



Scottish  
Independent  
Advocacy  
Alliance

# **Adults with Incapacity Resource Hub**

2021



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# Introduction

Sandra McDonald is an independent advisor and trainer on mental capacity issues. She was the Public Guardian for Scotland for fourteen years. She has long been an advocate of Independent Advocacy, particularly for those whose capacity is limited.

The following Reference Hub is the product of a series of focussed training events for independent advocates across Scotland, commissioned by the SIAA and delivered by Sandra from autumn 2019 to spring 2020. Participants at the events felt the sector would benefit from guidance that was relevant and specific to independent advocacy.

The SIAA appreciates that the Adults with Incapacity Act and its application will be part of the Mental Health Law Review led by John Scott QC, scheduled to report in autumn 2022. It also understands that the Scottish Government is considering some adjustments to current AWI legislation in the interim.

The following is current as of May 2021 and the SIAA will endeavour to include any changes to legislation, regulation or practice as they are introduced to ensure advocacy services have up to date information and guidance.

# Chapter 1: Foundation

## What is a Power of Attorney?

Capable person, over 16  
Largely only executed when need to be  
Majority drafted by a solicitor  
90,000+pa submitted (400pd)  
Welfare and/or finance  
Number of attorneys?  
Authority of attorneys?  
Finance can start immediately  
Welfare not unless/until incapacity  
Deed narrates powers  
No supervision  
Register with OPG  
Public register

### Power of Attorney



A Power of Attorney (most frequently abbreviated to PoA) is a legal document which a person creates, whilst mentally capable of doing so. A person must be aged 16 or over to grant a PoA. There is no set format, no set length, no set things (powers) it has to grant, these are decisions of the granter, the person making the PoA.

A PoA gives authority to a person, or people, of the granter's choosing to support them with, and if necessary to act on their behalf in, matters relating to their finances, property, and/or health and welfare should there come a time when the person is no longer able to make decisions about these matters.

The people given this authority are called attorneys (there is more about attorneys below).



There are two types of Power of Attorney that last beyond incapacity.

- **Continuing Power of Attorney:** a continuing power of attorney grants powers in respect of property and finance, to enable the attorney to assist the granter with finance and property matters. As the name suggests, the authority 'continues' should mental ability/capacity be lost. This type of PoA tends to be called a financial PoA.
- **Welfare PoA:** A welfare PoA gives authority to the attorney to support a person with health and welfare matters, or to make such decisions in their stead if they are no longer able to make these personally. It can be confusing that the document and the person who operates this are both referred to as the Power of Attorney. To avoid misunderstandings, you may wish to get into the habit of referring to the document as the Power of Attorney, or PoA, and the person operating this as the 'attorney'.

## The Attorneys

The attorney can be anyone of the granter's choosing, subject to a few caveats in law eg that the person is over 16 and is not bankrupt. The attorney does not have to be the next of kin, or eldest child; the person may wish to opt for a good friend rather than a family member, or even a professional e.g. their family solicitor.

How many attorneys are appointed is again entirely the discretion of the granter. There may only be one, or can be more than one. Where there is more than one, let us say there are two, usually both will have all powers, but it may be that one has the property and finance powers and the other has the welfare powers.

Multiple attorneys can be appointed, jointly, jointly and severally, or a mix of these.

**Joint:** means both, or all, attorneys must work together on all matters.

**Joint and several:** Attorneys may act individually, this applies 'across the board', each attorney has authority to act individually on all matters.

**A mix:** Attorneys must act jointly on the matters set out for joint decisions but can each act individually on the rest. A typical example is that attorneys must make a decision jointly about selling the house but can act individually on everything else.

## **Substitute Attorneys**

A granter can appoint a substitute attorney, as a replacement for the original appointees if one of them can no longer act for whatever reason. The name of any substitute will usually come after the word "whomfailing". If a substitute has taken up the role as attorney they will have a certificate to this effect; unless or until then they are not an attorney, so do not have to feature in your consideration.

## **What does this mean for you?**

You should know how the attorneys are appointed in order that you can be sure you are complying with the terms of the PoA when supporting your Advocacy Partner. For example, if you have spoken to one of the attorneys but they are required to act jointly, any decision which 'flows' from this would be in breach of the terms of the PoA as you should have sought the views of both, or all, attorneys.

There is a sample PoA at Appendix A which will assist you identify what you are looking for.

## The Powers

The granter can offer property and finance and/or health and welfare powers. These can be combined in the same document.

The typical format is inclusion of express powers, i.e. that the PoA lists all the powers the granter has given to their attorney. To try and avoid omitting something from this list it is usual for there to be what is referred to as a plenary power. This is a 'catch all' type of power, it goes ahead of the list of specific powers and will say something like "power to do everything I would have been able to do myself including but not limited to ... [and then the list would start]".

### **When can the powers start?**

The 'rules' differ dependent on whether one is talking about the welfare or the financial powers, even if these are combined in the same document.

Welfare powers cannot start unless or until the person is incapable – in respect of the decision to be made. By law, the attorney has to consider how they wish their incapacity to be determined – and a statement to this effect must be in the PoA, otherwise it cannot be registered.

There are really only two options – when the attorney reasonably believes this to be the case, or when professional opinion assesses this to be the case.

Financial powers can start as soon as the document has been registered with the Office of the Public Guardian (OPG). It can be helpful for financial powers to commence sooner, as this allows people to assist the granter with practical matters if they are finding it difficult.

It's not a case of 'activate' and active thereafter.

Even though the attorney may have started acting on the PoA, potentially in relation to many things, they should only do so if the person themselves is incapable of making a decision, or of taking action on the particular matter in hand. The PoA is only active when it is required to be.

## The Public Register

The OPG maintains a register, which is open to the public, which lists PoAs (and guardianships) that are registered with them. The register also names the person appointed. There is more information on the OPG website about the register and how you apply to access this. Anyone is entitled to this high-level information, you are not entitled to more detail than this, unless you have a right to the confidential detail.

## PoA Supervision

PoAs are not supervised routinely. The reason for this is that a PoA is a document granted by a person whilst capable, appointing, presumably, a person they trust to support them and act for them as may be necessary. It is seen as inappropriate for a state authority to supervise the person a capable individual has chosen to appoint.

However, concerns about the way in which an attorney is operating can arise. Examples may be: an attorney apparently spending the now incapable person's money on themselves, or making decisions that seem not to be for the benefit of the individual.

### **Reporting Concerns**

If you have concerns about the way in which an attorney is fulfilling the role you should report these, soonest, to the OPG, or to the Local Authority. Do not worry whether it is something you can or should report, or not. Any concern can be reported, there is nothing off limits. It is never too early to report something, but it can be too late.

OPG has an investigation service which allows them, in certain circumstances set out by law, to review the way in which an attorney is managing things. There is a referral form on their website, to tell them what you are concerned about and to offer any supporting information you may have.

The referral does not have to be accompanied with hard evidence - an explanation of the circumstances which have given rise to the concern are sufficient. The OPG will determine if this is a case in which they can become involved and if so if it is a case which requires investigating.

Do not delay, for instance whilst you seek out whatever information you may be able to find, or until you may be more certain, report what you have as soon as it seems necessary to do so. It is always better to be safe than sorry.

If, for whatever reason, the OPG doesn't have authority to investigate the situation they will let you know and most often will give you some signposting on what else you can do.

The outcome of an OPG inquiry is confidential so you shouldn't expect to hear details of what has happened following your report of concerns. This can be frustrating but please do not let this put you off raising concerns in the first place.

## Code of Practice

There is a Code of Practice which provides guidance to anyone who is working with and/ or caring for people (adults) who may lack capacity to make particular decisions.

The Act does not impose a legal duty on anyone to 'comply' with the Code – it should be viewed as guidance rather than instruction. But if a person has not followed relevant guidance contained in the Code then they may be expected to give good reasons why they have departed from it.

The Codes offers a best practice guide and is a helpful reference document; if you are not sure how to progress with something it may well offer a steer.

It covers such things as:

- When to act
- Managing the person's finances
- Paying services
- Obtaining specialist advice
- Keeping records
- Communicating
- Conflicts of interest
- What to do where your powers are insufficient
- What if there is a complaint against you

## What is a Guardianship?

- Incapable person (with no PoA)
- Incapable in relation to what?
- Welfare and/or finance
- Local Authority default
- How many guardians
- Substitutes
- Document narrates powers
- Registered with OPG
- Caution?
- Private or local authority applications 60/40
- Welfare powers can start immediately
- Financial powers limited until PG procedures complete and Certificate of Authority issued
- Cost?



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If a person who has lost capacity needs someone to support them with, or act on their behalf in, making decisions but there is no-one appointed as an attorney then a court process is required to appoint a guardian.

The application is made to the Sheriff court closest to where the now incapable person lives.

If there is no-one placed to make an application for guardianship, but it is clear that one is required, then the Local Authority are obliged to have to make this. To avoid conflict of interest they will usually appoint a local solicitor as financial guardian, the Chief Social Work Officer is most frequently appointed as welfare guardian, although in practice this is usually delegated to a local social worker.

## Powers

The court can appoint a property and finance guardian (this tends to be abbreviated to simply financial guardian) or a welfare guardian. These can be the same person. As the name suggests a financial guardian has property and finance powers and a welfare guardian has powers over health and welfare matters,

## Authority

As with attorneys, the number of guardians can vary between one and however many the sheriff agrees to appoint. Guardians can be appointed jointly or jointly and severally. Substitute guardians can be nominated to replace one of the original guardians if they are no longer able to act.

## Document spells out powers

A guardianship order will look very similar to the PoA shown at Appendix A in that it narrates who is appointed and what powers they have. You should have similar rigour in reading the guardianship order to make sure it covers what you need it to cover, where this is relevant.

## Registration with OPG

The court notifies the Public Guardian of the order they have granted, the OPG registers this and issues a Certificate of Authority – which looks very similar to the PoA version shown in Appendix A.

A financial guardian has some formalities to comply with before the Certificate of Authority can be issued, these can take 3-4 months. A welfare guardian can commence acting immediately – they do not have to wait for the issue of the Certificate, but do not always appreciate this.

## Supervision

Financial guardians are supervised by the Public Guardian, welfare guardians are supervised by the relevant Local Authority.

In respect of financial matters, there is a substantial level of both in year reporting and year-end accounting, which can be stressful for some people and generally comes with a cost, the level of which can be quite sizeable.

Although guardianship orders are supervised you should nonetheless report any concerns you may have, soonest, to the OPG or Local Authority.

## Caution

This is pronounced *kayshun* and is a type of insurance which the sheriff may have requested be taken to protect the estate. It can reimburse the estate if deliberate or negligent actions of the financial guardian have led to loss.



## What are the obligations of an attorney or guardian?

- In short, to put the incapable person at the centre of their thinking.
- To act with honesty and integrity.
- To owe a duty of care to the person, which means applying a standard of care and skill.
- To support the person to make their own decisions whenever possible.
- If this is not possible, to make the decision that the person would most likely have made for themselves.
- To only make decisions that they have authority to make
- To act in accordance with the principles of the Act.
- To be aware of, and have regard, to the Code of Practice.
- To maintain records of their actions.
- To comply with any orders of the Public Guardian and of the Court

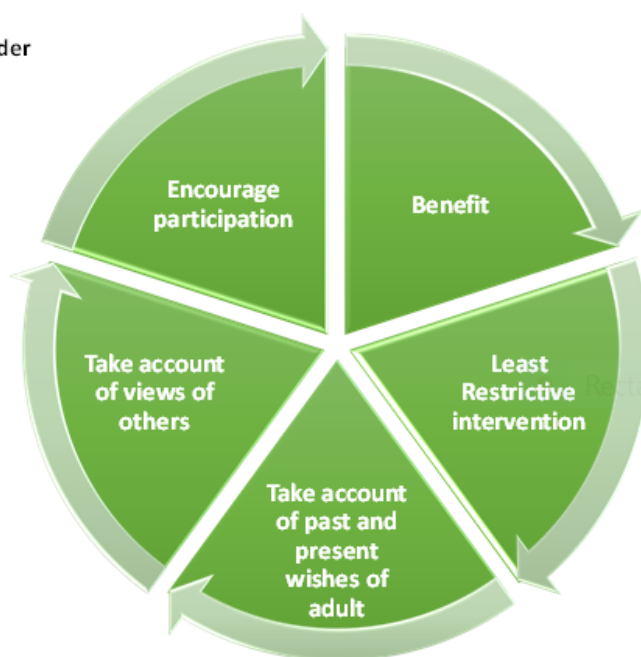
## A 'Statement of Wishes and Feelings'?

Increasingly granters are drafting what may be called a 'Statement of Wishes and Feelings', this will assist in the support of their decision making. A 'Statement of Wishes and Feelings' has no legal status but it sets out the granter's views on key matters; we're not talking about what are called 'end of life' decisions rather on living their day to day life the way they would prefer, so can be particularly valuable if there is a difference of opinion on a matter at a later date.

Appendix B shows you the sort of things that a Statement of Wishes and Feelings may include.

## Chapter 2: The AWI Principles

No priority in the order  
All to be met



### AWI Principles

The Adults with Incapacity (Scotland) Act 2000 (AWI), has, in its very first section, a set of five Principles that anyone interacting with a person who lacks capacity is required to respect. Although appearing as a list, the principles are not in a priority order, they are all equally as important; one is obliged to respect them all; it is not sufficient to think that because you meet one you do not need to consider the rest.

The Principles are:

#### Principle 1: Benefit

**Every action has to benefit the incapable person and cannot reasonably be achieved without the intervention.**

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

Benefit is not defined in the Act; it can be direct or indirect, physical or emotional for instance.

Occasionally it is not possible to discern a positive benefit, in which case it can be helpful to look at it from another angle: it may be possible to see a detriment without the intervention. If you can avoid that detrimental effect by taking whatever the action is, therein lies the benefit of the action.

## **Principle 2: Least Restrictive**

**The action has to be the least restrictive option in relation to the freedoms of the person, consistent with the purpose of the intervention.**

“Freedoms” doesn’t just relate to physical freedom, freedom of movement, being able to go wherever one may wish – it refers to freedom in any sense, for instance, freedom of expression, of will, of not being controlled. Freedom has to be interpreted widely.

Although the principle requires one to take the least restrictive action, a heavily restrictive option may nonetheless be the least restrictive IF it is the only way of achieving whatever is necessary. An example here may be the appointment of a guardian (in the absence of a previously agreed PoA). In legal terms the appointment of a guardian is a heavily restrictive option as it requires a court to make this decision (rather than the person concerned themselves) and it is covered by all sorts of rules and procedures. But if there is no alternative to this, because the individual needs someone to administer matters for them and there has been no PoA granted, then the appointment of a guardian becomes the least restrictive option as it is the only way of achieving what is necessary.

## **Principle 3: Take account of the present and past wishes and feelings of the person, as far as these can be ascertained**

Before taking any action you must take account of the wishes and feelings, past or present, of the person with incapacity and give respect to these in your decision making. The Act requires you to take steps, if

required, to ascertain these wishes and feelings e.g. use of drawings or communication aids, it is not sufficient simply to say the person cannot relay their wishes so I don't have to have any regard to this principle.

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

You must take account of the views of relevant others – but only in so far as it is reasonable and practicable to do so. The Act stipulates some persons who you should seek views from, such as the nearest relative, the named person and the primary carer. But it is safer to think in broader terms, and to include anyone you think who might be able to offer a view, especially if they may be able to offer an alternative view to your own, so you can be sure you have considered things from all angles.

The relevant other should be advised that they must offer a view on what they think the individual themselves would have wanted, or a view on what they feel would be for the person's benefit; they are not offering their own personal view per se.

#### **Principle 5: Support and Develop Skills**

You must encourage the individual to exercise whatever skills they do still have, as well as encourage them to develop new skills; this is aimed at facilitating the individual to make his or her own decisions wherever this is possible.

## An example of the principles in practice

John is welfare and finance attorney for his mother, Celia.

Celia lives in her own house but is struggling, desperately, to get upstairs. Her only toilet is upstairs. She needs the toilet with urgency sometimes, so is rushing on the stairs, she has tripped and fallen a number of times. It also upsets John that sometimes his mother doesn't get to the toilet in time.

John thinks that it would be better for his mother to live downstairs. He is debating spending a lot of his mother's money converting the lower floor of her house so she can live on a single level, this includes a small extension to put in a downstairs toilet and shower room.

In making the decision about the financial spend on the extension John needs to respect the principles so he has to ask himself.

### **1. Is Mum capable of making, or being supported to input to, this decision?**

John has tried to encourage his mother's participation, to support her to make a decision on this but is satisfied she no longer has sufficient mental capacity. John knows that a best interpretation of his mother's wishes would be to stay in her own home as far as possible.

### **2. Would spending this amount of money so Mum can live downstairs / live in her own home for longer be for her benefit?**

This may seem most obviously a yes. But we have talked earlier about being clear what the outcome is, what it is that is to be achieved. In this case it is for Mum to live in her own home as long as may be possible, but not at any cost, it has to be safely and with dignity (so she can have easier, and so more timely, access to the toilet).

### **3. What are the views of others?**

John talks to his Mum's carers about his idea. They are not sure that it is as good an idea as John thinks. They think the exercise that Celia gets from walking around her home is of value, they comment that she enjoys looking out of her upstairs window, as she can see the comings and goings of the neighbourhood from there, which she cannot do from downstairs. They think she will be more isolated if she is confined to downstairs. They think she will try and use the stairs anyway, so John would have to physically block her access, which they disagree with. They talk about the proposed downstairs toilet, which looks like it will be quite narrow. Celia uses a walking frame. It may be wider enough to take the frame but there is not enough space to allow Celia to turn around. Does she have to back in, or leave her walker at the door and walk in unaided? Neither of these are acceptable, neither make going to the toilet any safer, or quicker.

### **4. What is the least restrictive way of achieving the outcome [of being safe and of getting more timely access to a toilet]?**

The carers say they don't need a downstairs shower room, they can assist Celia on the stairs to access her current bathroom. Without this, could the size of the downstairs toilet be increased? They also talk about other ways of achieving the outcomes.

They will check Celia hasn't got a water infection which is making her need to go with urgency. They will ask the carers who do lunch and dinner support to ensure they take her to the toilet as well. They talk about using technology such as smart assistants to offer a reminder to go to the toilet. Finally, they talk about stair lifts and suggest John takes specialist mobility access advice before simply going ahead with the extension.

It seems from this that there may well be a lesser restrictive way of achieving the desired outcome and in which case, to comply with the Principles, John should explore these avenues first.

## 5. John is obliged to take account of his mother's views.

John thought he knew these (that Mum wanted to remain in her own home) but he hadn't realised that she enjoyed watching the coming and goings from her upstairs window. He spoke to his sister, she added that many of the people passing waved to Mum and that she also enjoyed looking from the side window in the other bedroom out to the fields where people dog walked and where there was a lot of wild life. She said Mum even enjoyed looking out for 'Charlie the Crow', whom she could recognise from his lopsided walk when it landed in her garden. The proposed downstairs living had no side windows, so would deprive Mum of all of these enjoyments.

One can see from this that there is a bigger picture to take account of. Yes, it is important that Celia lives safely and with dignity in her home, but there is also an element to the quality of life which John had not appreciated until talking to others.

You can see from this example how using the principles as John's guide in his decision making was extremely valuable. John genuinely believed the extension was a good idea to resolve the issues but had his use of Celia's money for this been challenged by anyone his decision would have lacked robustness; albeit that he had done what he believed was right he had not considered the issues comprehensively – and had not acted in line with the principles.

## Principles in Conflict

There will be times when the principles are in conflict with each other. For example, when the wishes of the person and the views of others are not the same. It may be that one of the principles conflicts with itself e.g. the current wishes of the person are contrary to what have been long established past wishes of that person.

A common example is a person who has been adamant about not wanting to go into care can no longer be cared for safely at home. Everything possible has been tried to allow them to remain at home but there is genuinely nothing more that can be done to care for them safely at home, despite their adamant and expressed wish there is no alternative but for them but to go into care. This places two of the principles in conflict – what is for their benefit (safety) conflicts with their wishes (not to go into care).

There is no easy answer on such occasions and no single piece of advice that can be given. The following checklist may assist.

- Do I understand the circumstances properly?
- Have all the right factors been taken into account; have I missed anything?
- Have I involved the person as much as is possible?
- Do I know their current views?
- Do I know their past views? If not, can I learn of these from somewhere?
- Can I glean anything from current behaviours?
- Do I know sufficient about their beliefs and values?
- Is there a compromise option which would resolve the conflict?
- Do I need to involve an advocate to elicit the person's views, if possible? (there is information about the role of Advocates in the next section)
- Is there anyone else who may have information?
- Do I need any more information / a second opinion?
- Are there any options I have not considered?
- Have I looked at this objectively?
- Have I given due weight (not too much and not too little) to relevant parties' opinions?
- Would a case conference assist – having all relevant parties speak together?
- Would mediation assist?



- Should I, or do I need to, speak to the Local Authority or OPG, for example, to get their advice?
- Do I need to take legal advice?
- Do I need formal direction from the court?

Sometimes though it is just not possible to eliminate the conflict, then it is a case of making sure you have a correct and comprehensive understanding of the full situation, from which you have to reach what you believe to be the right decision in the circumstances.

There is a case study at Appendix C for you to consider the Principles as they apply in an operational situation.

## Chapter 3: Capacity

There are various ways of describing lack of mental capacity, these include: 'mental incapacity', or just 'incapacity', 'lack of cognitive ability', 'cognitive impairment, or volitional impairment'. You will see them used seemingly interchangeably in various texts. Some people have a preference for one over the other, for ease and simplicity in this Hub we just refer to capacity or incapacity.

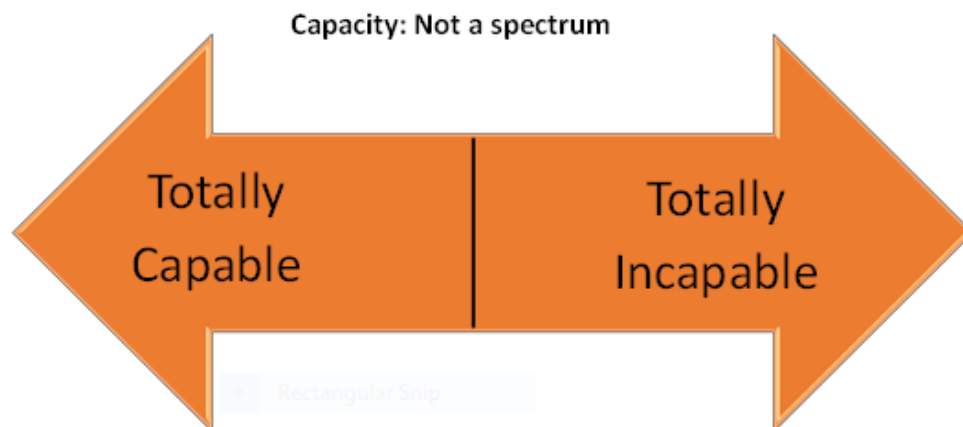
### Presumption of Capacity

In common law there is a presumption that all adult persons have capacity. The start point therefore should be one of presuming the individual has the capacity to make whatever the decision it is that needs to be made. It is discriminatory to do otherwise.

You must not assume that an individual lacks capacity to make a decision solely, for example, because of their age, disability, appearance, behaviour, medical condition (including mental illness), their beliefs, or their apparent inability to communicate.

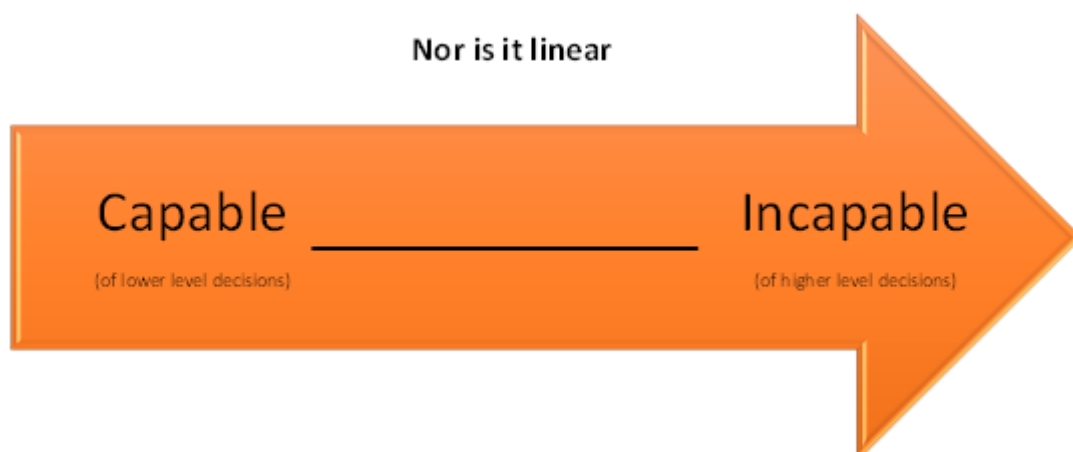
You are required to give a person all appropriate help and support to enable them to make their own decisions or to maximise their participation in any decision-making process. There is more discussion about this in the section to follow on Supporting Decision Making.

## Capacity is not all or nothing



Capacity is not all or nothing, it is not black or white; it may be a spectrum, with capacity at one end and incapacity at the other, but it's not a spectrum along which one makes a smooth journey, passing at some point across the halfway point from capacity into incapacity. There is much to and fro on the spectrum. There is often a large grey area. It is common for an individual to be capable on some days (or at certain times of day) of making some decisions, or taking the necessary action, and then not capable on another day of making the same decisions, or taking the necessary action. There are many things which affect an individual's capacity, there is more on this in Part 3 when we consider how an Attorney assesses capacity. For now, it is important to recognise that capacity can fluctuate, and quite markedly sometimes, and thus that capacity to make a given decision can only be assessed at the time the decision needs to be made.

## Capacity is not linear



You will often hear people say, he can make day to day decisions (for example about what he wants to eat) but he's not able to make more complex decisions (for example about his finances). Capacity is not neatly linear like this. As has been said, there are many reasons why capacity will fluctuate so an individual may be able to make a higher-level decision, whilst at the same time being unable to make a lower grade decision.

Ann was having a conversation with her Dad about him needing to go into a care home. Dad was participating fully, he was keen on the same care home that his wife and sister were both in, although this wasn't the best care home for his condition, there was a different one which would have suited his needs much better, he commented that he knew this but he wanted to be near his wife and sister, he said he knew the staff in their care home, he knew the routine and they knew him. He even mentioned that he and his wife had always looked out for his sister, who had never married, and he wanted to make sure he could continue to do this. It was clear from this conversation that he was very able to weigh up complex information. Immediately after this conversation Ann asked her Dad what he wanted for his tea, he asked what she was having, she said she was thinking of poached egg, he asked her what a poached egg was, and did he like poached egg. Ann spent about 15 minutes after that supporting her father, with the use of drawings and explanation, to make a decision about whether he wanted poached egg, or not.

You can see from this that Ann had to give her Dad a higher level of support to make what would generally be considered a lower level decision, about his tea, than she had to give him to make a higher level decision about his ongoing care. Do not assume therefore that low grade, day to day, or simple, decisions, or actions, may be possible but complex or higher-grade decisions, or actions, are not. You should always assess the individual's capacity to make the decision, or take the action, at the time it has to be made / done.

### Capacity is Decision Specific



Decision  
specific

Capacity is decision, or task, specific. Take the example of Ann and her Dad above, Ann's Dad had clear views about his care, perhaps born from his emotional bond to both his wife and sister and wanting to be near them. This allowed him to make a capable (or capacitous) decision on this matter. He was less 'invested' in what he had for tea so needed more support to make the decision.

There should be no assumption that the person cannot make a given decision just because typically they cannot – assessing capacity is an ongoing process that must be applied at every decision-making moment

## Unwise Decisions

We may not always agree with a decision that a person makes; we may think it unwise, risky, or not thought through properly; but if a person is capable of making this decision then they have a right, like any one of us, to make a decision that others might think is unwise, or disagree with.

Everybody has their own values, beliefs, preferences and attitudes. A person should not be assumed to lack capacity just because they are making a decision which most people would see as unwise, or which family members, friends, healthcare or social care staff are unhappy, or disagree with.

We have spent time considering what capacity is, or isn't, let us now look at this from the other side and consider what incapacity means.

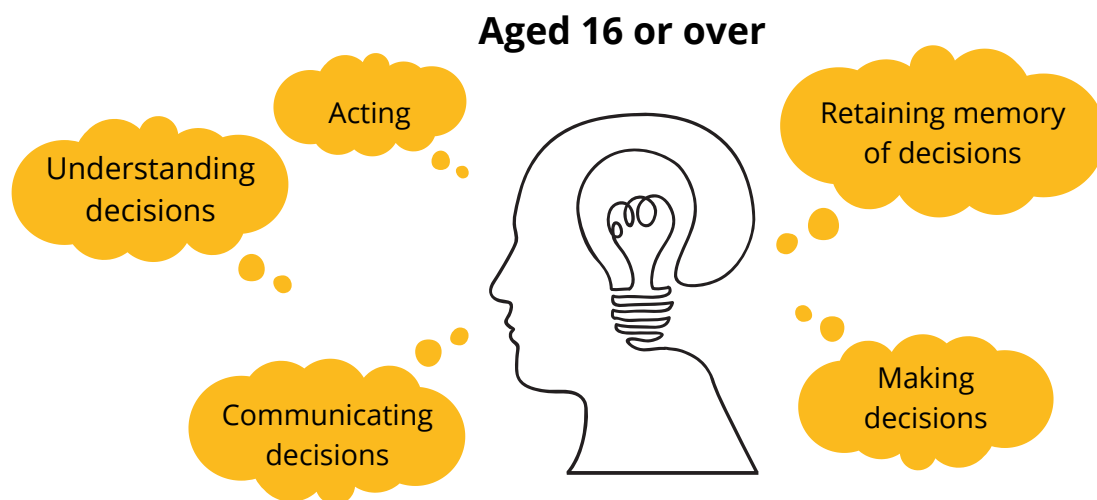
## Incapacity

Under the legal definition there is what is sometimes referred to as a 'gateway entry test', which is, that the person must have a mental disorder or impairment of the mind or brain before the Act can apply to them. The test of incapacity, described below, can only be applied if a person has a 'gateway entry' diagnosis. If a person does not have a mental disorder or impairment of the mind or brain then they 'cannot pass go' – the AWI cannot / does not apply to them.

There is criticism of this entry threshold on the grounds of its fairness. The argument is, that it shouldn't matter why a person lacks capacity, if a person lack capacity, for whatever reason, they should be afforded the protections that the Act offers. There is a view that the Act should be reworked in order to focus on an individual's ability to make decisions rather than on a legal assessment of capacity. With these arguments gaining force it is likely that the Act will be amended in the longer term but there is unlikely to be any change in the foreseeable future.

Therefore, assuming the person has a diagnosis of a mental disorder or impairment of the mind or brain i.e. that they have met the first test, the 'gateway entry' requirement, let us move on to the second stage of the test and look at how the Act defines mental capacity.

Assess capacity for decision against definition



### **By reason of mental disorder or inability to communicate**

A person is capable if they

- Have a general understanding of what decision they need to make and why they need to make it
- Have a general understanding of the likely consequences of making, or not making, this decision
- Can use and weigh up the information relevant to this decision
- Can make a decision
- Can retain the memory of their decision
- Can communicate their decision
- Can act on their decision, or act to safeguard themselves (Scotland).

Or, to flip this, a person is incapable if they do not have a general understanding, cannot weigh up information etc. To be judged as capable all of these factors have to be present; or to look at it the other way round, a person would be judged as incapable if any single one, and only one, of these factors was absent.

Let us look a little more closely at what the criteria mean.

## Understanding

A person needs all the facts, to be aware of the disadvantages as well as the advantages, must be able to weigh up the pros and cons, risks and benefits, giving each due consideration as they apply, or may apply, to their situation.

In order to assess if a person is considering things in an appropriate way (for them), it is necessary for you to know relevant things about their situation.

In the example above about Ann's Dad making the decision about his care home, the fact that his sister was a spinster for whom he felt a lifelong level of responsibility was something that one needed to know to assist you in putting his decision making in context.

To aid understanding, every effort must be made to provide, or present, information in a way that meets the individual's needs and circumstances. For example, if someone doesn't speak English as a first language, or is deaf, then to help them understand the information, you would offer use of interpreters, including sign language.

The level of understanding expected is that of 'the man in the street'. A person only needs to know what the average person would be expected to understand in the same situation. They do not need to have an understanding at expert level. With this in mind, information should be communicated in a simple way, avoiding use technical jargon or highly convoluted sentences.



## **Making a decision**

There are many, many, factors which affect one's ability to make a decision; for example, one may need time, a quiet environment, or support. All such obstacles to decision making should be removed and every support given before one can conclude that a person is incapable on the grounds that they are unable to make a decision.

We will look at the factors which impact on decision making discusses, and how one can support decision in the section on Supported Decision Making.

## **Retaining the memory of a decision**

This does not mean the person has to be able to retain the memory of their decision for ever more, or even necessarily for a lengthy period. But they must be able to retain the memory, or be able to recall it if prompted, for as long as it takes to make the decision. Items such as notebooks, photographs, posters, videos and voice recorders can help people record and retain information.

More complex decisions tend to take longer, need more thinking about, so will, usually, require the person to be able to retain the memory for a lengthier period, whereas with lower grade matters the decision may be able to be made very quickly, in which case the retention period is less.

For example: using Ann and her Dad again, the conversation and his decision about his care home is something which spans over a longer period so needs him to be able to retain the memory, or recall his memory, for longer. The decision to have poached egg for tea can be made quickly - and the egg ready soon thereafter.

You can use other than words to aid recall.

Steve, who has dementia, thought a large tree near his house needed to be felled, as it was in danger of falling on his house – but he really didn't want to arrange for this unless it was absolutely necessary.

Steve had worked as an engineer and had had high level mathematical ability. His son thought the use of a mathematical diagram would assist. He took Steve outside and together they measured the distance of the tree from the house, then used a protractor and string to calculate the height of the tree. This showed there was enough distance between house and tree for it not to hit the house if it fell. This was then drawn up as a scientific diagram, showing the house, tree and the various distances and measurements. Steve kept the diagram beside his chair. The next week when Steve talked about whether he should have the tree felled, his son reminded him of the measurements they had taken and advised Steve to check the diagram beside him. On doing this Steve could recall the exercise and was, again, reassured that there was no problem. This was a regular conversation with Steve but on each occasion a review of his scientific diagram assisted his recall and provided reassurance.

For most of us such a scientific drawing would not have meant anything, but it did for Steve; is there something which has meaning to the person you are supporting which would help them with recall / retention of memory?

### **Communicating the decision**

The person must be able to communicate their decision. This need not be verbally, it may be by drawing, by non-verbal signs or signals, or with use of communication aids for example. A person is not incapable if they can't communicate if this deficiency can be rectified by human or mechanical means.

## Inability to act

A person must then be able to action the decision they have made; or be able to act to safeguard themselves. For example, a person who is under the coercive control of another may be able to understand that they are in an unacceptable position, know that they need to do something to remedy this, have assessed the pros and cons of the options and have made their decision, they have no problem with retention of memory or communicating their thoughts, so, on the face of it, this person may seem capable, but the coercive control may inhibit them and so prevent them from being able to act on their decision.

Mary, who is in the early stages of dementia, lives with her son Paul. She knows that Paul is taking a lot of money from her account to 'feed' his drug habit. She can afford it, but she doesn't want this to be happening, but she is too afraid of Paul to say anything. She loves Paul and needs his care and support, he can be very temperamental and she doesn't want to upset him, he can be quite abusive to Mary. Mary wants to talk to the family solicitor, she feels he would have some advice for her but she is too afraid to ask Paul to take her, or to tell Paul that the solicitor has visited the house, so she does nothing.

This example shows how Mary is aware of what is happening and that something needs to be done, she even knows that taking the advice of her family solicitor is a good idea, so in this respect she seems mentally capable, but because of her fears she is not able to progress this, she is unable to act to take the necessary steps to safeguard herself and so prevent the abuse. The lack of ability to act, being one of the factors which is required for capacity, means that, in this case, Mary can technically be classed as incapable.

## Assessing Capacity

So, how do you assess capacity in practice? The information that follows reads like a checklist, it is a helpful steer but should always be adapted to the circumstances and the decision to be made.

To assess capacity you end up, effectively, asking yourself a series of questions.

### **1. Am I clear what the decision is for which I am assessing capacity?**

Remember that capacity is decision specific, so before you can begin to assess capacity you have to be clear that you know what the decision is for which you are assessing capacity. Assessing the wrong decision is one of the most common errors.

For example, a person may be unable to make decisions about their financial affairs, but they may know who they would wish to look after their money for them and know that they have to give official authority for this.

This example shows how assessing the person's capacity to manage money would likely have led to a conclusion of incapable, whereas assessing their ability to grant a PoA may have concluded them capable. This person would have been denied a critical opportunity to do a PoA if they had been considered incapable of this, because the wrong decision had been assessed.

## **2. Is the person clear what the decision is they are being asked to make and why they need to make it?**

You have perhaps had an experience where you have answered “yes” to something which the questioner was expecting would be a “no” (or vice versa) and both realised very quickly that a confusion had arisen in the way the question had been posed. What would have happened if you had not had this realisation, the person would have relied on what was actually a flawed response. Ensure therefore that you have set out the situation, or posed any questions, in a way that is unambiguous.

## **3. Am I starting with a presumption of capacity?**

If you find yourself thinking, for example, ‘I know they won’t be able to make that decision because they haven’t been able to do that for months now’ then you are starting with a presumption of incapacity.

We know that capacity is fluid, it is not all or nothing; just because someone typically cannot make a particular type of decision does not mean they will not be able to do so today. There are many stories of people who have lost capacity for many things, and for lengthy periods, suddenly having what seems to be a flash of insight.

## **Making Decisions**

## **4. Have I offered support to facilitate the person to make their own decision, if at all possible? (see the Supported Decision Making [SDM] section below).**

As you will see from the SDM section, decision making is a complex process and there is much that can impact adversely on this, but which may be able to be rectified. A simple example would be, a decision that is easy when pain free can become problematic if one cannot concentrate or think clearly because of pain. You need to be satisfied that you have done everything you can to optimise the situation so the person can make, or input to, the decision for themselves.

## Understanding the Decision

Before you can assess if the person can understand the information required to make the decision and is then weighing this up in an appropriate way, you have to consider a few things yourself first.

### **5. Do I know enough about whatever it is to assess if they have gone through an appropriate thought process?**

My Mum was told she needed to go on statins. She's not sure if she should say yes, she wants me to help her make this decision. I've heard of statins but have never examined the facts. I think they come with mixed press, but I don't really know, this may be wrong, I don't know the pros and cons, is it one tablet a day, do you need to watch your diet as well?

This example illustrates how, without knowing enough about the topic yourself you cannot assess if the person is considering things appropriately.

### **6. What do I need to know about the individual's personal circumstances, to assess the appropriateness of their thought process?**

A man who had been admitted to hospital as an urgency was asking his son, when he visited, to go around to his house to secure the back door that the fire service had had to break down to let the ambulance staff in. This sounds a very sensible, security conscious, request – and perfectly capacious.

Until you know that the man lives in sheltered accommodation, the ambulance was called by the warden, who let them in. The house he seemed to be talking about was his former home. His son has no idea where the notion of the fire service and breaking down doors came from.

This example illustrates how, in order to assess a person's capacity you may need to know aspects of their background or situation. You needed to know that the person lives in sheltered housing to know that his request to secure his back door was a flawed conversation.

**7. What would I expect the average man in the street to consider in order to enable them to arrive at a decision? Can I assess the individual against this benchmark, or do I need to make any adjustments?**

The benchmark against which you assess a person's ability to understand and make decisions will vary person by person and decision by decision.

**8. In respect of the decision to be made, what are the pros and cons I would expect them to weigh up? What are the short, and long term considerations?**

With this series of questions complete, you should now have all the information you need to make an assessment of the other person's understanding; you can go through the final series of questions.

**9. Has the person been given the information in a way in which they will understand it, if this is at all possible? Do they have information about all possible options?**

It is important not to assess someone's understanding before they have been given relevant information about a decision and in a way they will understand, if this is possible. Every effort must be made to provide information in a way that is most appropriate to help the person to understand. Quick or inadequate explanations are not acceptable, unless the situation is urgent.

**10. Is the person able to understand the information to enable them to come to a decision? Can they, and have they, weighed up the pros and cons appropriately? Have they thought about long term implications of their decision as well as the here and now?**

If the answer to any of these is no, double check - do I need to offer this information in a different way? What may assist? Have I thought about this laterally and considered anything that may assist them to understand the situation, or at least elements of it, so they can input even if only to a point.

Finally, remember that a person is not incapable just because they make what you may consider to be an unwise decision, or a decision that is different from the one you would have made, either for them, or for yourself if you had been in the same position. As difficult as it is, you have to assess objectively the person's capacity to understand, and so make a decision.

## Undue pressure

### **11. The next thing you need to check out is, is the person free of undue pressure?**

You need to make sure the person is making a decision of their own free will. Make sure you're not leading them or influencing them, even inadvertently. Make sure they know they can make a decision which may go against what you would have wanted / preferred.

I was making breakfast the other morning, my husband asked for cheese on toast, I tutted; he is quite particular about how he likes his cheese on toast, it is a faff, we didn't have a lot of time and I wasn't putting the grill on for anything else. His response was 'ok, it doesn't matter, I'll just have toast.' He was very willing to have toast, he was making no issue of it, but his preference was to have cheese on toast; he was moving away from this because of my influence [my tut], he did not wish to put me to the additional trouble he knew cheese on toast takes.



This example shows how, even a capable person, can easily be influenced by the inadvertent expression of another's opinion. Imagine then how much this is magnified when the person lacks capacity and may be compliant, with a wish to please and feels a reliance on the other person. You therefore have to work additionally hard to make sure you do not inadvertently influence the situation by your words, or lack of, or by your gestures.

There is a balance however as, from another food example

I asked my Dad, who has dementia, what he wished for tea; he asked what I was having. I didn't wish to influence his decision so said it didn't matter what I was having he could have whatever he wished. His reply was 'what are you having?' Again, I stressed that this didn't matter, he could have whatever he wished, to which his reply was 'what are you having?'. It was clear this conversation was going to go round and round unless I told him what I was having. I told him what I was intending to have, he said yes, I'll have that too. I finished with a final 'you don't have to have that, you can have what you want'. His response was, I want the same as you.

One could say I influenced his decision, but I hope the example shows how it would not have been possible to progress the conversation without me telling him what I was having. My influence on this occasion was what you may call benign. We would tend to both eat the same thing, so overall my influence was harmless. The meal we were both [then] having was a meal we would often have, a meal which he enjoyed, so it didn't matter that he'd picked the same as me.

Had I been intending to have something which I knew he didn't like and yet he was wanting to have what I was having, it's quite possible that he would then have influenced me as, in all likelihood, I would have given up whatever it had been my preference to have in favour of something which I know he would like. You can see from this that influence is all about balance.

## Retention of memory

**12. We are still on how you consider if a person has capacity, you can see from how extension this section is how complex the matter is. The next aspect we are going to look at is if the person has retention of memory and how you assess this.**

What does 'retaining the memory mean' when we can all forget something? If you forget where you put your keys, or can't remember what you had for your tea, even yesterday, does that make you incapable?

To remember where you put your keys you may go through a recall exercise – I had them in my hand when I went into the kitchen, I went straight to put the kettle on, I went into the cupboard for a cup and the coffee, the fridge for the milk and the drawer for a spoon. I sat down at the table to drink my coffee, I didn't have the keys in my hand then – so I must have put them down at some point on the coffee making journey – ah, there they are in the drawer, how stupid am I. Likewise with recalling the memory of what you had for tea, you may recall I was late in, not hungry, had to get this and that sorted before bed, ah, now I remember I just had beans on toast, for speed.

You will see from this, that memory is not just about retention of the facts but can also be about an ability to go through a recall process. If the person cannot go through the recall exercise it's perfectly ok to prompt them. So if I can't remember what I had for tea, you may say well, we were late in, we weren't hungry and we had to get this and that sorted before bedtime, with these prompts I may then recall, of course we had beans on toast for speed.

But capacity to retain a memory is more than just ability to recall, it's also about accuracy and consistency of the person's response. Using the 'what did I have for tea' example, you may prompt me on the recall process and I conclude 'oh yes, I had cheese on toast for my tea, for speed'. The recall exercise has made me realise I had something quick, but I didn't recall accurately what that was.

If you then 'test' this, say half an hour later, I may again say I had cheese on toast, so here you have a consistency of response, albeit inaccurate. If however on this later occasion I then recalled that I had egg on toast, you have neither an accurate nor a consistent response.

Questioning to check accuracy and consistency of recall can be tricky. The person can feel under interrogation, or that you are not trusting them, or they may even worry about your ability to recall given you are asking them the same question so often. It takes time to learn how to make this questioning subtle, so don't worry if you get some resistance at first.

As well as recall, consistency and accuracy, there is also something about how long a person can retain a memory.

How long anyone can retain the memory of something will vary depending on a number of things, for example how important the decision is and even how your brain processes information.

On 30th January 2010 I can recall my husband and I went to meet with my sister as it was her 40th birthday. We went out for a meal, I can recall generally the restaurant but would struggle beyond that. For me, all I need to remember is that we celebrated with my sister on her 40th and we had a lovely family evening. My husband however would be able to tell you that it was a Saturday because his football team were playing such a team, his team won 2-0, goals by Smith and Brown. We went to the Dog and Duck in New Town and he had steak.

Just because my husband can recall in such detail and I cannot does not make me incapable, it simply demonstrates we retain and process memories differently; you have to assess the person's ability to recall against their own benchmark.

The physiology of memory is extremely complex. This is another subject on which whole books have been written, so no-one is expecting you to be an expert. That said, as already mentioned, family and friends often find it easier to assess memory than professionals, as family and friends have a person's normal behaviour to benchmark against.

My Dad and I love mushrooms; when out, Dad and I most often share a mushroom starter. On this occasion, as usual, I suggested to Dad that we share a mushroom starter, his response was "that'd be nice, do you like mushrooms?"

A professional would not have recognised this as inability to recall as his response was perfectly natural, whereas for me I thought, how very odd that he can't recall that I like mushrooms and that we nearly always share a mushroom starter. With hindsight, this was one of the first indicators I had of Dad's dementia. It was easy for me to spot his inability to recall as it was such an unusual response – although I didn't know at that time what it signified.

## **Communication of the Decision**

This next section will be second nature to an Independent Advocate but it is included for completeness.

A person is not incapable simply because they cannot communicate their decision. You may need to find creative ways for them to communicate with you. Encouraging them to have a pen and paper to hand can be useful so they can write their thoughts as they arise, this frees the person from having the pressure of thinking they have to respond spontaneously at the time they are asked about whatever it is. Pictures can help the person indicate their preference, drawing what they want to say works for some, acting it out may work for others. Be as creative as may be required. An assessment by, or discussion with, a speech and language therapist can be extremely valuable.

Make sure you speak at an appropriate rate and volume, using words that will be understood by the person, using short sentences, not asking multiple questions. You cannot determine if the person is incapable of understanding if you have not communicated with them in a way in which they would understand.

A person may need more thinking time than previously, so be prepared to allow them this time, do not harry them for a decision. Feeling pressured may hamper their ability to respond, leading you to conclude they are incapable when, given time, they would have come back to you with something.

You should not be tempted to complete sentences for the person, or fill silences. This is frustrating for the person but you cannot make an accurate judgment on the person's ability if you are filling the gaps for them.

Under this heading of communication, we should also consider the standard and structure of the person's communication. For example, if the person ordinarily has extensive vocabulary and uses 'big words' for things, then you realise they have a reduced or changed language ability, this may offer you a marker on capacity.

The way in which the person talks may also be a marker. You should notice for example their tone, pitch or speed of talking, compared to their norm, and raise any changes with the person in charge of their care, in case these are indicative of changes that need professional attention.

The appropriateness of the person's responses is an indicator of capacity – do they give a relevant response to the question asked? However, do not assume a bizarre response necessarily indicates incapacity.

Communication is not just about the spoken word; you need also to assess the relevancy of any non-verbal behaviours and what this may say about capacity.

To summarise, the questions relating to communication which you need to ask yourself are:

- 13. Can the person communicate their decision to me? Do I need to do anything to ensure they are able to do so?**
- 14. Am I speaking to them in a way which allows them to understand?**
- 15. Have I given them enough thinking time, or am I rushing them?**
- 16. Am I letting them speak for themselves, or am I completing their sentences / filling silences ?**
- 17. Are they structuring sentences as I would normally expect them to do?**
- 18. Is their tone, pitch, speed of response all as I would expect it to be?**
- 19. Are their actual responses appropriate ? If not, is there any other reason this?**
- 20. Is there anything one can/should infer from their nonverbal responses?**

There are a few final things to consider:

- 21. Is the person capable of enacting / commissioning their decision?**
- 22. The very final thing to check is – Have I missed anything? Just do a final ‘once over’ in your mind to make sure you have not missed something which you ought really to have considered.**

There is a case study at Appendix D for you to consider capacity matters against an operational situation.

# Chapter 4: Supported Decision Making

Article 12(3) UNCRPD

## Supported Decision Making

States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.



One of the key tasks of an attorney or guardian is supporting the person with their decision making. The requirement to support a person with impaired capacity in their decision making applies equally across the UK and applies to all, to anyone fulfilling any function with, or for, a person with impaired capacity.

The requirement comes from the United Nations Convention on the Rights of Persons with Disabilities. For ease this is abbreviated to the UNCRPD. The UK has ratified the United Nations Convention; in non-legal terms this means we have agreed to respect the principles of the Convention. The Convention sets out a framework for the rights, as a nation, we are expected to show a person with disability. Disability includes a person with an intellectual disability, or cognitive impairment, i.e. someone with incapacity.

In short, if you are dealing, in any way, with a person who has a lack of capacity as well as AWI Act you must also have regard to the requirements of the UNCRPD.

You may hear the requirement to support decision making referred to in various ways - as supported decision making, as support for decision making, as support for autonomous decision making, as support for the exercise of legal capacity, to name but a few. Some people will argue that there are subtleties within the terminology which mean different things,

if I was to try to explain this, I would say that

- Supported decision making is the outcome, the result
- Support for decision making is the how, the practice
- Support for autonomous decision making is the same, but places more emphasis on the fact that it is the individual's own independent [autonomous] choice that you are supporting
- Support for the exercise of legal capacity is the technically correct terminology, it is the terminology used in the UNCRPD itself.

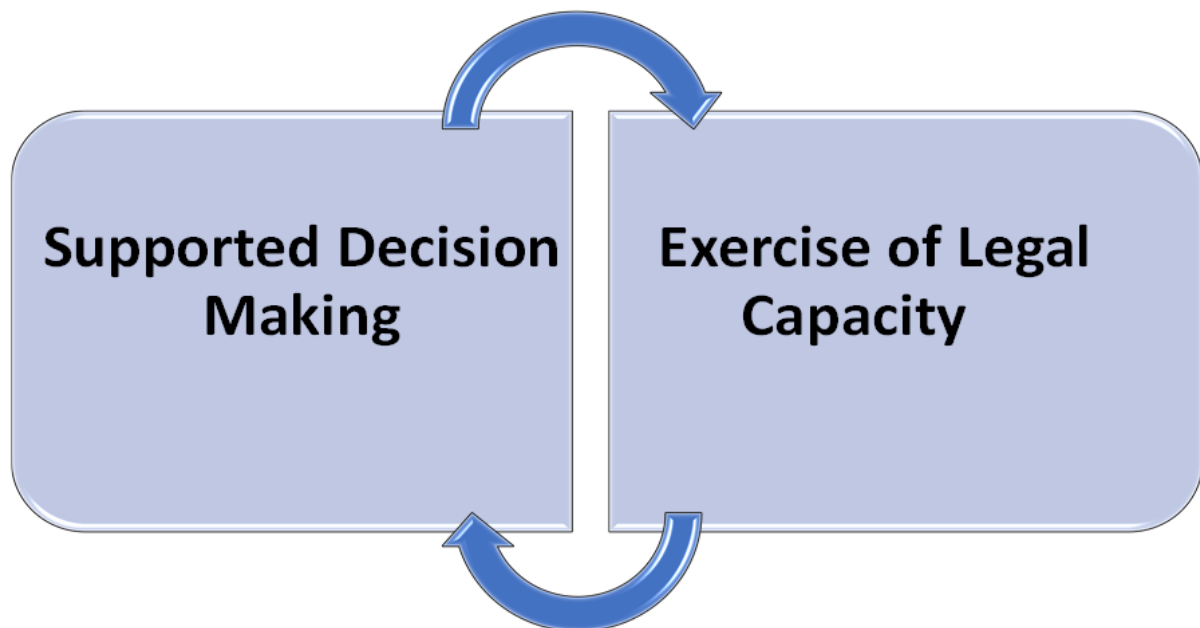
If support for the exercise of legal capacity is the technically correct term, this gets us into a discussion about what is “legal capacity”, and is this different from mental capacity? The simplest way to describe it is to think of mental capacity as ability and legal capacity as an authority we have, in law, to do something. Or maybe easier still to think of this as our rights.

By way of example, John is being interviewed under caution at the police station we know, from plenty of TV shows, that he has a right to remain silent, he has a right to be legally represented, he has a right to defend himself, he has a right to a fair trial; lots of interrelated rights in this situation. John wants a solicitor present, this is John exercising his legal capacity, the authority he has, by law, to be legally represented. Let us say that John says no to a solicitor, he doesn't see the point but then starts incriminating himself by all the things he's saying to the Police – we know that what he says can be used in evidence.

The Police have a decision to make as to John's mental capacity. If he understands the situation, the pros and cons of accepting representation, the risk of and impact from incriminating himself, but despite this he decides against legal representation, this is him exercising his legal capacity, his right to say no, to legal representation.



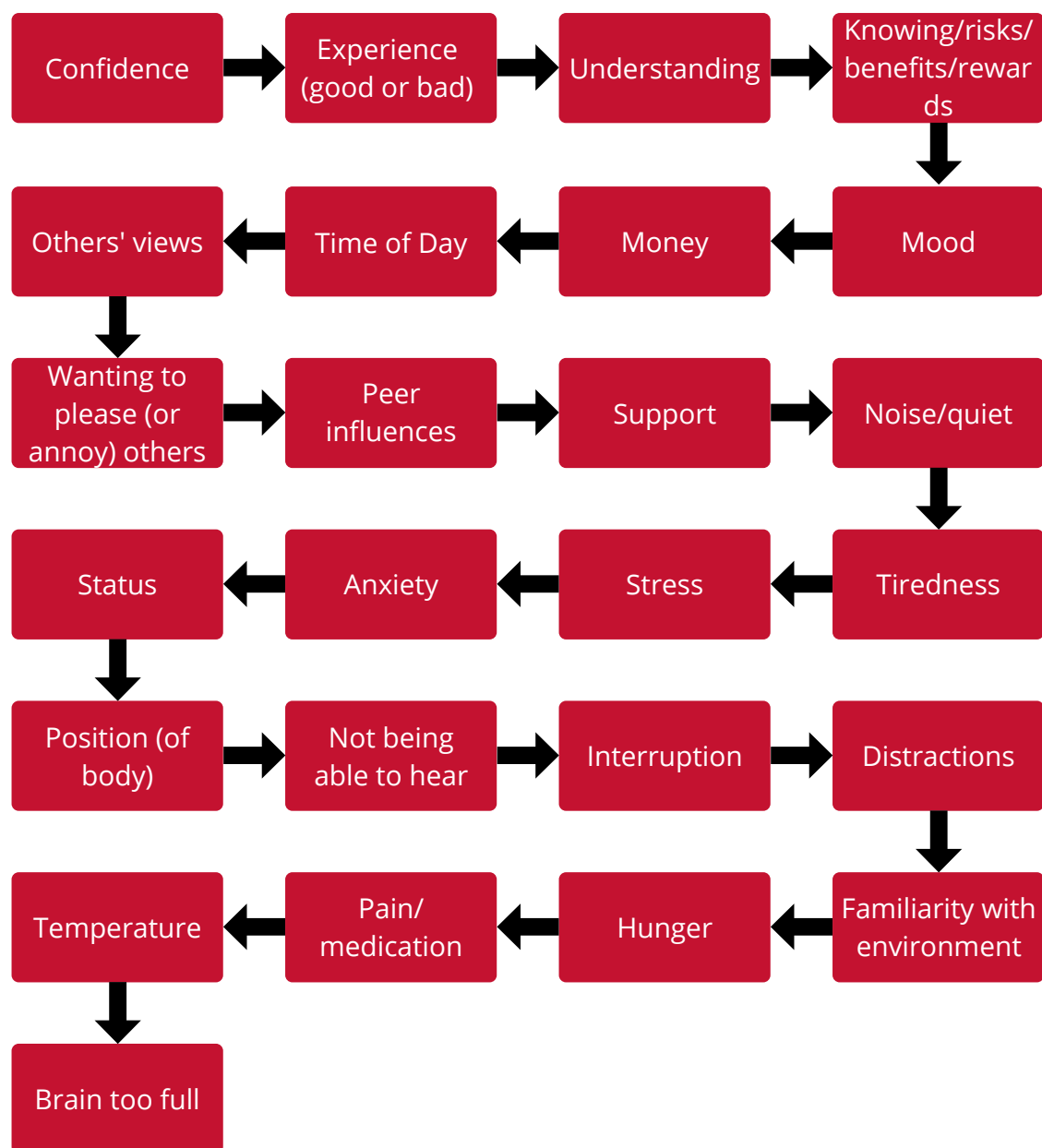
Hopefully this example shows the difference between mental capacity and legal capacity, despite the confusing use of the same word, "capacity. A person with incapacity has exactly the same legal rights / entitlements as a person of full capacity. The law requires us to maximise the ability of the individual to make decisions, or to participate in decision-making, as far as they are able to do so.



## Decision-Making Ability

Assessment of decision-making ability should not be confused with assessment of capacity, they are distinct, someone may be, by definition, incapable but may nonetheless be able to make a decision on a given matter, albeit with support. Like capacity though, decision-making ability is not all or nothing, i.e. it is not a case that one passes a point where one is not able, thereafter, to make any decision. Neither is decision-making ability linear, i.e. it is not a case of a person being able to make a low-level decision but not able to make a higher-level decision. Decision-making ability must be assessed for each decision.

## Factors Affecting Decision Making



There are a myriad of things which impact on anyone's ability to make a decision. Here we look at some of the more common ones, they are in no particular order:

### Experience and Confidence

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

## Understanding

If you don't have all the information, don't recognise the importance of the situation, don't appreciate the risks, benefits or rewards you won't be able to make, or make a properly considered, decision.

## Emotion

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

## Other people

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

## Time of Day

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

## Lack of Concentration

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

## Location

An unfamiliar location may adversely affect one's ability to decision make – lawyers when taking instruction on a PoA may attend the person's home to optimise their ability to have the necessary discussion.

## Environment

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

## **Pain**

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

## **Tiredness**

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

## **Lack of Support**

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

## **Money**

A lack, or even an excess, of money may influence a decision. This list is by no means exhaustive, it would be easy to go on; but there is sufficient to demonstrate just how many factors influence decision making. Things get even more complex when one 'overlays' some of the issues that may be specific to a person's medical condition which impact on their ability to make a decision, so things like:

- Attention-deficit
- Panic disorders
- Irritability
- Rigid thinking
- Paranoia
- Controlling impulses
- Hearing loss
- Suspiciousness
- Apathy / drive/ motivation

## **Supporting Decision Making**

The kind of support people might need to help them make a decision varies. It depends on, amongst other things, personal circumstances, the kind of decision that has to be made and the time available to make the decision. Here are some of the common things which you can do to support a person in their decision-making.


## Supporting decision making - your approach

Check first if the decision maker wishes you to support them in the process. The decision maker has the right to decide if they want decision making support in any specific instance. Check too if they wish you to be that supporter. The decision maker has a right to choose whom they want to support them to make decisions

Assuming you are progressing with supporting the individual's decision making then your approach should be -


- Stay calm, have patience
- Build trust
- Use touch if checked with the person
- Maintain eye contact, be on the same level as the individual
- Have open body gestures, smile
- Be matter of fact and relaxed
- Remain objective – ensure you are not inadvertently influencing the person's decisions by your words or gestures
- Do not use excessive persuasion or 'undue pressure'
- Speak at a steady rate and normal volume
- Make sure your comments/questions are clear /unambiguous
- Use language the person understands
- Use short sentences
- If the person is struggling for words, do not be tempted to offer them a range of options hoping one of these may be the one they are searching for
- Listen actively, be observant – a change in the person's body position or facial expression may indicate something different to the words they are conveying
- If you don't understand, apologise and ask the person to repeat it.
- Check your understanding of what they have said by repeating back and rephrasing what you believe yourself to have heard / understood
- Be alert to the person's emotions, acknowledge these

## Supporting decision making - the process



### Supporting decision making – the process

- Eliminate all of the obstacles
- Offer only as much support as is needed
- Be clear about decision to be made
- Take time
- Explain things in simple terms,
- Break the matter into 'bite sized chunks, offer the person choices/options.
- Focus on one decision at a time, don't expect more than a couple of decisions to be made within the same time frame.
- Use, and encourage the person to use, simple gestures if this helps, e.g. thumbs up, down, pointing, head or eye movements, mimes,



### Supporting decision making – the process

- Use drawings, pictures, recordings etc if this would assist
- Keep paper and a pen handy, be this for you or the individual
- Writing down key words can assist with the focus
- Give options
- Writing down choices can assist
- Will past examples assist?
- Can someone else help?
- Can it wait?

**Eliminate all of the obstacles**

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

**Be clear about the decision to be made**

It is hard to get to a definitive decision on something if one is not clear, from the outset, what the matter is on which a decision is required. Thus, make sure you make it clear to the person you are supporting, in easy to understand terms, what the matter is you are asking them to consider and decide on.

Focus on one decision at a time, don't expect more than a couple of decisions to be made within the same time frame.

**Take time**

In making a decision, many of us need time to consider the issue, then further time to ruminate on our decision, before confirming it is the way we wish to proceed, or not. And likewise, we can feel constrained in our ability to make a decision if we feel under pressure.

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

**Watch you are not putting pressure on**

A number of things we have touched on can put undue pressure on the person, which will inhibit positive decision-making ability. For example, if you rush the person, or stand bearing over them, or influence them by way of your behaviour or body language, from which the person reads they are making a poor choice, or one that you disapprove of – when they may be keen to try to please you. Watch your own interactions therefore to ensure you are not, even unintentionally, negatively affecting the person's freedom to choose.

## **Appropriate Questioning**

Check that you are not influencing the outcome by the way you ask the question. A closed question, for example “do you want a sandwich for lunch” closes the person’s choice, whereas “what would you like for lunch” leaves them free to tell you their preference. Accepting that it isn’t necessarily as easy as this.

- Offer only as much support as is needed
- Provide appropriate advice and information
- Explain things in simple terms,
- Break the matter into ‘bite sized chunks, offer the person choices/options.
- Use, and encourage the person to use, simple gestures if this helps, e.g. thumbs up, down, pointing, head or eye movements, mimes,
- Use drawings, pictures, recordings etc if this will be better for the individual than words, or will complement the words.

In any event, keep paper and a pen handy, be this for you or the individual.

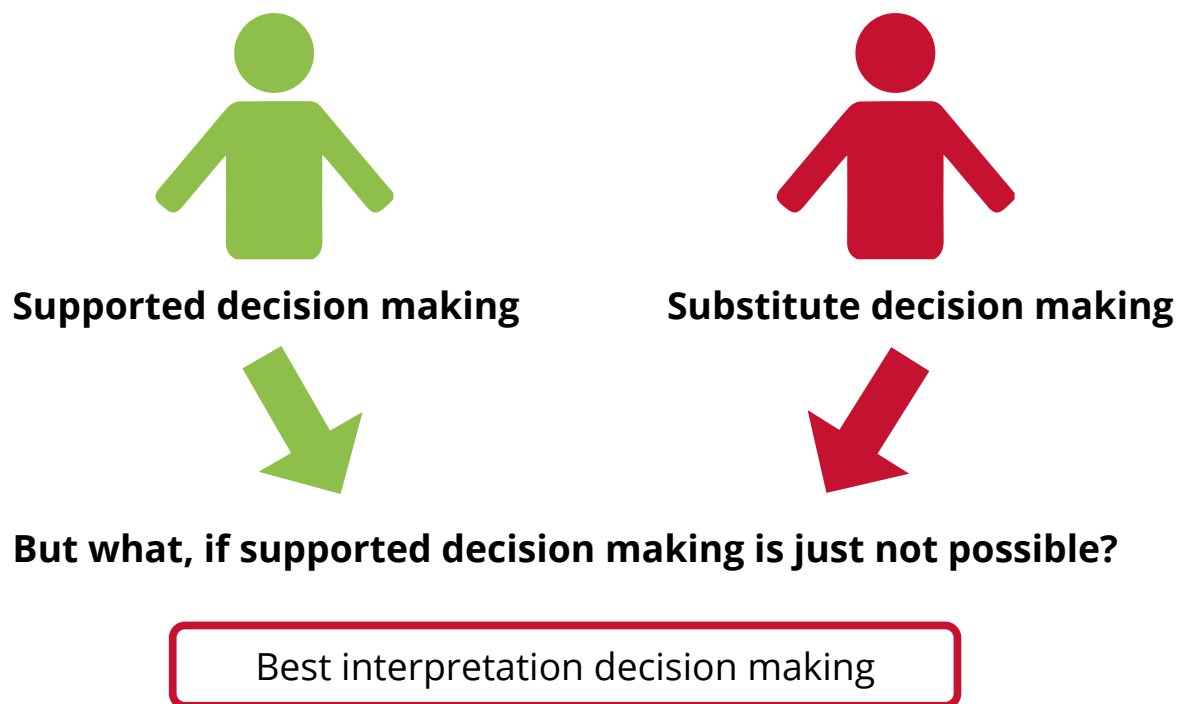
- Writing down key words can assist with the focus of the conversation
- Writing down choices can assist
- Will past examples assist?
- Has the person had to make a decision of a like nature previously which you can discuss with them? Although remembering that circumstances can change and just because they made a decision one way in the past does not mean that they will make that same decision on another occasion.
- Can someone else help?
- No one person has the monopoly on supporting another’s decision making - even if this person is appointed as their attorney, or guardian. There may be others who can assist, for example a long-term friend or a daughter rather than a son.
- Can it wait? Will the person regain capacity, or sufficient capacity to be supported with their own decision making, and if so, can the matter wait until then?



Once a decision has been arrived at the supporter should:

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

There may be occasions when, even with every support, it is just not possible for the individual to make a decision personally and in which case one must move to best interpretation decision making.



## Substituted Decision Making

Before we look at best interpretation decision making let us consider substituted decision making. This slide includes a reference to "substituted decision making" this is when someone substitutes their own decision for that which the person did, or may have, selected. Try to recognise substituted decision making and challenge it, as it is inappropriate. If the person cannot be supported to reach their own decision then the decision should be one which best accords with that which they would have made.

## Best Interpretation Decision Making

Again, much of what follows will be second nature to an Independent Advocate but it is included for completeness.



### Making a best interpretation decision

- Avoid discrimination, or personal bias.
- Ensure you are not making assumptions about someone's best interests simply on the basis of the person's age, appearance, condition or behaviour.
- Consider what the person's current wishes are, do you know?
- Can you glean anything from current behaviours?
- Is their mood, their tone or pitch of voice, their attitude, even their physiological responses telling you anything about a preference?
- What would their past wishes have been?
- Can you draw anything from their approach to similar decisions?
- Is there a Statement of Wishes and Feelings?

- Increasingly people are making a statement of their wishes and feelings which may assist with best interpretation decision making (see Part 2 for more information about Statements of Wishes and Feelings).
- Have you respected the person's rights, will and preferences (see below)?

Best interpretation decision making is decision specific, so a proper and objective assessment of what the person wishes may have been, what may be for their benefit must be carried out on every occasion. What is for a person's benefit may well change over time, this means that even where similar actions need to be taken repeatedly, the position should be regularly reviewed and not just assumed.

An attorney or guardian may find themselves conflicted, making a decision the person themselves would have made, but which is different to the decision they would have chosen for that person, or would have made for themselves. They may require support with reconciling themselves to the decision to be made.

## How does an attorney or guardian decide when to act?

Substituted decision making has been referred to above, it can be easy, for a variety of reasons, for an attorney or guardian to 'slip into' substituted decision making. They themselves may need support in supporting the person in their decision making, or alternatively they may need challenging on how far they assuming the responsibility for decision making when the person themselves may be capable, in respect of this matter.

For any decision that needs to be taken there is, in essence, a hierarchy of deciding when someone else may assume the decision making responsibility. There are a series of questions that an attorney or guardian needs to ask themselves:-

### **a) Can the person make their own decision on this matter?**

If this is the case, even if there is a guardianship, or you consider the PoA is in force, the person must be permitted to make their own decision on this matter.

### **b) Has the person been offered every support to make their own decision / offer their own view?**

If it seems the person is not able to make their own decision, before someone moves to make this decision on their behalf they should satisfy themselves that the person has been offered every support, in an effort to allow the person to participate in the decision making process as far as is possible.

### **c) If the attorney or guardian is to make this decision on the person's behalf are there any exclusions within the PoA/guardianship which precludes them making this decision? Or put the other way, does the PoA/guardianship order have the**

**necessary powers which permit the attorney/guardian to make the decision / take the action?**

**d) Do we know what the person's view on the matter would have been? Is there a Statement of Wishes and Feelings?**

**e) Is the decision being considered one which respects that which the person would, or would likely have, made had they been able to do so?**

**f) Does the law exclude the attorney / guardian making this decision / taking this action?**

**g) Can the attorney/guardian make this decision / take this action on their own, or do they need to do so jointly with a fellow attorney?**

**h) Is there anyone else who can offer a different angle to challenge any assumptions being made? What are the views of relevant others?**

**i) Is the decision / action for the person's benefit?**

**j) Can the same outcome be achieved in a way which is less impactful for them? (least restrictive option)**

## Chapter 5: Rights, Will and Preference

Article 12(4) UNCRPD

### **Rights, Will and Preference**

Measures relating to the exercise of legal capacity must

- Respect the rights, will and preference of the person,
- Be free of conflict of interest and undue influence,
- Be proportional and tailored to the person's circumstances,
- Apply for the shortest time possible, and
- Be subject to review



It was mentioned above that if you are dealing, in any way, with a person who has a lack of capacity, as well as the AWI Act you must also have regard to the principles of the UNCRPD.

The UNCRPD requires us to take account of the rights, will and preferences of a person with incapacity. In this context “will” means the person’s motivation, determination, intention or drive. It does not refer to any other form of ‘Will’, for example a legal bequest on death, or a living will.



**RIGHTS**



**WILL**



**PREFERENCE**

## Rights

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

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

These Rights are guaranteed by law, in the forms of various Acts, treaties, conventions and principles. A person with incapacity loses none of their human rights and that the UNCRPD requires us to respect these rights when working with, or for, that individual. There is no simple way of advising how to go about ensuring you respect the individual's rights; it can all be a matter of perspective.

Graham is the son of Audrey. Audrey was feeling vulnerable in her home. Graham suggested, and Audrey agreed, to the installation of external CCTV and a video doorbell so he can monitor for potential prowlers and scammers and intervene as may be required to keep Audrey safe. Audrey was reassured that Graham was there, even when not present, and that he could take action if necessary. Audrey's friend had a different view, she felt, quite adamantly, that Graham was invading Audrey's right to privacy and that it was inappropriate that he should have free access to intrude on Audrey's life in this way.

You will see from this example that whether one's rights have been, or are being, breached can be a matter of opinion. Audrey, in this case, is feeling supported, the friend being of a view the cameras are a breach of Audrey's rights. The opinion that counts is that of the person themselves.

That said, even if the action is consented to, eg Audrey agreeing to use of the cameras, it still has to be proportionate to the problem. To explain, let's use Audrey again.

Audrey is reassured by the presence of cameras for her safety but Graham uses them to monitor Audrey's life, to see when she goes out, when she comes in, and starts asking her where she went, who she saw, why she saw them etc.

In this case, Audrey consented to the installation of cameras for the purpose of safety but the way they are being used is disproportionate and so, in this respect, the use of the cameras is an invasion of her privacy.

## Will and Preference

Often you will hear 'will and preference' linked together, as if they are a single entity. It is important to remember that they are distinct.

Will is, as the dictionary definition would suggest, a sense of determination, a drive, a motivation, an intention. Preference is a choice, a partiality. It sounds simple but separating will and preference is not always easy.

For example: I would like to lose weight but I would like regular takeaways

Spend a minute to think – which of these is will and which is preference?

My preference is for takeaways, so does that mean it must be my will to lose weight? – well not if I'm having regular takeaways. At this point these are both preferences.

If losing weight is a will – (something I am driven or determined to do) then it has to be accompanied by some action, for example not having



takeaways so often.

Both a will and a preference can be expressed in many and varied ways, - of course in words, but also in tone and pitch of voice, in behaviour, mood, posture, facial expression, eye movement, self-harm; some of these may be intentional, some the person may not even be aware of. You need also to be alert to physiological responses e.g. increased breathing rate, headache, needing the toilet more frequently, or being sick.

The requirement is for us to “respect” a person’s will and preferences (as well as their rights). To ‘respect’ does not mean there has to be unqualified deference to the person’s will and preferences i.e. that we have to go with whatever the person’s will and preference is without any question, but there has to be more consideration given to the person’s views than just a fleeting nod. We have to give genuine consideration of their position; we cannot just pay their views ‘lip service’.

There is a case study at Appendix E which considers rights, will and preference in practice and how you would support the person’s own decision making.

## Rights, will and preferences in conflict

As with the principles, there will be times when rights, will and preference may be in conflict with each other. There will also be times when rights, will or preference may be in conflict with the principles. There will be times when the rights, will or preferences of one person may conflict with those of another.

As is the case when the Principles are in conflict there is no easy answer on such occasions and no single piece of advice that can be given.

## Managing such conflicts

The first thing to consider is whether a compromise is possible. Is there a different way of achieving the necessary end result in a way which is acceptable? Sometimes though, it is just not possible to eliminate conflicts, then it is a case of making sure you have a correct and comprehensive understanding of the full situation, from which you have to reach what you believe to be the right decision in the circumstances.

The following prompts will assist.

### **Am I clear what the central issue is / What outcome we need to reach?**

In conflict situations it is easy to lose sight of the key issue; ensure you are clear exactly what the outcome is that you are trying to reach.

### **Have I fully supported the person to make their own decision?**

Are you satisfied that you have fully supported the person to offer their own views? Do you need to involve anyone else, including for example Independent Advocacy, to ascertain the person's views impartially?

### **Is the individual free of undue pressure?**

Is the view being expressed by the person their 'unencumbered' view, are you sure they are not saying what they think they should say. Ensure they are not being influenced by someone else, or by the situation, into thinking they have to say a certain thing.

### **What is the person's own view on the matter? What is their preferred outcome?**

Are you clear what the person's rights are? What their will and preferences are? Have you given more than mere consideration to these?

### **What is the best interpretation of the person's views?**

If the person has not been able to offer their opinions, do I know what the best interpretation of their views is?

### **Do I need to know anything more about the circumstances / the situation?**

Make sure you know all you need to know, do not make the mistake of working with only a portion of the relevant information.

### **Am I clear of timeframes?**

Do not feel pressured into making a decision under a false assumption of a tight timeframe. Do you have longer than is assumed? If not, can you negotiate longer – to allow for a properly considered decision? If yes, be clear how long may be required for this?

### **Have I reviewed the position objectively?**

Challenge yourself on this, make sure your own values are not, even inadvertently, creating the conflict. Have you asked the views of others? Can someone else offer a view which may assist?

### **Am I clear that all possible options are under review?**

Ensure you have thought laterally about all possible options. Do not make the mistake of going with the one which seems the most viable, or obvious, or even the only one, without first having considered if there are others. It may be obvious to you that these other options will never be viable solutions but an objective systematic review would include them anyway, even if this is only to exclude them in the end.

### **Have I conducted a review of each option?**

For each option consider

- What are the views of the person – on each option?
- What are the views of others – on each option?
- How would this option benefit the person / is this option in their best interests?
- Would there be any risk or detriment to the person from this option?
- Is this the least restrictive way of achieving the outcome needed?

### **Is there any compromise option?**

Is there an option which the person would tolerate, even if it not the ideal. This still has to be a viable solution. It may be that it presents a

short term point, whilst time is taken to consider the longer term, or broader, options.

**Have I sought the opinions of all relevant people?**

Ensure you have not omitted a relevant 'player', the views of all relevant people involved need to be considered.

**Are there wider things I need to consider?**

It is appropriate to consider wider things in such a review, for example the impact on, or risks to, others that any of the options may present, or the costs.

**Is there anything else I need to consider?**

Is there anything particular to your current case/situation that you need to consider before reaching any conclusions?

**Would it be wise to consult someone else / get authority before making a decision?**

Do you wish to / need to run your proposed decision past someone else, for example the Local Authority, the Office of the Public Guardian, a lawyer?

**Have I made a clear action plan?**

Am I clear who is doing what, in what timeframe, when this will be reviewed etc. Are all relevant others clear also of this action plan?

**Who do I need to tell?**

When you have reached a decision on the way you wish to progress the matter, make sure you advise everyone who is relevant.

**Have I made a comprehensive record of all matters?**

When you have completed such a formal assessment, you are advised to make a clear record of all the things you considered, discussion, actions, your rationale for your decision etc. as this will be of great assistance should there be any challenge to why/how you have arrived at the decision you have taken.

## Chapter 6: Use of IAs, the responsibilities of a care home

A matter which can create immense frustration for IAs is when they are declined permission to see a client when the care home may wish this, but the attorney or guardian is adamantly refusing. This next section considers the responsibilities of care homes and concludes with actions IAs may take when this conflict situation arises.

### Attorney or guardian is the representative of the incapable person

Care homes are sometimes not appreciative of the fact that the attorney or guardian is the representative of the incapable person; that they should make a decision that the person themselves would have, or would likely have, made had they been able to do so personally. This can sometimes create conflict for the attorney or guardian when the decision is one they would not have agreed with.

### Attorney or guardian's decision making process

Attorneys or guardians may not be aware of their obligation for supported decision making and so can easily 'slip', inadvertently sometimes, into substituted decision making. If a care home is not aware of the requirement for supported decision-making and is not skilled at identifying a substituted decision, they are not placed to challenge the flawed decision-making process of the attorney or guardian.

## **Overview of SDM**

Here is a summary of the process of supported decision making

### **1. Assessing Capacity**

Welfare powers only commence if the person is incapable – in respect of the decision to be made; so, if the decision is of a welfare nature the first thing an attorney should do is satisfy themselves that the person is not capable of making this decision for themselves. See Chapter 3 on capacity.

### **2. Supporting Decision Making**

The attorney or guardian must have offered all support that may be necessary to allow the person to make their own decision. See Chapter 4 on SDM above.

### **3. Respecting the rights, will and preference of the person**

In making a decision on behalf of the person the attorney or guardian is obliged to respect the rights, will and preferences of that person. The decision should be one the person themselves would have made had they been able to do so. See Chapter 5 above.

### **4. Complying with statutory principles**

The relevant Acts governing the operation of a PoA, have a set of underpinning principles with which an attorney is obliged to comply. See Chapter 2 above.

## Obligations of a care home

Care homes may think that if an attorney or guardian has a given power then they cannot intervene, but the care home are the primary carer and themselves have the same statutory obligations to follow the above decision-making process. Compliance with a decision of an attorney or guardian without their own consideration of the matter may place them in breach of these statutory obligations.

The care home must follow the same steps outlined above. So, they must first satisfy themselves that the person is not capable of making the decision personally, having offered whatever support may be necessary to facilitate them to make their own decision. They must also consider the person's rights, will and preference in respect of the matter and are required to act in accordance with the principles of the Act.

## What regard is to be paid to the decisions of an attorney or guardian?

A care home is required to take account of the views of relevant others which, most definitely, would include an attorney or guardian. The requirement is to 'take account' of their views, i.e. the views of others must be given due consideration, but do not necessarily have to be followed. That said, the requirement to take account of the views of others is not a gratuitous exercise, one cannot take account of others' views then simply disregard them because they do not accord with your own, there has to be justification for setting aside the views of others.

In taking account of the views of others due weight should be given to their respective views, so for instance, Person A is a good friend of the now incapable person and thinks option 1 is better, Person B is their nominated attorney and thinks option 2 is better. There would have to be a strong rationale for setting aside the views of the attorney, if the decision was to go with option 1.

## Can a care home ask for an independent advocate to visit if the attorney or guardian is refusing this?

As we have seen, a care home has all the same obligations to support the person's autonomous decision making and respect their preferences. If they feel the assistance of an independent advocate would help them to fulfil these obligations, then they can make a referral on behalf of the person, notwithstanding the view of the attorney.

They are however advised to seek legal opinion on the principle, per se, of accessing Independent Advocacy in the situation as it is and also on just what their requirement of the Independent Advocate should be. The referral needs to focus on asking the Advocate to establish things, if this proves possible, which allows the care home to fulfil its own statutory or regulatory compliance, so careful framing of the reasoning is key.



# Appendix A

## Power of Attorney Example

1

Office of the  
Public Guardian (Scotland)



ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

### **CERTIFICATE OF REGISTRATION OF POWER OF ATTORNEY**

Certificate Number 1234567/2018/45  
Case Reference Number PG/S/755248/2018/1

I hereby certify that the attached Power of Attorney granted by Mary Smith on 23 October 2018 appointing James Smith and Paul Smith has been registered with the Office of the Public Guardian in terms of the Adults with Incapacity (Scotland) Act 2000 Section 19.

A handwritten signature in black ink, appearing to read 'L. Smith'.

**Public Guardian**  
**7 November 2018**



This seal appears red on the original and all bound pages are embossed.

## Appointment

I, Mary Smith, residing at 24 New Place, Edinburgh, appoint James Smith, residing at 24 New Place, Edinburgh and Paul Smith residing at 16 Old Road, Glasgow to be my continuing attorneys (my “Attorney”) and each of them alone and the survivor of them in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000 (which act and any subsequent amendment of that is referred to as the “Act”)

2

I appoint the said James Smith and Paul Smith to be my welfare attorneys and each of them alone and the survivor of them as my attorney in terms of section 16 of the Act. My continuing attorneys and my welfare attorneys are each referred to as my Attorney.

I declare that I intend that this power of attorney shall be a continuing and a welfare one which shall continue to have effect even if I shall have lost capacity in relation to the matters in this deed and I record that I have considered how my incapacity shall be determined for the purposes of this power of attorney.

3

## General Powers

My Attorney may manage my whole affairs as my Attorney thinks fit and shall have full power for me and in my name or in his/her own name as my Attorney to do everything regarding my estate which I could do for myself and that without limitation by reason of anything contained in this power of attorney or otherwise.

4

In the event of medical opinion advising that I incapable in terms of the Act to make decisions about my personal welfare then my attorney may make decisions on my behalf in relation to my personal welfare.

5

My attorney shall be subject to the requirements of the Act.

6

Without prejudice to these general powers my Attorney shall have the set powers set out in the following clauses.

## Financial powers

7

My attorney shall have the following powers:-

1. To open, close, operate, any account containing my funds including those held in common with other persons.
2. To claim and receive on my behalf all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which I may be entitled.
3. To sign and endorse any cheques, deposits, receipts or bank drafts issued and to be issued in my name or made payable to me.
4. To sign and deliver deeds and documents.
5. To be allowed financial information concerning me.
6. To have disclosed to them any passwords as may be necessary including to manage my digital affairs.
7. To require disclosure to my attorney of any document or information regarding me, however confidential, including testamentary documents, where these relate to my property or financial affairs.
8. To pay my household expenses.
9. To effect, pay the premiums on, alter or surrender any insurance policy.
10. To buy, lease, sell and otherwise deal with any interest I may have in property of any kind or description and wherever situated.
11. To buy, sell or lease and otherwise deal with heritable property (land and buildings) on my behalf.
12. To pay for private medical care and residential care costs.

13. To pay any debt or claim owing by or to me.

14. To pay for me to go on holiday and for the expenses of any accompanying carer/carers.

15. To purchase out of my income or capital, a vehicle or any other equipment which may be required for my benefit.

16. My Attorney is to be reimbursed for any reasonable outlays or out-of-pocket expenses while acting on my behalf.

8

## **Welfare powers**

My attorney may have the following powers:-

1. To decide on all aspects of my care and accommodation arrangements, including what facilities and services should be provided to me.

2. To decide where I should live, whether permanently or temporarily.

3. To require disclosure to my attorney of any document or information regarding me, however confidential, where these relate to my personal welfare.

4. To consent, or refuse such consent, to any medical treatment or procedure or therapy of whatever nature my attorney may decide is for my benefit, where this is not specifically disallowed by the Act.

5. To make such decisions relating to my dress, diet and personal appearance as are appropriate.

6. To make such decisions regarding my social and cultural activities.

7. To exercise any rights of access I have in relation to personal data and records.

8. To decide with whom I should, or should not, consort.
9. To arrange for me to undertake work, education or training.
10. To take me on holiday or authorise someone else to do so.
11. My Attorney is to be reimbursed for any reasonable outlays or out-of-pocket expenses while acting on my behalf.

### **Validity of documents**

All decisions which may be made and all documents which may be granted by my Attorney to whatever person or persons shall be equally valid and binding as if granted by me.

### **Recall**

The continuing and welfare power of attorney shall remain in existence until it is recalled by me in writing or until my death.

### **Testing Clause**

This document is executed as follows:-

*Jeannie Whyte*

Signature of Witness

*Mary Smith*

Signature of Granter

### **JEANNIE WHYTE**

Full name of witness (print)

### **5 OLD STREET, NEWTOWN**

(Address of witness)

*23 October 2018*

Date of signing

*Newtown*

Place of signing

## Notes

1

To be operable a PoA must be registered with the OPG. If it has been so registered it will have a Certificate of Registration attached. This is an example of what a Certificate looks like for a PoA which has been sent in manually; if it has been submitted electronically it will have a watermarked crest on each page – but will not have a red seal.

The Certificate contains the names of the attorneys – in this case James Smith and Paul Smith.

2

This PoA appoints James Smith and Paul Smith jointly and severally, the reference to “each of them alone” indicates this. It also allows for one of them to continue in a sole capacity should the second one be unable to act – the reference to “the survivor of them” indicates this.

This paragraph appoints them as continuing ie property and financial attorneys, the following paragraph appoints them as welfare attorneys, also jointly and severally, or alone if that became necessary.

3

The granter makes it clear the PoA is to continue in the event of her incapacity. She says she has considered how her incapacity is to be determined. This is a legal requirement where there are welfare powers, what is not required is for the person to say HOW they would wish their capacity to be determined – merely just that they have considered it.

Given there is no explicit instruction otherwise one can assume that the attorneys can decide, they can start acting on the PoA when they reasonably believe the person to be incapable – in respect of the matter to be determined.

4

This is called a plenary power and purports to give the attorney an overarching power to do everything the granter would otherwise have been able to do themselves. However, the reference to “estate” creates a confusion – does this only give overarching property and finance powers?

This demonstrates the importance of knowing how to read/interpret a PoA. If you are dealing with a person on a welfare matter you should satisfy yourself that they have an express power to cover this as you may not be able to rely on the plenary power in respect of welfare matters.

5

This now introduces the requirement for a medical opinion of incapacity, which is somewhat at odds to the wording at Note 3. This illustrates why you should read the whole document and not stop when you think you have found what you are looking for. There may be contradictory requirements elsewhere.

Medical opinion appears only to be necessary in respect of welfare matters. The wording of the paragraph may lead you to think its giving overarching welfare powers, this may have been the granter’s intention but it only allows decisions on their behalf so one would have to look at the express powers to see just what decisions the attorneys had power to make.

One cannot imply anything into a PoA - so the fact that the granter may have intended this to be an overarching welfare power is irrelevant.

6

One sentence which says so much and may well mean very little to most attorneys, as they won’t know what the requirements of the Act are. You may have to do ‘education’ around this aspect as part of any interaction with the attorney.

7

Here are the list of express property and finance powers. They cannot cover every single eventuality that may arise, so you are allowed to interpret them broadly. For example, if you are working with the person on whether they should move into rented accommodation there isn't an express power which would allow the attorney to enter into such an agreement on the person's behalf (assuming the person could not enter the agreement personally), there is however a power to sign deeds and documents. A "deed" is a legal document so this power would permit the attorney to enter into a tenancy contract.

8

Here are the express welfare powers – or are they? It says the attorneys "may" have the following powers it doesn't say "shall" have. We know from above that there isn't an overarching welfare power that can be relied upon now there may not even be express powers that can be used!!! These attorneys would be advised to take legal advice as to the extent of authority this PoA gives them.



# Appendix B

## Statement of Wishes and Feelings

There are no rules about what a Statement of Wishes and Feelings should, or should not, include; it can include anything that is important to you. The following information will offer you a guide.

### Factual information

It is helpful to include some factual information e.g.

- Name of your doctor & address of the medical practice
- Any relevant past medical history
- Medications that you are on
- Any allergies you may have
- Any aids you may need for your mobility
- Name of your dentist & address of the dental practice
- If you have false teeth, a dental plate or crowns
- Name of your opticians
- If you wear distance or reading glasses, if you wear contact lenses.
- If you wear a hearing aid / where you have your hearing tests.
- Any family history that your attorney needs to know.
- Family that you would wish to remain in contact with, or prefer not to see.
- Where you bank
- Where personal papers can be found
- If you have made a Power of Attorney, and where this can be found
- Anything about your pensions that the person may need
- Any other financial information they may need
- Who you use a Financial Advisor, if you have one
- Who your Solicitor is, if you have one.
- Who holds title deeds to your house, if you have one.
- Where a copy of your Will can be found, if you have one.
- Which church you worship at, if you do.
- Any social groups you attend

- If you donate to any charities, or would not wish donations to certain charities
- Which hairdresser you use, if you do.
- Any other factual information about you that your attorney may not know or that you would want your attorney to know.

### **Special Instructions**

If there are particular instructions include these in the Statement. For example:

"I wish my daughter Beth to continue to live in the house, even if I have to go into care. This is her home."

"I do not wish you to sell the diamond necklace in my jewelry box as this is gifted to Beth in my Will"

### **Preferences**

Include in your Statement of Wishes and Feelings your preferences on anything you want to draw to your loved ones /carers attention.

Examples are:

- Views as to how you would like to be cared for
- Any care preferences (eg. prefer a shower to a bath, need to sleep with a light on, need to be in bed by 10pm, prefer my main meal at lunch time)
- Religious or spiritual beliefs that you would wish respected.
- Dietary requirements you would wish respected; or just your favourite foods, or foods you don't like.
- If you have a preference for tea/coffee or don't drink either. Milk, sugar?
- A favourite tippie if you have one, or if you prefer not to drink alcohol.
- Any preferences on your clothing (eg. some women prefer not to wear trousers, some men prefer always to be formally dressed, some people prefer to wear cotton only)
- Any preference on where your clothes are purchased from, or not.

- Any soaps / soap powders you prefer, or cannot use.
- Any shampoos / conditioners you prefer, or cannot use.
- Perfumes/aftershave you particularly like, or not.
- Music you like / do not like
- Television programmes you like
- Films you like
- If you like peace and quiet or prefer to be in the midst of the group
- What hobbies you have
- Places you like to visit, or to go on holiday to (you may wish to mention if you burn easily, or can't swim)
- Particular dislikes and activities, places or people you would prefer to avoid
- If you wear makeup – any preferences you wish to offer about this.
- If you have pets, any comments you wish to make about them? What are their likes/dislikes, who would you wish to look after them if you are ill, which kennels do you prefer, which vet do you prefer etc?
- Or maybe you have a fear of animals that you wish to mention
- There is no limit to this list, include anything which is important to you and which you would wish others to know about.

## **Explanatory Information**

Some of the things you have requested above may be news to the person now caring for you or may come as a surprise to them. If you think this is likely to be the case it can be helpful to offer some explanatory information, this helps your loved ones understand your position and thus makes it more likely that they will respect it.

An example may be:

I would like my grandson Adam to take over the running of my business if I am not able to do so personally. This may come as a surprise to some of you, as he is fresh out of college, but I see him as an extremely bright young man who will go far in the business world. We have had many a long conversation about his aspirations and he shows a natural aptitude for the business. He is enthusiastic and can be hands-on, when I know

the rest of you already have your own families and work to look after Adam - Sally, my very trusty secretary, has all the information you need to 'hit the ground running'. Use her wisely Dear Boy and treat her well. Good luck, have fun, be happy and do me proud. I have every faith"

## **Information on Family and Friends**

This section is particularly important if you have a more complex family situation. It is quite common for long lost family to get in touch when they hear a relative is ill. It can be hard for those caring for you to know if they should allow a particular individual, or certain people, to visit you.

Offering them some guidance within your Statement of Wishes and Feelings about who you would wish to see, or maybe who you would not wish to see no matter what, can be extremely helpful.

If there is a good friend that you have shared many confidences with it can be helpful to name this person in your Statement. This person would potentially be able to offer your family information about you that maybe your family themselves do not know.

## **Confidentiality**

It can be hard for your loved ones to know what information to share with others, particularly other family members. This is often the cause of family upsets, where one family member thinks information is being deliberately withheld from them but the other family member is only trying to respect your confidentiality. Consequently, it can be helpful to include something in your Statement of Wishes and Feelings about what information you are happy to be shared with whom, or not, as the case may be.

## **Expressions of Love, Affection and Appreciation**

Some people chose to include in their Statement of Wishes and Feelings an expression of their love, affection, or appreciation, to family and

friends; this is especially so if they have struggled to find the right words whilst able to do so.

It is important for any person close to you to hear of your love, affection or appreciation if they haven't already, but it may be particularly important if you have a family member who has become estranged.

"To Paul, I know we fell out a long time ago but I want you to know that I have thought about you every day and no matter what happened you will always be my son and I will always love you"

If including such statements is not for you, just omit this.

## Style

A Statement of Wishes and Feelings does not have to be a dull list of instruction. It can leave a legacy for your family to have the Statement of Wishes show your personality. There is no set format, so draft it however it seems right for you. The comment to Adam above, is an illustration of how a Statement can show personality.

## Thanks / close

It can be nice to offer thanks to the person now taking care of all your wishes.

"These are my wishes and feelings. I am aware that this is not a legally binding document but if I lose the capacity to make decisions personally, I wish for this document to be used by others to guide how I should be cared for and how my affairs should be administered.

I thank, most sincerely, those who are now, as far as is possible, trying to respect these. Your efforts for me are very much appreciated."

Then remember to sign and date this.

Keep it somewhere safe and tell key people where it is.

If you have a Power of Attorney, give a copy to your nominated attorney/s.

If you have a solicitor you may wish to give a copy to them.

You should give a copy to your doctor for filing in your medical records.

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## **Anticipatory Care Planning?**

A Statement of Wishes and Feelings can complement an anticipatory care plan.

Anticipatory care planning helps you make informed choices about how and where you want to be treated and supported in the future. It requires health and care practitioners to work with you and your carers to ensure the best outcomes for you are achieved.

It is not the purpose of this paper to give you detail about Anticipatory Care Planning; if an Anticipatory Care Plan is something which you think would be of benefit for you a web search for 'Anticipatory Care Planning' brings up several highly reputable sites which give you all the relevant information.

## **A Life Story Book?**

Some people wish to do a Life Story Book in addition to a Statement of Wishes. This can be helpful too as it shows 'you' to people caring for you at a later stage who may not have known the younger you. A Life story Book is like an album, with pictures, souvenirs and mementos from your life which you accompany with the story of your life. There is no set format, include whatever makes you who you are, examples may be:

- Where you were born
- The names of your parents and any siblings
- Where you lived as a child

- Any pets you had
- Where you were schooled
- What qualifications you got
- Any memories that stay with from your young days
- Any higher education
- Your working life
- Things you have achieved /are proud of
- When and how you met your Partner
- The birth and names of any children
- Hobbies / Volunteering
- Family holidays
- Times with good friends
- Things you have enjoyed in retirement
- And anything else which you feel makes you who you are

### **Advance Directive (Living Will)**

An advance directive offers your views on your care in the final stage of life .A Statement of Wishes and Feelings does not replace an Advance Directive. You may still wish to complete an Advance Directive.

An Advance Directive is not legally binding on the health care staff but the law requires your wishes to be taken into account, an Advance Directive is a clear expression of these.

It is not the purpose of this paper to give you detail about Advanced Directives, if you are interested in making an Advanced Directive a web search for 'Advanced Directives' brings up several highly reputable sites which give you all the relevant information.

## Appendix C

### **Doris (Principles case study)**

Doris is 86 years old. She is confused and disorientated. During a recent hospital stay she was diagnosed with early dementia and has fluctuating capacity.

Before the hospital stay, Doris had been living in her own home. She was found, having fallen, by a neighbour who looks in on her. The neighbour checks every few days. It is not known how long Doris had lain there before the neighbour found her.

The house was in a state of squalor - it isn't known if this is how Doris usually choses to live, or if this was a recent deterioration. Doris was underweight and of unkempt appearance; again, it is unclear if this is her usual demeanour or a result of a recent deterioration.

Doris has been referred to you by the local social work team. She is currently in intermediate care pending decisions about her ongoing care arrangements.

Doris has a son, Simon, and daughter, Dot, who are in disagreement on most things.

The Local Authority has opened the conversation with Simon and Dot about the possibility of guardianship, but they don't believe they will be able to facilitate this effectively as joint appointees. Simon and Dot each feel they should be appointed, individually. They are both opposed to the other person being appointed.

There is a forthcoming AWI case conference which you will be attending to represent Doris's views. Simon and Dot have both phoned you recently to express their views on Doris's ongoing care, which they are in disagreement about:



- Dot feels a care home near Doris's current house is the best option. Simon lives nearby, so could offer support himself and visit her in the care home regularly.
- Simon feels Dot should look after Doris. He says that this arrangement is, for them, the culturally accepted norm and Dot has plenty of space for their mum to move in, so he doesn't see what the issue is. Dot lives in London, so this would mean a whole new environment for Doris.

You meet with Doris and find, at least in her current condition, she is unable to express any view. You are thus in a position of non-instructed advocacy.

You speak to the neighbour who confirms Dot and Simon don't get on, they do both visit however and both seem to have love for Doris. She isn't sure if Doris recalls either of them properly now though as she gets muddled when she is talking about her family.

**With reference to the AWI principles, what are your thoughts on Doris's situation?**

## Appendix D

### **Andy (Capacity assessing case study)**

Andy is 30 years old and has an acquired brain injury following a fall from a ladder on to a concrete patio whilst mending his guttering. He has a loss of cognitive impairment, which is unlikely to improve, but does have a high level of residual capacity. Andy is currently living at home with the support of his brother, Paul.

After the injury, Paul was aware that Andy would need someone to manage his affairs so contacted a solicitor to get power of attorney for Andy. The solicitor got a medical opinion which assessed Andy as capable of instructing a PoA, and Paul was thus appointed as power of attorney.

After some months, Andy started telling his friends that he didn't want Paul to look after him anymore. His friends weren't sure why he felt like this - Paul seemed caring enough, and regularly gave Andy lifts to and from the club so he could socialise. But, Andy made similar comments regularly, so his friends suggested that he tell his social worker how he felt. He didn't do this. After about a year - and mainly because they were getting fed up of hearing Andy saying the same things again and again - one of the friends was elected to speak to Andy's social worker.

The social worker assessed Andy and found him capable - so, if he wanted to revoke the power of attorney, which seemed to be what was on Andy's mind, then he could do so. The social worker told him that he could do this and how to go about it.

A few months later, the social worker was on a routine visit and learned that Andy had stopped going to the club. She thought Andy seemed different and much more withdrawn than when she had last met him. She referred Andy to you to see if there was anything an independent advocate could bring to the situation.

When you spoke to Andy, he told you that Paul wouldn't let him eat what he wanted. He could only have what Paul said. Also, when Andy wanted more money, Paul said he was spending it on rubbish so wouldn't let him have it. You learned that Paul had had the phone cut off and taken away Andy's mobile because the bills were too high. Andy has stopped going to the club because Paul said his friends were bad people. Andy said Paul took him everywhere then locked him in when he wasn't around, saying it was to make sure he was safe. Andy got quite upset when he told you that Paul had taken his record player away and he didn't know why – before the accident, he had been a part time DJ and still enjoyed his turntable and music.

**Q1 What are your thoughts on all of this?**

**Q2 What happens next may depend on if Andy is considered capable, or not.**

**How would you go about considering his capacity?**

## Appendix E

### **Lorraine (SDM/RWP case study)**

Lorraine is 23 and has a learning disability. She currently lives at home with her mother, although would like to get her own place with her partner. She has a reasonable level of cognitive ability but, nonetheless, her mother is appointed as her guardian. The guardianship commenced when Lorraine was 16, seemingly for no specific reason, and was renewed when she was 19 for a five-year period. Her mum has a full range of guardianship powers and is exercising these as she sees necessary.

The social worker, as part of the guardianship supervision, has referred Lorraine to you. Lorraine's Mum is not happy with this as she thinks you will 'put ideas in her head'.

Lorraine tells you that she used to go to a social group, where she met her partner, but her mum has stopped her going because she doesn't approve of the relationship. Lorraine is not allowed any time on her own with her boyfriend because her mum is fretting about her getting pregnant. However, Lorraine says she sneaks out at night when her Mum is asleep to see her boyfriend.

Recently, her mother has taken away Lorraine's mobile phone, in order to limit her access to social media and 'friends' that are, in her view, unacceptable, and stop her spending as much money shopping online. Lorraine expresses a desire to dress like her peer group – but when you meet with her, she looks like a middle-aged lady. You learn that much of the spend on line was for modern clothes.

**What are Lorraine's rights, will and preferences?**

**How would you approach supporting her decision-making?**



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