

Working with the Adults with Incapacity (Scotland) Act

Information and guidance
for people working in
adult care settings

Contents

| | |
|---|----|
| Who is this guidance for? | 2 |
| Why have we produced this guidance? | 2 |
| Does this guidance cover financial matters? | 3 |
| What is guardianship and why do you need to know about it? | 3 |
| Who is welfare guardianship used for? | 4 |
| When does someone apply for guardianship? | 4 |
| What kind of powers can a guardian have? | 5 |
| How long does a guardianship order last? | 5 |
| What are the legal functions and duties of a guardian? | 6 |
| Can more than one person be appointed guardian? | 7 |
| Who else might be involved in guardianship? | 7 |
| Can guardians be given powers to consent to medical treatment? | 8 |
| What do care providers need to know? | 8 |
| What powers can be delegated to the care provider? | 9 |
| What is a power of attorney? | 10 |
| When does a power of attorney come into effect? | 10 |
| How long does a power of attorney last? | 11 |
| What authority does the welfare attorney have? | 11 |
| What are the benefits of power of attorney for people in your care? | 12 |

| | |
|---|-----------|
| What are the functions and duties of the local authority? | 13 |
| What other parts of the Act should I be aware of? | 14 |
| What is incapacity and what should care staff know about it? | 15 |
| What are the general principles on which the Act is based? | 16 |
| What is the Office of the Public Guardian? | 21 |
| What is the Mental Welfare Commission for Scotland? | 21 |
| Appendix 1: Glossary of terms | 22 |
| Appendix 2: Guardianship's Checklist for Resident's File | 23 |
| Appendix 3: Other useful contacts | 24 |
| Appendix 4: Other reading | 24 |

Who is this guidance for?

This guidance has been developed to support managers and staff working in registered services for people with mental illness (including dementia), learning disability and other mental disorders in Scotland. It is for anyone employed in caring for an individual who, because that person is not capable of making key decisions about his or her own health and welfare, has become subject to the Adults with Incapacity (Scotland) Act 2000. The Mental Welfare Commission (MWC) has legal duties in relation to safeguarding the rights of people who are subject to the welfare provisions of the Act. Our guidance, therefore, focuses on issues relating to welfare guardianship and welfare powers of attorney in care homes and other registered care settings. While we do discuss some areas of financial decision-making, this is only as far as these may have a bearing on the welfare of an individual.

Why have we produced this guidance?

Through our visits to people on guardianship and calls to our advice and information line, we have become aware of the need for clarity on roles and responsibilities regarding the use of welfare powers in care settings. Our visiting programme has also highlighted the need for improved record keeping where individuals are subject to welfare powers under the Act. This guidance aims to answer these two needs by providing clarification on the role of welfare guardians and a checklist of information that we would expect care providers to maintain.

Where a person is subject to the Adults with Incapacity Act (AWI), other people will be given legal authority to make decisions or take action on his or her behalf. They could be authorised to make decisions on a wide range of welfare or personal care issues, from where a person lives, to whom he or she is allowed to spend time with. The law also allows these authorised individuals (welfare attorneys or welfare guardians) to delegate decision-making power to

care providers. We think it is important for managers and their staff to know:

- Who in their care is subject to the Act.
- To whom powers have been granted.
- The extent of these arrangements.
- The length of time for which the authority lasts.
- The powers which have been delegated under the Act.

Your local authority has a number of statutory duties under the AWI Act. These include supervising private guardians and in some cases acting as guardian. The court may also order that they supervise a welfare attorney. In respect of guardianship and welfare attorneys, you need to know who is carrying out these duties in relation to adults in your care. Any concerns you or other members of the care team might have can then be properly addressed to the person responsible.

Care providers who require further information and support to resolve difficult welfare issues relating to the AWI Act can contact our advice and information line on 0131 222 6111. Other AWI information resources are also available from our website www.mwcscot.org.uk.

Does this guidance cover financial matters?

This guide is concerned mainly with the welfare provisions of the AWI Act although some basic terminology relating to financial management under the Act is included in the glossary. Guardianship and powers of attorney may also be granted in respect of an adult's property and/or finances. For information about financial provisions please contact the Office of the Public Guardian (OPG) who can provide information and advice on these matters. (See Appendix 3 for contact information.)

What is guardianship and why do you need to know about it?

Guardianship under the AWI Act is a legal mechanism that allows relatives, carers, or other parties, such as local authorities, to make certain decisions or take certain actions regarding the welfare or financial affairs of adults who lack capacity to make these decisions themselves. Adults include anyone over the age of 16.

One of the primary uses of guardianship under the AWI Act is to authorise not just where a person should reside, but also the care he or she should receive, and how these are delivered. The powers granted relate to those areas of an adult's life in which he or she lacks the capacity to make decisions or take actions which need to be made or taken to safeguard the person's rights and protect his or her welfare. It is important for the care provider to know what powers have been granted. A copy of the powers granted should be obtained from the guardian, the local authority or the Office for the Public Guardian. These should be kept on file.

Who is welfare guardianship used for?

It is estimated that there are upwards of 100,000 adults with some impairment of capacity, due to dementia, learning disability or other cause, living in Scotland. The majority of these people receive care from Scotland's many and diverse care providers, either in formal community care settings, or from informal carers or relatives, most without any specified legal authority. The use of welfare guardianship as well as welfare attorneys has risen quite sharply since the introduction of the Act. In the first three years since the introduction of the AWI Act in 2002 there were, in total, a little over 1,000 applications granted for welfare guardianship. Its use is continuing to rise considerably each year as is the registration of welfare powers of attorney. In the year from April 2006 to March 2007 there were nearly 1000 applications for welfare guardianship approved. The trend shows no sign of abating and it is increasingly likely that someone in your care will be subject to welfare

guardianship, if this is not the case already.

The majority of people subject to welfare guardianship have some form of dementia. It is estimated that there are nearly 17,000 people with dementia who are resident in care homes. The second most common use for welfare guardianship is for individuals whose lack of capacity is due to a learning disability. Approximately 2,600 people with a learning disability and another 1,000 people with mental illness are presently in care homes. The potential for substantial further growth in the use of the AWI Act for people who lack some capacity is another reason why managers and staff should familiarise themselves with the basics of the legislation.

When does someone apply for guardianship?

If an adult loses some capacity to make decisions for themselves, a relative, a carer, a local authority, or indeed any other interested party, may make an application to the court to be their guardian. The application is based on two doctors' reports and a report by a mental health officer (in welfare guardianship), or a report by another relevant professional (usually an accountant) in financial only guardianship. The application might be made because the person is struggling to make decisions, or because he or she cannot safeguard their finances or their property. It may be because there is conflict between the adult and their carers about what care they need, or where they need to live. It may simply be because the carers or relatives want to have a central role in all the decisions being made for the person who lacks capacity. In some situations guardianship is sought primarily to make financial arrangements, and welfare powers are decided at the same time.

It should not be presumed that the guardian has the power to make all decisions regarding care.

Whatever the reasons that trigger a guardianship, it is important for all concerned in the care of the person who lacks capacity that they know about their role and responsibilities under the Act.

Copies of application forms for guardianship can be downloaded from the Scottish Executive website.

What kind of powers can a guardian have?

A guardian may have the legal authority to make a number of decisions on behalf of an adult who lacks the capacity to make these decisions for him or herself. The decisions they can make will be specified in the Guardianship Order and it should not be presumed that the guardian has the power to make all decisions regarding the care of a person. (A welfare attorney, which is discussed below, can have the same range of powers, the difference being they are granted by a person when they have capacity to understand the implications of granting a welfare attorney.)

It is, therefore, important that care providers know what kinds of powers the guardian has. It is especially important that they know whether it is a welfare only, or financial only order, or whether the guardian has *both* welfare and financial powers. For instance, if a guardian has only financial powers, they may have no legal authority to make decisions about welfare matters. This alone should not preclude them from

being involved in these decisions, in the way that you would ordinarily involve other carers and relatives.

How long does a guardianship order last?

A guardianship order may be time limited. Initially the default period for guardianship orders is three years, although many are now granted for an indefinite period. A care provider should ask to see how long the power of attorney or guardianship lasts and should note when/if the powers cease. The power of attorney, as discussed below, is not exercised until the attorney believes that the adult who granted the powers no longer has the capacity to make these decisions or take these actions him or herself.

What are the legal functions and duties of a guardian?

Most importantly, a welfare guardian, the same as anyone else exercising functions under the Act (and this will include managers and staff of registered services at times), must ensure that his or her actions are in accordance with the general principles of the Act (see pages 17-21). These are discussed in detail below.

Guardians have a number of functions and duties. Many of these will relate to the powers specified in the Guardianship Order. Their powers may include:

- Power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order.
- Power to manage the property or financial affairs of the adult, or such parts of them as may be specified in an order.
- Power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.

- Power to act as the adult's legal representative in relation to any matter within the scope of the powers granted.
- Power to pursue or defend an action including one nullifying a marriage, separation or divorce in the name of the adult.
- Power to arrange for some or all of his or her functions to be exercised by one or more persons acting on his or her behalf (very often a care provider). However, the guardian cannot surrender or transfer any part of his or her functions to another person. In other words, the guardian remains responsible for how these functions are exercised.
- The duty to comply with any order or demand made by the Public Guardian in relation to the property or financial affairs of the adult insofar as this is within the scope of the guardian's powers.

The general duties of a guardian are:

- The duty to keep records of the exercise of his or her powers. It follows from this that when you are exercising any of the guardian's functions on his or her behalf, you should record when you do so and forward this record to the guardian at regular intervals.
- The duty to provide the local authority with any reports or other information about the personal welfare of the adult, or the exercise by that guardian of his or her powers as may be reasonably requested.
- A number of reporting and monitoring duties on financial guardians as set out by the Office of the Public Guardian.
- The ability to make an application to the sheriff if the adult or any other person does not comply with the welfare power(s) being executed by the guardian with which they might reasonably be expected to comply. The sheriff may make a compliance order obliging people to adhere to the

decision of the guardian. This might even involve the police returning a person to where the guardian wishes them to live.

- A common law duty of care for welfare guardians and a fiduciary duty for financial guardians.

Can more than one person be appointed guardian?

Two or more people may be appointed as joint guardians. One may have welfare powers, the other may have financial powers, or they may share both. It is important, therefore, that care providers understand the roles of all guardians involved.

A substitute guardian may be appointed either initially when the guardianship is granted, or subsequently by application to the sheriff. The substitute becomes the guardian when the original guardian becomes unable to act in their role.

Who else might be involved in guardianship?

The supervisor

When the guardian is a relative, carer or other private individual, and has welfare powers, the local authority in which the person lives must allocate a supervisor for the guardian. This will usually entail the supervisor meeting the guardian, reviewing the care plan, at least six monthly. The supervisor will look at the appropriateness of the use of powers.

The delegate guardian

When the local authority is the guardian, the guardianship order normally states that the guardian is the Chief Social Work Officer. The local authority must then provide a member of staff to fulfil the role of guardian. They are sometimes called the delegate guardian. There may be an allocated worker for the person who lacks capacity, as well as a delegate guardian. The allocated worker/care manager would be the day to day contact for the care provider. The delegate guardian would usually only get involved at the reviews, for visits, and always when major decisions are being made about the care plan.

Can guardians be given powers to consent to medical treatment?

A guardian may have welfare powers relating to medical decisions. The care provider should consult with doctors about medical decisions as normal, but they must also consult with guardians (and welfare attorneys) if they have relevant powers, before decisions are made. It is, therefore, important that a care provider knows whether medical powers were granted in the order.

If the person lacks capacity to decide about his/her medical treatment, a certificate under the AWI Section 47(1) is required in order to authorise treatment. This is the case regardless of whether there is a guardian or a power of attorney with powers relating to medical decisions. The GP, or other authorised health care professional, should complete this treatment certificate. It is recommended that a copy of this is kept close to where the adult is receiving their everyday treatment, so that care providers giving medication can see that the treatment certificate covers

the treatment they are giving, and is up to date. (Treatment certificates need renewed either annually, or after three years, depending on the nature of the treatment.) Treatment certificates, and guidance about when they are to be completed, are available to download from the Scottish Executive website.

Where there is conflict over medical treatment between the doctor and the guardian, they can seek resolution by contacting the MWC who may organise an independent doctor to give an opinion about the proposed treatment (section 50). If the care provider, or other interested party, is in conflict over the treatment being given, they can appeal to the sheriff (section 52).

Issues regarding the covert administration of medication are addressed in a separate MWC publication (see 'Other reading' below).

What do care providers need to know?

Care providers should know:

- Who the guardian is and how he or she can be contacted at all times. In the case of the local authority acting as guardian, this is the name as well as contact details of the person in the local authority to whom this has been delegated and contact details for whom to contact in his or her absence.
- The names and contact details where a joint or substitute guardian has been appointed.
- What powers a guardian has.
- How long the power of guardianship lasts.
- Which powers the guardian wishes to delegate to them and the recording and reporting arrangements related to the exercise of any delegated powers (see below).
- What wishes the guardian has regarding the circumstances in which the care provider should contact him or her, e.g. notification of serious accidents and incidents,

The care provider should know when it is appropriate to involve the guardian in decision-making.

or information about certain meetings the guardian might wish to attend.

- The name and contact details of the local authority supervising officer in the case of private welfare guardianship and contact details for another officer when this person is not available.

What powers can be delegated to the care provider?

The care provider, care home workers or support staff, are often the people who intervene directly in the life of the person who lacks capacity. It is the care provider who is expected to carry out the care plan, which may include placing limits on the person's freedom. It is necessary, therefore, for the care provider to know which powers have been delegated to them. This means he or she may have the delegated power, for instance, to determine a special diet for the adult, withhold alcohol, manage who the person is allowed to see or not see, or when he or she can go out.

Some interventions may include the use of hands on restraint, or actual deprivation of liberty. Care providers need to be clear when such powers have been delegated to them and the circumstances in which they can use them.

The reverse side of knowing which powers have been delegated to the care provider is knowing which powers have not been

delegated. The care provider should know when to call in the guardian and involve him or her in decisions and meetings. In virtually every case where there is a planned change to the care or treatment plan, the care provider should contact the guardian and discuss this with him or her first. The guardian should also be contacted regarding any significant accident or incident (as should other bodies such as the Care Commission). The important factor is for managers to clearly understand and record the expectations of the guardian regarding communication from care providers.

What is a power of attorney?

Whilst an individual retains the capacity to do so, he or she can make out a *power of attorney*. Power of attorney gives a trusted person, often a family member or a solicitor, the power to make certain decisions or take certain actions on behalf of an individual, should that individual eventually lose their ability to make decisions for him or herself.

A person may have the capacity to sign over a power of attorney to someone they trust, even though they lack some capacity to make more complex decisions for which they are granting the powers. However, where capacity is borderline, it is best practice for there to be a formal assessment of capacity by a doctor.

As with guardianship, the powers can relate to property and finances (continuing powers of attorney) and/or welfare matters (welfare attorneys). We will be focusing primarily on those relating to welfare matters in this guidance.

When a person's capacity becomes impaired, decision-making is much clearer if there is an existing power of attorney, as the attorney should be able to state what the person's past wishes were. They should be able to carry out their decision-making role with some confidence that the decisions being taken are what the individual would have wanted while they had capacity.

As with guardians, power of attorney can be shared between two or more people.

When does a power of attorney come into effect?

Essentially a power of attorney can come into effect any time after it is registered with the Office for the Public Guardian (OPG). There are, however, factors which might affect when, following registration, the powers can be exercised by the attorney. A continuing power of attorney relating to property or finances may become effective in some cases, at any point after registration. It is possible for any power of attorney document to state that the Public Guardian must not register it until the occurrence of some specified event. In such cases the OPG will not register it until satisfied that the specified event has occurred. In all welfare powers of attorney documents (and in those cases of continuing powers of attorney which cannot start being used until there is a loss of capacity in respect of the powers granted) it must be stated that the adult has considered how such a determination of capacity is to be made. This may be, for instance, the completion of

a medical examination which confirms the loss of capacity in respect of those powers granted. The law states that the attorney, before exercising any powers, must reasonably believe that the adult has become incapable in relation to these decisions or actions which need to be made or taken.

How long does a power of attorney last?

Most commonly, the power of attorney lasts indefinitely. Very often the welfare attorney has a wide range of potential powers at his or her disposal which he or she can exercise as and when necessary. It may be, however, that a person has fluctuating capacity, or that they may recover capacity lost, such as after a stroke or in cases of alcohol related brain damage. In such cases where a welfare attorney has been appointed, they may stop having to use their powers in the event of the adult having recovered capacity.

What authority does the welfare attorney have?

An attorney may have the legal authority to make a number of decisions on behalf of an adult who lacks the capacity to make these decisions for him or herself. The decisions they can make will be specified in the order granted and it should not be presumed that a welfare attorney has the power to make all decisions regarding the care of a person.

As with guardians under the Act, the actions of the attorney are subject to the *general principles*, so it is important that everyone concerned in the care of someone who lacks capacity knows these principles, and how they can work to guide best practice and resolve problems (see pages 17-21).

The attorney can insist that his or her decisions on behalf of the person being cared for are executed according to the attorney's wishes, but if the person who lacks capacity refuses to comply, the attorney would have to consider applying for guardianship. The power to enforce compliance only exists with

No-one should be making decisions for someone else if that person has capacity to make the decision.

a guardian, not an attorney.

Likewise, if anyone, including the person lacking capacity, is unhappy about the decisions being made by the attorney, he or she can apply to the court for an order requiring the attorney to be supervised by the local authority. The sheriff has other powers which can be used under this section 20 of the Act. Similarly, the same parties can apply for guardianship, or ask the local authority to do so on their behalf.

Attorneys and guardians should be involved in all decisions (for which they have the relevant powers) about changes in care arrangements and treatment plans, and be invited to meetings at which these arrangements are discussed.

No one, not even a guardian, should be making decisions for someone else, if that person has capacity to make the decision for themselves. Every effort should be made to encourage the person to develop and exercise the necessary skills to manage his or her own welfare and financial affairs.

What are the benefits of power of attorney for people in your care?

As stated above, anybody who has the capacity to understand what he or she is agreeing to in granting specified powers to the attorney may grant a power of attorney. Granting a power of attorney when someone has capacity may avoid the need for a guardianship order to be made in the future. Powers of attorney are intended to ensure that decision-making powers are given to someone the individual would trust to act as he or she would, in similar circumstances. They are a way of an adult maintaining some control over his or her affairs after losing capacity. They often have the advantage of being much less expensive than guardianship applications (unless undertaken personally or by obtaining free legal aid) and avoid the necessity of applying to the court and attending any related hearings.

Powers of attorney might be ideal for use by someone in the early stages of dementia. Such an option

could be discussed by medical, nursing and/or social work staff as part of the process of sharing the diagnosis with an individual and his or her family. In many cases people with a learning disability will not need someone to exercise powers on their behalf as they would have the capacity to manage their own affairs. In other cases, an individual with a learning disability might have sufficient capacity to appreciate that it might be helpful to grant certain powers to someone they trust such as a family member. The individual could grant a power of attorney even though he or she might not have the capacity to make the decisions or take the actions in those areas to which the specified powers relate. This is because capacity under the Act is always in relation to specific decisions or actions.

Welfare powers of attorney have become very popular with the public even at this early stage in the life of the Act. Last year nearly 15,000 welfare powers of attorney were registered with the OPG. In the first six months of 2006/07 this rose to

approximately 19,000 new welfare POA cases registered. It may be, in time, that the greater use of welfare powers of attorney will slow down the rate of growth in the number of welfare guardianship applications and orders.

What are the functions and duties of the local authority?

Part 1 of the Act also details the functions of the local authority. Almost all adults in your care will have had, and will continue to have, some local authority involvement. They would have had a community care assessment and should continue to have a care manager. It is important to know about the wider duties of the local authority under the AWI Act, so that you can alert the key local authority contact when you wish to discuss matters which might fall within these functions.

These functions include:

- Supervising welfare guardians. This requires visits to the guardian and the adult on guardianship at intervals of no longer than six months.
- Receiving and investigating any complaints relating to the exercise of powers by a welfare attorney.

- Investigating any circumstances made known to them in which the personal welfare of an adult seems to them to be at risk.
- Making applications and undertaking the role of guardian.
- Supervising welfare attorneys when ordered by the court.
- Providing welfare guardians and welfare attorneys, when requested, with information and advice in the connection with the performance of his or her functions under the Act.
- Consulting with the Mental Welfare Commission and/or the Office of the Public Guardian on matters relating to the exercise of functions under the Act, where there appears to be a common interest.

What other parts of the Act should I be aware of?

The Principles of the Act

Part 1 introduces the definition of incapacity and lays out the general principles to be followed when operating under the Act. The *general principles* apply to care providers as well as guardians and others. Basically all actions taken under this Act must be in accordance with these principles. This is covered in more detail on pages 17-21.

Powers relating to financial and property matters

A guardian or attorney may have powers relating to the finances or to the property of the person being cared for. They will have to submit regular financial reports to the OPG. The funds and assets that they manage on behalf of the adult who lacks capacity still belong to that adult and must be kept separate from the guardian/attorney's own funds and assets. In managing the financial affairs, they must take into account present and past wishes of the individual concerned, and use funds to benefit the adult. Funds

must also be managed in accordance with all of the general principles of the AWI Act.

Access to funds

Part 3 details the procedures for "intruding" or managing the funds of someone who lacks capacity, through a designated account. There may be someone in your care who has funds managed this way. The use of these funds is agreed to, and monitored by, the OPG, but it is important that you know when these arrangements are in place.

Management of funds by managers of authorised establishments

Part 4 details how managers of authorised establishments, registered with the Care Commission, may manage the funds of a resident who lacks the capacity to manage their own funds and for whom there is no financial attorney or guardian. The manager of an authorised establishment may apply to the Care Commission for a Certificate of Authority for the management of funds. The Care Commission has a duty to enquire from time to time

on how such funds are managed. The funds must be managed in line with the principles of the AWI Act. The Scottish Executive has produced a Code of Practice for managers who wish to consider this option (see Appendix 4). This is not to be confused with DWP appointeeship.

Consent to medical treatment

Part 5 details how the legal authority can be obtained to give medical treatment to someone who lacks capacity to consent. Even where there is a guardian/attorney with relevant powers there should be a *treatment certificate* (section 47). More information on this can be found on page 8.

What is incapacity and what should care staff know about it?

Each individual has a different capacity to make decisions about different aspects of their personal life, their welfare and financial affairs. For most people this level of capacity is sufficient for everyday purposes. The law recognises that each of us, as adults, has the right to make decisions for ourselves unless it is established that we lack the capacity to do so. Following severe mental ill health or disability, trauma, or with the onset of illness such as dementia, our capacity to make some decisions may diminish, either temporarily or permanently, partially or totally.

Everyone in the care sector involved in the care of people who may not have full capacity should be aware of the ability of individuals in their care to make decisions for themselves. It should form a part of the individual's assessment and care plan, especially any risk assessment and risk management plan.

It will often emerge in the course of your work that someone in your care appears to have diminishing capacity to make important decisions affecting his or her care and/or treatment. Carers or relatives can find themselves increasingly having to make decisions for the person. Eventually, as this situation persists, or the frequency or importance of these interventions increases, there should be an assessment of the person's needs, and his or her capacity to consent to care, treatment, and the management of his or her financial affairs. The assessment should be carried out by doctors, social workers, and other health care workers. It should take into account the views of all those involved in the person's care, including relatives and carers.

The result will be a care plan and possibly a risk management plan that covers all of the interventions necessary to maintain the person who lacks capacity in a care environment that can safely meet their needs. Depending on the outcome of this

review, and the views of all those involved, it may be necessary to consider whether formal authority is necessary to manage the welfare and/or financial affairs of the person being cared for. It is likely that seeking formal authority will be necessary if any of those involved in the review, including the adult, cannot agree about key aspects of the care plan.

The AWI Act takes into account the various possibilities regarding the ability to communicate, the level of capacity, and its variability across the spectrum of decisions that need to be made, and defines incapable as being incapable of:

- a) Acting.
- b) Making decisions.
- c) Communicating decisions.
- d) Understanding decisions.
- e) Retaining the memory of decisions.

It is, therefore, imperative that all care providers are aware of some important features that need to be considered when assessing capacity. An adult may have difficulties communicating or

expressing their views verbally, but this does not mean they necessarily lack the capacity to hold a view. People who know them well, relatives and carers, may find it easier to understand their non-verbal communication, and any assessment of capacity should take this into account. If necessary, professionals with the necessary skills, such as speech and language therapists, should carry out this assessment.

Equally important will be a person's language skills, their comprehension, their ability to concentrate, or take in information in certain circumstances, and their ability to remember things. It is also crucial not to view the individual in isolation. A person left to their own devices may lack capacity to make key decisions or take certain actions which, with appropriate support and assistance from others, he or she might have the capacity to make. Skilled carers and professionals, as well as close relatives with good knowledge of the individual and a good relationship, may be able to help the adult work through

the otherwise confusing array of information and take decisions for him or herself. Difficulties in organising and sequencing of information and actions may be overcome to enhance an individual's decision-making capacity. All of these factors must influence how an assessment of capacity is made.

What are the general principles on which the Act is based?

The principles of the AWI Act are, in effect, a set of rules that must be adhered to when intervening in the life of a person subject to the provisions of the Act.

It is important that everyone caring for someone who lacks capacity knows the principles of the AWI Act as they underpin good practice whether a person is on guardianship or not.

It will be expected that staff, as well as guardians/attorneys, can evidence following these principles when for example, the care of the adult is being reviewed by the MWC.

So what are the principles?

There are five principles:

1. Benefit

There shall be no intervention in the affairs of an adult under or in pursuance of this Act unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.

There have been some interesting challenges as to whether this principle has been met.

Case example 1: What benefit to the adult does buying a birthday present for a grandchild bring? It has been argued that if it was the normal practice of the adult to buy a grandchild a present for their birthday, and it was known that they did this as part of a loving, sharing relationship that brought mutual benefit to both adult and grandchild, and that if the adult had continued to have capacity they would have continued this practice (i.e. it meets all the other principles, see below), that although the

notion of benefit to the adult in this case may be tenuous, nevertheless reasonable expenditure for this purpose may be acceptable.

Case example 2: What benefit to the adult does buying a car for a relative bring? Even though a relative might argue that the adult would receive more visits if they had a car, it would be difficult to justify this expenditure for a potential benefit, when the benefit of having the car to the relative is so much more evident than the benefit to the adult. Expenditure for this purpose may not be acceptable.

Case example 3: What benefit does denying access to one relative with whom the adult previously had a reasonable relationship bring? Different sides of a family sometimes fall out, and guardians have been known to try to limit, or stop, access to an adult in a care home to their siblings, because of their own feelings about the brother or sister (or in-laws). If the adult formally had a reasonably good relationship with both sides of the family, or even if it can be shown

from their current contact with that relative, that this contact is positive and stimulating to both adult and relative, it may be that the guardian's decision to try to limit access is against the principles of the Act. Careful and diplomatic negotiation may be needed by the care home, or the supervisor of the guardian, to settle this dispute. Unless it is clear that the contact is against the wishes of the adult, or that the contact is causing stress or anxiety, then it might be against the principles for the guardian to use their powers for this purpose.

2. Minimum intervention

Where it is determined that an intervention in the affairs of an adult under or in pursuance of the Act is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

The principle of minimum intervention might be used to decide where or how the care of an adult who lacks capacity can be provided. Supporting them in their own home might be the least restrictive alternative. However, in some instances, the support level and the restrictions needed to maintain care in their own home safely, may amount to a more restrictive regime than can be safely managed in a care home.

Case example 4: A son who has welfare powers expresses the view that he wishes his mother to remain in a hospital ward. He believes her care needs are better met in this setting and that it would be unsafe to move her to a care home. This can be difficult to resolve if the care team believe her needs can be

safely met in a care home. Ultimately, the hospital managers could discharge the patient from a ward if the clinical decision of the doctor is that she no longer needs hospital care. The son following the principles of the Act may decide which care home she moves to. The hospital ward and regime may not be the minimum intervention required to meet her needs.

Case example 5:

Behavioural problems are noted to occur in the care of an elderly resident with dementia. After a period of monitoring it is observed these occur more frequently when personal care is being attended to; the resident does not enjoy being bathed nightly and prefers to sleep in a specially adapted chair next to her bed, rather than in the bed itself. Following discussion with the guardian it is revealed that she never used to sleep in her bed before she moved to the care home and preferred not to bathe daily. It is agreed with the guardian and care manager to have a trial providing a bath every second or third night, and to allow the resident to sleep

in her chair. A review period is set for this decision and her behaviour is monitored.

Some elements that would generally form part of a person's care plan might represent a more restrictive intervention than is necessary when considering the needs of that person as an individual.

3. The present or past wishes of the adult

In determining if an intervention is to be made, and, if so, what intervention is to be made, account shall be taken of the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication appropriate to the adult's situation.

Behaviour may be the only way a person with limited communication can express their will. As can be seen from the above example, it may be necessary to take behaviour as an expression of current wishes and feelings. When trying to ascertain the wishes of a person it may be necessary to offer simple alternatives. For instance, in meeting this principle care staff might in the morning offer the choice between two outfits to wear that day, rather than expecting the person to choose from all the alternatives. Care staff may need to encourage the person to engage in activities in a way that they can understand, rather than in a way that may cause them anxiety.

Case example 6: A guardian who lives in Wales and cannot visit his mother decides he wishes his mother to move to Wales to be nearer where he lives. When he tells the care home his wish they contact the care manager as they feel this does not take into account his mother's wishes. A meeting is arranged and so far as it can be established the resident states she wishes to stay where she is. The doctor advises that, at her age, there is a risk to her health, but he does not feel this is so significant as to be a determining factor. An advocate is involved and spends some time getting to know the resident. The care manager discusses the situation with staff in the care home and her manager.

Ultimately negotiation is the best course, but if it was very clear that the son was overriding his mother's wishes, the decision could be challenged through the court. Sometimes the benefit to the mother of the move may not be apparent to her, and her resistance might be based on her incapacity to see this benefit. The move

might go ahead. On other occasions the court may decide the guardian is not carrying out his role in a manner consistent with the principles of the Act and appoint the Chief Social Work Officer of the local authority as guardian in his place.

4. Consultation with other carers, relatives and other relevant people

In determining if an intervention is to be made, and if so, what intervention is to be made, account shall be taken of the views of:

- *The nearest relative.*
- *The primary carer.*
- *Any guardian, or power of attorney with the relevant powers.*
- *Any other person as directed by the sheriff.*
- *Any person who appears to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible for making or authorising the intervention.*

By now it will be clear that any intervention or decision, made by any person, on behalf of someone who lacks capacity must be discussed with all parties involved in the care of that person and their views taken into account. Although a power of attorney can insist on their view dominating, as mentioned above, they cannot force compliance on a person who lacks capacity and resists their wishes. A guardian on the other hand, may seek a compliance order (section 70) through the courts, and in such a case, the person lacking capacity must comply.

5. Encouraging the adult to exercise their own will and self-determination

Any guardian, power of attorney or manager of an establishment exercising functions under this Act shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he or she has, and to develop new skills, concerning their personal welfare, financial affairs or property.

It is not simply acceptable to resign oneself to the limitations of a person's capacity without testing their ability to develop skills. This principle puts an expectation on guardian/attorneys, and care providers, to encourage and promote the decision-making skills of the person in all areas of their welfare and finances.

Case example 7: An adult with a learning disability moves from long-term hospital care in to his own tenancy. The care provider asks for a guardian to sign the tenancy agreement. If the language of the tenancy agreement was couched in a way that the person could comprehend, and they were helped to understand the

significance of the agreement and were able to give informed consent, this could be more valid and empowering than expecting someone else to be appointed to do this.

Case example 8: An adult with a learning disability has been assessed when he was living in long-term hospital care as having no road safety skills. Accordingly when he moves to his own tenancy his care plan states he is never to be allowed out of his home unaccompanied. The support staff believe he can acquire these skills and want to try to train him in road safety, but his guardian is reluctant on grounds of safety. This principle can be used as the basis for reasonable negotiation, with the guardian, to permit the training to begin when risk assessments have been completed.

Case example 9: A new resident arrives in a care home with few clothes and toiletries. When the care provider contacts the relative with financial powers of attorney they come to the care home with some items. The staff talk to the attorney about leaving a float, but he

does not agree to this, and sometimes over the weeks the care home's own funds have to be used until the attorney eventually provides money. The new resident cannot go out shopping, or select their own clothes, and never has any money in their pocket to buy small daily items.

Often relatives will have genuine cause for concern about how secure money and other personal items are in the care home. It will be necessary to build up a trusting relationship with the guardian/attorney and show them how you can account for expenditure. It is possible to use this principle to promote the independence of the person you are providing support to, through negotiation with guardians/attorneys.

What is the Office of the Public Guardian?

The OPG was created as a consequence of the AWI Act. It is based in Falkirk and is part of the Scottish Courts Service. Its functions are:

- To supervise guardians and intervenors dealing with the property or financial affairs of an adult who lacks capacity.
- To grant authority to access funds.
- To maintain registers of guardians/attorneys.
- To provide advice and guidance on financial matters.
- To investigate complaints.
- To consult with the MWC and local authorities.

Care providers and others with concerns about the financial affairs and property of a person who lacks capacity, even if there is no guardian or attorney, can telephone the OPG and discuss their concerns.

What is the Mental Welfare Commission for Scotland?

The MWC is an independent organisation set up by statute, working to safeguard the rights and promote the welfare of anyone with a mental illness, learning disability, or other mental disorder. We visit people on welfare guardianship where we think this might be appropriate, speak to care providers, guardians/attorneys, and others involved in the care of a person who lacks capacity. If we have any concerns about the care and treatment of a person on guardianship we may bring these to the attention of the relevant health board or local authority. We might undertake a more detailed investigation where the welfare or property of someone who lacks capacity is at risk.

Through our telephone advice service we can offer care providers and others with information and guidance about use of the AWI Act in practice, even if there is no guardian or attorney.

Appendix 1

Glossary of terms

advocate

An independent person who provides support to another individual in order that their voice can be heard in decision-making processes.

the Act

The Adults with Incapacity (Scotland) Act 2000.

the adult

A person who is 16 years old or older.

chief social work officer

The officer appointed by a local authority under section 3 of the Social Work (Scotland) Act 1968, as amended by the Local Government etc (Scotland) Act 1994.

court

In this guidance this means the sheriff court which deals with most matters under the Act that require a judicial decision.

financial guardian

Guardian with powers over the adult's property and financial affairs.

intervention order

An order made by the sherriff, under part 6 of the Act, that something should be done or a decision made on behalf of an adult.

MWC

Mental Welfare Commission

nearest relative

The person defined by the Act as having the closest degree of kinship to the adult.

OPG

Office for the Public Guardian; the organisation responsible for monitoring financial guardianship and POA.

primary carer

A primary carer is the main person providing informal care to an individual. The primary carer may or may not reside with the person they are caring for.

welfare attorney

An individual who has been specified within a Power of Attorney document to take on welfare decision-making powers on behalf of another adult, when that adult has lost capacity to make those decisions him or herself. Welfare attorneys are appointed by an individual while they still have decision-making capacity.

welfare guardian

An individual, appointed by the courts, to make specific welfare decisions on behalf of another individual who does not have capacity to make decisions him or herself.

Appendix 2

This is a checklist of information that we would expect to see in the file of an individual subject to welfare guardianship. Checklists can be downloaded from the publications section of our website www.mwscot.org.uk.

Guardianship Checklist for Resident's File

| Name of person with incapacity | DOB | Date g'ship granted | Duration of g'ship |
|---|-----------------------|--|--|
| | | | |
| Name and address of guardian(s) | Relationship to adult | Tel numbers/contact arrangements, inc out of hrs | |
| Circle whether – welfare/financial/both | | | |
| Circle whether – welfare/financial/both | | | |
| Powers of guardian/attorneys | Circle* | Tick* | Notes |
| Decide where the adult should reside. | Yes/No | | If No, the adult may be free to leave. Is there a policy to manage this situation? |
| Provide social, cultural, or educational activities and holidays. | Yes/No | | |
| Access to be given to medical, social work or care staff when required. | Yes/No | | |
| Financial powers of any kind (usually as financial guardian/attorney). | Yes/No | | If No, add details below of who is managing finances. |
| Consent to medical treatments, research, or supervise medication. | Yes/No | | A section 47 Treatment Certificate ¹ to authorise treatment may be necessary. See GP or psychiatrist. |
| Take legal action of any kind on behalf of the adult. | Yes/No | | |
| Access to any confidential records or data held on the adult. | Yes/No | | If Yes, guardian has the same access to care home's records as adult. |
| Dress, diet, personal appearance or hygiene. | Yes/No | | |
| With whom the adult may consort, or restrict or control access to certain people. | Yes/No | | If Yes, add details below of any person who has restrictions put on their access to the adult. |
| Accompany the adult, or monitor or supervise the adult at all times. | Yes/No | | If No, is the adult's right to freedom and privacy being respected/promoted? |
| Other, please specify. | Yes/No | | If there are more powers attach a separate sheet ² . |
| * Circle Yes if guardian has this power ² . Tick each of the powers the guardian has delegated to staff. | | | |

| | Name and address | Telephone number |
|---|------------------|------------------|
| Supervisor (for private guardians only) | | |
| Person managing financial affairs – ie appointee | Local authority: | |
| Person(s) for whom access to adult is restricted² | | |

¹ The Act requires a Treatment Certificate be completed even where there is a guardian/attorney with this power.

² Attach details of any arrangements, and any other authorised restrictions, to this sheet.

Appendix 3

Other useful contacts

The Care Commission
Compass House
11 Riverside Drive
Dundee
DD1 4NY
Tel: 01382 207 100

The Office of the Public
Guardian
Hadrian House
Callendar Business Park
Callender Road
Falkirk
FK1 1XR

Appendix 4

Other reading

Published by the Mental
Welfare Commission:

Safe to Wander

Rights, Risks and Limits
to Freedom

When to invoke the Adults
with Incapacity (Scotland)
Act 2000

Covert Medication

Available at
www.mwcscot.org.uk.

Published by the Scottish
Executive:

Code of Practice for
Continuing and Welfare
Attorneys

Code of Practice for
Managers of authorised
establishments under
part 4 of the Act

Guardianship and
Intervention Orders – making
an application – A Guide
for Carers

And other training materials
available on the Scottish
Executive website

Published by the Scottish
Commission for the
Regulation of Care:

The National Care
Standards



Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HE

Tel: 0131 313 8777

Fax: 0131 313 8778

Service user and carer
freephone: 0800 389 6809

enquiries@mwscot.org.uk

www.mwscot.org.uk

March 2007