

WEST DUNBARTONSHIRE HSCP

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

PROCEDURES

AWI PROCEDURES

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1. Introduction

- 1:1 The following procedures are intended as accessible guidance to interventions in terms of the Adults with Incapacity (Scotland) Act 2000 – hereafter referred to as *the 2000 Act* – within the context of the local authority’s duties and powers as prescribed in the legislation.
- 1:2 The document is not intended as a comprehensive guide to the 2000 Act itself, nor can it encompass the significant, and increasing, body of research, guidance, and case law that pertains to the 2000 Act and associated legislation. **Annex C** provides useful online links and further sources of further information and guidance.
- 1:3 The procedures should be utilised in conjunction with reference to the Act itself, associated Codes of Practice, and further guidance as relevant. Further valuable sources of information and assistance would include colleagues and other agencies with specialist knowledge in this field - including West Dunbartonshire HSCP (WDHSCP) Mental Health Officer (MHO) Service and Legal Services, and external organisations such as the Office of the Public Guardian for Scotland (OPG) and Mental Welfare Commission for Scotland (MWC).

2. Overview of the Adults with Incapacity (Scotland) Act 2000

- 2.1 The 2000 Act was introduced with a view to promoting the welfare of individuals who lack capacity to make important decisions on their own behalf. It authorises a range of interventions in respect of welfare, financial, and property matters.
- 2.2 Capacity refers to the ability of an individual to make informed decisions and/or, take appropriate action, and to understand the possible implications of taking or not taking that action or decision. Interventions in terms of the Act pertain to adults (aged 16 and over) who have been assessed as lacking sufficient capacity to make certain (or all) decisions for themselves with regard to their welfare and/or financial and property matters.
- 2.3 For the purposes of the 2000 Act, an adult who lacks capacity is incapable of-
- acting; or
 - making decisions; or
 - communicating decisions; or
 - understanding decisions; or
 - retaining the memory of decisions,
- due to the existence of an organic mental disorder, learning disability, acquired brain injury, severe mental illness or personality disorder. An individual might also be deemed to be incapable by reason of an inability to communicate because of physical disability. It must be remembered that a diagnosis of any of the above conditions does not necessarily indicate impaired decision making. Moreover, a finding of impaired decision making does not necessarily constitute grounds for intervention in terms of the 2000 Act. Any intervention under the 2000 Act must be done so in consideration of the principles set out at s.1 of the Act. See s2.5-2.10 below.
- 2.4 It is important to bear in mind that *capacity* is a complex legal concept, and all professionals involved in exercising functions under the 2000 Act should make every effort to familiarise themselves with current research and guidance in this regard.

The Principles

- 2.5 The 2000 Act is underpinned by a set of principles that must be adhered to when consideration is being given to any intervention contained therein. The principles must also be considered in the context of s.13ZA of the Social Work (Scotland) Act 1968 - hereafter referred to as *the 1968 Act*.

Principle 1 – benefit:

- 2.6 There shall be no intervention in the affairs of an adult 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.

Principle 2 – least restrictive option:

- 2.7 Where it is determined that an intervention in the affairs of an adult or in pursuance of the 2000 Act is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with purpose of the intervention.

Principle 3 – take account of the present and past wishes of the adult:

- 2.8 In determining if an intervention is to be made, and, if so, the nature and extent of that intervention, account shall be taken of the present and past wishes of the adult so far as they can be ascertained by any means of communication, whether human, or by mechanical aid appropriate to the adult. It is important to note that it is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained by any means possible.

Principle 4 – consultation with relevant others

- 2.9 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 and primary carer of the adult;
 - the named person (as defined in the 2003 Act);
 - any proxy (guardian or attorney) who has powers relating to the proposed intervention;
 - any person whom the sheriff has directed should be consulted; and
 - any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or the proposed intervention, where these views have been made known to the person responsible;

in so far as it is reasonable and practicable to do so.

Principle 5 – encourage the adult to exercise residual capacity (ie – whatever skills s/he retains); and to support the development of new skills

- 2.10 Any person exercising functions under the 2000 Act shall, in so far as it is reasonable and practicable to do so, encourage the individual to exercise whatever skills they have concerning property, financial affairs or personal welfare, and support them to develop new skills as appropriate. This would also be normal good practice for others providing support to the person.

The Presumption of Capacity

- 2.11 A fundamental cornerstone of the 2000 Act is the presumption of capacity. All individuals must be considered to have capacity unless there exists evidence to the contrary. In legal proceedings, the burden of proof lies with the person who is indicating that capacity is lacking. Further evidence is then required in order to establish that the proposed intervention is warranted (and consistent with the principles).

Intervention Orders

- 2.12 An Intervention Order grants authority for a one-off decision to be made and/or action to be taken on behalf of an adult who lacks capacity. The powers granted under an Intervention Order might relate to the subject's welfare, finances or property. Examples of circumstances whereby an Intervention Order may be appropriate would include: the sale of heritable property to raise capital for care costs; signing a legal document such as a tenancy agreement, or the termination of such a contractual agreement.

Guardianship Orders

- 2.13 A Guardianship Order is more suitable when there is a requirement for ongoing intervention in respect of an individual's welfare, finances, or property. There are two forms of Guardianship: welfare and financial. A Guardianship Order is generally wider in scope than an Intervention Order, and will remain in place for a longer period fixed by the Court on granting the Order. An application for Guardianship must specify the powers sought, as only those deemed appropriate and necessary will be granted. The principles must be applied when considering what powers should be sought. The powers sought must be proportionate to the facts and circumstances.

Who can apply for an order?

- 2.14 Anyone with an interest in the adult can apply to the sheriff court to become a welfare and/or financial Guardian or Intervener. Usually the person who wishes to act for the adult makes the application.
- 2.15 Only one person is allowed to be nominated to be an Intervener, but more than one person can apply to be Guardian. Joint Guardianship is often advisable as it enables tasks to be shared, and provides cover should one person become unavailable. Alternatively, a substitute Guardian may be nominated at the time of making the application. This would be to ensure continuity in the event of the Guardian being unable to continue for any reason.

Duty of the Local Authority to Apply

- 2.16 The local authority has a duty to apply for an order in circumstances where the person has been assessed as needing one, but there is no one else in the life of the adult able or willing to do so. Where welfare powers are required, the Chief Social Work Officer (CSWO) is appointed (with day-to-day authority delegated to an allocated social worker). The local authority cannot act as financial guardian to an Adult. A solicitor in private practice could be appointed as financial guardian to an adult. This is a formal appointment following appointment by Order of the Court.
- 2.17 Intervention Order (s.53(3) of the 2000 Act):
Where it appears to the local authority that:
- a) the adult is incapable as mentioned in subsection 53(1); and
 - b) no application has been made, or is likely to be made, for an order under this section in relation to the decision to which the application under this subsection relates; and
 - c) an Intervention Order is necessary for the protection of the property, financial affairs or personal welfare of the adult,
- they shall apply for an Intervention Order under this section.
- 2.18 Guardianship Order (s.57(2) of the 2000 Act):
Where it appears to the local authority that:
- (a) an adult is incapable in relation to decisions about, or of acting to safeguard or promote his or her interests in his or her property, financial affairs or personal welfare, and is likely to continue to be so incapable; **and**
 - (b) no other means provided by or under the 2000 Act would be sufficient to enable the adult's interests in his or her property, financial affairs or personal welfare to be safeguarded or promoted; **and**
 - (c) no application for Guardianship has been made or is likely to be made; **and**
 - (d) a Guardianship is necessary for the protection of the property, financial affairs and/or personal welfare of the adult,

they shall apply under this section for a Guardianship Order.

- 2.19 The local authority is required to investigate circumstances where the personal welfare of an adult who lacks capacity might be at risk under s.10(1)(d) of the 2000 Act. The findings of this investigation may prompt a statutory intervention in terms of the 2000 Act, or, in the event of urgent action being required*, the Mental Health Care and Treatment (Scotland) Act 2003 (*the 2003 Act*) or the Adult Support and Protection (Scotland) 2007 (*the 2007 Act*) as appropriate.

*The 2000 Act has no specific provision for authorising urgent action to safeguard the welfare of an adult. While it is possible to apply to the Sheriff for an interim order pending a full hearing to consider an application for Guardianship, this option requires for the full application (with reports) to have been lodged.

3. Deprivation of Liberty, Supported Decision Making and Participation

3.1 When considering whether to intervene in the life of an adult, and on what basis, consideration must be given as to whether the proposed intervention would constitute a 'deprivation of liberty' as defined under Article 5 of the European Convention on Human Rights (ECHR). The *Bournewood* and *Cheshire West* cases make clear that a person who lacks capacity to consent to a deprivation of liberty requires legal/procedural safeguards to be in place to ensure that Article 5 is not violated. However where a person has the ability to give valid consent, such safeguards are not necessary. It is necessary to ensure that they have given full, free and informed consent however and the use of advocacy may be of assistance to determine this.

3.2 Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) outlines the right of persons with disabilities to exercise legal capacity on an equal basis with others. Local authorities must provide people with disabilities the support necessary to exercise their legal capacity and safeguards must be in place to ensure that this "respects the rights, will and preferences of the person". The UN Committee on UNCRPD sees Supported Decision Making as being an integral to this.

3.3 Supported Decision Making:

- Supporting people to make independent decisions on a formal or informal basis;
- Supporting and enabling people to express their views and wishes within the context of substitute decision making mechanisms, such as Guardianship Orders.
- "Supported decision making is a framework within which a person with a disability can be assisted to make valid decisions. The key concepts are empowerment, choice and control" (Carter, 2009).
- Supported decision making includes accessing the necessary support so an individual can make a decision and supporting them to ensure that the decision is respected;
- Must be person-centred and informed.

3.4 The participation of children:

Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) sets out that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 12 of the UNCRC sets out that the child who is capable of forming his or her own view, has the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Whilst this is a relatively rare occurrence, the views of any children involved in AWI processes should be sought and the court is encouraged to view the only barrier to doing so as specific and clearly evidenced welfare concerns (rather than a vague assertion of the potential impact). Advocacy support is necessary as it aids effective participation. This is not to say that any minor should be asked, but consideration and discussion has to take place around the practicability of seeking a view, in consideration of the child's age and maturity and in consideration of their best interests. The decision making around that should be recorded.

4. From Assessment to Case Conference

- 4.1 As a general rule, an AWI case conference should be requested when consideration is being given to the local authority making an application for either an Intervention Order or a Guardianship Order. They can also be convened in situations where there is a degree of complexity or disagreement, or where the Local Authority might require to give consideration to formally entering court proceedings raised by another party in respect of an Adult. The case conference provides a multiagency forum to ensure multiagency professional discussion of the principles.
- 4.2 **Diagram 1** refers to the procedure to be followed work assessment of need might result in an AWI case conference being convened.

Diagram 1:

From Assessment to Case Conference.

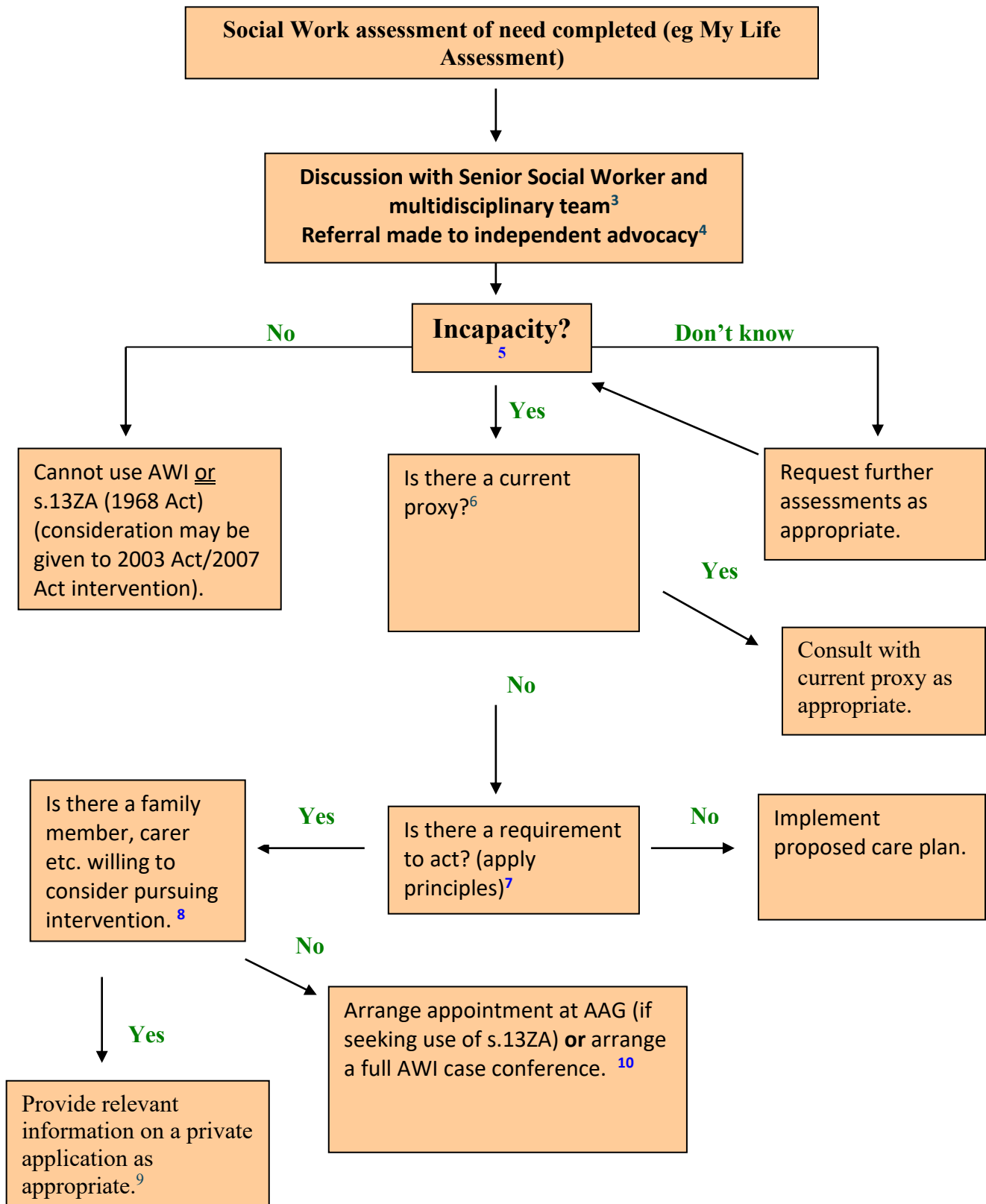


Diagram 1 Notes:

1. **Assessment:** The completed assessment must be current (an updated assessment review is appropriate, but must be authorised by the assessor's line manager prior). All assessments must

include considerations of risk. It is important to highlight what measures have already been taken to manage those risks identified in order to evidence consideration of the least restrictive option. All relevant paperwork must also be sent to legal services ahead of the case conference.

2. **Capacity:** The Scottish Government has produced a helpful guide to communication and assessing capacity. This publication is designed for social work and healthcare practitioners and can be accessed using the following online link: <http://www.scotland.gov.uk/Publications/2008/02/01151101/0>
3. **Consultation:** The worker undertaking the assessment should consult with their line manager, and the multidisciplinary team where appropriate, regarding potential need for statutory intervention. These discussions will assist in establishing the grounds for further intervention.
4. **Participation:** Wherever practicable the adult should be supported to participate. A referral to an appropriate independent advocacy service (such as Lomond and Argyll Advocacy) should be made at as early a stage as possible.
5. **Establishing incapacity:** This is a fundamental but complex task, and should be approached on a multi-disciplinary basis, although it is only a doctor who can formally assess incapacity. It must always be remembered that incapacity is task-specific. CT (computerised tomography) and MRI (magnetic resonance imaging) scans, psychiatric/neuro-psychological/speech and language therapy and occupational therapy assessments, can all assist in when assessing the existence and degree of incapacity.
6. **Current proxy:** It is important to ascertain whether or not there is already someone with legal authority to make decisions on the adult's behalf. This might be a previously appointed welfare or continuing (financial) Power of Attorney. The OPG may have a record of this information. If this information cannot be sought from the adult or their carers/family, then the Senior Social Worker or Business Support for the MHO Service can be contacted. They will then request this information from the OPG.
7. **The requirement to act:** The fact that an adult has been assessed as incapable does not, in itself, constitute grounds for a statutory intervention. Reference to the principles is a key when considering whether there is a requirement to act. At this stage, advice can be sought from a Mental Health Officer (MHO). WDHSCP MHO Service operates an on-call duty rota during the hours of 0845 – 1645 (Monday - Thursday) and 0845 – 1555 (Friday). The duty MHO is available to offer advice and assistance during this time and can be contacted 01389 812070. The local authority's Legal Service is also a valuable source of advice and guidance.
8. **Alternative applicants:** When considering whether it is appropriate for the local authority to pursue an intervention, it is first necessary to establish if there are any other interested parties who might consider making an application (s.53 of the 2000 Act). This might be a family member, informal carer, or any other interested party who has an ongoing interest in the welfare and/or financial affairs of the adult.
9. **Information:** Information, advice and support should be given to those considering pursuing an intervention under the 2000 Act. Provide prospective applicants with the *Are You Applying For Guardianship?* leaflet (Annex F). Whilst anyone who is considering making an application should consult with family and secure independent legal advice, it is necessary to monitor how this progresses as delays can be detrimental to the adult. As a guide, prospective applicants should be given 2 weeks to make initial arrangements, although this timescale may be shorter in more pressing situations (such a

delayed discharges). In all circumstances where it is believed that any delay could have an adverse impact, the care manager should take steps to arrange a formal AWI case conference to consider appropriate options. Whilst a private application being prepared, the allocated worker should regularly seek updates as to how matters are progressing and record any reasons for delays in the adult's case record.

10. **AWI case conference:** It is the responsibility of the lead assessor to arrange an AWI case conference. To do this, the lead assessor should email the MHO Service Business Support Assistant or the MHO Senior Social Worker. Case conferences will only be arranged on receipt of a full invite list, updated assessment/review, confirmation of incapacity and confirmation of referral to advocacy. It is also the responsibility of the lead assessor to present the case at the case conference. The case conference must be chaired by a designated manager. An appropriately trained minute taker must also be in attendance as the minute may be taken as evidence in any subsequent legal proceedings.

5. The Order in Operation

The supervision of private Welfare Guardians

- 5.1 Under s.10(1)(a) of the 2000 Act, the local authority must supervise all private welfare Guardians. An initial visit should take place within three months of the order being granted. Thereafter, a further visit should take place after an interval of no more than twelve months. Following this visit, there is scope to consider varying the frequency of further visits or dispensing with the requirement to undertake any further visits.
- 5.2 On receipt of confirmation of the order being granted, an MHO will be allocated to complete the initial supervision review and the associated CareAssess form. Thereafter, the case will be allocated to the *Guardianships* clipboard on CareFirst, where it will be allocated to a social worker for completion of subsequent reviews. For further detail of this process, please read *SOP – Supervising Officer (Private)*. It is important to note that in some Guardianship cases there will be a requirement for increased supervision visits detailed within the interlocutor. The Supervising Officer must always check the supervision requirements when allocated a case for supervision.
- 5.3 Occasionally, an order will be granted for a period of less than one year. In such circumstances, the local authority is required to arrange for the adult and Guardian to be visited within 3 months of the order being granted, and further contact within the final 3 months of the period of appointment.
- 5.4 The purpose of supervision is to monitor the welfare of the adult, whilst ensuring that the Guardian has the necessary advice, guidance, and support to appropriately act as Guardian. Supervision should be proportionate to the needs of both the adult and the Guardian.
- 5.5 The Supervising Officer should always have regard for principles of the 2000 Act. If the Supervising Officer is of the view that the Guardian is not acting in accordance with the principles, they must address such concerns. They should also discuss this with their supervisor and, where appropriate, an MHO.
- 5.6 The MWC will occasionally request copies of review paperwork and/or recordings relating to the supervision of private Guardianship Orders. Supervising Officers should also notify the MWC of significant concerns and investigations at the earliest opportunity, following discussion with the appropriate line manager and the MHO service/Legal Services
- 5.7 Having undertaken the mandatory visits detailed above, the Supervising Officer may, alongside their line manager and the Guardian, decide to:
- Vary the interval between visits to greater than 12 months, or;
 - Cease the supervision visits altogether, or;
 - Increase the level of supervision.

The relevant form on *CareAssess* must be completed. The document *SOP - Supervising Officer (Private)* provides further detail on this process.

Following this, the MWC must be notified. A printed copy of the CareAssess variation/cessation report form will be acceptable for this purpose, but should be manually signed by the Supervising Officer and countersigned by their line manager.

- 5.8 If an adult subject to private Guardianship moves to a new home address out with West Dunbartonshire on a permanent basis, responsibility for supervision should be transferred to the local authority area in which the adult has settled. In the event that this occurs, the Office of the Public Guardian, and Mental Welfare Commission for Scotland must be informed in writing. All template letters relating to transfers in and out of West Dunbartonshire are on Comino.

The Role of Day-to-day Guardian (Local Authority Welfare Guardianship Orders)

- 5.9 Following the granting of a local authority welfare Guardianship Order, a day-to-day Guardian must be appointed. It is the responsibility of the day-to-day Guardian (on behalf of the CSWO) to notify the adult (unless otherwise specified by the Sheriff), the OPG, and the MWC, of the name of the day-to-day Guardian. This notification must be made no later than seven days from the local authority receiving confirmation of the order being granted.
- 5.10 Whilst the 2000 Act does not specify who should be appointed as day-to-day Guardian, in practice the role usually falls to the allocated social worker as they already have a professional knowledge of the case, is likely to have undertaken the assessment of need, and will be familiar to the adult and their carers. It is unlikely that a case will have progressed to the submission of a local authority welfare Guardianship application in the absence of an allocated social worker. In any instance where this has been the case, or where the previous social worker is no longer involved, the relevant manager must ensure that a social worker is allocated as a priority.
- 5.11 As with other statutory processes, it is not good practice for a case to be transferred between teams whilst an application for Guardianship is underway as this can lead to an unnecessary delay in allocating a day to day Guardian once the order is granted.
- 5.12 The document *SOP –Day-to-Day Guardian (LA)* details the full process to be followed on CareFirst when allocating a day-to-day Guardian. It is imperative that the day-to-day Guardian has a copy of the order granted, is aware of the powers afforded to them by the Guardianship and knows how long the Guardianship has been granted for.
- 5.13 The prescribed timescales for visiting an adult subject to a local authority welfare Guardianship order are the same as those for the supervision of private Guardians (see above). The day-to-day Guardian is responsible for ensuring that such reviews are undertaken and recorded. When a review has been completed, the day-to-day Guardian should completed the necessary CareAssess form. The document *SOP –Day-to-Day Guardian (LA)* details the full process to be followed on CareFirst.

Financial Considerations

- 5.14 Local authorities cannot take on the role of financial Guardians in respect of an adult who lacks capacity. The day-to-day Guardian must however give consideration to the adult's financial circumstances, with the principles of the legislation as a guide in this regard. If there is another proxy with financial powers, the day-to-day Guardian should liaise with that individual or organisation with a view to ensuring that the adult's finances are managed in a controlled manner that is consistent with

his or her best interests. Where there is no-one in place with powers to manage the adult's finances, and it is deemed that provision is required in this respect, the day-to-day Guardian should discuss options with their line and/or an MHO.

- 5.15 Where there are issues relating to non-compliance with a Guardianship Order, further advice should be sought from the MHO and Legal Services as required.

Renewing a welfare Guardianship Order

- 5.16 It is the responsibility of the day-to-day Guardian, in consultation with relevant others, to routinely review the requirement for the order to remain in place. The Office of the Public Guardian will alert the local authority to the expiry date of a welfare Guardianship order no later than three months prior to the date of expiry. The day-to-day Guardian should then discuss the option of applying for renewal with his or her line manager. When it is deemed necessary for a Guardianship order to be renewed, it is the responsibility of the day-to-day Guardian to arrange an AWI case conference where this will be formally discussed. The document *SOP - OPG Expiry Letters for Guardianships* details the full process to be followed on CareFirst.

Recalling a welfare Guardianship Order

- 5.17 The 2000 Act 2000 sets out two grounds for recalling Guardianship Orders:

- the grounds for appointment are no longer fulfilled; or
- the interests of the adult in his property or financial affairs can be satisfactorily safeguarded or promoted otherwise than by Guardianship.

In circumstances whereby it is deemed no longer appropriate for an order to be in place, this can be recalled. If recall is being considered for a local authority Guardianship, then an AWI case conference should be arranged. Thereafter, the process for recalling an order is to formally notify in writing, using the prescribed forms (which can be found at www.gov.scot/collections/adults-with-incapacity-forms-and-guidance), the adult; named person (if applicable); primary carer, OPG; the MWC; and any other relevant party who might have an interest, giving them 21 days in which they can object. Where any objection to the proposed recall is raised, the local authority must remit the matter to the sheriff for consideration.

Transferring local authority Guardianship responsibility to another local authority

- 5.18 S.76 of the 2000 Act requires the CSWO to inform their counterpart in another local authority if the adult moves into their area. It is then the responsibility of the CSWO of the receiving authority to notify the OPG and MWC of the transfer. It is good practice to allow for a period whereby the progress of the adult in his or her new place of residence is monitored prior to seeking a full transfer of responsibility to the receiving local authority.

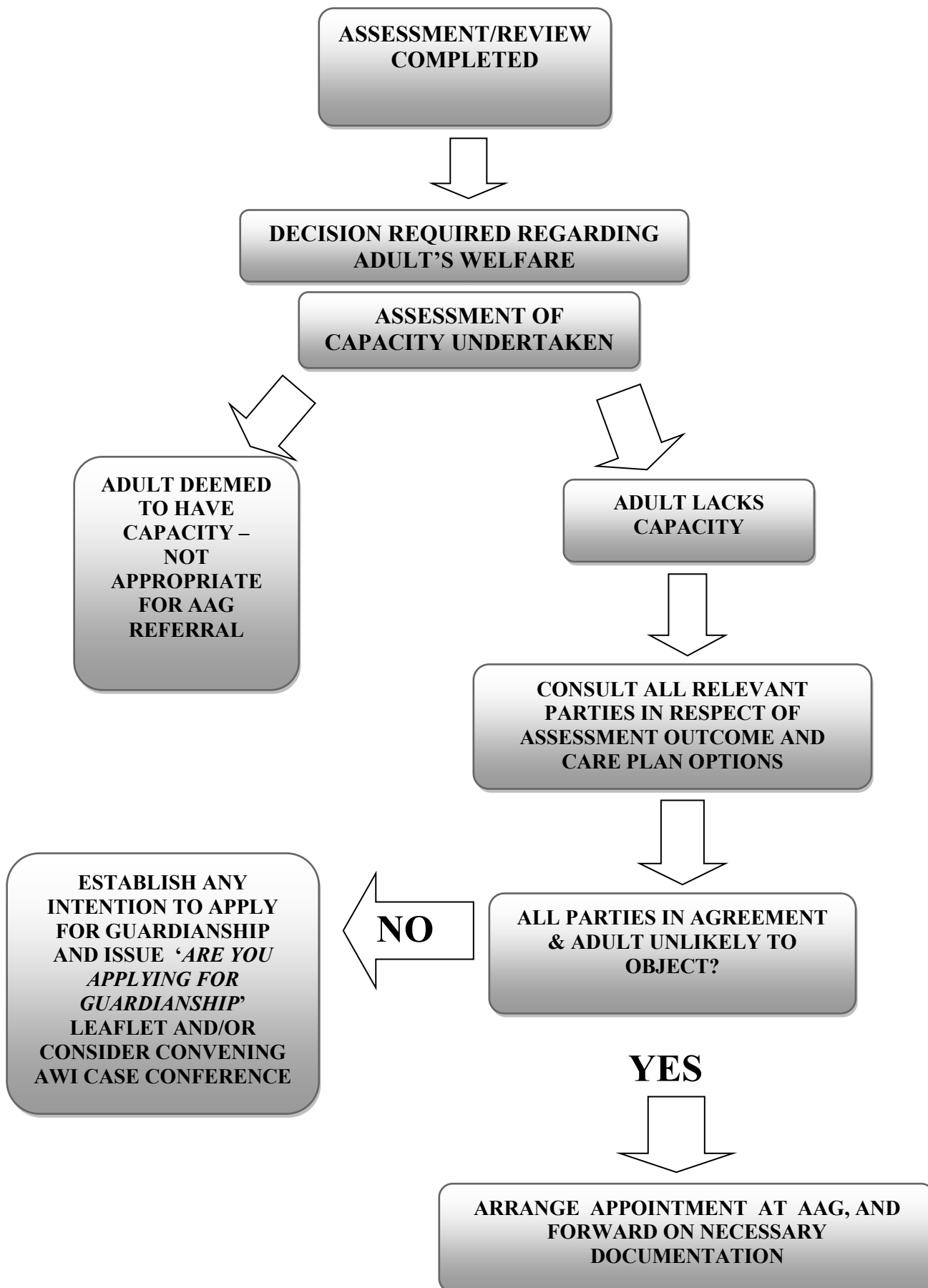
The documents *SOP – Transferring Guardianship to West Dunbartonshire* and *SOP - Transferring Guardianship to another Local Authority* detail the full processes to be followed.

6. The AWI Authorisation Group and s.13ZA

- 6.1 The AWI Authorisation Group (AAG) was established to authorise interventions under the terms of s.13ZA of the 1968 Act. The AAG panel is made up of a Senior Social Worker, MHO and local authority solicitor. The group convenes on a weekly basis on a Tuesday at 1pm via MS Teams, and referral slots are available by emailing AAG@west-dunbarton.gov.uk and forwarding on a copy of the most recent assessment/review, the AAG Checklist (Annex C) and a completed capacity assessment (Annex D). Urgent AAG meetings can be convened when necessary.
- 6.2 The AAG process is illustrated below (diagram 2).

Diagram 2:

AAG PROCESS FLOWCHART:



S.13ZA of the Social Work (Scotland) Act 1968

- 6.3 S.13ZA of the 1968 allows the local authority to make decisions on behalf of a person who requires community care services (including any permanent change of home address facilitated by the local authority) and who lacks capacity as defined in the 2000 Act.
- 6.4 The principles set out in Section 1 of the 2000 Act must be taken into account at all stages when considering any intervention in respect of an adult who lacks capacity, and this includes s.13ZA.
- 6.5 S.13ZA can be used to enable somebody to access a community care service when they have been assessed as being incapable of making that decisions themselves. This includes moving to a care home or being in receipt of care and support in their home. It can only be used when:
- there is no proxy with relevant authority and there is no application for an order under the 2000 Act with relevant powers in the process of being determined; and
 - the risk assessment indicates that there are no issues that would warrant an order under the 2000 Act; and
 - it is considered that the adult will not be deprived of his or her liberty under Article 5, ECHR (see below); and
 - there would be no further benefit to the adult in applying for an order.
- 6.6 In addition, the following factors are key indicators as to s.13ZA being an appropriate option:
- the person does not object to the proposed action; it appears that s/he is unlikely to indicate an unwillingness to participate with the care arrangements;
 - all interested parties are in agreement with care intervention proposed.
- 6.7 S.13ZA cannot be used when:
- There is a current Guardian or a Welfare Attorney with powers relating to the proposed steps in place;
 - An Intervention Order or Guardianship Order has been granted relating to the proposed steps;
 - An application has been made but not yet determined for an Intervention Order or Guardianship Order under Part 6 of the 2000 Act relating to the proposed steps.

When to seek an Intervention Order or Guardianship Order

- 6.8 The local authority should seek to obtain an order under part 6 of the 2000 Act when:
- It appears to the local authority that the adult is incapable, no application has been made or is likely to be made by another interested party for an order in relation to the decision in question, and;
 - An order is necessary for the protection of the property, financial affairs or personal welfare of the adult; and/or
 - In providing the care intervention needed, the circumstances would amount to a deprivation of liberty;
- 6.9 Further indicators would be that:
- The person with impaired capacity is opposed or is likely to oppose to the proposed course of action;
 - The carer/family members have expressed a different view to that of the person and/or the health and social work professionals involved with the needs assessment and care plan, or there is disagreement

amongst professionals. In such cases, where no agreement can be reached, local authorities may conclude that the only way to protect the personal welfare of the individual would be through an application for an order and a hearing before a sheriff.

APPENDIX A

ASSESSING WHETHER THE PROPOSED CARE INTERVENTION AMOUNTS TO 'A DEPRIVATION OF LIBERTY' IN TERMS OF ARTICLE 5, EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

1 Where a person lacks the capacity to give informed consent to the proposed care intervention, consideration must be given as to whether the circumstances would amount to a 'deprivation of liberty'. This guidance seeks to summarise the factors identified as relevant by the ECHR cases to date. Professionals using this guidance should take account of these factors in assessing whether a person in their care may be deprived of their liberty.

2 'Deprivation of liberty' is not defined in Article 5, ECHR itself. However, the European Court of Human Rights (EctHR) and domestic courts have considered its interpretation. What amounts to a deprivation of liberty will depend on the circumstances of each individual case. It is therefore not possible to have rigidly defined criteria stating what will and will not amount to a deprivation of liberty. It will depend on the particular care intervention/ package that is being proposed for the adult and the circumstances of the adult him or herself.

3 However, case law can provide us with an indication of what might be considered to amount to a deprivation of liberty. A recent example of a decision of the EctHR in this area was in the case *H.L. v UK* (referred to as 'Bournewood'). The EctHR in Bournewood considered that what amounts to a 'deprivation of liberty' will depend on the specific situation of the person concerned, taking account of a whole range of factors arising in their particular case, such as the type, duration, effects and manner of implementation of the measure in question. The court further elaborated that the distinction between deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance. In brief this particular case concerned an adult with autistic spectrum disorder who did not have the capacity to consent and whose carers were opposed to his being resident in hospital. The ECHR decided that there had been a deprivation of liberty and, as it had not been in accordance with a procedure prescribed by law, it breached Article 5.

4 Another case in point is that of *H.M. v Switzerland*. In that case a vulnerable but mentally capable woman was placed in a nursing home against her will. The EctHR concluded that placing her in a nursing home was a responsible measure taken by the competent authorities in the applicant's own interests in order to bring about the necessary medical care and adequate living conditions and was not a deprivation of liberty. The case of *Muldoon* is a Scottish case in which the sheriff considered the above two EctHR cases in the circumstances of a compliant but incapable adult who was placed in a nursing home without a Part 6 (2000 Act) order having been obtained. The sheriff concluded that where an adult was compliant with a regime, but legally incapable of consenting to or disagreeing with it, then the adult was deprived of his or her liberty and that therefore that step should not be taken without express authority governing it (i.e. a Part 6 order). The Scottish Government does not agree with this interpretation of the EctHR cases. The EctHR cases make it clear that all of the circumstances of the case have to be taken into account and that incapacity of itself does not automatically mean that there will be a deprivation of liberty in the provision of the care intervention/package to that adult. It is of note that in the case of *H.M. v Switzerland* the EctHR concluded that there had been no deprivation of liberty even where the adult was capable.

Identifying deprivation of liberty

5 What amounts to deprivation of liberty depends on the interaction and accumulation of factors, as well as degree and intensity, in relation to the specific circumstances of the individual. It could be argued that institutional care will always be more restrictive than care at home, but this may not necessarily be the case. This guidance should therefore be applied regardless of care setting.

6 The following list of factors is illustrative of those which may be relevant in considering whether the care intervention might constitute ‘deprivation of liberty’. Consideration needs to be given to whether deprivation, within the meaning of Article 5 ECHR, is likely to arise either immediately or in the future; and, if so, whether such deprivation is justified in the light of all the relevant factors. It will be necessary to consider the combined impact of all the restrictions place upon the adult.

- Factors affecting personal autonomy, including:
 - **the person’s past and present wishes** – daily choices available within the care setting i.e. activities, meals, bedtimes, etc;
 - **access to resources** to support physical and social autonomy and interests as far as possible;
 - **the extent/nature of limitations on contact** with the outside world, including for example: contact with their partner, spouse, family members, friends, others with an interest in the person; opportunity for visits, telephone contact; access to local community. If the person is prevented from leaving the facility, whether by locked doors or restraint, that would be a factor in considering whether or not there is deprivation of liberty. **However, restrictions placed for the person’s protection would not necessarily amount to deprivation of liberty if opportunities exist to see family and friends and go out accompanied.** A person is not deprived of their liberty simply because they lack the physical ability to leave or the mental capacity to form a genuine intention to leave;
 - **internal design of physical environment and accessibility** – the extent/ nature of limitations on living/moving about within a care setting. For example, if the person is not allowed any freedom of movement within the facility they are probably deprived of their liberty. Restrictions which are unavoidable within a group living situation and which apply to all residents would be unlikely in themselves to constitute deprivation of liberty. However, this would depend on the context and the extent of other restrictions imposed on the person concerned;
 - **external physical environment and access**, e.g. safe garden. If the person is accustomed to and enjoys being outside for a while each day and is prevented from doing so, then this will be a factor to consider in terms of deprivation of liberty;
 - **the use of restraints**, e.g. limitations on movement such as placing the person in seating or situations from which they do not have the physical ability to remove themselves/duration of any limitations. Although the use of restraint to administer treatment or care would not necessarily constitute a deprivation of liberty in the absence of any other restrictions, it should be seen as an indicator that a person’s wishes are possibly being over-ridden and careful consideration should be given as to whether they are deprived of their liberty. (See the Mental Welfare Commission’s Guidance (2006) ‘Rights, Risks and Limits to Freedom’ and Guidance on ‘Covert Medication’ (2007));
 - **skills and abilities of staff** to communicate with person and quality of that interaction;
 - **Effect of change in care regime** – consider whether the changed care regime will be more or less restrictive than the person is accustomed to, e.g. will the person have greater freedom of choice and less restricted environment, for example, the person with learning disability moving from hospital to community; person with dementia being moved from isolated top tenement flat to ground floor room in a care home with a safe garden area.

7 Deciding what amounts to ‘deprivation of liberty’ will depend on the circumstances of each individual case. Such decisions may involve a fine balancing of elements and in such cases practitioners might want to consider taking advice from their own legal departments.

APPENDIX B

Useful addresses and publications

Office of the Public Guardian (Scotland)

Hadrian House

Callendar Business Park

Callendar Road

Falkirk

FK1 1XR

Enquiry line: 01324 678300

www.publicguardian-scotland.gov.uk

For information and advice about matters covered by the Act. The OPG's focus is primarily on financial matters. If they cannot assist directly with queries on other matters relating to adults with incapacity (e.g. welfare, health, care) they will point you to other agencies who will be able to help. The OPG does not provide legal advice. All OPG publications, including forms and guidance notes can be downloaded. Hard copies are available on request.

Mental Welfare Commission for Scotland

Thistle House

91 Haymarket Terrace

Edinburgh

EH12 5HE

Tel 0131 222 6111

www.mwscot.org.uk

Helpline: 0800 389 6809

The Commission provides advice on welfare matters in relation to AWI and free good practice guides – see website for further information.

Scottish Government

Civil Law Division

Area 2 W

St Andrew's House

Regent Road

Edinburgh

EH1 3DG

Tel: 0131 244 3581

<http://www.scotland.gov.uk/topics/justice/civil/awi>

Adults with Incapacity Act Codes of Practice and other publications are listed on, and can be downloaded from, the website.

Dumbarton Sheriff Court

Church St

Dumbarton, G82 1QR

01389 763266

www.scotcourts.gov.uk/

Department for Work and Pensions

There is a free Benefit Enquiry Line for People with Disabilities on 0800 88 2200 (textphone users 0800 24 33 55). From the local authority you can also get details of the local welfare rights office that will give you advice and help with benefits. You will find useful information and guidance for disabled people and carers on the Department for Work and Pensions website –

www.dwp.gov.uk

Care Commission

Headquarters
Compass House
11 Riverside Drive
Dundee
DD1 4NY
01382 207100

www.carecommission.com

The Care Commission is an independent body which regulates care services in Scotland. It inspects and investigates complaints in relation to care homes; short break/respite care services; housing support; adult placement schemes; support services; care at home; nursing agencies; and hospice care. There are national care standards for all these services.

Law Society of Scotland

26 Drumsheugh Gardens
Edinburgh
EH3 7YR
0131 226 7411

Client Relations Helpline: 0845 113 0018

www.lawscot.org.uk/Public-Information/

The Law Society is the governing body for solicitors. It provides information to the public on where to find and what to expect from solicitors. The Law Society's Client Relations Office has a legal responsibility to handle complaints against Scottish solicitors. To discuss a complaint, or if you need more information, contact the Client Relations Helpline.

Scottish Legal Aid Board

44 Drumsheugh Gardens
Edinburgh
EH3 7SW
0131 226 7061
Legal Aid Helpline: 0845 122 8686

www.slab.org.uk

Provides advice and information on entitlement to legal aid for applications in relation to the Adults with Incapacity Act; and a list of solicitors registered for legal aid work.

Citizens Advice Bureau –

The nearest CAB can be found in the phone book or at:

www.cas.org.uk

Scottish Independent Advocacy Alliance

Melrose House
69a George Street
Edinburgh
EH2 2JG
0131 260 5380

www.siaa.org.uk

This website will provide a link to the Independent Advocacy Service Directory for Scotland.

Alzheimer Scotland – Action on Dementia

22 Drumsheugh Gardens
Edinburgh
EH3 7RN

Office: 0131 243 1453

Freephone 24hr Dementia Helpline 0808 808 3000

www.alzscot.org

Provides a free guide for carers and people with dementia in Scotland: 'Dementia: Money and Legal Matters'. The website also provides information about the different kinds of powers of attorney and how to set them up. You can call the Dementia Helpline to arrange for a copy to be sent to you.

ENABLE

6th Floor
7 Buchanan Street
Glasgow
G1 3HL
0141 226 4541

www.enable.org.uk

Supports people with learning disabilities of all ages by campaigning, providing information, legal advice, training and other services.

Capability Scotland – Advice Service

11 Ellersley Road
Edinburgh
EH12 6HY
0131 313 5510

www.capability-scotland.org.uk

Provides advice and information and local services for people with a range of disabilities, their families and carers.

Scottish Association for Mental Health

Cumbræ House

15 Carlton Court

Glasgow

G5 9JP

Tel: 0141 568 7000

www.samh.org.uk

Provides information, legal advice and support to people with mental health issues.

SENSE Scotland

43 Middlesex Street

Kinning Park

Glasgow

G41 1EE

0141 429 0294

www.sensescotland.org.uk

Works with children and adults who have communication support needs because of deafblindness, sensory impairment, learning and physical disabilities.

PAMIS

Head Office

Springfield House

15/16 Springfield Road

University of Dundee

Dundee

DD1 4JE

01382 385 154

www.dundee.ac.uk/pamis

PAMIS works with people with profound and multiple learning disabilities, their family carers and professionals who support them.

Headway Scotland

Tel. 0131 537 9481

www.headway.org.uk

Headway provides: support and help to people affected by brain injury through a network of local groups and branches; information and advice; carer support; and a range of services (which vary from area to area).

Chest, Heart and Stroke Scotland (CHSS)

65 North Castle Street
Edinburgh
EH2 3LT
0845 077 6000

www.chss.org.uk

e-mail advice@chss.org.uk

Advice line: 0845 0776000

CHSS aims to improve the quality of life for people affected by chest, heart and stroke illness through medical research, advice and information and support in the community.

APPENDIX C

AAG Checklist

**West Dunbartonshire Community Health & Care Partnership
Adults with Incapacity (Scotland) Act 2000
Authorisation Group (AAG)**

Name of Adult:

Section 13ZA CHECKLIST

(to be completed and submitted in respect of ALL referrals to the AWI Authorisation Group when an intervention under the terms of S13ZA is being proposed)

1. Comprehensive Assessment (including risk assessment) completed?

YES ☐ NO ☐

Date completed:

If no, give reason:

2. Assessment of capacity obtained?

YES ☐ NO ☐

Name & designation of assessor:

Date of assessment:

NB: please ensure that the *Assessment of Capacity* report has been completed and is available for consideration.

3. Has an independent advocacy worker been appointed for the Adult?

(NB: referral must be made at earliest opportunity)

YES ☐ NO ☐

Date of referral:

If not, give reason:

4. Is it anticipated that the Adult will object to the proposed implementation of the care plan?

YES ☐ NO ☐

(NB: if it is anticipated that the Adult would object, S13ZA cannot be considered)

5. Agreement with current care plan:

Are all professionals involved in agreement with the current care plan?

YES ☐ NO ☐

Are all other interested parties (family members, informal carers etc.) in agreement with the current care plan?

YES ☐ NO ☐

(NB: in order for an intervention under the terms of S13ZA to be implemented, all relevant parties must be consulted and be in agreement with the care plan)

6. Are you aware of a Guardianship application being pursued or lodged with the court?

YES ☐ NO ☐

If yes, please provide details:

DECISION

To be completed by AWI Authorisation Group

Authorisation to implement care plan in terms of Section 13ZA, Social Work (Scotland) Act 1968 granted:

YES ☐ NO ☐

Comments and recommendations:

Signed:

Designation:

Date:

APENDIX D

Assessment of Incapacity for 13ZA Process

Under the provisions of 13ZA of the Social Work Act (1968 (amended 2007)), the local authority requires to know whether an Adult has capacity to consent to a care plan intervention (e.g. moving to a care home). This form is to record this assessment and should be completed by a senior member of the medical team if the patient is in hospital. If the assessment is undertaken in hospital by a junior member of medical staff, it must be countersigned by the Consultant in the ward. General Practitioners may complete the assessment if the patient is in the community. Psychiatry involvement is not required in the majority of cases but may be necessary in very complex capacity assessments.

Patient Details

Name: CHI:

Address:

Current Location (Ward):

Decision requiring assessment of capacity (e.g. transfer to residential/nursing care placement):

Assessment of Incapacity

1. Does the person have a mental disorder or an inability to communicate that renders them incapable of making the above decision? Yes/No

2. Where there is an inability to communicate, what efforts have been made to ascertain the adult's view (eg SALT)?

Please provide evidence, e.g. known diagnosis of dementia, score of cognitive tests, collateral history from family, information from nurses, OT, physio etc.

Tests of Incapacity

3. Please provide evidence for each of the below legal tests where you believe the person lacks capacity:

- a) Acting on decisions

- b) Making decisions

- c) Communicating decisions

- d) Understanding decisions (appreciates information, apply it to personal circumstances etc)

- d) Retaining memory of decisions

4. Is the incapacity likely to be:

Temporary	Yes/No
Permanent	Yes/No
Fluctuating	Yes/No

Where the incapacity is assessed as temporary/fluctuating, please comment:

Assessor Details

Name:

Designation:

Location:

Consultant's countersignature (required if assessment undertaken by member of junior medical staff)

Signed:

Name: