



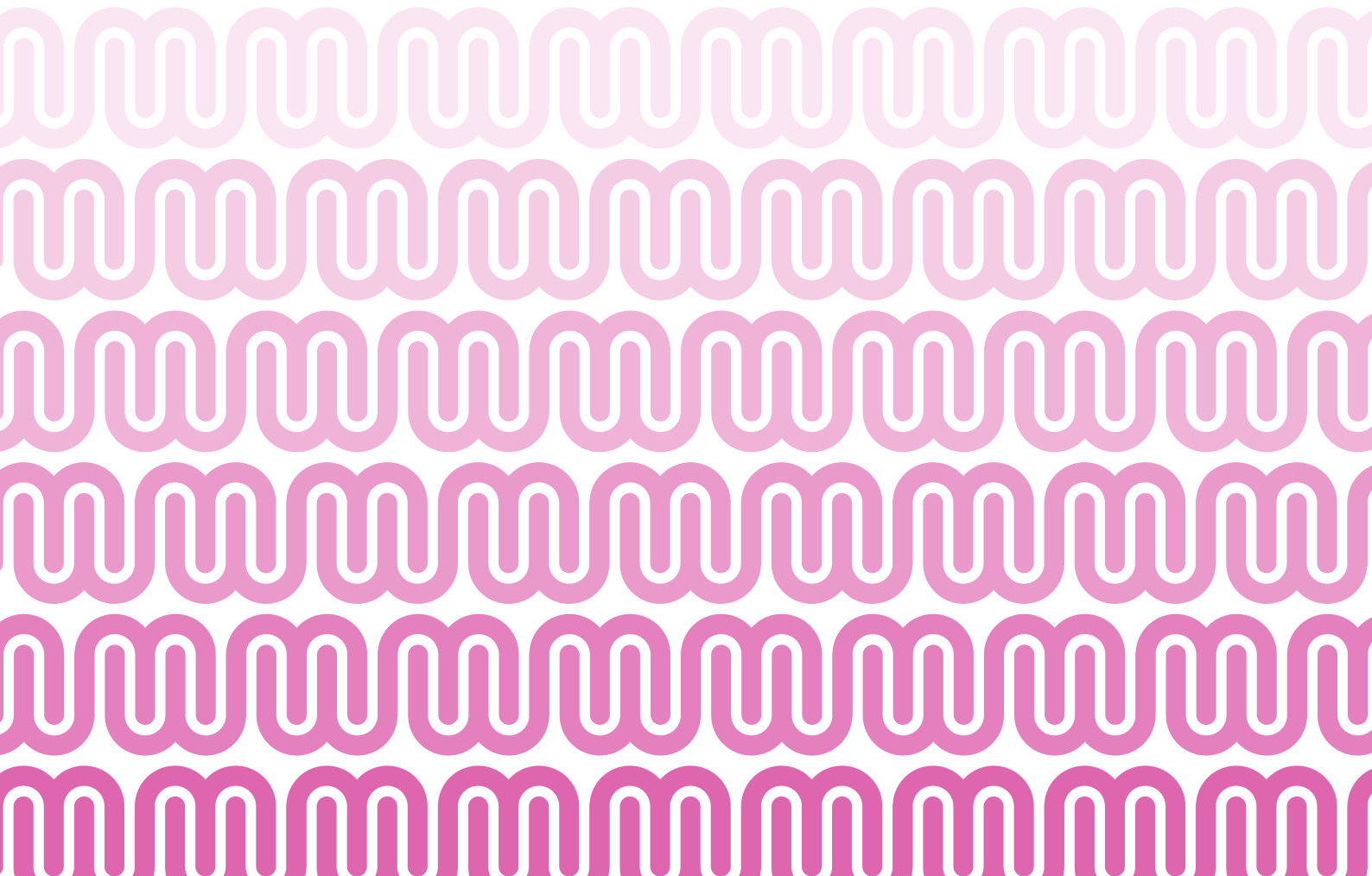
**mental welfare**  
commission for scotland

# **Working with the Adults with Incapacity Act – for people working in adult care settings**

Good practice guide

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Revised July 2020



# Our mission and purpose

## Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

## Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

## Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

## Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

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## About this guidance

### Who is this guidance for?

This guidance has been developed to support managers and staff working in registered services for people with mental illness, learning disability, dementia or related conditions 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 (AWI).

The Mental Welfare Commission (the Commission) has legal duties in relation to safeguarding the rights of people who are subject to the welfare provisions of the Act. This 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 in relation to the welfare of an individual.

### Why have we produced this guidance?

Through our visits to people on guardianship and calls to our Advice Line, we are aware of the need for clarity on roles and responsibilities regarding the use of welfare powers in care settings. Our visiting programme also highlighted the need for improved record keeping where individuals are subject to welfare powers under the Act.

This guidance aims to provide clarification on the role of welfare guardians and attorneys, and the information that we would expect care providers to maintain.

Where a person is subject to the Adults with Incapacity Act (AWI), other people have 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 who 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. It is vital for managers and their staff to know:

- Who in their care is subject to the Act
- Who powers have been granted to
- What the powers are
- How long the powers last
- Which powers the guardian or attorney has delegated to care providers.

Local authorities have statutory duties under the AWI Act. These include supervising private guardians and in some cases acting as guardian. The court may also order that the local authority supervise a welfare attorney. You need to know who is carrying out these duties in relation to adults in your care, so that you can contact the person responsible if you have any concerns.

If you require further information and support to resolve difficult welfare issues relating to the AWI Act you can contact our Advice Line on 0131 313 8777. Other AWI information resources are available from our website [www.mwcscot.org.uk](http://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 and advice about financial provisions contact the Office of the Public Guardian (OPG). (See Appendix 3.)

## The principles of the AWI Act

The principles of the AWI Act must be followed by anyone when intervening in the life of anyone subject to the provisions of the Act.

Everyone caring for someone who lacks capacity should know the five principles of the AWI Act. They underpin good practice whether a person is on guardianship or not. The principles help with supported decision making. Supported decision making is a way that adults with mental illness, dementia, learning disabilities or other related conditions can be supported, in order to ensure that decisions made by or about them genuinely reflect their choices. The Commission's [Supported Decision Making](#) good practice guide explains this further.

The Commission expects that staff, as well as guardians and attorneys, can evidence following these principles when the care of the adult is being reviewed.

### 1. Benefit

**Any action or decision taken must benefit the person, and only be taken when that benefit cannot reasonably be achieved without it.**

**Case example 1:** 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 other relatives, because of their own feelings about them. If the adult formerly had a reasonably good relationship with both sides of the family, or if their current contact with that relative 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.

**Case example 2:** What benefit to the adult does buying a birthday present for a grandchild bring? Was it their normal practice to buy the grandchild a present as part of a loving, sharing relationship that brought mutual benefit to both adult and grandchild? If the adult had continued to have capacity would they have continued this practice (i.e. does it meet the other principles, see below)? If so, it can be argued that although the benefit to the adult in this case may be indirect, nevertheless reasonable expenditure for this purpose may be acceptable.

**Case example 3:** 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.

### 2. Least restrictive option

**Any action or decision taken should be the minimum necessary to achieve the purpose. It should be the option that restricts the person's freedom as little as possible.**

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:** Stressed and distressed behaviour is 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 deciding if an action or decision is to be made, and what that should be, account must be taken of the present and past wishes and feelings of the person as far as these may be understood.**

Some adults will be able to express their wishes and feelings clearly. For others, 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. You should try to find out about their past wishes and preferences from people who know the person. The person must be offered help to communicate their views. This might mean using memory aids, pictures, non-verbal communication, advice from a speech and language therapist, or support from an independent advocate.

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. For significant decisions, an independent advocate should be involved.

**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 inability to see this benefit. The move might go ahead. On other occasions the court might decide the guardian is not carrying out his role in a manner consistent with the principles of the Act and make a direction as to what the decision should be, or 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**

**Take account of the views of others with an interest in the person's welfare. The Act lists those who should be consulted whenever practicable and reasonable. It includes the person's primary carer, nearest relative, [named person](#), [attorney](#), or [guardian](#), if there is one.**

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.

#### **5. Encouraging the adult to use existing skills and develop new skills**

**Encouraging and allowing the adult to make their own decisions and manage their own affairs and, as much as possible, to develop the skills needed to do so.**

This principle puts an expectation on guardians and attorneys, and on care providers, to encourage, promote and support the decision making skills of the person in all areas of their welfare and finances.

The Commission's [Supported Decision Making](#) good practice guide explains the relevance and importance of supported decision making, and the role that it can play in reinforcing principles that underpin Scottish legislation.

**Case example 7:** An adult with a learning disability moves from long-term hospital care into his own tenancy. The care provider asks for a guardian to sign the tenancy agreement. If the tenancy agreement was worded in a way that the person could comprehend, and they were helped to understand the significance of the agreement and to give informed consent, this would allow maximise self-determination.

**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.

## Guardianship

### **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 welfare 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 this is 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. Since the early days of AWI, powers granted have become increasingly specific and tailored to the individual's needs e.g. authorising restrictions to the adult's internet access, or use of social media.

It is important for care providers to know what powers have been granted for each individual in their care. You should obtain a copy of the powers granted from the guardian, the local authority or the Office of the Public Guardian. Keep this on file so that it is accessible to staff who are providing day-to-day care for the adult.

### **Who is welfare guardianship used for?**

It is estimated that there are upwards of 100,000 adults in Scotland with some impairment of capacity, due to dementia, learning disability or other cause. The majority receive care, either in formal 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 sharply since the introduction of the Act. In the first three years following 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 year on year as is the registration of welfare powers of attorney. In the year from April 2019 to March 2020 there were over 3,100 applications for welfare guardianship approved. The majority of people subject to welfare guardianship have diagnosis of learning disability. The second most common use for welfare guardianship is for individuals whose lack of capacity is due to dementia.

### **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 (a care manager or in some instances 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 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, although welfare powers should not be sought unless there is an established need for

them. Copies of application forms for guardianship can be downloaded from the [Scottish Government website](#).

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.

## **What kind of powers can a guardian have?**

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

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. You should not presume that the guardian has the power to make all decisions regarding the care of a person. (A welfare attorney, discussed below, can have a similar range of powers. The difference is that a powers of attorney is granted by the person him or herself, when they have capacity to do this.)

It is important that care providers know what kinds of powers the guardian has. It is especially important that you 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. However, you may still involve them in these decisions, in the way that you would ordinarily involve other carers and relatives.

Welfare powers may include, for example:

- Power to decide where the adult should live
- Power to return them there should they leave this address
- Power to consent to medical treatment
- Power to decide what care the adult should receive
- Power to decide who the adult should consort with
- Power to restrict access to internet use or access to social media

This is not a complete list of potential powers. Powers are tailored specifically to the adult's assessed needs.

Financial powers could include:

- Power to deal with particular matters in relation to the property, financial affairs or personal welfare of the adult
- Power to manage all or part of the property or financial affairs of the adult
- Power to authorise the adult to carry out transactions
- Power to act as the adult's legal representative

## **How long does a guardianship order last?**

A guardianship order is time limited – normally the default period for guardianship orders is three years, although this could be more or less depending on the circumstances of the adult. It is specified in each individual order. A care provider should ask to see how long the power of attorney or guardianship lasts and should note when/if the powers cease. A welfare power of attorney, as discussed below, is not used 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 principles of the Act (see pages 6-9). These are discussed in detail below.

The general duties of a guardian are:

- To keep records. When you are using delegated powers on behalf of the guardian, you should keep records and provide these to the guardian regularly.
- To provide the local authority with information about the personal welfare of the adult, or how the guardian has used their powers as may be reasonably requested.
- Reporting and monitoring duties on financial guardians as set out by the Office of the Public Guardian.
- The ability to apply to the sheriff if the adult or any other person does not comply with the welfare power(s) being executed by the guardian. The sheriff may make an order obliging people to comply with the guardians' decision. For example, this could 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 either or 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 later by the sheriff. The substitute becomes the guardian when the original guardian becomes unable to act.

## **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, unless there has been an assessment which deemed this unnecessary. This will usually entail the supervisor meeting the guardian, and reviewing the care plan, at least six monthly. The supervisor will look at the appropriateness of the use of powers, support the guardian in their duties and ensure that actions taken are in line with the principles of the Act.

### **The authorised officer**

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 called the authorised officer and should be the main contact for any decisions made about the adult's welfare. Managers and staff should know who the authorised officer is for each adult in their care and what powers they have been granted.

## **Can guardians 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 or welfare attorneys if they have relevant powers, before decisions are made. It is, therefore, important that you know 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 certificate, along with a treatment plan detailing what the care and treatment the certificate is authorising. We recommend that you keep a copy of this close to where the adult is receiving their everyday treatment, so that staff 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 from the [Scottish Government website](#).

Treatment cannot automatically proceed if a welfare attorney or guardian has been consulted and refuses to consent. Where this happens, the Mental Welfare Commission 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).

The Commission publishes separate guidance on covert medication (see 'Other reading' below).

There is more information about treating people under AWI in the Commission's good practice guide: [The Adults with Incapacity Act in General Hospitals and Care Homes](#).

## **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. If the local authority is acting as guardian, this is the name and contact details of the person in the local authority to whom this has been delegated and details of whom to contact in his or her absence.
- Names and contact details where there is a joint or substitute guardian
- What powers the guardian has
- How long the power of guardianship lasts.
- Which powers the guardian wishes to delegate to the care provider and the recording and reporting arrangements (see below).
- The guardian's wishes about when the care provider should contact him or her, e.g. notification of serious accidents and incidents, or information about certain meetings the guardian might wish to attend.
- The name and contact details of the local authority supervising officer for private welfare guardian, and contact details for another officer when this person is not available.

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

## **What powers can be delegated to the care provider?**

The care provider, care workers or support staff are often the people who are involved 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.

Some examples of possible delegated powers are to determine a special diet for the adult, to withhold alcohol, to manage who the person is allowed to see or not see, or to decide 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.

You 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 Inspectorate).

You should agree with the guardian what information they wish to receive from you.

## Powers of attorney

### What is a power of attorney?

Whilst an individual has the capacity to do so, he or she can make a *power of attorney*. Power of attorney gives a trusted person, often a family member, friend or solicitor, the power to make certain decisions or take certain actions on behalf of the individual, if they eventually become unable to do this.

A person may have the capacity to grant 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 focus 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?

Welfare powers cannot be used until the granter has lost capacity to make these decisions. Powers relating to financial and property affairs are known as 'continuing powers' and may be granted with the intention of coming into effect immediately and continuing on the granter's incapacity, or beginning on their incapacity. A power of attorney document can contain continuing powers, welfare powers or both.

A power of attorney must be registered with the Office for the Public Guardian (OPG) to come into effect. It is possible for any power of attorney document to state that the Public Guardian must not register it until some specified event. In such cases the OPG will not register it until satisfied that the specified event has occurred. Welfare powers of attorney (and continuing powers of attorney which cannot start being used until there is a loss of capacity in respect of the powers granted) should state that the adult has considered how a determination of capacity is to be made. This may be, for instance a medical examination which confirms the loss of capacity in respect of the 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.

### 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 document. You should not presume that a welfare attorney has the power to make all decisions regarding the care of a person. As with guardians under the Act, the attorney must follow the principles of the Act (see above), 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. The attorney can insist on his or her decisions, but if the person who lacks capacity refuses to comply, the attorney would have to consider applying for guardianship. Only a guardian can have power to enforce compliance, not an attorney.

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

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 support the person to make decisions, and to encourage the person to develop and exercise the necessary skills to manage his or her own welfare and financial affairs.

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, or for a guardian to be appointed.

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

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. They are a way of an adult maintaining some control over his or her affairs after losing capacity. 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 a relatively simple and low cost way of an individual choosing how decisions may be made on their behalf, if there comes a time when the individual is unable to make their own decisions.

Post-diagnostic support for people with dementia should include discussing powers of attorney. In many cases people with a learning disability will not need someone to exercise powers on their behalf as they have the capacity to manage their own affairs. In other cases, an individual with a learning disability might have sufficient capacity to choose 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 AWI Act is always in relation to specific decisions or actions.

## **What are the duties of the local authority?**

Part 1 of the Act 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 need to.

The local authority's functions include:

- Supervising welfare guardians. This requires visits to the guardian and the adult on guardianship at intervals of no longer than six months, unless it is agreed that this is unnecessary, following assessment.
- 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 connection with the performance of their 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?

### **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. They must be managed in accordance with the principles of the AWI Act.

### **Access to funds**

Part 3 details the procedures for 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 care home managers can apply to the Care Inspectorate to manage the funds of a resident who lacks the capacity to manage their own funds and has no financial attorney or guardian - see [the Care Inspectorate's guidance](#). This is not to be confused with DWP appointeeship.

## 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. As a result of severe mental ill health or disability, trauma, or with the onset of illness such as dementia, our capacity to make some decisions may be affected, 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 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. It defines incapable as being incapable of:

- acting.
- making decisions.
- communicating decisions.
- understanding decisions.
- retaining the memory of decisions.

Care providers should be 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. 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 vital to maximise support for decision-making. With appropriate support and assistance from others, an individual might have the capacity to make his or her own decision. Skilled carers and professionals, including independent advocates 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.

## Further information

### Office of the Public Guardian

The OPG 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 Mental Welfare Commission 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 contact the OPG and discuss their concerns.

Phone: 01324 678300

Web: <http://www.publicguardian-scotland.gov.uk/home>

### Mental Welfare Commission for Scotland

The Commission is an independent organisation set up by statute. We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions. We visit people on welfare guardianship where we think this might be appropriate, and speak to care providers, guardians and others involved in the care of a person who lacks capacity. If we have 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 we believe there are valuable lessons to be learned across Scotland. Our Advice Line offers care providers and others information and guidance about use of the AWI Act in practice, even if there is no guardian or attorney.

Phone: 0131 313 8777

Web: <https://www.mwcscot.org.uk/>

### Other Commission guidance

[Common concerns with power of attorney](#)

[Power of Attorney - quick guide for staff in hospitals and care homes](#)

[Covert medication](#)

[Money Matters](#)

## Appendix 2 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 sheriff, under part 6 of the Act, that something should be done or a decision made on behalf of an adult.

**Nearest relative** Whoever is first on this list: the person's spouse or civil partner; long term partner; child, parent, brother or sister; grandparent; grandchild; uncle or aunt; niece or nephew.

**OPG** Office of the Public Guardian; the organisation responsible for monitoring financial guardianship and powers of attorney.

**Primary carer** The primary carer is the main person providing informal care to an individual. They may or may not live with the person they are caring for.

**Welfare attorney** An individual 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 court to make specific welfare decisions on behalf of someone who does not have capacity to make decisions him or herself.



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