ideally, all 13ZA cases which result in a DOL should progress to guardianship as soon as the move has been facilitated to formally authorise the DOL.

What if we use 13ZA to move/transfer a person but then they try to leave?

13ZA cannot be used to hold a person against their will. A court authorisation is required for this – by way of the granting of a guardianship order.

When do I need to take legal advice?

There is no specific 'rule' as to when you need to take legal advice, each case should be considered on its own merits. As above, typically there is a sense of when legal advice is, or may, be needed, follow any instinct on this.

Chapter 10: Section 47

Section 47, commonly referred as “an AWI”, is the section of the Adults with Incapacity Act which permits those responsible for medical treatment to authorise this for a person who has not got the mental capacity to consent.

Adults with Incapacity (Scotland) Act 2000 section 47(5) says “A certificate for the purposes of subsection (1) shall be in the prescribed form”… i.e. You must use the form directed by the Scottish ministers in this statutory instrument:

The Adults with Incapacity (Medical Treatment Certificates) (Scotland) Regulations 2007 / Scottish Statutory Instruments 2007 No. 104. This Is currently the prescribed form for administration of medical treatment under Section 47 of the Act.

The Mental Welfare Commission and Scottish Government both have comprehensive advice on using Section 47. The following therefore is a summary.

- Section 47 can only be used for a person who lack capacity to give, or refuse, consent.
- “Medical treatment” includes any procedure or treatment designed to safeguard or promote physical or mental health.
- A doctor is permitted to sign a section 47 as well as a dentist, optician, or nurse where they have completed the relevant capacity assessing course.
- A welfare attorney, or guardian if they have relevant powers, must be consulted.
- The intended care should also be discussed with the nearest relative, primary carer, or any relevant others.
- The section 47 certificate covers the care specified in the treatment plan. Additional treatments cannot just be ‘bolted on’ at a later date. If a new/different treatment is needed, then the whole section 47 needs reviewing.
- The section 47 should be reviewed when there is a change of circumstance e.g. a move from hospital to a care home, even if all the same care is going to be provided.
- You can have more than one s47 at a time. For example, if there is one running for day-to-day care but then the person needs a specific procedure e.g. an endoscopy then a separate section 47 would be required to authorise this.

- The certificate is for a specified period. It should be for the shortest time considered likely, ideally it should not be for a period exceeding one year but it can extend for three years where capacity is unlikely to improve in that time.
- The authority can be revoked, e.g. if capacity improved or returned sufficiently before expiry of the certificate. It can also be renewed, e.g. if capacity did not improve or return as quickly as was anticipated.
- Section 47 authorisation cannot be used for to give treatments by force or to authorise a deprivation of liberty.
- The principles of the AWI principles and UNCRPD requirements still need to be respected.

Chapter 11: Managing conflicts

A variety of conflicts can arise. For example,

- The person wishes to leave the care home, but they may not appreciate there is a main road outside and could potentially be injured – they have a right to safety, and you have a duty to ensure their safety. Here, the principles conflict with their rights and your duty of care.
- The person's preference has the potential for harm. Here, the UNCRPD requirements (to respect a person's preference) conflict with the principles (to have the intervention be for the person's benefit).
- The person expressed a clear wish in the past, let's say to not be a burden on their family if they needed to have care, but now they need care they are refusing. Here, their present wish conflicts with a past wish.

It is not possible to offer a comprehensive list of conflicts as there are so many ways in which conflict can arise. It may too be in respect of people, for example:

- The person may dispute decisions of the attorney
- Two attorneys may disagree with each other
- An attorney may disagree with the proposed clinical direction
- The clinical team may disagree with decisions/actions of the attorney

Because there are so many potential causes of conflict it is not possible to be specific about how one should manage such a situation, but the following offers a guide.

1. Is the central issue clear. When conflict has been around for a while, the material issue can be lost sight off. It can help to rebase - what is it we are trying to achieve?
2. Are the points of difference clear? Are we clear what is giving rise to the conflict. Do we know what the views of the various parties.
3. Do we need to know anything more about the circumstances / the situation? Sometimes there is a relevant point which has not been considered, or recognised, which may offer a point on which compromise can be built.

4. Are timeframes clear? Can they be adjusted? Sometimes just offering more time takes the pressure of the person to make a decision and one finds that they become more able to take things in and reach a conclusion.
5. Has the person been fully supported to make their own decision? In line with the UNCRPD requirements, see chapter 6; and, to comply with the AWI principles to encourage the person's participation.
6. Would Advocacy support assist? See chapter 5
7. What are the person's rights in the given situation? The UNCRPD, see chapter 7 requires us to respect the person's rights.
8. What is, or would be, the person's own view on the matter? In order that we can respect the UNCRPD requirement to respect the person's will and preferences, and to take a decision best on the best interpretation of their views. This too ensures compliance with the AWI principle to take account of past and present wishes.
9. Anything to be gleaned from their current behaviours?
10. Would explaining things differently help?
11. Can anything be drawn from past decisions of a comparable nature?
12. Has the position been reviewed objectively? It is easy when parties have strong emotion to become subjective, taking to narrow a focus, failing to take account of the potential breadth of relevant issues.
13. Have the views of all relevant others been sought?
14. Is there anyone else who may have information?
15. Has due weight (not too much and not too little) been given to relevant parties' opinions?
16. Have all viable options been considered? Any compromise options?
17. Have views of parties been genuinely listened to and respected?
18. Are there wider things that need to be considered? E.g. costs, impact on, or risks to, others
19. Would a case conference assist – having all relevant parties speak together?
20. Would mediation assist?
21. Would it be wise to consult someone else / get authority before making a decision? E.g. LA/SW/OPG/MWC/legal advice

22. Finally, ensure a clear record of things considered, actions taken, and decision made.

It may not be possible to reconcile the conflict but using an aide memoir like this will ensure that you have taken a systematic approach and considered all relevant matters. A comprehensive file note, using the language of the AWI and UNCRPD, will evidence this.

Clinical team disagree with decisions of the attorney.

As mentioned above, this is but one of many conflicts that may arise. The aide memoir above holds good even in this situation, work through the above points in a systematic way. You cannot simply overturn, or disregard, decisions of an attorney, or guardian, even if you think these are wrong but neither do you have to compliantly follow their instructions where you are of the view that these are concerning.

In this eventuality, this is a situation when advice, including legal advice, is certainly recommended. It may be that a formal complaint about the attorney or guardian is justified, or even that court action, for instance to seek to have the powers in the power of attorney or guardianship order amended, or even, as a last resort, to request the person is removed from office. This is a matter for your legal team not something which you yourself have to determine.

Chapter 12: International position

Questions which arise with regularity: -

1. Can a Scottish order (power of attorney or guardianship) be used in another country and, reciprocally?
2. Can a non-Scottish order be used in Scotland?
3. What is the mechanism for getting a non-Scottish order authorised for use in Scotland?
4. What are the supervisory arrangements?

These questions are addressed below in respect of the two main Scottish orders, guardianship, and Power of Attorney.

Can a Scottish order be used elsewhere in the world?

The acceptance of Scottish orders in other countries is a matter for that other country to determine. The attorney or guardian should be advised to check with an agent versed in the law of that country.

If required, formal UK Apostillation of the order can be offered. This is via an online application, by the holder of the Order, to the Legalisation Office, a UK Government department. The Public Guardian for Scotland is a recognised signatory.

The book on International Protection of Adults covers cross border requirements in a wide range of countries, so may offer a useful start point.

Can a Scottish order be used in England?

The English equivalent of the AWI, the Mental Capacity Act 2005, (MCA) governs this. The wording would suggest that it is permissible to use a Scottish PoA in England, but experience shows that attorneys find this difficult in practice. We (Scotland) had hoped that the Ministry of Justice (MoJ) would take the opportunity, via the Bill which modernised powers of attorney in England and Wales (progressing in 2023), to ease the recognition of Scottish PoAs but they have seen this as unnecessary, believing that the MCA as drafted is sufficient. There is a process which allows an attorney to have their Scottish PoA endorsed for use in England and Wales. Application is via the Court of Protection.

Can a non-Scottish order be used in Scotland?

The position varies depending on whether this is an order analogous to Scottish guardianship, or the equivalent of a Power of Attorney.

Orders analogous to guardianship

Schedule 3, paragraph 7 (1) of the Adults with Incapacity (Scotland) Act 2000 is the relevant section. It states that:

"Any measure taken under the law of a country other than Scotland for the personal welfare or the protection of property of an adult with incapacity shall, if one of the conditions specified in sub-paragraph (2) is met, be recognised by the law of Scotland."

This wording reflects the Hague Convention on the International Protection of Adults.

Measure of protection

According to this wording, a 'measure of protection' is one that is "taken" [under the law of another country]. The definition of such measures is in paragraph 14 and include guardianship and analogous institutions 14(c).

As for PoAs, there is a view that a 'measure of protection' should, or may, include a PoA competently drafted and recognised in its country of origin – but, from this, you can see that there is dubiety about the position of a PoA. To err on the side of caution it is best to look at 'foreign' PoAs and guardianships distinctly.

Mechanism for Enforcement

1. A measure [of protection] that falls within the ambit of paragraph 7 i.e. one that is recognised by the law of Scotland may be registered, paragraph 8.
2. SSI 2003/556 covers the process of registration – which is via the relevant Sherriff Court.
3. If the measure is not written in English, translation to English is required, which must be certified as a correct translation.
4. Notification of the intention to register an international measure must be given to certain Scottish Authorities, as listed.
5. If/once 'the foreign order' is approved by the sheriff for registration the Public Guardian is notified and a Certificate issued, in the same way as for a Scottish guardianship appointment.

6. The person so appointed would then be permitted to exercise their order in Scotland.

Supervision

7. What is not clear is the process for ongoing supervision, following registration of the order.
8. It would be preferable for the relevant Scottish Authority to take over supervisory responsibility, but nothing compels this. There can be a tendency for the appointee to be supervised by both Scotland and the country of origin.
9. Reciprocally, where a person under a Scottish order moves out with the Scottish jurisdiction it would be preferable for the receiving country to take over supervision, as per their own jurisdictional requirements, but nothing 'triggers' this.
10. We have had cases where either Scotland continues to supervise someone now abroad – with no jurisdictional authority; or ceases supervision but without formally transferring this to the receiving country, leaving the guardian unsupervised and potentially the incapable person exposed.
11. Once a non-Scottish guardianship order is registered, and even if the Public Guardian has assumed supervision, it is unclear what happens if/when there are any issues with the way in which the guardian is acting, or issues with the order generally - are these reported back to the court of origin and if so by whom, or are these dealt with in Scotland by the court authorising the use of the foreign order?
12. This is a matter on which we await more legal clarity.

Power of Attorney, or equivalent

13. Schedule 3 paragraph 4 is the relevant part of the Adults with Incapacity (Scotland) Act 2000, the relevant wording being, in paragraph (1)

    "The law governing the existence, extent, modification, and extinction of continuing or welfare powers of attorney (including like powers, however described) shall be that of the State in which the granter habitually resided at the time of the grant of these powers."

14. And in paragraph (3) "The manner of exercise of such a power shall be governed by the law of the State in which its exercise takes place".

15. This wording reflects the Hague Convention on the International Protection of Adults.

16. Interpreting this, an international equivalent of a Power of Attorney (including an English lasting power of attorney – for property, finance, or welfare) may be exercised / used in Scotland, but it cannot be changed or revoked, other than as may be permitted by the law of the country of origin.

17. When being exercised in Scotland, its use is subject to the Adults with Incapacity (Scotland) Act 2000.

Mechanism for Enforcement

18. There is no provision for such a Power of Attorney to be registered in Scotland. SSI2003/556 relates only to a process for orders equivalent to guardianship.

19. The reason there is no such provision, it is suggested, is because the wording of Schedule 3, paragraph 4 permits the use of a Power of Attorney in any event, without the need for formal registration.

20. This is endorsed by the terminology in several places throughout the Act, e.g. at Section 1(7) whereby a guardianship is accepted *"if it is recognised by the law of Scotland"* S1(7)(a), but there is no such corresponding caveat in respect of a power of attorney S1(7)(b) and (c).

21. Even though use of a non-Scottish Power of Attorney should simply be accepted, Users of non-Scottish Powers of Attorney can struggle to have their deed officially recognised because of the lack of registration.

22. A Scottish Power of Attorney has a certain appearance; although a prescribed format is not required, many do follow a similar general design, once registered with the Office of the Public Guardian the deed has a Certificate of Authority attached. Organisation relying on the authority of an Attorney look for the Scottish Certificate of Authority as an indication that it is a bona fide document. When they see what to them is a strange foreign order, they are unwilling to accept the authority of the attorney.

23. The Office of the Public Guardian has a form of Certificate on their website, which mirrors in appearance that of a registered Scottish deed, and which explains the position with non-Scottish deeds. Attorneys can download this to append to their deed; this has assisted in some cases.

24. A formal recognition process for non-Scottish powers of attorney would reduce the difficulties faced by those seeking to rely on these in Scotland

but this a) goes beyond what the Hague Convention requires and b) places an additional hurdle, and cost, for those that are managing with a non-Scottish deed without finding they need formal validity.

What is clear is that we require greater awareness in respect of the legislation that applies in cross border cases in order that, for example, Agencies appreciate that they can rely on a non-Scottish power of attorney, as presented but there is no-one charged with increasing awareness. Regrettably, therefore this issue rumbles on, without any satisfactory easy solution.

Appendix A

Scottish Mental Health Law Review

AWI Recommendations

The recommendations below are limited to those in respect of AWI, chapter 13 of the review report.

1. The Scottish Government should, as a priority, amend the Adults with Incapacity (Scotland) Act 2000.
2. Section 1 of the AWI Act should be amended to give greater priority to the will and preferences of the adult.
3. The Scottish Government should amend the Power of Attorney scheme as follows:
    - The granter should state when a POA should come into force.
    - A person's ability to grant a POA should be conducted in accordance with the ADM test in Chapter 8, within the framework of HRE and SDM.
    - The certificate accompanying a POA should be called a 'Certificate of Autonomous Decision-Making Ability.'
    - The act of a GP completing a POA certificate should be included as an NHS funded service.
    - A comprehensive investigatory framework should be developed with OPG, Local authorities, the MWC and Police Scotland and full and equal participation with persons with lived experience including unpaid carers.
    - Provision should be made in law for an attorney to be subject to supervision should an investigation determine this is required.
    - As per the recommendation in chapter 3 updating of the AWI Act
    - principles are required.
4. The Scottish Government, together with the OPG, MWC, local authorities and such other agencies as necessary, along with the full and equal participation of persons with lived experience including unpaid carers, should develop support, training, and guidance for attorneys. This should include:

- Awareness of the role and obligations of an attorney.
- Information on the new HRE/SDM/ADM framework.
- Provision of an advice helpline/ online support.
- Consideration of ways in which access to granting a power of attorney may be eased.
- Consideration of ways in which the cost of a POA can be eased.

5. The Scottish Government should ensure there is increased awareness of the importance of a POA, with targeted engagement, and multimedia involvement, with focussed messaging for groups who may benefit more from having a POA, actively encouraging all citizens to grant a POA early, as part of lifestyle planning.
6. The Scottish Government should ensure that Part 5 and associated guidance and forms should require a certifying practitioner to demonstrate that they have considered and adhered to the principles of the AWI Act when issuing a section 47 certificate.
7. The Scottish Government should ensure that guidance gives greater clarity on the support that is required to be given to the person in assisting them to make an autonomous decision, before engaging section 47.
8. NHS Education Scotland should review the training of doctors and other professionals who are authorised to grant section 47 certificates. This should include their understanding of relevant human rights issues, and the principles of the legislation.
9. Section 47, 47A and associated regulations should be amended as follows:
    - The authority currently granted by section 47 should be reframed to make clear that treatment which is authorised should be that which would reflect the best interpretation of the adult's rights, will and preferences.
    - To specify the circumstances in which it is not necessary to complete AWI Act documentation when treating a patient who is unable to consent and make clear that in all cases the principles of the legislation apply.
    - To widen the categories of healthcare professional who can assess incapacity and issue a section 47 certificate, including registered psychologists where appropriate.

- To provide a process of electronic recording and auditing of section 47 certificates, overseen by the Mental Welfare Commission.
- To provide that force, detention, or covert medication should require explicit authorisation by a legal process with a right of appeal to the tribunal, unless there is a genuine emergency.
- Section 47 should operate within the Human Rights Enablement, Supported Decision Making and Autonomous Decision-Making framework.

10. Scottish Government should undertake further consultation to develop:
    - A clear process to authorise conveying an adult to hospital for physical treatment or diagnostic tests where they are unable to make an autonomous decision.
    - An extension to s47 to authorise restrictions on a person leaving hospital while they are receiving treatment for a physical condition or diagnostic tests, with provision for review after 28 days, and an appeal process.
11. In all cases, including emergencies, force, detention, or covert medication should be recorded and subject to monitoring and audit, overseen by the MWC.
12. The MWC should issue guidance on the use of force, detention and covert medication which should have the same legal effect as the statutory Code of Practice.
13. An adult, or someone acting on their behalf, including a carer or advocate should have practical and effective access to a court or tribunal by a simple procedure to challenge a decision to grant a section 47 certificate, or a treatment authorised under that certificate.
14. The safeguards for specified treatments under s48 should be adjusted so that the same safeguards apply as under the MHA for
    - ECT, vagal nerve stimulation and transcranial magnetic stimulation
    - (Subject to further consultation) artificial nutrition and hydration: we propose these should be the same as under the Mental Health (Care and Treatment)(Scotland) Act 2003

- Drug treatment for mental and intellectual disability given for more than two months to a person subject to a deprivation of liberty.

15. It should be lawful to give treatment which is necessary to a patient under Part 5 (section 49) where an application for a Decision-Making Representative is in train, provided the application does not involve a dispute regarding the treatment.
16. The law should make clear that a decision-making representative cannot override the adult in relation to a decision where the adult is able to make an autonomous decision regarding the treatment.
17. We recommend that the reformed system should include a straightforward process by which an adult who believes they can take an autonomous decision about their medical treatment can access the tribunal. [See chapter 5 on support that is available where an ability to instruct a solicitor is limited]. In addition, any stated opposition to a particular treatment by the adult should bring into play the same safeguards as opposition by a decision-making representative.
18. Scottish Government should ensure adequate resourcing to realise these recommendations.
19. The decision-making model should replace the current guardianship system.
    - The current access to funds and management of residents' finances processes should be subsumed within the model.
    - The application for a specific issue intervention order should be retained, authorised by a judicial body.
20. The Decision-Making model should operate within the Human Rights Enablement, Supported Decision Making and Autonomous Decision-Making framework.
21. The Scottish Government should develop Codes of Practice and guidance to support the operational detail which offers clarity about processes, rights, roles and responsibilities, scrutiny and monitoring and includes information on managing and resolving conflicts of interest and disagreements between the person and/or Decision-Making Supporter, Decision MaRepresentative, or attorneys.
22. The Mental Health Tribunal for Scotland should be the judicial body to whom such applications are made.

23. This work should be developed with key practitioners and the full and equal participation of people with lived experience including unpaid carers.

24. There should be adequate resourcing to ensure the effective delivery of this new model.