

THE HIGHLAND COUNCIL – HEALTH AND SOCIAL CARE

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

HIGHLAND PROCEDURES

AWI Procedure Version 5 (June 2022)

Foreword

The Adults with Incapacity (Scotland) Act 2000 sets out the legal framework for regulating intervention in the affairs of adults who may not have the capacity to make important decisions about their finances or welfare. This may be as a result of a mental health problem, learning disability, dementia or inability to communicate. The framework is underpinned by principles which enable interventions to be tailored to the needs of the individual.

This practice guidance (procedure) is composed in line with legislation such as The Adults with Incapacity (Scotland) Act 2000, Mental Health (Care & Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007. The guidance (procedure) **should** be read in conjunction with the updated Code of Practice for Local Authorities exercising functions under the 2000 Act.

I am pleased to introduce this practice guidance (procedure) which will continue to be regularly reviewed and updated to take account of any future changes in legislation, policy and research on best practice in order to ensure the most appropriate outcomes for adults who lack capacity in Highland.

Fiona Duncan

Chief Social Work Officer and Executive Chief Officer, Health & Social Care, HC

Simon Steer

Director of Adult Social Care, NHS Highland

INDEX	PAGE
Introduction	3
1. The Overarching Principles	4
2. Measures of Intervention Authorised by the Act	5
3. Adults in the Community	9
4. Adults Admitted to Hospital	10
5. Provisions of the Act	11
6. The Local Authority as Guardian	12
7. Young People and the Act	19
8. Private Applications	20
9. Disputes	22
10. Joint and Substitute Guardians	23
11. Recording of Guardianships and Intervention Orders	25
12. Recall of Guardian's Powers	27
13. Supervision of Proxies	29
14. The Supervising Officer/Delegated Officer	32
15. Renewal of Guardianship	34
16. Transfer of Individuals under Local Authority Guardianship	35
17. Non-compliance with the Decisions of the Welfare Guardian	36
18. Medical Treatment of Adults Who Lack Capacity	37
19. Moving Adults Who Lack Capacity to Care Homes	40
20. Adults at Risk Who Lack Capacity	42
21. Protection Orders under Adult Support & Protection (Scotland) Act 2007	48
22. Overriding Consent of the Adult at Risk	52
23. Adults with Incapacity and Adult Protection Meetings	53
24. Adults with Incapacity (Scotland) Act 2000, Adult Support & Protection (Scotland) Act 2007 and Implications for Practice	54
Appendices	56

Introduction

Overview

The Adults with Incapacity (Scotland) Act 2000 provides for decisions to be made on behalf of Adults who lack capacity to do so themselves because of a mental disorder or inability to communicate. The decisions concerned may be about the Adult's property or financial affairs, or about their welfare, including medical treatment, or both.

What is Incapacity?

The Act is the first of its kind to define capacity in terms of decision-making ability and to take account of the complexity of the decisions to be made. For example, an individual may be capable of deciding what they will wear or eat, but be unable to decide the level of care which will be necessary in order for this to happen (acting on decisions). They may be unable to comprehend the complexities of their situation or the levels of care they may actually require (understanding decisions). They may not have or have lost problem-solving abilities (making decisions). They may have poor short-term memory leading them to forget decisions they have made (retaining the memory of decisions). They may have lost the ability to communicate decisions as in those who have suffered physical trauma or, more commonly those who have organic brain syndrome leading to such conditions as expressive dysphasia and the loss of reading and writing ability.

For the practitioner it is often a matter of fine judgement as to whether or not there may be an issue of incapacity. Despite poor memory, is there consistency of response when presented with the same factors? Despite poor ability to carry out their decisions, are they still able to make informed choices and to determine how these choices will be met and the implications of their actions? Do they in fact have a full appreciation and understanding of the issues involved, but are simply disagreeing with the plans proposed?

Who Decides Incapacity?

Whilst social work and nursing staff are often at the forefront of such issues, it is the province of medical doctors to determine whether or not the individual does or does not have capacity in relation to the decisions requiring to be made. Accordingly expert medical advice will be required in all cases.

Legislative Framework

The 2000 Act is central to the legislative tools concerned with the provision of care and protection for those considered vulnerable by mental disorder, the other Acts being:

- The Social Work (Scotland) Act 1968
- The Community Care and Health (Scotland) Act 2002
- The Mental Health (Care & Treatment) (Scotland) Act 2003
- The Adult Support and Protection (Scotland) Act 2007
- The Criminal Procedures (Scotland) Act 1995

The 2000 Act may be used separately or in conjunction with any of the above. This Practice Guidance (procedure) relates primarily to the Adults with Incapacity (Scotland) Act 2000.

1. The Overarching Principles

The Adults with Incapacity (Scotland) Act 2000 was the first Act to have at its base an overarching set of principles which **must** be followed in making decisions by all persons intervening in the affairs of an Adult, namely:

1.1 Benefit

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

The provision of an appropriate level of care should be in the interests of the Adult. Where there is agreement amongst all the professionals and people with an interest in the Adult's affairs and the Adult is not objecting to the proposed plans, a measure taken under the Social Work (Scotland) Act 1968 (Sec. 13ZA) to arrange that care, **may** be compliant with the principle of the intervention being of benefit.

1.2 Least Restrictive Action and Minimum Intervention

Where it is determined that an intervention is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the intervention. Such decisions should take into account the other principles set out in the Act:

1.3 Consultation with Relevant Others

However, if the Adult or interested parties object to the proposed arrangements, or it is known that such measures would not have been in accordance with the Adult's past wishes, to proceed would be to contravene Principle 4;

1.4 Take Account of the Adult's Past and Present Wishes

Any measures to be taken which would override the Adult's known past or present views **must** be authorised through the use of Adults with Incapacity (Scotland) Act 2000 where the Adult's views will be taken account. Any attempt to impose measures in the face of objections or issues may be perceived as Deprivation of Liberty under Article 5 of the Human Rights Act.

1.5 Encourage the Adult to Exercise Whatever Skills s/he has

This is often overlooked in applications for Guardianship Orders particularly in applications by individuals where the requested powers have been copied from the Code of Practice and detail all possible powers that a Guardian may have, the net effect being to give the Guardian power to dictate every aspect of the Adult's life. This is clearly in conflict with the principle of minimum intervention and must be considered in the context of the Adult's capacities as well as incapacities.

2. Measures of Intervention Authorised by the Act

2.1 Power of Attorney

An Adult may grant Power of Attorney giving his chosen Attorney powers over property and finance (Continuing Attorney), or welfare (Welfare Attorney), or both. An Attorney has no authority to act until the document conferring the powers has been registered with the Office of the Public Guardian.

The granter (the Adult) **must have capacity** to grant this and where there is doubt medical opinion **must** be sought. A Welfare Power of Attorney does not become active until the granter (the Adult) loses capacity and a letter of confirmation from a Consultant or GP to that effect is generally required. It is good practice, although not a requirement, to inform the OPG when a Welfare Power of Attorney has been activated.

Social Work and Nursing staff should encourage Adults and carers to pursue Power of Attorney where there is a diagnosis of mental disorder in which it is anticipated that capacity may be lost in the future and whilst there is still the possibility of determining the Adult's wishes regarding their future.

2.2 Access to Funds

Where the Adult's affairs are simple or the estate modest guardianship may not be the least restrictive intervention necessary to benefit the Adult. Access to Funds provides carers and relatives with a means of accessing the Adult's funds in order to manage day-to-day expenses and care requirements.

[Chapter 2: THE ACCESS TO FUNDS SCHEME - Adults with incapacity: code of practice for those authorised to access funds - gov.scot \(www.gov.scot\)](#)

2.3 Welfare Guardianship

The Local Authority may only make an application for Welfare Guardianship when no one else is doing so and it is considered necessary. An application by the Local Authority may in exceptional circumstances propose a relative as a Welfare Guardian. If no one suitable and willing is identified the proposed Guardian will be the Chief Social Work Officer (CSWO).

The functions of the Welfare Guardian are then in practice delegated to a Social Work Officer to carry out the functions on the CSWO's behalf.

www.gov.scot/Publications/2008/03/20114619/3 Adults with Incapacity (Scotland) Act 2000: Code of Practice: For Local Authorities Exercising Functions under the 2000 Act

The CSWO has the power to recall a Welfare Guardianship and is under an obligation to do so if the grounds are no longer met (5.73 A)

2.4 Financial Guardianship

The Local Authority's involvement in applications for guardianship will normally stem from assessment and care management procedures and will normally relate to personal welfare needs which have been identified through those procedures.

In the case of guardianship dealing purely with property and financial matters there might be no Local Authority involvement since there is no need for a social work report to support such an application. However it is likely that the need for financial guardianship will come to light through assessment and care management processes, for example if a person with

moderate means requires to be moved into residential care. In such a case, the CSWO may not be appointed guardian, but if guardianship is the only way to deal with the management of the adult's estate, and no-one else is applying, the Local Authority has a duty to make the application. The Local Authority may not act as Financial Guardian and a suitable guardian will require to be identified at the pre guardianship case conference. This may be an independent solicitor.

As with Intervention Order applications, a Financial Guardianship application will also require two medical reports and a report by someone with sufficient knowledge of the Adult's situation. This could be a Health and Social Care professional. There is no requirement for a Mental Health Officer to complete the required report for Financial Guardianship. Local Authority Legal Services are required to complete the Summary Application and lodge the application in Court, but in these circumstances generally the relative should instruct their own solicitor to take the application forward.

[What is a guardianship order \(publicguardian-scotland.gov.uk\)](http://publicguardian-scotland.gov.uk)

2.5 Intervention Orders

Where a single transaction would be sufficient to deal with a clearly defined financial, property or welfare matter, an application for an Intervention Order may be made to the Sheriff. As with Guardianship Applications this requires two medical reports and a supporting report by someone with sufficient knowledge if the intervention is regarding property or finance. This report may be by an MHO, Social Work Professional or any other professional with sufficient knowledge. Social Work Staff may be Interveners but if this is proposed an additional person is required to complete the supporting report to avoid conflict of interest. This may be the Advanced Practitioner or another Social Work Officer. Reports are completed on the prescribed proforma with Legal Services completing the Summary Application and lodging the application in Court. If the intervention relates to a financial matter the report can be prepared by any person who has knowledge of the Adult.

[What is an intervention order \(publicguardian-scotland.gov.uk\)](http://publicguardian-scotland.gov.uk)

In practice, Intervention Orders are more often used in the field of property and finances as transactions tend to be discrete interventions such as the signing of a tenancy agreement or the sale of a house to provide for care costs. Welfare interventions tend to be more complex or of an ongoing nature thus making Guardianship more appropriate.

2.6 Medical Treatment

Certificates of Incapacity to Consent to Medical Treatment

An Adult who cannot give informed consent to medical treatment can only be treated under a Certificate of Incapacity authorised by Section 47 of the 2000 Act. This is issued by the GP, or if the Adult is a hospital patient, by a hospital doctor and has a duration of up to three years. If a Welfare Attorney or Guardian have been granted medical powers they may be able to consent to medical treatment as if they were the Adult him/herself. It should be noted that Section 47 applies to treatment for physical and mental disorders that do not fall under the scope of the Mental Health (Care & Treatment) (Scotland) Act 2003.

GP's can be fairly general with the treatment plan and may delegate parts of that treatment to other practitioners who have specialist expertise such as prescribed dental treatment or physiotherapy. In the case of operations which were not foreseen a new certificate will have to be issued if the Adult is to have surgery and anaesthesia. Surgeons and hospital medics may as a matter of routine do their own. Welfare Attorneys and Guardians must be

consulted by medical practitioners in the formulation of treatment plans. Welfare Attorneys and Guardians may have been granted powers to access medical information and data concerning the Adult and to consent to or decline some forms of treatment for example, more aggressive forms of treatment.

2.7 Participation in Research

There are strict conditions regarding an Adult taking part in research when they cannot give informed consent. This may be problematic for researchers as was discovered during the research into the effectiveness of the Adults with Incapacity (Scotland) Act 2000 in the report “Learning from Experience”.

2.8 The Office of the Public Guardian

Registration of Powers of Attorney and Guardianship.

All Guardianships and Powers of Attorney must be registered with the Office of the Public Guardian (OPG). A Power of Attorney does not become effective until it is registered with the Office of the Public Guardian (see previous section 2.1). They will provide help and guidance to all prospective applicants by telephone or via their website. The OPG has a specific remit to oversee the operation of Guardianships with powers over property and financial affairs and has a duty to investigate complaints into the misuse of powers in relation to these. The Public Guardian’s powers to make enquiries into misuse of financial powers have been extended by the Adult Support & Protection (Scotland) Act 2007.

[powers of attorney and their safeguards.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk/powers-of-attorney-and-their-safeguards.pdf)

2.9 The Mental Welfare Commission

The Mental Welfare Commission has a duty to oversee the operation of Welfare Guardianships and to investigate any complaints relating to these, or deficiencies in the care provided to the Adult.

They have a duty to visit those under Guardianship Orders and will require to be updated by those Social Work Officers who have responsibility for supervision of the Adult and the Guardian as to how those powers are being used.

They will also require to be notified by Social Work Officers if Guardianships have been revoked, if the Adult has been moved to another Local Authority area, and if there are any issues regarding the Guardian exercising their powers unsatisfactorily or inappropriately.

2.10 Limitation of Liability

The 2000 Act makes it a criminal offence to wilfully misuse the powers of a Guardian, a Continuing or Welfare Attorney and incorporates both acts of commission and omission. Social Work Officers/Staff therefore have to exercise judgement in this regard when supervising Guardianships and Guardians.

Fiduciary duty (duty of care) will not be breached if the person acted reasonably and in good faith or failed to act but the failure was reasonable and in good faith.

NB. Mental Health (Care & Treatment) (Scotland) Act, Section 315, makes it a criminal offence to ill-treat someone who suffers from a mental disorder.

2.11 The Role of the Mental Health Officer

Mental Health Officers are tasked with carrying out the duties of the Local Authority in terms of the Adults with Incapacity (Scotland) Act 2000, the Mental Health (Care & Treatment) (Scotland) Act 2003 and the Adult Support & Protection (Scotland) Act 2007. Their role is to advise on appropriateness of the use of the 2000, 2003 And 2007 Acts.

2.12 Referral to the Mental Health Officer Service

Mental Health Officers are available for general consultation through contacting the Duty MHO who will advise on the most appropriate course of action. There is a duty rota in operation at all times throughout the day and via Out of Hours.

(Appendix 1 – Highland Council Health & Social Care, MHO leaflet)

Mental Health Officers have a statutory duty to complete specific reports in respect of Welfare Guardianship applications. It is therefore essential that all requests for consultation and allocation of a Mental Health Officer are made timeously and in accordance with the 2000 Act and associated Codes of Practice.

If it is considered that action may involve the use of legislation under the Adults with Incapacity (Scotland) Act 2000 ***and there is no private individual in the process of making an application***, Health & Social Care staff should make a referral in writing outlining the situation in brief to the email addresses listed on the referral form, for the allocation of a Mental Health Officer. Once allocated, the designated Mental Health Officer will liaise with the Adult Social Care worker, Council Solicitor and any other relevant individual, and matters will then proceed to an Adults with Incapacity Case Conference.

(Appendix 2 – Highland MHO Service Referral Form)

2.13 Central Database

The Adults with Incapacity Central Database is maintained by the MHO Service Administrative Assistant. The Administrative Assistant is responsible for entering all data concerning persons subject to Orders onto the CareFirst system. **All** requests for Intervention Orders, Guardianship Orders and any other actions under Adults with Incapacity (Scotland) Act 2000 must be notified here regardless of whether the application is made by the Local Authority or not. By so doing Officers can be updated as to revocations, recall and when renewals are due.

In cases where there is no mental disorder the relevant Team Manager must consult with the Social Work Lead Officer who should notify the Principal Mental Health Officer.

Email address: HSCMHO.Managers@highland.gov.uk

3. Adults in the Community

3.1 Identifying Capacity

In the course of assessing a service user's needs Health & Social Care staff may become aware that an Adult may be incapable of making informed decisions in major areas of their lives. This opinion will be based on discussions with the Adult (insofar as they are able to participate) consultation with family/carers, relevant professionals and medical personnel, and consultation with line managers.

3.2 Pre-Existing Powers

Health & Social Care staff should attempt to establish at an early stage whether there already exists any Powers of Attorney or Guardianship Powers and if so, what powers are relevant to the Adult's situation. Checks can be made with the Office of the Public Guardian who maintain a public register of all powers of attorneys, guardians, and persons appointed under intervention orders. In Highland the MHO Service Administrative Assistant is the authorised link person with OPG.

3.3 Discussing Private Guardianship

Health & Social Care staff should also establish whether or not a private individual is in the process of making an application for Guardianship. The worker may give advice concerning the process of Private Guardianship but should refrain from advising this course of action unless there is a definite medical opinion as to incapacity and other legislative options have been ruled out by consultation with relevant other professionals. Consultation should include the Mental Health Officer Service and Legal Services.

3.4 GP involvement

Health & Social Care staff should also establish a preliminary opinion of the Adult's capacity to make decisions in the areas of concern from the Adult's GP and should advise the GP of possible actions under the legislation. The GP should also be asked to attend any pre guardianship case conference.

(Appendix 3 - Adults in the Community - Flowchart)

4. Adults Admitted to Hospital

- 4.1** If, following a crisis in the community, the service user is admitted to hospital, Health & Social Care staff must notify the ward staff and Consultant of the current situation with regards to any care planning under consideration in respect of Adults with Incapacity (Scotland) Act 2000. This should include the views of the Adult themselves, carers/family and any other interested parties.

Ward staff should contact the Lead Social Work Officer for the relevant area to appraise them of the situation and if the Adult's capacity requires assessment medical opinion should be sought to confirm incapacity.

- 4.2** The Mental Health Officer Service should be contacted for advice and guidance and this would serve as an opportunity to make preliminary arrangements for any forthcoming AWI Case Conference.
- 4.3** The outcome of the initial discussions may point to the need for formal measures under the 2000 Act and Guardianship being considered as necessary. A formal request must be made for allocation of a Mental Health Officer, and Highland Council Legal Services **must** be contacted and invited with the MHO to the AWI Case Conference.

(Appendix 4 – Adults in Hospital - Flowchart)

5. Provisions of the Act

5.1 Powers of Attorney

Continuing Power of Attorney concerns financial matters and heritable property, whereas Welfare Power of Attorney concerns matters of the Adult's personal welfare. Granters must have capacity to grant these and in cases of doubt, the Adult's solicitor should seek an assessment of the Adult's capacity to grant Power of Attorney, from a suitably qualified medical practitioner.

5.2 When Powers Can Be Used

Welfare Power of Attorney is only exercisable if the Adult (granter) loses capacity in relation to the powers granted.

5.3 Determination of Capacity

The law now provides that a Power of Attorney should include a statement by the granter (the Adult) how his/her capacity in relation to these decisions is to be determined. All Powers of Attorney must be registered with the Office of the Public Guardian. Local Authorities and the Mental Welfare Commission may receive a copy on request. Evidence of Power of Attorney should be provided by the Attorney upon request by the Local Authority.

5.4 Revocation of Power of Attorney

A granter may revoke a Power of Attorney in a written document which incorporates a certificate in a prescribed form by a solicitor or by another member of a prescribed class (usually doctors) stating that the Adult has been interviewed and understands the effect of such a revocation and that no undue influence has been brought to bear and the Adult has capacity.

6. The Local Authority as Guardian

If a family member or other interested parties do not intend to pursue an application themselves, then a Case Conference must be convened.

In exceptional circumstances the Local Authority may make an application for Guardianship in which the proposed Guardian is **not** the Local Authority but a private individual. These circumstances can arise when application by a private individual would result in undue delay and there is some unacceptable degree of risk to the Adult which would be incurred.

NB: The plan to move an adult from hospital to a care setting would not be sufficient reason for the Local Authority to initiate an application if there are family members or other parties intending to make an application. A case conference should be arranged if there are concerns about undue delay and all interested parties invited including a Mental Health Officer and Legal Services.

6.1 Case Conference

On the basis that the Health & Social Care worker, their line manager who in consultation with the Social Work Lead Officer for the area agree that an intervention may be required by the Local Authority, a Case Conference should be convened at the earliest opportunity. For patients in hospital NHS staff should consult with the Social Work Lead Officer as soon as it is apparent that an intervention under Adults with Incapacity (Scotland) Act 2000 is required.

The Health & Social Care Worker, or Team Manager then requests the allocation of a Mental Health Officer in writing to the MHO Service Team Managers, with a copy to the Principal Mental Health Officer and the MHO Service Administrative Assistant. The Mental Health Officer attending the initial Case Conference may on occasion be the duty Mental Health Officer. An assessment of need should be included with the initial request for Mental Health Officer attendance at the Case Conference.

6.2 Briefing/Background Report

Prior to the AWI Case Conference the responsible Health & Social Care worker **must** compile a brief background report to inform the Case Conference. This should include relevant background information, the current situation and reasons for believing why an action under Adults with Incapacity (Scotland) Act 2000 may be necessary and the proposed care plan.

It should highlight the current areas of concern along with any measures that have been tried and the reasons for their failure. This report should be completed and sent in advance of the AWI Case Conference to those attending.

6.3 Chair

The chairing of an AWI Case Conference is done by the relevant Team Manager/Team Leader/Area Social Work Lead Officer responsible for the area within which the Adult normally resides, or was resident in immediately prior to hospital admission.

If it is decided not to call an AWI Case Conference, then the reasons must be recorded in writing stating clearly any alternative considered and agreed. This decision must be signed by Team Manager/Social Work Lead Officer

(Appendix 10 – Aide Memoire for Chair)

6.4 Who Should Attend

The following staff should be invited to the AWI Case Conference:

- *Health & Social Care Worker/case holder*
- *Relevant Team Leader*
- *Mental Health Officer*
- *Solicitor from Local Authority Legal Services*
- *Medical/Nursing representatives*
- *Nearest Relatives*
- *Primary Carers*
- *Advocacy*
- *Any other relatives/professionals with an interest, eg private solicitor and any other relevant Adult Social Care staff*

NB: The Quorum for a decision making AWI Case Conference must include representatives of Highland Council Legal Services and the Mental Health Officer Service, to agree any substantive legal measures in respect of the Adult.

The Adult should be invited to the AWI Case Conference unless it would cause undue stress or significant risk. In practice most Adults who lack capacity would find the Case Conference a difficult experience. For the majority of Adults, their wishes and feelings about an Order can be ascertained in private. It is useful for the designated Mental Health Officer and Adult Social Care worker to have done so prior to the Case Conference.

6.5 Minutes

Minutes of the AWI Case Conference **must** be taken. It is the responsibility of the Chair to organise this.

The minute taker should record who is present and their details, including contact addresses/whereabouts and their involvement with the Adult. Details of dialogue and interactions between the parties particularly any issues and objections should also be recorded in the minute.

The Chair should summarise the following for the minute taker at the end of the meeting:

- *Confirmation that the Adult lacks capacity in respect of the proposed interventions*
- *Whether the application will proceed or whether an alternative course of action has been agreed*
- *Who will be the proposed Guardian, and if this is the Chief Social Work Officer, who will be the Responsible Officer for supervisory purposes and/or a proposed Intervention Order*
- *What powers are seen to be necessary in terms of the proposed Care Plan*
- *Is an Interim Order required (see Interim Orders Section 57(5) of the Act)*
- *Whether the Order is likely to be opposed by any of the parties with an interest*

Copies of the minutes should be sent to those attending the AWI Case Conference within 10 working days. This is the responsibility of the Chair Person and is required in order to inform Legal Services for their drafting of the Summary Application, and to inform the Mental Health Officer who is responsible for requesting and co-ordinating the two medical reports.

(Appendix 11 – AWI Case Conference Minute Template)

The decision of the AWI Case Conference must be communicated to the Adult. This is best undertaken by the Mental Health Officer as part of their preparatory work for their Mental Health Officer report, or in some cases this could be carried out by the Health & Social Care worker allocated to the case.

NB: If following this Case Conference the family state their intention of become Guardians, they will require to confirm the details of their solicitor in writing to the Chair of the AWI Case Conference within 2 weeks of the meeting. There will be an expectation that the responsible Team Manager ensures appropriate follow-up to avoid unnecessary delay with regards to the AWI application process.

(Appendix 5 - Standard Letter re delay)

6.6 Urgency

In exceptional circumstances the AWI Case Conference may be a process rather than an event. Such circumstances are likely to arise when there is a substantial risk to the Adult in the community and the granting of an Interim Order is sought without delay. There may also be occasions when concerns reported under Adult Support & Protection (Scotland) Act 2007 may result in consideration of the use of Mental Health (Care & Treatment) (Scotland) Act 2003 legislation until measures under Adults with Incapacity (Scotland) Act 2000 can be sought. ***Legal Services and the Mental Health Officer Service should be consulted as a matter of priority when such situations arise to avoid unnecessary delay in responding to matters of concern in respect of Adults with incapacity.***

6.7 Interaction with Adult Support & Protection Legislation

The decision to pursue an Interim Guardianship Order may arise from an Adult Support & Protection Case Conference in which case the relevant professionals and interested parties may have already convened at this overarching event. In this case a further Case Conference need not take place, although Mental Health Officers must consult with all the relevant parties and record their views and it is always preferable to have a brief meeting with a core group of Adult Social Care staff, Social Work Lead Officer, and Legal Services before making the application.

In cases of extreme urgency where there is substantial risk to the Adult's safety but which does encompass issues of neglect or ill treatment, an application may be made without an actual meeting taking place provided that all relevant parties' views are represented and the Team Manager and Social Work Lead Officer and Legal Services are in agreement to proceed.

It must be borne in mind that the use of Adults with Incapacity (Scotland) Act 2000 is not a quick process and is dependent on the legal process in accordance with prescribed timescales.

Psychiatric Consultants rarely attend AWI Case Conferences in person unless there are areas of difficulty or contentious issues and a psychiatric opinion is required to help clarify these. Their views are sought, and can be represented by the Mental Health Officer or by nursing staff or Specialist Psychiatric Registrars. They are likely to be required to prepare a report in accordance with the legislation.

6.8 The Application Process

Applications for Guardianship are completed by the Local Authority in which the Adult is habitually resident.

The application is made and presented to Court by Legal Services and must be accompanied by two medical reports, one of which must be by a Section 22 Approved Medical Practitioner i.e Consultant or Specialist Psychiatric Registrar where there is mental disorder. The second medical report is completed by the GP.

The Lead Officer is the Mental Health Officer where there is mental disorder and the application relates to Welfare. Where incapacity is due to physical inability to communicate the Health & Social Care/ Social Worker is Lead Officer and should complete the Chief Social Work Officer's report and forward this to the Principal Mental Health Officer for signing.

Where the application concerns only property or finance the Lead Officer is the Health & Social Care Social Worker or any other identified officer of Health & Social Care Integrated Services in Highland e.g Financial Assessment Officers may be well placed to do reports involving property and finance.

NB: The Local Authority may make applications and can act as Interveners but may not act as Financial Guardians and a suitable independent solicitor has to be found to act in this regard. Such issues should be raised and discussed at the pre guardianship Case Conference in order that there is clarity of role and responsibilities in respect of the making of such applications.

6.9 Mental Health Officer and Medical Reports

Following the AWI Case Conference the Lead Officer (Mental Health Officer or Health & Social Care Worker as detailed above) will consult the medical personnel regarding the medical reports.

Two medical reports are required, one to be by "an approved psychiatrist" ie Consultant Psychiatric Registrar and the other may be the Adult's GP. If an Adult has no GP then two psychiatrists may do so provided that they are not from the same directorate. Consultants are usually able to arrange the second report in such cases.

The Lead Officer should write to the Adult's GP to request the medical report. Letters (or emails) should detail in the request that the GP comment on the Adult's ability to make decisions with regard to the powers sought.

The GP's view will be known from previous contacts and their attendance at the pre guardianship Case Conference. The powers sought must be stated in the requesting letter/email to the GP.

The Mental Health Officer, or Health & Social Care Worker in the case of Intervention Orders, should also give GPs a date by which the report should be received by the Mental Health Officer or Adult Social Care Worker. This should be within 21 days, **not** the 30 day time frame.

The letter/email should also detail to whom the invoice for payment should be sent. NHS Highland are responsible for payment to GPs. Consultants complete their reports as part of their duties.

Consultants are well practised in completion of Adults with Incapacity (Scotland) Act 2000 reports but some GPs may be inexperienced in the completion of these. In the case of hospital patients, the Consultants will usually contact the GP to co-ordinate the medical reports.

Note: The Adults with Incapacity Act places **no** obligation on medical practitioners to produce these reports, or to do so within a particular time. It is therefore essential that the

Mental Health Officer communicates with the medical report writers at the earliest opportunity to establish the time frame within which their interviews for the purposes of the report will take place.

The Mental Health Officer must submit their own report to Legal Services accompanied by the medical reports within 21 days of the date of the first medical report, for the purpose of Guardianship. Legal Services must lodge the reports and Summary Application in Court within 30 days of the first report.

The time period commences on the day of the first interview. It is therefore advisable for the Mental Health Officer to delay conducting their interview until the first medical has already taken place as there can be unforeseen delays, depending on the time pressure on the medics.

It is the responsibility of the Mental Health Officer to collect the medical reports and submit them to Legal Services along with their own report.

6.10 Content of Reports

Reports are completed on the statutory forms.

[Adults with incapacity: forms and guidance - gov.scot \(www.gov.scot\)](http://www.gov.scot)

The Mental Health Officer (or Health & Social Care Worker) report must contain the following:

- The Author's opinion as to the general appropriateness of the Order sought;
- Whether any conflicts of interest have been identified;
- Evidence that the Author has applied the general principles of the Act to the application;
- Consideration of whether there were less restrictive alternatives that could have achieved the benefit sought, and
- Justification of the rejection of *the* less restrictive alternative courses of action;
- The views of the nearest Relative, Primary Carer and all parties with an interest in the affairs of the Adult;
- The views of any Guardian or Attorney appointed under the Act;
- If the Adult is also subject to compulsion under the Mental Health (Care & Treatment)(Scotland) Act 2003, and has nominated a Named Person, the views of the Named Person as defined by that Act must be included.

In a Local Authority application appointing the Chief Social Work Officer, the part of the report concerning suitability of the proposed Guardian is left blank.

6.11 Lodging the Application

The report is sent to Legal Services by email (electronic signature is acceptable), and a copy is filed by the MHO in the Adult's electronic MHO Service case file.

It is helpful for solicitors to include with the reports, a front page with contact details of all interested parties on whom papers will have to be served.

On receipt of the three reports Legal Services will draft the application. The solicitor will advise the Mental Health Officer of its completion prior to it being lodged.

Legal Services will lodge the application with the three reports and will liaise with the Sheriff Clerk in relation to dates for hearings. A Warrant of Intimation to interested parties will be issued by the Court with a date for a hearing.

6.12 The Court Process

If the application is for Guardianship and an Interim Order is sought, the hearing will usually take place within a few days of the application being lodged.

The Adults with Incapacity (Scotland) Act 2000, as amended by the Adult Support & Protection (Scotland) Act 2007, obliges the Sheriff to take the wishes and feelings of the Adult into consideration in his determination, and also those wishes and feelings as represented by Independent Advocacy.

6.13 Interim Orders

An Interim Order is used in cases where there is **urgency** to enable the Adult to be protected until a full Hearing can take place. It is valid for a maximum of six months although this can be extended.

The same reports are used for both Interim and full Hearings.

An Interim Guardian is a Guardian for the purposes of all relevant provisions of the Act and may exercise the powers granted by this accordingly. There are usually only limited powers granted at an Interim hearing.

There is no requirement to notify the Adult or other interested parties of a Hearing for an Interim Order. For the full Hearing any person with an interest in the Adult must be notified unless there is good reason for not doing so. This would normally include parents, siblings or children of the Adult and collection of such information as far as it can be ascertained when the reports are sent to Legal Services will save much delay in the Court process.

6.14 Attendance at Hearings

The Sheriff Clerk will arrange the date of the full Hearing within 28 days of the application being lodged. In cases of urgency and where an Interim Order is being considered, the Council Solicitor and Sheriff Clerk will negotiate a Hearing. The Local Authority (Council) Solicitor who has drafted the application usually attends the Hearing.

Legal Services will advise whether the Mental Health Officer or other professionals need to attend the Hearing. Such attendance is usually not necessary.

All the parties mentioned in the reports will be notified of the date of the Hearing. Legal Services will arrange for the appropriate paperwork to be intimated to the Adult and other parties ordered by the Sheriff. All parties must receive at least 21 days clear notice of the date of the Hearing, which makes timescales for intimation very tight.

The notice of intimation is worded so that the recipient may attend the Hearing if they wish to, but in general they need only do so if they were opposing or are not in agreement with a particular issue and wish to be heard.

Both the Adult and any interested party have the right to oppose the application and may engage legal representatives to do so, or they may attend court and speak directly to the Sheriff.

If, for any reason intimation fails, a further Hearing will require to be arranged before the application can be dealt with by the Sheriff.

Legal Services will represent the Local Authority in applications. If there is no opposition and the Sheriff is satisfied with the reports and the application, the application will usually be granted.

If the Sheriff is not satisfied he will arrange a Hearing for evidence to be led or will determine further procedure.

6.15 Safeguarders and Curators

Whether the application is opposed by any party or not, the Sheriff may appoint a Safeguarder who is an independent solicitor. The Safeguarder's role is to safeguard the Adult's interests in relation to the application in cases where the Adult does not have capacity to instruct a legal representative and to advise the Court of the Adult's views. The Mental Health Officer will generally comment in their report as to whether the Court might consider appointing a Safeguarder.

A Curator will establish the views of all parties and will make a recommendation to the Sheriff as to whether they consider the Order necessary. A Safeguarder may oppose the granting of the application on behalf of the Adult.

6.16 Approval and Notification

Where the Sheriff grants an Interim Order the Lead Officer is informed in writing by Legal Services (email suffices) and the Guardian or Intervener may then start to exercise their powers. Where the Sheriff grants a Welfare Guardianship order or an Intervention order the Guardian or Intervener may not exercise their Powers until a Certificate has been issued by the OPG.

The Sheriff Clerk notifies the Public Guardian who registers the application. The Public Guardian issues a certificate of Appointment to the Chief Social Work Officer of the Local Authority. On receipt of this the Chief Social Work Officer must immediately forward the Order to the Principal Mental Health Officer.

The Mental Health Officer Service Administrative Assistant will enter the Order on the CareFirst system and will send out a copy of the Order to the relevant Health & Social Care Worker and/or Team Leader.

7. Young People and the Act

Section 79(A) Adults with Incapacity (Scotland) Act 2000 provides for Guardianship Applications to be made for children who will reach their 16th birthday within three months. A Guardianship Order may be made in this time but will not become effective until the child becomes an Adult at the age of 16. This section was added in recognition of the delay in decision making Orders, in which vital decisions were not authorised until many weeks after the Adult's 16th birthday.

8. Private Applications

8.1 Referral for Mental Health Officer Report

Where a private individual is making an application pursuant to Adults with Incapacity (Scotland) Act 2000 they will have instructed their solicitor to advise the Chief Social Work Officer of the Local Authority (Highland Council) in writing, of the intention to make such an application. The Chief Social Work Officer must respond to this request within 7 days.

All notifications of pending applications which are received by the Chief Social Work Officer must be forwarded immediately to the Principal Mental Health Officer for allocation of a Mental Health Officer.

8.2 Time Frame for Mental Health Officer Report

The Mental Health Officer must submit their report to the solicitor within 21 days of receipt of the notification to the Chief Social Work Officer. Any information asked of Health & Social Care staff is essential and requests for such information should be considered a priority.

8.3 Medical Reports

Solicitors arrange for two medical reports to be completed by a Consultant and the Adult's GP within the above time framework and the application must be lodged in Court no later than day 30. The timeframe begins with the completion of the first medical certificate.

The Adult Support & Protection (Scotland) Act 2007 extended these time boundaries so that the Sheriff may continue to consider the application if satisfied that there has been no change which is relevant to the matters set out in the report. (AWI 2000, Section 57(3)(b))

8.4 The Powers Applied For

In order that Mental Health Officers and medics can comment on the appropriateness of the powers requested, a copy of the Summary Application should be included by the solicitor along with their notification to the Chief Social Work Officer. If not included, Mental Health Officers should request this from the solicitor as soon as possible as it is essential that there is clear information as to the powers requested in respect of the Adult's welfare.

8.5 Content of Reports

The Mental Health Officer will require to address the appropriateness of the Order and the Powers sought in their report. They will require to address the question of whether the powers are the least restrictive and alternatives considered. They will also have to consider the suitability of the proposed Guardian(s) to exercise the powers applied for. To this end an extensive interview will be necessary with the proposed Guardian(s) to determine their understanding and to advise of their duties and responsibilities under the 2000 Act.

Under S.57(3)(b) of the Act MHOs must prepare a report, in prescribed form, to be lodged in court, relating to the personal welfare of the Adult. The report will contain their opinion as to the general appropriateness of the order sought and the suitability of the individual nominated in the application to be appointed guardian, if not the CSWO of the Local Authority. The MHO must consider information from a variety of resources, this includes the Adult who is subject of the application, interested parties and other professionals involved with the Adult, including medical professionals who complete the reports of incapacity,

information provided in reports of incapacity is key information informing the MHO of diagnosis of a mental disorder, the nature of the disorder and how it affects the Adult and their decision making capacity.

8.6 Suitability of Guardians

The suitability interview carried out by the Mental Health Officer also serves an informative purpose and can address any queries and issues the prospective Guardian may have. Local Authorities have a duty to supervise all those who are appointed as Welfare Guardians and there may be some anxiety as to the format of such supervision. It is helpful for the Mental Health Officer to give prospective Guardians a copy of the relevant Code of Practice to keep as a reference document and to go over the role, functions, powers and requirements with them.

Under Integration of Health & Social Care, the Chief Social Work Officer has delegated functions under Section 10, AWI 2000 and from the 1st of April 2012, Health & Social Care staff, employed by NHS Highland, are responsible for the supervision of Guardians in Highland.

(Appendix 6 – Delegated Functions)

9. Disputes

9.1 Excessive Powers and Unsuitable Guardians

During the course of their interview with the proposed Guardian(s) and following consultation with relatives and professionals, the Mental Health Officer may be of the opinion that the proposed Guardian is not suitable in terms of some or all of the powers craved, or that the powers requested are excessive in some instances.

9.2 Informing the Applicant

Although the proposed Guardian has commissioned the report through their solicitor the opinions expressed by the Mental Health Officer within that report may be unfavourable.

If this is the case the Mental Health Officer must inform the prospective Guardian and their solicitor in writing, and give reasons for this opinion. The Mental Health Officer should also inform the Principal Mental Health Officer and Legal Services.

9.3 Accountability of Mental Health Officers

Mental Health Officers are in a semi-autonomous position and are accountable to the Law and to the Courts in terms of the content of their reports, and not to the applicant. In the event of a dispute over a proposed Guardian's suitability guidance should immediately be sought from Legal Services and the Mental Welfare Commission.

9.4 Action following a Negative Suitability Report

If a Guardianship Order is still deemed to be necessary and the proposed Guardian is unsuitable discussions should be held with Legal Services and the Principal Mental Health Officer to consider an application naming the Chief Social Work Officer as proposed Guardian if no other person is suitable and able to make the application.

10. Joint and Substitute Guardians

Private individuals may function as sole Guardians but if they are unavailable for short periods, e.g holidays, they may delegate their powers to others. Most of the powers involving the daily care of the Adult will in any case be ordinarily delegated to carers or care homes. However, in some cases the Guardian may be unavailable for lengthy periods or may be difficult to contact. In such cases a substitute Guardian may be named under the Guardianship Order. They would only assume the powers if instructed by the Guardian and relinquish them on their return.

In cases where a fail-safe arrangement is needed, e.g Guardian is elderly or may develop poor health or may prefer ongoing help with their duties, joint Guardianship where the Guardians have equal powers may be preferable.

If Guardians are jointly proposed or if there is to be a substitute, the Mental Health Officer report must include details of both parties suitability.

10.1 Reports/Forms

Mental Health Officer reports must be completed on Statutory Forms, AWI (2) for Guardianship Orders for Personal Welfare. All Adults with Incapacity (Scotland) Act 2000 statutory forms can be downloaded from the Scottish Government website.

[Adults with incapacity: forms and guidance - gov.scot \(www.gov.scot\)](http://www.gov.scot)

10.2 Payment

It is the Private Solicitor's responsibility to organise medical reports and to pay the medical practitioners who provide the medical recommendations.

10.3 Time Frame

The Mental Health Officer report (AWI (2)) must be sent within the 21 days to the solicitor concerned. Solicitors should not request Mental Health Officer reports unless the medical reports have been requested and dates for medical assessments are arranged/known/planned. All reports must be completed within a tight legal framework of 21 days starting with the first medical assessment.

10.4 Content of Suitability Reports

Factors which the Sheriff must take into account before appointing a Guardian are set out in Section 59 of the Adults with Incapacity (Scotland) Act 2000. These provide useful guidance as to what information should be contained in the report on the suitability of the person(s) (proposed Guardian) named in the application for a Guardianship Order. These factors are:

- *That the person is aware of the Adult's circumstances and condition and of the needs arising from such circumstances and condition;*
- *That the person is aware of the functions of a person appointed as Guardian/Intervener (including understanding of the general principles);*
- *Accessibility to the Adult and primary carer;*
- *The ability of the person to carry out the functions of Guardian/Intervener;*

- *Any likely conflict of interest with the Adult;*
- *Any undue concentration of power of the Adult which is likely to arise in the person appointed;*
- *Any adverse effects which the appointment of the person would have on the interests of the Adult;*
- *Any such other matters as appear to be appropriate.*

10.5 Submission of Reports

A letter to the solicitor should accompany the report requesting that the Mental Health Officer and Social Care staff (as appropriate) be informed of the date of the Court Hearing and the outcome of the Hearing by email. This will allow Social Care staff to take up their duties in respect of care measures and supervision.

11. Recording of Guardianships and Intervention Orders

When an Order is granted the Court will inform the Office of the Public Guardian who will, in turn inform the Chief Social Work Officer. On receipt of the Order this should immediately be dispatched by email to the Administrative Assistant of the Mental Health Officer Service who will copy the Order and enter details on the CareFirst client system. The existence of the Order and date will be recorded on the CareFirst database. The Administrative Assistant will email renewal dates to the relevant workers 3 months prior to the renewal date.

11.1 Delegation of Chief Social Work Officer's Duties

On receipt of the Order the Chief Social Work Officer will delegate the supervisory powers to NHS Highland Adult Social Care staff. Any private application for which there no designated Social Care Worker, must have a worker assigned immediately on receipt of the notification by Team Managers.

11.2 Supervision of Private Guardians

In general this will be the Social Care Worker who has had involvement with the Adult prior to the application. If CMHT Social Care Worker has had involvement during the application process, when the Order is granted the case may be transferred to the appropriate Team Manager as involvement will be long term.

11.3 Statutory Contact

It is necessary to meet with the Adult and the Guardian as soon as possible after the Order is granted. There is a statutory duty to meet with them no more than 3 months following the granting of the Order, and no less than 12 monthly thereafter. Care service reviews are an ideal forum since all those concerned in the care of the Adult are together and there is an expectation that the Guardians are invited and in attendance at care reviews.

The Mental Welfare Commission issued new guidance for supervision of guardians in June 2014. This guidance should be consulted and can be accessed via

<http://www.legislation.gov.uk/ssi/2014/123/made>

11.4 Recording Decisions

Guardians have a duty to record decisions made in the exercise of their powers.

11.5 Reviews and Supervisory Duties

When undertaking a review of the Guardianship Order, the Social Care worker should concentrate on the Order and the powers included, and adhere to the Principles underpinning the AWI 2000 Act. Are the grounds for Guardianship still met or should the Order be recalled? Is the use of the Guardian's powers satisfactory, are there issues that have arisen between the Guardian and the Adult, the carers or the Local Authority?

The Social Care Worker should complete the review documentation on CareFirst.

(Appendix 7: AWI Guardianship Review/Supervision Form)

11.6 Supervision and Interviewing

The Adult should be interviewed alone and their wishes ascertained as far as is possible and the Guardian should also be seen alone to give them the opportunity to express their opinion on the level of care the Adult is receiving.

11.7 Supervising Social Care Worker's Duties

The Social Care Worker must complete a written report of their supervision of Guardianship.

A Review and Supervision record is available on CareFirst and this should be completed for both Private and Local Authority Guardianship orders.

(Appendix 7 – AWI Guardianship Review/Supervision Form)

<http://www.legislation.gov.uk/ssi/2014/123/made>

The Social Care worker should complete the Supervision of Welfare Guardians form and should send a copy to the Mental Welfare Commission and a copy to the Guardian. This will assist the Mental Welfare Commission when they visit the Adult and the Guardian. There is a statutory duty for Social Care Workers to review and to visit all those under Guardianship. (This function is delegated to NHS Highland Adult Social Care staff.) Availability of completed supervision forms on the CareFirst database, will also assist the Mental Health Officer in the future if renewal or recall is required, or a decision to change/vary/cease the supervisory visits.

There is a procedure if it is considered that supervision is no longer necessary and all parties should agree and be informed

12. Recall of Guardian's Powers

12.1 Change in Circumstances

A Guardianship Order may be recalled if the grounds for appointment of a Guardian are no longer met or the interests of the Adult in property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted in some other way.

Either the Adult or any other person with an interest may make an application for the recall to the Sheriff. The Local Authority would be considered as a person with an interest in relation to such cases, whether the Chief Social Work Officer is Guardian or not. Applications for recall by the Local Authority will be made by Legal Services following consultation with the Guardian, allocated Social Care worker and a Mental Health Officer.

12.2 Recall by Local Authority

If the Chief Social Work Officer is the Guardian, the Local Authority may recall the powers of a Welfare Guardian without going to Court, if the same grounds (as above) are met.

The Local Authority can either do this at its own instance or on an application by the Adult or any person with an interest. In such cases, the Adult, nearest relative, primary carer and any other person with an interest must be given time to object (21 days) before the powers can be recalled.

12.3 Recall by Mental Welfare Commission

The Mental Welfare Commission may recall a Guardian's welfare powers having formed this opinion through their own supervisory work and contact with the Adult and Guardian.

12.4 Recall of Financial Powers

The Public Guardian may recall a Guardian's financial powers if there is evidence of misuse. Cases where there are such concern should be referred in writing to the Office of the Public Guardian. Concerns about misuse of financial powers **must** be brought to the attention of the responsible Team Manager and consideration should be given to holding a multi-disciplinary meeting under Adult Support & Protection (Scotland) Act 2007.

12.5 Necessity of Powers

In the course of their supervisory powers Social Care Workers may reach a conclusion that the welfare powers of the guardian are no longer necessary in which case the procedures for recall should be followed. This situation is most likely to arise in cases of head injury where capacity to make decisions has been recovered. Here the Adult themselves may request the application for recall to be made.

12.6 Misuse of Powers

Occasionally a Welfare Guardian may neglect their duties, be inaccessible or obstructive to the Adult's care provision. Other interested parties may object to the way in which the Guardian is using their powers. Social Care staff may form an opinion that the powers of the Welfare Guardian are not being used in a satisfactory way, i.e the best interests of the Adult are not being served, in which case they should refer to Legal Services.

Concerns about misuse of welfare powers **must** be brought to the attention of the responsible Team Manager and consideration should be given to holding a multi-disciplinary meeting/case conference under Adult Support & Protection (Scotland) Act 2007.

The Council's Legal Service should always be consulted where recall, removal or replacement is being considered.

12.7 Appeal Against Recall

The Chief Social Work Officer may decide to recall a Welfare Guardian's powers or to refer the matter to the Sheriff for a decision by completion of a statutory form. Whatever the decision, the Guardian has the right of appeal to the Sheriff whose decision on the matter is final.

If a Guardianship or the powers of a Welfare Guardian are recalled, the Local Authority must notify the Public Guardian and the Mental Welfare Commission by completing statutory form AWI (19) and record the reasons for doing so. If any of the interested parties object to the recall the matter must be referred to the Sheriff.

12.8 Parties with an Interest

In cases where the Chief Social Work Officer is appointed Guardian the Local Authority may wish to recall the Guardianship if the grounds for Guardianship are no longer fulfilled, **or** the interests of the Adult can be safeguarded some other means (AWI 2000 Section 73(a)). The Adult themselves can also make an application under this section for recall of Guardianship. In such cases the Local Authority must treat the Office of the Public Guardian and the Mental Welfare Commission as if they were interested parties. If there are objections the recall cannot proceed and must be heard by the Sheriff.

The Public Guardian must notify the Local Authority and the Mental Welfare Commission in writing if they have recalled the financial powers.

All changes to Welfare and Financial Guardianship will be registered with the Office of the Public Guardian.

Copies of recall forms received must be sent to Mental Health Officer Service Administrative Assistant where they will be copied/scanned and sent out to Social Care Workers, Guardians and relevant parties.

13. Supervision of Proxies

13.1 Supervision of Attorneys

In general, the Local Authority has no responsibility for the supervision of Welfare or Continuing Attorneys. However, in the course of their duties Social Care staff may become aware that there are concerns in relation to the Attorney's performance/conduct.

For example, an Attorney with welfare or financial powers may prove inaccessible, they may withhold resources from the Adult or they may even prove obstructive in the implementation of care and support services which are deemed necessary. Ultimately the Attorney is bound by the principles and the code of Practice and may be called to account for their actions. ***A Welfare or Continuing Attorney may not do anything which is at the expense of the Adult's financial or welfare needs.***

13.2 Financial Issue Concerns

If there is a concern about matters of property and finance the matter must be referred to the Office of the Public Guardian whose responsibility it is to investigate all complaints in relation to Continuing Attorneys and property and finance. Any interested party, including the Local Authority may make an application to the Sheriff that the Continuing Attorney must henceforth be supervised by the Public Guardian and may determine that all accounts must be submitted for scrutiny. In such cases the Continuing Attorney can continue to exercise their powers. The Sheriff may also revoke the powers completely.

13.3 Investigations of Attorneys

The Local Authority has a duty to receive and investigate all complaints in relation to Welfare Attorneys and the exercise of their powers. Complaints may come to Social Care staff via other relatives, carers, Care Homes or hospitals.

13.4 The Role of the Mental Welfare Commission

If there is mental disorder the Mental Welfare Commission requires to be informed by Social Care staff in writing of the concerns although it will only investigate a complaint if it is not satisfied with the outcome of the Local Authority investigation.

13.5 Supervision of Welfare Attorneys

Any interested party may challenge the actions of a Welfare Attorney by application to the Sheriff. The Sheriff may ask the Attorney for a report accounting for their actions. The Sheriff may make an Order requiring the Welfare Attorney to be supervised by the local Authority or may recall the Attorney's powers altogether, or he may order that the Welfare Attorney must report directly to the Sheriff.

13.6 Procedures for Welfare Concerns

In cases where there are concerns regarding the misuse of Attorney's powers, these should be referred to a Case Conference involving a Mental Health Officer and Legal Services to consider whether an application should be made with a view to Local Authority supervision. This would however, imply at least some measure of compliance from the Attorney and the Local Authority may consider that an application for Guardianship would be more appropriate. Much will depend on the circumstances and urgency of the Adult's situation.

13.7 Risk to Adult

If there is serious risk or neglect or actual harm to the Adult through the misuse of the Attorney's powers, a Case Conference should be convened in accordance with Adult Support & Protection procedures without delay. The Mental Health Officer and Legal Services should be consulted and consideration should be given to request their attendance at the Case Conference. It is a criminal offence to neglect or ill-treat a person for whom a Power of Attorney is held. It is a criminal offence to ill-treat an individual suffering from a mental disorder.

13.8 Accountability of Attorneys

When discussing the possibility of granting a Power of Attorney with service users and relatives, workers should remind Attorneys that they are accountable for their decisions if a complaint should arise in relation to their powers and the exercise of the powers. Attorneys have a duty to keep written records of the exercise of their powers.

13.9 Time Frame for Supervision of Attorneys

If the Sheriff makes an Order that the Local Authority must supervise an Attorney, the assigned Adult Social Care worker must visit at least once a month for the period specified by the Order. The worker must inspect the written records of the Attorney who are required by law to produce these (see also Code of Practice for Welfare Attorneys, for details of the type of incidents which must be recorded).

13.10 Misuse of Welfare Powers

If compliance with supervision requirements on the part of the Attorney is an issue, the Local Authority may make an application for Guardianship, the granting of which would end the Attorney's powers, and in the case of neglect or ill-treatment may take action under Adult Support & Protection (Scotland) Act 2007 or, Mental Health (Care & Treatment) (Scotland) Act 2003 measures.

13.11 Notification of Supervision or Termination

All Orders made by the Sheriff whereby an Attorney must be supervised by the Local Authority, or powers have been recalled, or the Attorney must report to the Sheriff, or a Guardianship has brought the powers of the Attorney to an end, must be notified to the Public Guardian where they are registered. The Public Guardian notifies the persons concerned and the CSWO of the Local Authority. This notification must be forwarded to the Administrative Assistant for the MHO Service where it will be entered on the CareFirst system and the case holder and Team Manager notified via email.

13.12 Resignation of Private Guardian

If a Guardian resigns there must be continuity of the Guardianship or a judicial determination that this is no longer required.

Unless a joint or substitute Guardian is named on the Order the Guardian must apply to the Sheriff for his own removal and replacement (Section 71(a)), or a judicial determination to end the Guardianship (Section 71(c)).

In the case of a joint (or substitute) Guardian who is willing and able to act, the Guardian must give notice in writing to the Mental Welfare Commission and the Office of the Public Guardian.

13.13 Resignation of a Welfare Power of Attorney

A registered Continuing or Welfare Attorney who wishes to resign must give notice in writing to the Adult (granter), and the Public Guardian. Such a resignation does not have effect until the expiry of a period of 28 days commencing with the date of receipt by the Public Guardian. When the Welfare Attorney's 28 day resignation period comes to an end, the Public Guardian must notify the Local Authority and the Mental Welfare Commission accordingly. ***(Section 23 Adults with Incapacity (Scotland) Act 2000)***

13.14 Death of a Private Guardian

Section 75(A) has been added to the Adults with Incapacity (Scotland) Act 2000. Upon death the representatives of a Guardian shall notify the Adult, the Office of the Public Guardian, the Local Authority and the Mental Welfare Commission in cases of mental disorder and personal welfare.

The death will be registered by the Office of the Public Guardian and a new certificate of appointment issued to any surviving joint Guardian, or to any substitute Guardian who is willing to act and who can give the necessary security.

14. The Supervising Officer/Delegated Officer

When the Chief Social Work Officer is appointed as Welfare Guardian, the day to day duties are delegated to NHS Highland Adult Social Care Workers. The Adult Social Care Worker will be the Supervising Officer of the Adult. It is the responsibility of the Team Manager to allocate the case to the Adult Social Care Worker and if unable to identify a worker the Team Manager will be the allocated Supervising Officer by default.

14.1 Notification of Supervising Officer

The Chief Social Work Officer will inform the Adult and, in cases of Mental Disorder, the Mental Welfare Commission, of the name of the Supervising Officer within 7 working days of the date on which the Order is granted.

(See Appendix 9 - Pro-forma letters)

Adults subject to a Welfare Guardianship Order must have a Supervising Officer at all times. Team Leaders must ensure this and must inform the Mental Welfare Commission of any change of Supervising Officer and also notify the MHO Service Administrative Assistant.

NB: The Local Authority have a duty to provide information to the Mental Welfare Commission on a 6 monthly basis, of all Local Authority Welfare Guardianship Orders and the Supervising Officer allocated to the Adult's case.

14.2 Notification of Change of Address

Once an Order is granted any change of the Adult's address must be notified to the Mental Welfare Commission by the Supervising Officer.

Once the Hearing has taken place and the Order has been granted, the Mental Health Officer's active role in the case will cease but can be reactivated if further action is required in terms of renewal, or if issues arise in supervision or implementation of the Order. Such requests should be directed to the Principal Mental Health Officer without delay.

14.3 Supervising Officer's Duties

All Guardians and Adults subject to Welfare Guardianship must be visited by the Supervising Officer in the first 3 months of the Order and thereafter at least once within 12 months of the Order being granted.

In June 2014 the Mental Welfare Commission issued new guidance on supervision of guardianship and guardians

www.legislation.gov.uk/ssi/2014/123/made

NB: The Local Authority has a legal duty to supervise all guardians and Adults subject to Welfare Guardianship.

Since many Guardianship Orders have no limit of time Supervising Officers must address the question when reviewing whether the Order is still required or whether a less restrictive measure is more appropriate. For example where an Adult has been placed in a care home under a Guardianship Order and has settled well into the establishment, can their needs now be met under less restrictive measures?

If it appears to the Supervising Officer that this may be the case they must consult with their line manager and a Mental Health Officer with a view to determining whether the

Guardianship Order ought to be recalled as Local Authorities have a duty to keep the need for the Order under constant review.

The Responsible Officer should complete the review documentation on CareFirst.

(Appendix 7 – AWI Guardianship Review/Supervision Form)

15. Renewal of Guardianship

15.1 Timing of Renewals

The Local Authority has a duty to apply for renewal of Guardianship if nobody else is doing so and if renewal is necessary (**NB:** This also applies in cases where the original application was not made by the Local Authority).

An application can be made any time prior to the expiry of the Order. Providing that the papers are lodged at Court before expiry, the previous Order will remain in force until the application is determined. If the Order has expired a new application must be made.

Renewal dates will be flagged up to the Social Work Team Manager and Social Worker (Responsible Officers) by the MHO Service Administrative Assistant **three** months in advance of expiry to give time to all parties to renew the application for the Order. At this time the Responsible Officer who is supervising the Private Welfare Guardian should discuss with them whether they intend to make an application for renewal via their solicitor as previously.

The professionals and any Guardians involved should consider (a) is renewal necessary and (b) are the same powers required. A formal Case Conference is not necessary but the renewal should be discussed with all the relevant parties (including Legal Services and Mental Health Officer) and a minute taken to confirm the decisions taken.

15.2 Required Reports

Where the Local Authority is the applicant, the Mental Health Officer must inform Legal Services that renewal is required and submit to Legal Services the appropriate reports **at least** 10 days before the date of the Expiry of the Order.

Applications for renewal are similar to initial applications.

A report is written by a Mental Health Officer, supported by one medical report written by a medical practitioner (Section 22 qualified). If the Adult has communication difficulties, a Chief Social Work Officer Report is required (this is delegated to an NHS Highland Adult Social Care professional).

The Chief Social Work Officer's Report is completed by the Supervising Officer on the appropriate form. The report gives an opinion as to the appropriateness of continuing the Guardianship, based on an interview and assessment of the Adult not more than 30 days prior to lodgement, and the suitability of the applicant to continue to be the Adult's Guardian (Private Applications only).

In cases of renewal of Financial Guardianship a report will be required from the Public Guardian as to the conduct of the applicant as the Adult's Guardian and their suitability to continue to be appointed.

16. Transfer of Individuals under Local Authority Guardianship

Where the Chief Social Work Officer is the Guardian and the Adult changes their habitual residence to another Local Authority, the Guardian must advise the Chief Social Work Officer of the receiving Local Authority, who on receipt of this notification becomes the Guardian.

The Chief Social Work Officer of the receiving Local Authority must notify the Public Guardian and, where appropriate, the Mental Welfare Commission within 7 days of receipt of the notification. The Chief Social Work Officer must also notify the Adult of the change in Responsible Officer and give details in writing under Section 64(9) of the Adults with Incapacity (Scotland) Act 2000.

(Appendix 8 - Proforma letters)

17. Non-Compliance with the Decisions of the Welfare Guardian

This situation is most likely to be encountered where a Welfare Guardian has been appointed and has powers to arrange care and support services in the Adult's own home. This is often the last attempt to avoid admission to a Care Home in the case of Adults who lack capacity and who are reluctant to receive such services deemed necessary to secure their welfare.

The Welfare Guardian may or may not have the power to determine where the Adult will reside but when there are likely to be compliance issues in the community this power should be considered as a fail-safe option.

Much of the success of an Adult remaining at home will depend on the skill of the carers in developing a therapeutic relationship with the Adult but the Responsible Officer or Guardian should make it clear to the Adult that the care plan is to be complied with. Mental Health Officer can also be called on to assist in conveying such advice if appropriate.

It is sometimes the case however that the Adult cannot comply with the decisions of the Guardian and a care plan breaks down. The Guardian may, in this case, exercise the power of residence and may be assisted in this by the Mental Health Officer. A process of persuasion must then take place as the Act is clear that an enforced removal of the Adult to a Care Home is the last resort.

If this fails there is no "quick fix" under the Adults with Incapacity (Scotland) Act 2000. The Act requires to comply with the Human Rights Act as regards to deprivation of liberty.

17.1 Situations of Risk and Urgency

In cases where the Adult is at serious risk if left in their own home other measures under Adult Support & Protection (Scotland) Act 2007 or the Mental Health (Care & Treatment) (Scotland) Act 2003 should be considered. Such cases should be discussed with Legal Services and Mental Health Officer Service as a matter of priority.

17.2 Section 70 Orders

To remove an Adult from their own home to a Care Home an application must be made under Section 70 as follows:

(a) an Order ordaining the Adult/person to implement the decision of the Guardian; or

(b) a Warrant authorising a Constable to enter the Adult's premises and apprehend the Adult and remove him to the place specified by the Guardian.

Applications for such Orders or Warrants will, following consultation with the Guardian, be made by Legal Services.

Under the Adults with Incapacity (Scotland) Act 2000 the Sheriff has to allow objections to be heard, but the Sheriff has power to dis-apply or modify the application insofar as it requires objections to be heard. In cases of extreme risk or urgency these could be dispensed with.

18. Medical Treatment of Adults Who Lack Capacity

18.1 Urgent Treatment

A medical practitioner may treat a patient when no consent has been given under “Common Law” and only in the circumstances where urgent treatment is necessary for the preservation of the Adult’s life or for the prevention of serious deterioration in his/her medical condition.

18.2 Section 47 Certificate

When an Adult cannot give informed consent to medical treatment there **must** be legal authority to give that treatment. Relatives can sometimes mistakenly believe that they can consent to treatment on their relative’s behalf, this is not the case.

Relatives or interested parties must be authorised by appointeeship under either a Power of Attorney, Intervention Order or Guardianship, which must give a power over medical treatment.

Part 5 of the Act gives a general authority to Medical Practitioners to treat Adults who are incapable of consenting to the treatment in question. Medical Practitioners will be responsible for determining incapacity and for the issuing of the medical certificate confirming incapacity.

The Medical Practitioner’s decision is always subject to a right of appeal to the Sheriff. Appeal can be instigated by the Adult or anyone who can claim an Interest in the adult’s welfare or medical treatment. Common Law gives authority to give life-saving treatment to patients who cannot consent. The Act makes no change to this position.

The Act is concerned only with non-emergency treatment and defines medical treatment as ‘any procedure or treatment designed to safeguard or promote physical or mental health’.

18.3 Who has Authority to Treat?

The Medical Practitioner primarily responsible for the treatment and any other person authorised by the Medical Practitioner has authority to treat.

Before the Medical Practitioner’s authority to treat a certificate must be completed to the effect that the patient is incapable of giving consent to the treatment in question. A medical certificate can be valid for up to three years. It should be noted that more than one certificate could be in place at any one time.

The Medical Practitioner’s general authority to treat an adult will not apply where a ‘*proxy*’ has been given authority to consent to treatment on behalf of the Adult that is a Welfare Attorney, Welfare Guardian or someone authorised under an Intervention order.

Where a proxy has been appointed with authority to consent to treatment the Medical Practitioner is obliged to seek that person’s consent as far as is reasonable and practicable before giving the treatment.

The medical certificate issued by the Medical Practitioner primarily responsible for consent of a proxy will take the place of the consent of the Adult.

Under Section 47 of the Adults with Incapacity (Scotland) Act 2000, a medical practitioner primarily responsible for the medical treatment of the Adult (the GP in the community or a hospital doctor for inpatients) must issue a Section 47 certificate stating that they are of the opinion that the Adult is incapable in relation to decisions about medical treatment.

The certificate must be accompanied by a treatment plan which should be sufficiently detailed to provide for all day to day medical treatment that the Adult may need.

All persons authorised to treat under Section 47 certificates and all appointees under the Act are bound by the principles of the Act.

Treatments for mental disorder which fall within the scope of the Mental Health (Care & Treatment) (Scotland) Act 2003 are specifically excluded from a Section 47 certificate. Surgeons and anaesthetists will usually prefer to issue their own certificate for surgical procedures.

The Section 47 authority to treat may be delegated to other practitioners such as dentists, physiotherapists, speech therapists who must seek the Responsible Medical Officer's approval for any actions.

In practice, many Adults suffering from dementia are routinely treated in residential establishments without the lawful authorisation of a certificate. It is the province of GPs whether or not they issue such certificates but Health & Social Care staff should be mindful of the legal necessity to do so in their dealings with Care Homes/Residential Establishments.

A Section 47 certificate is valid for up to three years depending on the condition and circumstances of the Adult.

It does **not** authorise the use of any kind of force or coercion in the giving of medical treatment unless there are exceptional circumstances.

It does not authorise the admission of the Adult to hospital for treatment of mental disorder **against the adult's will**. The Mental Health (Care & Treatment) (Scotland) Act 2003 must be used in this instance. However, in situations where an Adult lacks capacity to give informed consent to such hospital admission, a Welfare Proxy may place in hospital (informal admission) a patient who gives no indication of disagreement or resistance.

Where there is a Proxy with relevant powers, the authority under Section 47 only applies if the medical practitioner is unaware of the appointment of a Proxy being authorised to consent to medical treatment, or the medical practitioner has failed to obtain the consent of the guardian, welfare attorney or person authorised under the intervention order because it was unreasonable and impracticable to do so.

Where the Chief Social Work Officer is Guardian a Section 47 certificate will be required for any decisions about medical treatment.

An Intervention Order may authorise one single health care intervention.

Medical powers may encompass decisions to refrain from acting as well as to act for example deciding whether or not to resuscitate.

Welfare Guardians and Attorneys exercising a power over medical treatment are bound by the principals to take account of the Adult's past wishes, eg an Adult who is a lifelong

Christian Scientist would not wish to have medical treatment and a Welfare Attorney would be bound by this should the need arise. In all that they do Welfare Proxies are accountable to the law and may have to account for their decisions in court.

For further guidance please see MWC practice guidance reports section:

www.mwcscot.org.uk

www.mwcscot.org.uk/publications

18.5 Disagreement with a Welfare Proxy's Use of Medical Powers

Where there is disagreement between the Responsible Medical Practitioner and the Proxy or any other party with an interest, appeals can be made to the Sheriff by the doctor under Section 52, or any interested party (can be the Local Authority) under Section 3(3) against the decision of the Welfare Proxy. If there is still no agreement it may be further appealed to the Court of Session as to whether treatment should or should not be given. A Section 47 certificate may *not* be issued until the appeal is heard but treatment can be carried out under Common Law where the delay would endanger an adult's health (the principle of necessity).

Where an application for an Intervention or Guardianship Order has been made but not yet determined, or an appeal is in process and a doctor is giving treatment under the Common Law's principle of necessity, they are bound to comply with the Section 1, principles of the Adults with incapacity (Scotland) Act 2000.

18.6 Revocation of Section 47 Certificate

A doctor is under obligation to revoke a Section 47 certificate where the Adult's condition has changed and it is no longer warranted.

19. Moving Adults Who Lack Capacity to Care Homes

19.1 Section 13ZA

Section 64 of the Adult Support & Protection (Scotland) Act 2007 amends Section 13 of the Social Work (Scotland) Act 1968 by the insertion of Section 13ZA. This is a new power to help Adults who lack capacity to benefit from social care services including the provision of residential care.

The Adult must be incapable of making decisions in relation to where they live and a medical opinion will be required to determine this (family members may believe that they have the right to determine whether or not an Adult lacks capacity but this resides **only** with a medical practitioner).

A multi-disciplinary meeting, case conference, case review meeting or ward meeting **must** take place involving all relevant professionals and parties with an interest.

NB: Any decision considering the use of 13ZA requires the involvement of Legal Services and MHO Service representatives and must be confirmed in writing (email will suffice). The outcome of the decision must be confirmed in writing and communicated to the Welfare Guardian and the Adult and copied to the MHO Service Administrator.

The principles of the Adults with Incapacity (Scotland) Act 2000 must be considered.

Article 5 of the European Convention on Human Rights (ECHR) must be considered (Deprivation of Liberty)

A Mental Health Officer must be consulted with a view to addressing the question of possible Deprivation of Liberty.

All decisions relating to the use of the power conferred by Section 13ZA **must** be documented and records kept.

[Social Work \(Scotland\) Act 1968 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1968/11/section/13ZA)

(Appendix 9 - Highland Health & Social Care Procedures for 13ZA)

19.2 When Section 13ZA Cannot be Used

This power cannot be used:

- Where the Adult has expressed a view or is, by their behaviour, opposing the move
- Where there is disagreement among family members and professionals about the proposed care plan or choice of care facility
- Where there is no benefit to the Adult
- Where a Proxy (Welfare Guardian or Welfare Attorney) has been appointed
- Where an application for Guardianship or Intervention Order has commenced but not yet determined
- Where a move to the proposed care setting would constitute a Deprivation of Liberty under Article 5 of the European Convention on Human Rights.

If any of the above apply the power cannot be used Guardianship must be used to effect a move.

Decisions about the use of the power must be documented and address the following issues:

- The service the Adult needs
- Can the Adult make a decision about those services? (This must be based on medical opinion)
- What are the views of the Adult, relatives, the primary carer and relevant professionals
- What action would be of most benefit to the Adult and the least restrictive to their freedom
- Would the proposed care setting constitute a Deprivation of Liberty?
- Is an Order under the legislation necessary?

19.3 Deprivation of Liberty – Factors to be Taken into Account

In considering Deprivation of Liberty, the following factors need to be taken into account:

The Person's Wishes

What is the scope for making choices? How well do these choices reflect what is known about the Adult's past wishes and way of life?

Can the Adult **Access Resources** to support their choices and interests?

Any Limitation on Contact with the outside world, or with family or friends or the local community. A person who has been effectively imprisoned within their own home because of their condition may well have a greater scope for contacts in a care home setting

Is the Facility locked? Is this for safety reasons? People with dementia may require the protective measure of a locked door.

Internal Environment – can the Adult move about the communal areas freely?

External Environment and Access - A person accustomed to roaming freely outdoors throughout their life time will require access to a safe outside area.

Use of Restraint. Is restraint used or needed to administer treatment or care? An Adult with dementia may be resistant when being attended to and gentle restraint may be required to keep them clean and comfortable.

Skills and Abilities of Staff. Can they communicate with the Adult? An Adult with dementia may have lost the power of speech in part and specialist care may be required. A neurological disease such as Huntingdon's Disease may require that staff are skilled in coping with challenging behaviours.

In determining whether a move to a Care Home would constitute a Deprivation of Liberty, consideration must be given as to whether there will be greater freedom of choice and less restriction than the Adult is used to.

If, in considering any or all of the above factors, there is any sense of imprisonment for the Adult in the intended move, the 13ZA power **must not** be used.

19.4 Invoking Section 13ZA

The power is the Local Authority's alone and whilst it must take account of the opinions of other professionals or relatives, pressure from other disciplines should not be a factor in decisions as to whether to use this power.

20. Adults at Risk Who Lack Capacity

The Adult Support & Protection (Scotland) Act 2007 defines an Adult at risk as someone who:

- Is unable to safeguard their own well-being, property, rights or other interest;
- Is at risk of harm; and
- because they are affected by disability, mental disorder, illness or physical or mental infirmity are more vulnerable to being harmed than adults who are not so affected.

Section 6 of the Act places Council's under a duty to consider the importance of providing Independent Advocacy Services to the Adult where it considers there is a need to intervene.

Following investigation, the Adult should be referred at the earliest opportunity by the investigating officer to Independent Advocacy, unless they have refused this outright.

20.1 Investigations

The Adult Support & Protection (Scotland) Act 2007 gives Local Authorities the power to investigate any situation where a vulnerable Adult might be at risk. It gives power to gain access to the Adult's home, to interview the Adult and arrange for medical examination. An Adult at risk can be removed to a place of safety or a Court Order sought to remove the alleged perpetrator.

Whose Duty to Investigate?

In cases of incapacity the Mental Welfare Commission have a duty to investigate where there is risk to the personal welfare of the Adult. They will invariably refer such concerns to the Local Authority and generally only investigate if they are unsatisfied with the Local Authority's investigation.

Concerns involving property and finance are investigated by the Office of the Public Guardian. The Mental Welfare Commission must be given reports of all Local Authority investigations.

The overarching procedures in the case of Adults at risk are those processes relating to Adult Support and Protection and are dealt with in the operational instructions relating to this.

<http://www.nhshighland.scot.nhs.uk/Services/ASC/AdultSupport/Pages/welcome.aspx>

20.2 Investigations – Which Act to Use?

The Adults with Incapacity (Scotland) Act 2000(AWI), The Adult Support & Protection (Scotland) Act 2007(ASP) and the Mental Health (Care & Treatment) (Scotland) Act 2003(MHCTA) all give Local Authorities duties to investigate wherever an Adult with a mental disorder may be at risk. The Act of most relevance will depend on individual circumstances.

At the initial investigation stage much will depend on what is already known about the mental functioning of the Adult and whether or not there is mental illness, if so use the Mental Health (Care & Treatment) (Scotland) Act 2003 may be required. If there is incapacity, then the Adults with Incapacity (Scotland) Act 2000 is likely to be the appropriate legislative framework. If the Adult is fully capable, but vulnerable because of disability or infirmity, the Adult Support & Protection (Scotland) Act 2007 will be of paramount importance.

20.3 Investigating Officers

All three Acts authorise enquiries into the circumstances of an Adult at risk. The Adult Support & Protection (Scotland) Act 2007 authorises Council Officers to undertake such investigations. Under Integration of Health & Social Care in Highland (see [Appendix *...](#)) arrangements are in place where the Local Authority has delegated duties to allow NHS Highland Adult Social Care staff to act as Council Officers and undertake investigations under ASP 2007. A Mental Health Officer is authorised under all legislation to visit the Adult, demand access and to interview the Adult at risk.

Whilst they are not Lead Officers in investigations under the Adult Support & Protection (Scotland) Act 2007, a Mental Health Officer **should** be consulted at the initial stages of investigation where the Adult is known to suffer or is likely to suffer from a mental disorder or incapacity, in case action under other legislation is more appropriate.

Adult Social Care Workers/Council Officers will have to carry out the assessment and care management processes following any investigation. Team Managers may wish to consider urgent discussion with the Principal Mental Health Officer with a view to a joint visit with a Mental Health Officer in certain cases. NHS Highland Team Managers should consult with the area Social Work Lead Officers when ASP 2007 investigations are being considered.

20.4 Adult Support & Protection and the Mental Health (Care & Treatment) (Scotland) Act 2003

Principles of the Adult Support & Protection (Scotland) Act 2007

Those officers undertaking interventions under the ASP 2007 are bound by the principles which are an amalgamation of those contained in the AWI 2000 and MHCT 2003 Acts.

Interventions under Adult Support & Protection (Scotland) Act 2007 must:

- Be of benefit to the Adult;
- Take account of the range of options available;
- Take account of the Adult's wishes (past and present);
- Take account of the views of any person with an interest in the Adult's welfare or property;
- Provide information to allow the Adult to participate in the decision making process;
- Be non- discriminatory;
- Take account of the Adult's abilities, background, and characteristics;

20.5 Access to Adults at Risk – Refusal of Access

Where there is known to be, or it is likely that there is mental disorder and difficulty with access is anticipated, a warrant for entry and/or removal or examination of the Adult can be sought. Council Officers are authorised to apply for warrants under the Adult Support & Protection (Scotland) Act 2007 which are compiled by Legal Services. Mental Health Officers are empowered under both Acts to apply for warrants. Applications for warrants are made to the Sheriff, or a Justice of the Peace in cases of urgency.

20.6 Obstruction

It is an offence punishable by fine and/or up to three months imprisonment to prevent or obstruct a Council Officer or any other person who is authorised to act by virtue of a Protection Order or a warrant for entry under any legislation.

Non-compliance by the Adult at risk themselves does not constitute an offence.

20.7 Warrants under the Mental Health (Care & Treatment) (Scotland) Act 2003

If access to the Adult is refused, either by the Adult themselves or by the carers and there is known to be mental disorder which might warrant urgent removal to hospital, the Mental Health officer must apply to the Sheriff or a Justice of the Peace for a warrant for entry or possible removal under the Mental Health (Care & Treatment) (Scotland) Act 2003. The Mental Health Officer can also simultaneously obtain a warrant allowing medical examination on the spot or obtain access to medical records. Such warrants authorise the Mental Health Officer and any Constable to enter lock fast premises and to interview the Adult.

The Mental Health (Care & Treatment) (Scotland) Act 2003 also gives Mental Health Officers authority to request an Assessment or Removal Order to remove the person to a place of safety for medical examination and assessment. Such a place of safety can be a hospital or a care home. In practice, if a Mental Health Officer enters accompanied by a medical practitioner and there are grounds for detention in hospital this would take precedence over a Removal Order as a Removal Order does not authorise medical treatment.

20.8 Grounds

If it is known that the Adult has a mental illness, personality disorder or learning disability invoking the investigatory powers of the Local Authority under the Mental Health Act might be:

- Ill treatment, neglect or inadequate care, either currently, or in the past – That the Adult appear to be living alone or without care and are unable to look after themselves or their property or finances.
- There is a risk to other people because of the Adult's mental disorder (the Adult as perpetrator)
- Loss or damage to an Adult's property because of mental disorder – Where someone at risk will not grant entry, the Mental Health Officer should seek a warrant to make enquiries at the Adult's home before a Removal Order is applied, as evidence is required in order for the Sheriff or Justice of the Peace to grant such a warrant.

Applications for warrants are made by the Mental Health Officer on the statutory forms available on the Scottish Government website. Legal Services can provide assistance in the drafting of warrants.

[Mental Health law: forms - gov.scot \(www.gov.scot\)](http://www.gov.scot)

In cases of urgency, the Sheriff or Justice of the Peace does **not** have to hear from all the relevant parties.

The decision whether or not to grant a warrant or a Removal Order is the Sheriff's, and his decision is final. There is no right of appeal. Justice of the Peace should only be approached

in cases of urgent necessity when there is no Sheriff available. However the Adult or any person with an interest may apply to the Sheriff to have the Order set aside or to have the person removed to another place.

Following the Hearing, whether or not the warrant or Removal Order is granted, the Mental Health Officer **must** notify the Mental Welfare Commission of the outcome.

Mental Health Officers and Health & Social Care Workers taking part in investigations must bear the principles of the Mental Health (Care & Treatment) (Scotland) Act 2003 and the Adults with Incapacity (Scotland) Act 2000 in mind, namely: least restriction, involvement of the Adult and carers, and the Adult's wishes and feelings.

Note: Workers should also bear in mind that as such investigations will be based on authority and not necessarily on consensus, agreement by all parties is unlikely in cases of abuse and neglect

20.9 Warrants Under Section 37 Adult Support & Protection (Scotland) Act 2007

Warrants for entry authorise a Health & Social Care Worker/Council Officer to visit any specified place with a Constable and, if necessary, the Constable may use reasonable force in order to fulfil the objectives of the visit. A Section 37 warrant is valid for 72 hours.

The Grounds for a Section 37 warrant are:

(a) That the Officer has been or expects to be refused entry (evidence will be required to confirm this)

(b) Any attempt to visit without a warrant would defeat the object

Team Managers should anticipate in discussion with the Investigating Officer and Social Work Lead Officer whether or not a warrant may be required. In Section 38 of the Adult Support & Protection (Scotland) Act 2007 a warrant for entry may be approved without a previous attempt at entry if, any attempt by a Health & Social Care Worker/Council Officer to visit the place without such a warrant would defeat the object of that visit. Managers will have to weigh carefully the evidence in determining whether an attempt to visit the Adult without a warrant would provide forewarning to perpetrators and disguise an abusive situation.

Team Managers must advise Police Scotland as soon as practicable that a warrant for entry is in process and, if granted, a Constable will be required to attend. Arrangements can then be made for co-ordinating the visit according to availability of a Police Officer and any Medical Practitioner.

Applications for warrants under the Adult Support & Protection (Scotland) Act 2007 are drawn up by Legal Services who should be advised as soon as possible that a warrant will be required and will endeavour to find a Justice of the Peace before whom the application can be made.

The Investigating Officer would then take the application to Court or the Justice of the Peace and speak to it under oath in chambers. Once granted, it is then an offence to refuse to allow the visit to proceed. The Sheriff can attach a power of arrest to the warrant.

Warrants for entry can stand alone in a Section 37 enquiry to enable interview and assessment of the Adult, or can be used in combination with any of the 2007 Act's protection Orders. An Assessment Order **must** also have a warrant for entry granted.

20.10 Adults Who Lack Capacity and Investigations Under Adult Support & Protection Procedures

It is a criminal offence for any Welfare Attorney or Guardian to ill-treat or wilfully neglect the Adult, and the Police and Legal Services **must** be informed by Team Managers or Social Work Lead Officers if this is suspected.

The Adults with Incapacity legislation does not confer powers on Local Authorities to deal with urgent cases of Adult Protection. An Interim Guardianship would be the swiftest measure under the AWI 2000 Act but, given the complexities of the procedures, the time taken to complete applications by Mental Health Officers and the need for intimation to all parties, this measure is not recommended in cases of urgency and the use of Adult Support & Protection (Scotland) Act 2007 measures or Mental Health (Care & Treatment) (Scotland) Act 2003 may be more appropriate.

20.11 Investigations under Adults with Incapacity (Scotland) Act 2000

Under Section 10(1) of the Adults with Incapacity (Scotland) Act 2000 the Local; Authority has a duty to carry out and report on investigations where the welfare of an Adult appears to be at risk and the Adult may be incapable in respect of decisions regarding their personal welfare.

The Local Authority also have a duty to investigate complaints in relation to the exercise of functions of Welfare Attorneys, Guardians or Interveners and this is dealt with under Private Guardianship processes. **(See Section 8 of this Procedure)**

This section will deal solely with possible actions under Adults with Incapacity legislation where there is risk to the welfare of the Adult.

As with Adult Support & Protection procedures, all first line contacts have guidance as to who should be informed should any concerns arise about an Adult's welfare. The Mental Welfare Commission and the Office of the Public Guardian **must** be contacted and informed that an investigation will take place.

Both these bodies are under an obligation to divulge any information they hold in respect of the Adult who is subject to the investigation.

20.12 Investigations under Adult Support & Protection (Scotland) Act 2007

In recognition that many elderly people who are at risk of ill treatment are fully capable and physically frail and are not mentally disordered, the investigatory powers of Local Authorities have been extended. In cases of Adult Protection "any officer of the Council" may visit the Adult and interview them in private. Council Officers/Health & Social Care Workers may now seek a warrant for entry and examination if this is necessary.

Investigating Officers should ascertain prior to visiting whether the Adult is subject to any existing interventions under the Adults with Incapacity (Scotland) Act 2000 and whether any Proxies have been appointed.

They should ascertain from any medical practitioner what is known about the Adult's capacity. They should ascertain who are the significant persons in the Adult's life.

A Council Officer/Health & Social Care Worker, and any person accompanying the Officer, may interview, in private, any Adult found in a place being visited under a Section 37 investigation under the 2007 Act. If a Doctor accompanies the Officer they may examine the

Adult. Any person holding health, financial or other records may be required to give copies to the Council Officer, either at the time of the investigation, or later.

The Adult must be informed of their right to refuse to answer questions and it is their right to refuse to be examined.

The Council Officer must state the object of the visit and must produce evidence of their authorisation to visit the place.

During their enquiries the Investigating Officer should ascertain who, if anyone, is making decisions for the Adult and in what capacity? How does the Adult's lack of capacity impact on his/her life and how does it place him/her at risk? Is the Adult a risk to themselves, to others or are they at risk of exploitation from others by virtue of their lack of capacity?

If Proxies have been appointed are they discharging their functions satisfactorily? If there is doubt, the outcome of a Case Conference may be a recall of a Welfare Guardian's powers

www.gov.scot/Publications/2011/03/24114616/8

Investigating Officers must record the Adult's views and the views of any relatives or carers insofar as they will co-operate and are able to do so.

21. Protection Orders under Adult Support & Protection (Scotland) Act 2007

Having gained access, the 2007 Act introduces new measures for protecting vulnerable Adults as follows. In making these Orders the applicant must give notice of the application to the affected Adult at risk and the subject of the application. (Banning Orders or Temporary Banning Orders)

Before determining an application for a Protection Order the Sheriff may give the subject of the application and the vulnerable Adult an opportunity to be heard.

The Sheriff may dispense with the above if by so doing it will protect the Adult from harm and will not prejudice any person to whom the application applies.

The affected Adult may be accompanied to any Hearing by anyone who they wish to support them, and by their Advocacy Worker and Legal Representative should they wish to challenge the Application.

In cases where the Adult has incapacity and does not understand the legal process, a Safeguarder may be appointed by the Sheriff to protect the interests of the affected Adult. As with Adults with Incapacity (Scotland) Act 2000 this would be an independent solicitor.

21.1 Assessment Orders

The Council is the applicant and the effect of the Order would be to authorise the Council Officer to interview the specified person in private and to have them medically examined by a health professional who must be nominated by the Council.

The purpose of this Order is to assist the Council to decide if an Adult is at risk and if so, what should be done to protect them.

The Order is valid for 7 days from the date granted. A Warrant for entry must be attached to this and is valid for 72 hours.

The Grounds:

- *The Council has reasonable cause to suspect that the Adult is, or is likely to suffer serious harm*
- *An Assessment Order is required to establish whether the person is an Adult at risk who is, or is likely, to suffer serious harm*
- *A suitable place for interview is available*
- *An Adult can be removed under an Assessment Order only if their own home is not practicable, due to obstruction or lack of privacy*

A Removal Order is the more appropriate Order where it is anticipated that a removal of the Adult from his/her home will be necessary

21.2 Removal Orders

A Removal Order authorises an Officer of the Council to move an Adult to a specified place and enter any place in order to pursue the Order. The Order will be accompanied by a warrant for entry.

The council must take reasonable steps to protect the Adult from harm. The move must be effected within 72 hours. It will expire 7 days after the day on which the Adult was moved.

The Grounds:

(1) The Adult who is the subject of the application is in fact an Adult at risk who is likely to be seriously harmed if not moved to another place, and

(2) There is a suitable place available for them

During the period of the Removal Order's effect the Sheriff may require the Council to allow access to the Adult at risk, including by the alleged perpetrator.

Before doing so he must hear relevant representations from the Adult, the person wishing to contact, any person with an interest and from the Council as to whether such access should be permitted, and under what conditions. The Sheriff will consider opinions in the light of the principles of the Act and take into account the Adult's wishes and feelings in the matter.

The Local Authority is not authorised to retain an Adult beyond the expiry date of a Removal Order. On expiry the Adult must either be returned home or taken to any other place which the sheriff specifies having regard to the Adult's wishes.

A Removal Order can be varied or recalled before the expiry date on application by the Council, the Adult or any other interested party.

21.3 Banning Orders

The Adult Support & Protection (Scotland) Act 2007 introduces Banning Orders. A Sheriff may grant a Banning Order only if satisfied:

(1) That the Adult at risk is being, or is likely to be seriously harmed by another person

(2) The Adult's wellbeing or property would be better safeguarded by banning the specified person from the place occupied by the Adult, than by removing the Adult themselves.

A Banning Order may be imposed regardless of the Adult or the subject of the ban's entitlement to live there.

A Banning Order may be temporary and, as with Interim Guardianship will expire when the full application is determined.

The Adult themselves can apply for a Banning Order or any other person who is entitled to occupy the place where the Adult resides.

The Council can apply for a Banning Order and **must** do so if the following criteria are met:

The Council is satisfied that:

(1) An Adult at risk is being or is likely to be seriously harmed by another person;

(2) The risk to the Adult's wellbeing or property would be better safeguarded by banning the other person from a place occupied by the Adult, than by removing the Adult from that place;

(3) That no-one else is likely to apply for a Banning Order, and

(4) That no other proceedings to eject or ban the person are coming before a court (eg interdicts etc and criminal proceedings)

21.4 Effects of a Banning Order

A Banning Order may authorise that the subject is banned from a specified area in a specified place.

(1) Authorise the ejection from that place.

(2) Prohibit them from removing any specified item from the place.

(3) Direct a specified person (the Council) to preserve any of the subject's property which remains in the specified place whilst the order has effect.

(4) Impose conditions or anything else the Sheriff considers necessary for the proper enforcement of the Order.

The Sheriff must have regard to any representations by the subject of the order, the Adult, the applicant, and any other person with an interest in the Adult's wellbeing.

The Banning Order is effective for a maximum of 6 months from the date of the order unless it is recalled or another earlier date is specified by the Sheriff.

Where the Sheriff grants, varies or recalls a Banning Order, the applicant must deliver a copy of the Order to the Adult at risk and any other person with an interest in the Adult's wellbeing or property.

21.5 Powers of Arrest

The Sheriff may attach a Power of arrest to any Banning Order. Where this occurs, the applicant must deliver a copy of the order to the Chief Constable.

A Constable may then arrest the subject if he reasonably suspects that they are breaching or have breached the Order **and** he considers that there would be a risk of the subject breaching the Order again if not arrested.

If a Banning Order is breached this must be carefully recorded as this will inform the basis for action on the part of the Police or the service.

The subject of the Banning Order arrested under Section 28 for Breach of the Order, would then be detained until either the procurator Fiscal takes criminal proceedings against them, or they are brought before the Sheriff on the next court day who, if satisfied that the order has been breached or there is a risk that the Order will be breached again, may authorise the subject's continued detention for a further 2 days.

21.6 Protection of Property and Funds

If an Adult is moved under a Removal Order the Council must take reasonable steps to protect their property. The Council is authorised to enter any place where an Adult has been removed under a Removal Order in pursuance of this duty.

The Council is not entitled to recover any expense involved in so doing from the Adult being removed. On expiry of the Order the property must be returned to the Adult.

The Adult Support & Protection (Scotland) Act 2007 extends the Public Guardian's powers to intromit the funds of an Adult in respect of payment of an Adult's taxes, provisions of sustenance, accommodation, fuel and services, care services, payments of debts and any other item which the Public Guardian may authorise unless there is appointed Continuing Power of Attorney or Guardian, or an Intervention Order relating to the funds in question.

Interested parties intending to make an application for Access to Funds and who do not have information from banks etc regarding the Adult's funds may now be issued on application with a certificate from the Public Guardian authorising this information to be disclosed. They may also have a certificate authorising the opening of an account in the Adult's name with a view to Intromission. Under Section 24, Intromission with Funds, the Public Guardian may issue a withdrawal certificate authorising the withdrawer to withdraw funds for specified purposes. If a withdrawer overdraws the Adult's account banks will have right of redress against the withdrawer.

Withdrawal certificates may be varied, there may be joint or reverse withdrawers appointed.

The Public Guardian may suspend or terminate the authority of the withdrawer by issuing a withdrawal certificate and notifying all interested parties.

Joint accounts may continue to be operated if one of the account holders becomes incapable unless the terms of the account state otherwise or the joint account holder is barred from access by the court. Many relatives of elderly Adults may prefer to make arrangements with them to operate joint accounts long in advance of any incapacity.

The Adult Support & Protection (Scotland) Act 2007 also extends the powers and duties of the Public Guardian in undertaking investigations into cases of financial abuse. The Public Guardian now has greater powers to remit matters to the Sheriff and to access financial information from financial bodies and any other corporate body which may assist in the enquiry.

The Public Guardian may require any records of the Adult's accounts from fund-holders and records, of the exercise of a continuing Attorney, Guardian or Intervener's use of their powers in relation to the Adult's funds.

Section 67 of the 2007 Act gives the Public Guardian much more explicit powers to initiate or to take part in such court proceedings he considers necessary to safeguard the property and financial affairs of an incapable Adult.

Where the Council has concerns in respect of financial abuse, the Office of the Public Guardian are the lead investigatory agency and the matter must be referred immediately to them.

These Orders have useful application in cases of self-harm where the Adult is living in squalor **and** is suffering harm as a consequence. The Adult need not necessarily be suffering from mental disorder and may choosing to live like this without actual harm resulting. The Sheriff would need to be convinced that if the situation were not addressed **serious** harm to the Adult would result.

A Removal Order's more contentious application is when an Adult is at serious risk of harm from the actions of another individual within their home. The alleged perpetrator may also be resident within the Adult's home and be in a close relationship with them.

Whether a Removal Order or a Banning Order is sought will depend on individual circumstances as found by the Investigating Officer and will include an assessment of the Adult's ability to manage alone and will take account of their wishes and feelings in relation to the perpetrator and their home.

22. Overriding Consent of the Adult at Risk

The Sheriff cannot make a Protection Order where the Adult at risk has refused consent **unless** the Adult has been pressurised into refusing consent **and** there are no steps to be taken with the Adult's consent which would protect the Adult from harm.

Section 35 of the Adult Support & Protection (Scotland) Act 2007 makes provision for taking action in cases where consent could not reasonably be expected to be given when the Adult has a close relationship with the subject and has trust and confidence in that person eg mother and child.

Only the Sheriff may override consent in the granting of a Protection Order. Council Officers/Health & Social Care Workers may not do so if an Adult refuses an interview or a medical examination.

The measures set out in the Adult Support & Protection (Scotland) Act 2007 empower the Sheriff to override the Adult's consent if serious harm is likely to result from not doing so. ***If consent is refused and the Adult has capacity this should not prevent an application for measures under the Adult Support & Protection (Scotland) Act 2007 if the evidence for doing so is compelling.*** The Sheriff will be bound by the principles of the 2007 Act in his determination whether to grant an Order or not.

23. Adults with Incapacity and Adult Protection Meetings

In cases of high risk and urgency it will not be possible to delay an Adult Protection meeting. An Adult Protection Meeting must take place without delay if any action under the provisions of the Adult Support & Protection (Scotland) Act 2007 may result. The meeting must take the highest priority.

In cases of lesser urgency, on completion of an initial investigation, the Investigating Officer should complete the report with recommendations and the Adult Support & Protection (Scotland) Act 2007 procedures should be followed with regard to arranging a Case Conference.

Because of the complexities of the interplay between the three acts in respect of Adult Protection and the differing focus of each Act, Mental Health Officers and Legal Services **must** be invited to attend Adult Protection Meetings where there is **mental disorder**, if actions under Adult Support & Protection (Scotland) Act 2007, Adults with Incapacity (Scotland) Act 2000 or Mental Health (Care & Treatment) (Scotland) Act 2003 legislation may result.

If it is considered necessary that an application for Guardianship should be made by the Local Authority this would then preclude the need for Guardianship Case Conference, since all the necessary parties will be present at the Adult Support & Protection (Scotland) Act 2007 meeting.

The grounds for Guardianship and the identity and powers of the Guardian can then be discussed with a view to establishing the likely effectiveness of the legislation in relation to protecting the Adult and their place within the Adult Protection Plan.

Only Legal Services can make applications on behalf of the Local Authority for measures under Adults with Incapacity (Scotland) Act 2000. Only Mental Health Officers can submit the report to accompany the medical recommendations for Welfare applications.

Mental Health Officer and legal opinions will be necessary in cases where the recall of a Guardian's powers is under consideration.

Mental Health Officers will generally become core group members of the Adult Protection Plan during its implementation. Since additional measures may be needed, or measures under a different Act may be required Mental Health Officer involvement should continue for as long as Adult Protection measures are in place.

24. Adults with Incapacity (Scotland) Act 2000, Adult Support & Protection (Scotland) Act 2007 and Implications for Practice

The Adults Support & Protection (Scotland) Act 2007, by the introduction of Protection Orders has given Local Authorities much needed means of protecting vulnerable Adults regardless of whether or not they are suffering from mental disorder.

When an Adult's decision-making capacity has not been assessed and they will not co-operate with such an assessment, matters need not grind to a halt as was previously the case. This is particularly useful with individuals who are unco-operative but who are living in squalor or neglect. Previously, if such individuals did not submit to an assessment of their capacity no action could be taken.

Previously the only orders available for Adults at risk applied only to those with a mental disorder and were limited to those of Intervention and Guardianship, both slow processes with limited potential to protect Adults from harm.

In recent years it has become evident that frail and elderly Adults who lack capacity are targets for unscrupulous groups and individuals within their communities. The evidence against such people is often insufficient to instigate criminal procedures and prosecution and the Adult has occasionally found themselves the subject of a Guardianship Order in order to protect them from such exploitation, with the effect of the Adult being moved, perhaps prematurely into a care home. The perpetrators were unaffected and were free to locate their next victim. A Banning Order with a power of arrest may, in such cases, have resulted in the Adult remaining at home with necessary supports.

Section 4 of the Adult Support & Protection (Scotland) Act 2007 gives Councils a clear new **duty to make enquiries** if it knows or **believes** it might need to intervene to protect an Adult's wellbeing, property or financial affairs. Whilst this must be evidence-based there is now scope to enquire where abuse is suspected, and the reasons for that suspicion is compelling.

It would be the purpose of the Adult Protection Meeting/Case Conference armed with new information-sharing powers to amass the evidence from multi-disciplinary sources as to the likelihood of abuse having occurred and to predict the likelihood of this reoccurring.

Having gathered the evidence, grounds for a Protection Order signifies that the Council **has reasonable cause to suspect** that the person is an Adult at risk who is, **or is likely to be**, at risk of serious harm.

The consent or not of the Adult at risk is a matter for the Sheriff to consider. The lack of Adult consent should not be a barrier to the Council fulfilling its duty to make an application to intervene if they consider it necessary.

Adults at risk in the community would be more likely to consent to a Banning Order if their persecutors are not in a close relationship with them. If a close family member is the alleged/suspected perpetrator, or where a Removal Order is under consideration from the Adult's home, consent is likely to be refused. In such circumstances the Sheriff cannot make a Protection Order **unless** the Adult is at risk of serious harm in which case he can override consent.

It must be shown however that undue pressure has been brought to bear upon the Adult, either through intimidation or by emotional ties the Adult has to the perpetrator.

In cases of urgent necessity the Sheriff can dispense with the requirement that all parties should be heard before an Order is made if that will safeguard the Adult. It can therefore be a much quicker process.

In cases of Adult abuse it will often be a matter of fine judgement for the Adult Protection Meeting/Case Conference as to the legislative steps required to address a particular situation, but failure to act will not be an option.

Protecting and safeguarding vulnerable Adults who are at risk of harm requires professionals and agencies to work together, communicate and share information with the purpose of protecting Adults who they believe are likely to suffer serious harm without intervention under Adult Support & Protection (Scotland) Act 2007, Adults with Incapacity (Scotland) Scotland 2000 and/or mental Health (Care & Treatment) (Scotland) Act 2003.

APPENDICES

Appendix 1	Highland Council Social Care & Health MHO Service Leaflet
Appendix 2	Highland Council Social Care & Health MHO Service Referral Form
Appendix 3	Adults in the Community Flow Chart
Appendix 4	Adults in Hospital Flow Chart
Appendix 5	Letter Template – Delay in progressing AWI Application
Appendix 6	Delegated Functions
Appendix 7	AWI Review/Supervision form for both LAWG and Private Guardianship orders
Appendix 8	Letter Templates for informing about AWI orders
Appendix 9	Highland Health & Social Care Procedures for 13ZA
Appendix 10	AWI Meeting – Aide Memoire for Chair of the Meeting
Appendix 11	AWI Case Conference – Minute Template

Mental Health Officer Services

“Mental Health Officers – providing a service for those affected by mental disorder”

Organisational Values

- **Listening**
- **Open**
- **Valuing**
- **Improving**
- **Supporting**
- **Partnering**

MHOs recognise the importance of early intervention, supportive relationships, recovery, inclusion in the community, productive lives and treating each individual and their carers with dignity and respect. The MHO assessment embraces diversity and confidentiality and strives to work with people's strengths.

How to Contact Us

Tel: 01463 702156

Email: HSCMHO.Managers@highland.gov.uk

Susan Redmond/Euan Williamson
Principal Mental Health Officers (Part-time)
Highland MHO Service
Family Resource Centre
Limetree Avenue
Inverness
IV3 5RH
Tel: 01463 702156

Useful telephone numbers:

Out of Hours Service: 0808 175 3646
NHS 24: 111
Advocacy Highland: 01463 233460
Mental Health Tribunal Service: 01698 390000
Mental Health Tribunal Service (for Carers and Patients): 0800 345 7060
HUG: 0300 365 9366
Adult Support & Protection: During normal office hours - please use these Team contacts:
Badenoch & Strathspey: 01479 812618 (nhsh.bandsspoa@nhs.scot)
Caithness: 0345 850 9413 (nhsh.caithness-sw-duty@nhs.scot)
East Ross: 01349 853131 (nhshighland.eric@nhs.scot)
Lochaber: 01397 709832 (nhsh.lochabersw@nhs.scot)
Inverness (E & W): 01463 888333 (nhs.spoainvernesseastwest@nhs.scot)
Mid Ross: 01349 860460 (nhsh.mrhsc@nhs.scot)
Nairn: 01667 422702 (nhsh.nairnsocialwork@nhs.scot)
Skye, Lochalsh & Wester Ross: 01471 820174 (nhsh.singlepointofcontactSLWR@nhs.scot)
Sutherland: 01408 664018 (nhsh.sspoc@nhs.scot)
For under 25 year olds in Mid & East Ross, Inverness, Badenoch & Strathspey and Nairn:
Transitions Team: 01463 644325 (nhsh.transitionsteam@nhs.scot)
Child Protection: 08457 697 284

Comments, Concerns & Complaints

We aim to provide a responsive, quality service and welcome any feedback on the service you have received.

If you wish to make a suggestion, raise a concern or make a complaint, please contact the Principal Mental Health Officers Susan Redmond or Euan Williamson on 01463 702156.

Complaints can also be made in writing to:

Complaints Officer

Customer Resolution & Improvement Team
The Highland Council
Glenurquhart Road
Inverness
IV3 5NX

Or access the Highland Council's Online Complaints form at:

www.highland.gov.uk/complaints

The Mental Welfare Commission has a duty to safeguard the rights and welfare of people with a mental illness, learning disability or other mental disorder.

The Commission can be contacted on:
0131 313 8777 (Professional advice line).
0800 389 6809 (for Service Users and Carers)

Who We Are

Highland Council's Mental Health Officer (MHO) Service was created to offer a specialist service following the Highland Council and NHS Highland's integration of Health and Social Care Services on 1st April 2012.

MHOs are employed to carry out statutory duties under the **Adults with Incapacity (Scotland) Act 2000** and the **Mental Health (Care and Treatment)(Scotland) Act 2003**.

MHOs are qualified social workers who have completed post qualifying additional specialist training. MHOs are appointed and employed by the Highland Council.

The Forensic MHO Service works within the MHO Service undertaking statutory work under the **Criminal Procedure (Scotland) Act 1995** with mentally disordered offenders. There are two Principal Mental Health Officers (sharing the full-time role), three Practice Lead/MHOs, a Senior Administrative Assistant and a Senior Clerical Assistant within the MHO Service. Additional MHOs are located in Inverness, Lochaber, Skye, and Golspie. New Craigs Hospital is the base for the Forensic MHOs.

What We Do

MHOs carry out assessments, usually at the request of a doctor, regarding the need for compulsory detention in hospital. The MHOs consider alternatives to detention and where necessary consent to statutory detention. MHOs also participate in an MHO rota. This is a 9am to 5pm service where the MHO on duty can be contacted on 01463 702156. The West area locality MHOs may also respond to emergencies. Forensic MHOs respond to requests for assistance from the Scottish Court Service, HMP Porterfield, Northern Constabulary and Criminal Justice Services. There is an MHO provision out with office hours where the MHO on call can be contacted on 0808 175 3646

Adults with Incapacity (Scotland) Act 2000

MHOs are involved in actions to safeguard the welfare, finances and property of those people who lack capacity as a result of mental disorder. A mental disorder can be mental illness, learning disability or brain impairment as a result of injury or dementia.

Lack of capacity means where a person over 16 cannot make their own decisions, understand or remember information or cannot communicate.

MHOs will:

- Make applications for Welfare Guardianship or Intervention Orders where this is needed and is not being done by someone else;
- Write statutory reports to support private Guardianship Applications and Intervention Orders.

- Provide information and advice to service users subject to detention about their rights, including
- how to choose a **Named Person**, make an **Advance Statement**, access **Independent Advocacy Services**;
- Will make an application for a Compulsory Treatment Order to the **Mental Health Tribunal for Scotland** in circumstances where further detention is needed;
- Supervise and review all cases subject to compulsory measures;
- Write Social Circumstances Reports to inform care planning;
- Carry out assessments to determine whether action is needed in relation to welfare and/or financial matters;

MHOs also:

- Offer advice and assistance to all professionals involved in mental disorder;
- Work closely with partner agencies to ensure provision of appropriate and supportive services to Service Users and Carers;
- Provide advice, guidance and assistance to people who act as Welfare Powers of Attorney;
- Provide advice, guidance and assistance to people who act as Welfare Guardians;
- Carry out investigations under all relevant Mental Health legislation;
- Participate in Adult, Support and Protection Procedures;
- Prepare reports and act as designated MHOs for Mentally Disordered Offenders;
- Adhere to Highland Council's Policy and Procedures in carrying out work;

**ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000
REFERRAL TO MHO SERVICE**

**(DUE TO THE HIGH VOLUME OF REFERRALS PLEASE SUBMIT THIS FORM TO US BY
12 NOON ON THE WEDNESDAY BEFORE OUR ALLOCATION MEETING - HELD ON
THURSDAYS - TO ALLOW TIME FOR PROCESSING)**

(TO BE COMPLETED BY CARE MANAGER/SOCIAL WORKER)

PLEASE NOTE THAT A MINIMUM 14 DAYS NOTICE FOR ATTENDANCE AT AWI MEETINGS IS REQUIRED

Client Forename	Client Surname	Date of Birth	CF NUMBER

Home Address
Current Address (if different from above)

Has the client been assessed as lacking capacity?
YES / NO (please give details)

Have Highland Council Legal Services been consulted/contacted?
YES / NO (please give details)

Views of the Family
(has a Private Guardianship Application been considered?)

Relevant Others (e.g care team)

Reasons for Referral (please include relevant background and current circumstances and list significant others ie family/care team)

Assessment of Risk

Referred by (name, address AND email address):	Date:

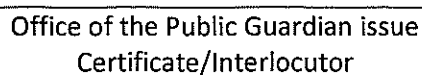
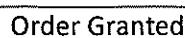
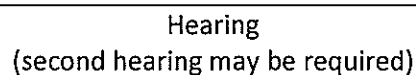
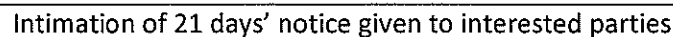
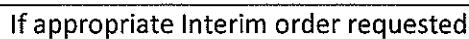
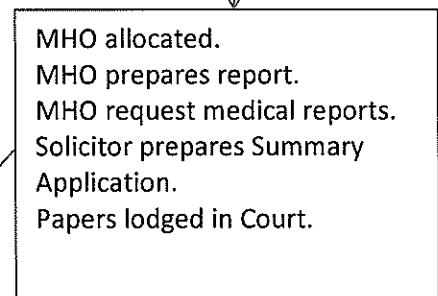
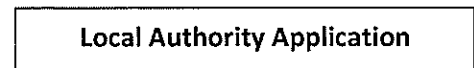
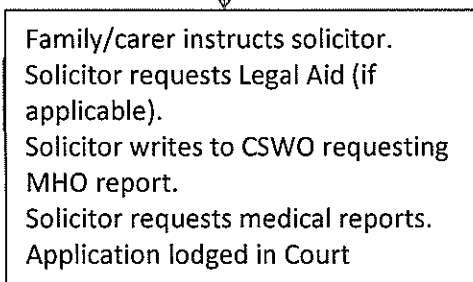
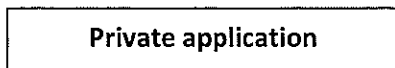
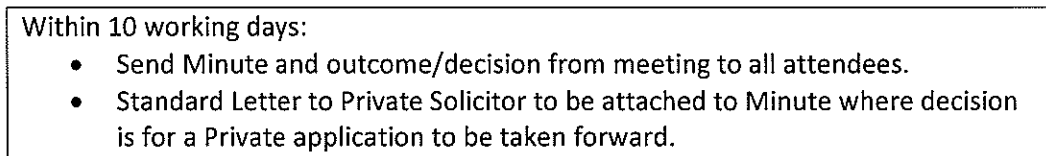
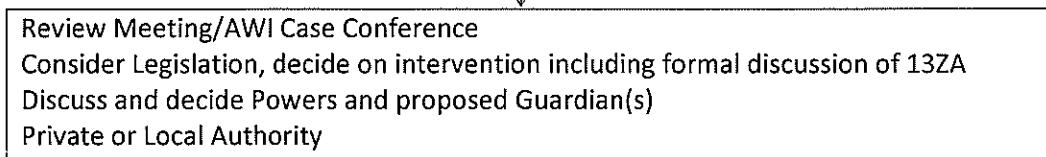
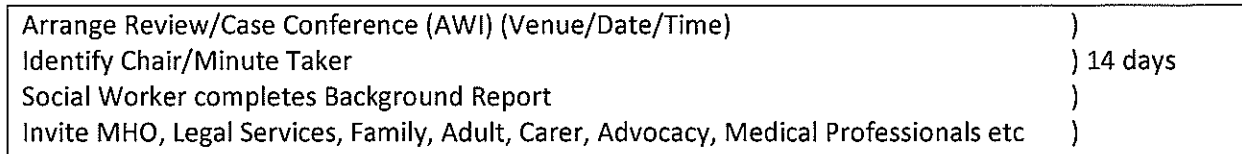
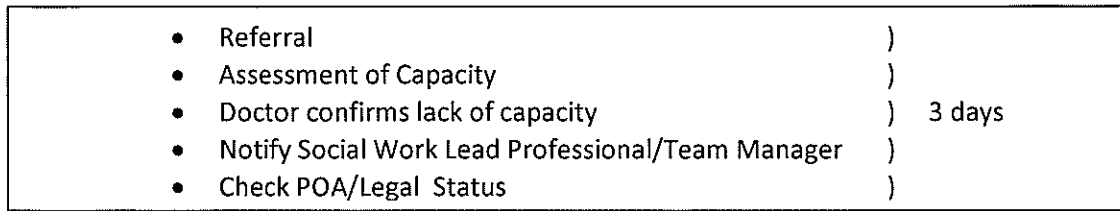
PLEASE RETURN THIS FORM BY EMAIL TO THE FOLLOWING:

HSCMHO.Managers@highland.gov.uk

theresa.batchelor@highland.gov.uk

amy.noble@highland.gov.uk

**SUMMARY OF AWI PROCESS FLOWCHART
FOR CLIENTS IN THE COMMUNITY**



CHECKLIST

1. Is there Power Of Attorney or Guardianship already in place? Check with MHO Admin (holds a list). POA/Guardian is required to provide valid certificate on request.
2. Should there be no concerns from the HSC team about a private application being made by family then you may not need an AWI meeting. (NB – review meeting should still be held).
3. Where an AWI case conference is being arranged the MHO Service should be notified, and an MHO **must** be invited to attend the meeting. (NB legal services/family solicitor(if appropriate) **must** also be invited to review/cc meeting)
4. The review meeting should be chaired and minuted. The minute **must** be distributed within 10 working days of the meeting. The meeting **must** include a background report/chronology of the adult's situation and circumstances to allow for consideration of relevant legislative intervention, or 13ZA, and the proposed guardian(s) and powers to be sought if AWI 2000 intervention agreed.
5. Ensure letter to family/carer which should also be copied to solicitor is sent with the minute from the review as soon as family/carer have stated intent to instruct solicitor and inform family this will be done. (See Letter Template - Appendix))
6. Ensure all dates regarding application and report requests and receipt of (Private or HSC) are recorded accurately and timeously on Edison and Carefirst. This applies to both NHSH/HSC/HC staff.

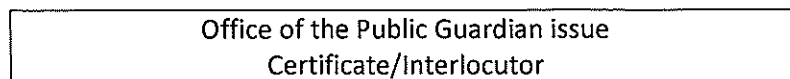
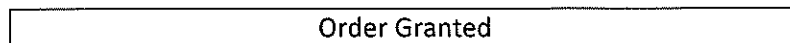
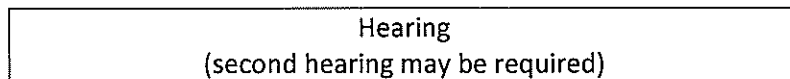
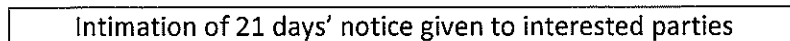
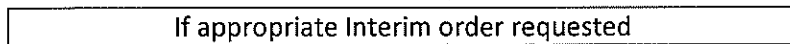
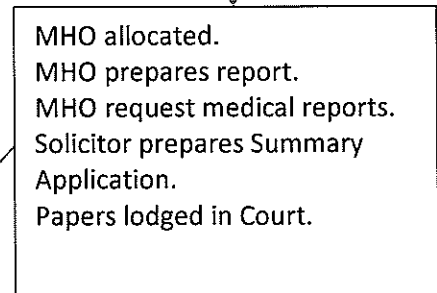
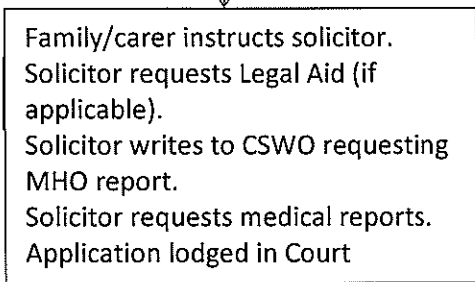
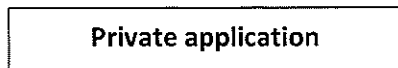
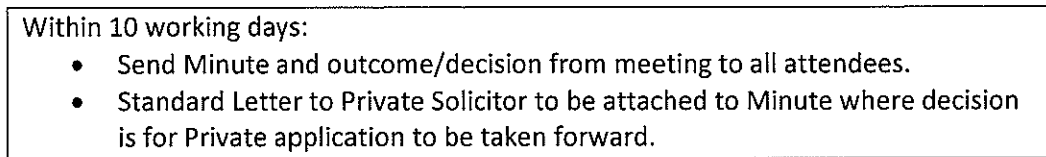
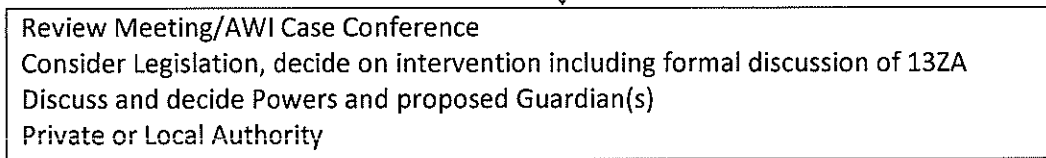
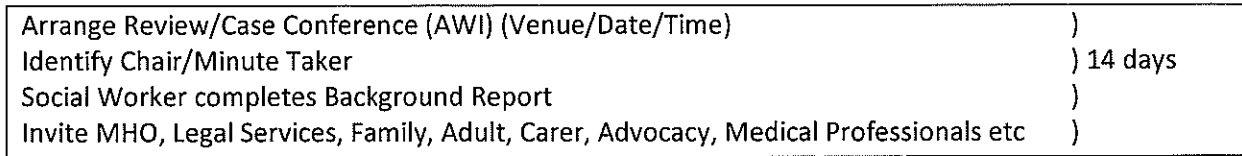
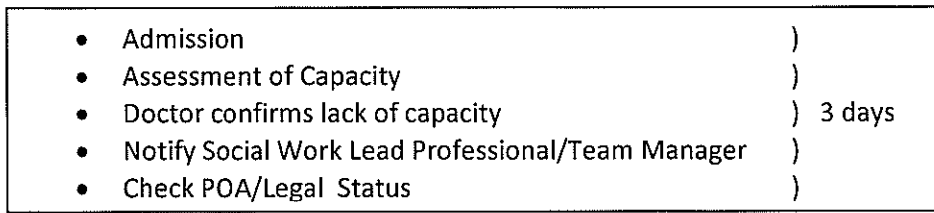
7. PRIVATE APPLICATIONS

The solicitor will work with the applicant to complete the summary application and forward to the MHO, GP and Consultant along with request for assessment of the adult's capacity. The assessment and reports require to be completed within the statutory timeframes of AWI 2000.

8. LA APPLICATIONS

These applications are made and presented to Court by HC Legal Services. MHO will request the medical reports and must submit their own report, accompanied by the two medical reports, to HC Legal Services **within 21 days of the first medical report** (Section 13 Highland AWI Procedures 2015). HC Legal Services will complete the Summary Application and lodge the application, **by day 30** of the first medical report, in Court.

**SUMMARY OF AWI PROCESS FLOWCHART
FOR PATIENTS IN HOSPITAL**



CHECKLIST

1. Is there Power Of Attorney or Guardianship already in place? Check with MHO Admin (holds a list). POA/Guardian is required to provide valid certificate on request.
2. Should there be no concerns from the HSC team about a private application being made by family then you may not need an AWI meeting. (NB – review meeting should still be held).
3. Where an AWI case conference is being arranged the MHO Service should be notified, and an MHO **must** be invited to attend the meeting. (NB legal services/family solicitor(if appropriate) **must** also be invited to review/cc meeting)
4. The review meeting should be chaired and minuted. The minute **must** be distributed within 10 working days of the meeting. The meeting **must** include a background report/chronology of the adult's situation and circumstances to allow for consideration of relevant legislative intervention, or 13ZA, and the proposed guardian(s) and powers to be sought if AWI 2000 intervention agreed.
5. Ensure letter to family/carer which should also be copied to solicitor is sent with the minute from the review as soon as family/carer have stated intent to instruct solicitor and inform family this will be done. (See Letter Template - Appendix
6. Ensure all dates regarding application and report requests and receipt of (Private or HSC) are recorded accurately and timeously on Edison and Carefirst. This applies to both NESH/HSC/HC staff.

7. PRIVATE APPLICATIONS

The solicitor will work with the applicant to complete the summary application and forward to the MHO, GP and Consultant along with request for assessment of the adult's capacity. The assessment and reports require to be completed within the statutory timeframes of AWI 2000.

8. LA APPLICATIONS

These applications are made and presented to Court by HC Legal Services. MHO will request the medical reports and must submit their own report, accompanied by the two medical reports, to HC Legal Services **within 21 days of the first medical report** (Section 13 Highland AWI Procedures 2015). HC Legal Services will complete the Summary Application and lodge the application, **by day 30** of the first medical report, in Court.

APPENDIX 5

Draft

Adults with Incapacity (Scotland) Act 2000

Welfare Guardianship Application

Re:....., DOB, Address:.....,

Dear

I refer to the Adults with Incapacity pre guardianship case conference meeting that was held on the

..... (copy attached)

At that meeting, which you attended, it was agreed that a welfare guardianship was required to ensure the welfare and well-being of (the Adult). has been assessed as no longer having capacity to make informed decisions regarding his/her own care and welfare.

At the meeting in....., you intimated that you intended to apply to become(the adult’s) welfare guardian, and that you would consult with your solicitorand other family members regarding this matter.

To date, the Local Authority have not received formal notification from a solicitor regarding an application seeking welfare guardianship for

We will therefore now proceed to make an application under Section 57(2) of the Adults with Incapacity (Scotland) Act 2000.

As nearest relative you have a right to be consulted about the proposed welfare guardianship intervention, and you will be contacted by the Mental Health Officer in due course for this purpose.

You have the right to object to the proposed application and you may wish to consider seeking legal advice and representation from a solicitor to assist you with this.

I trust this helps to clarify matters, but should you require further information, please don’t hesitate to contact me at the above address.

Yours sincerely

.....

CC –

Fiona Moir, Senior Administrative Assistant

Susan Redmond, Interim Principal MHO

Theresa Batchelor, Solicitor, Highland Council

Regarding Schedules 18B and 18C, see proposals below.

APPENDIX 6

Schedule Part 18B – Council Officers – Special Arrangements

Further to revised regulations agreed by the Scottish Parliament in March 2012, references to 'Council Officer' in the Adult Support & Protection (Scotland) 2007 Act apply where any function under Part 1 of the 2007 Act is delegated by a local authority to an NHS body by virtue of arrangements made under section 15(1) of the Community Care and Health (Scotland) Act 2002.

Any relevant reference in that part of the Act to, a "council officer" is to be read as including a reference to an employee of an NHS body, and any reference to a "council nominee" is to be read as including a reference to a nominee of the NHS body.

For the purpose of the lead agency arrangement in Highland, these roles are delegated to NHS Highland Social Workers by the Chief Social Work Officer, on the basis of the structures and practices set out in the professional social work leadership model, overseen by the Head of Adult Social Care.

Schedule Part 18C – NHS Highland Employees Supporting Sections 10 and 12 of the Adults with Incapacity Act 2000 – Special Arrangements

Section 10(1)(a) of the Adults With Incapacity (S) Act 2000 places a duty on local authorities to supervise a guardian who has personal welfare powers. These functions can not be delegated from a local authority to a health board. It therefore remains the responsibility of Highland Council to ensure arrangements for the supervision of "welfare guardians".

Regulation 2 of the 2002 Regulations sets out the duties of local authorities in carrying out these supervision functions. These duties are to ensure that the guardian and the adult are visited on behalf of the local authority within certain timescales. Highland Council will ensure, via the Principal Mental Health Officer, supported by the Principal Officer (Social Care) and Policy Officers, that NHS Highland Social Workers are supported and monitored, and act on its behalf in carrying out such visits. These arrangements will be overseen within NHS Highland by the Head of Adult Social Care, on the basis of the structures and practices set out in the professional social work leadership model.

Activities in relation to the formal functions of Mental Health Officers shall be carried out by that service within the Highland Council.

Bill Alexander
Director of Social Work
Highland Council
01463 702860 07769 641503

AWI Guardianship Review / Supervision Form



Form Details

Form Start Date: 14/06/2018 Worker Name: Karen Test

Person Details

Name: Mrs Guardian Test CareFirst ID: P264412
 DoB / EDD: 21/01/1949 Gender: Female
 Address: No Fixed Abode, XXX Tel No: 00000 000000

AWI Guardianship Review / Supervision Form

Date of this meeting:

Indicate if this is a Local Authority Guardianship Review or a Private Guardianship Supervision:

Is this the first Review / Supervision meeting? Not Answered

If not, record the date of the previous meeting:

Please record the legal status for AWI Guardianship as a classification, if this has not already been recorded:

Use the 'Peek' and 'Grab' functionality to select an existing classification.

Category:

Notes:

Guardianship details:

	Financial	Welfare	Financial and Welfare
Date order started:			
Length of order:			
Expected end date / if any:			
Guardian name / address / phone number:			

Supervisor's name, office address and phone number:

For Private Guardianship only.

Caseholder's name, office address and phone number:

If different from the Supervisor.

AWI Guardianship Review / Supervision Form

Name: Mrs Guardian Test

CareFirst ID: P264412

Powers granted:

Brief description of how the powers are being used:

Where the adult can reside; make decisions in respect of dress, diet, appearance and social activities; liaise with medical professionals; etc.

Note any changes in circumstances since the last review:

Views of the Local Authority delegated Guardian on care and support arrangements:

Views of the Private Guardian on care and support arrangements:

Including supervisory arrangements.

Views of the Supervisor:

For Private Guardianship.

Are all the powers still required?

Note what decisions are made/how the powers are used. If no powers are used is the Order still necessary?

Are all the powers adequate?

Note if any more powers should be sought.

Are all the powers being used in line with the principles of the Act and The European Convention on Human Rights?

AWI Guardianship Review / Supervision Form

Name: Mrs Guardian Test **CareFirst ID:** P264412

- Do they benefit the adult?- Are the views of the person on Guardianship and the carers known and taken into account?- Are only those decisions made that the adult lacks capacity to make?- Are they offered choices?- Do the decisions take into account less restrictive alternatives?- Is the adult encouraged to develop capacity/skills to make their own decisions?

If the answer to any of these question is 'No', how is this to be addressed?

Are any powers delegated to care staff?

Are any changes to the Order or care arrangements required?

If yes, how will these be addressed?

Any other relevant information:

For Local Authority Guardianship, please answer this question with 'Yes' to create an activity for the next review:

Assign the activity and record when it is required by.

For Private Guardianship, please indicate if a next supervision meeting is required:	Not Answered
---	--------------

If 'Yes': assign the triggered activity to arrange the next meeting and record when it is required by;

If 'No': answer question 1.1.23 to explain why another Supervision meeting is not required.

If a next Supervision of Private Guardianship is not required, explain why not:

Completion

Completed By:	Date:
Worker:	
Tel:	
Address:	

(Name & Address of Adult)

Dear Sir/Madam

**ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000
INTERIM GUARDIANSHIP ORDER /GUARDIANSHIP ORDER (*delete as appropriate)**

As you may already be aware I, as Chief Social Work Officer of The Highland Council, have been appointed as your **Interim Guardian / Guardian** (*delete as appropriate).

I am now writing to give you notice under Section 64(9) of the Adults with Incapacity (Scotland) Act 2000 that **(name / designation / address of responsible officer)** is the officer responsible for carrying out the functions and duties of Guardian on my behalf.

This means that **(name of officer)** will meet with you regularly to ensure that you are happy with your accommodation and the care and support being provided to you. If you have any questions or concerns, you should speak to **(name of officer)** in the first instance.

Yours faithfully

Chief Social Work Officer

TEMPLATE 2 – Notice to MWC re first order granted

Mental Welfare Commission for Scotland

Dear Sirs

**ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000
INTERIM GUARDIANSHIP ORDER / GUARDIANSHIP ORDER (*delete as appropriate)**

I am writing to give notice in terms of Section 64(9) that **(name / designation / address)** is the officer responsible for carrying out the functions and duties of **Interim Guardian / Guardian (*delete as appropriate)** in respect of **(name / address of Adult)**.

Yours faithfully

Chief Social Work Officer

TEMPLATE 3 – Notice to Adult re final order where interim order previously granted

(Name & Address of Adult)

Dear Sir/Madam

**ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000
GUARDIANSHIP ORDER**

As you are aware I, as Chief Social Work Officer of The Highland Council, was appointed as your Interim Guardian. This appointment has now been confirmed and I remain your Guardian.

As previously intimated to you under Section 64(9) of the Adults with Incapacity (Scotland) Act 2000 **(name / designation / address of responsible officer)** has been the officer responsible for carrying out the functions and duties of Interim Guardian on my behalf. I now write to confirm that **(name)** will remain the responsible officer.

As you are already aware this means that **(name of officer)** will meet with you regularly to ensure that you are happy with your accommodation and the care. If you have any questions or concerns, you should speak to **(name of officer)** in the first instance.

Yours faithfully

Chief Social Work Officer

TEMPLATE 4 – Notice to MWC re final order where interim order was previously granted

Mental Welfare Commission for Scotland

Dear Sirs

**ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000
GUARDIANSHIP ORDER**

I refer to my previous letter in terms of Section 64(9) that **(name / designation / address)** is the officer responsible for carrying out the functions and duties of **Interim Guardian / Guardian (*delete as appropriate)** in respect of **(name / address of Adult)**.

My appointment as Guardian has now been confirmed and I am writing to notify you that **(name)** remains the responsible officer.

Yours faithfully

Chief Social Work Officer

TEMPLATE 5 – Notice to Public Guardian

The Office of the Public Guardian

Hadrian House
Callendar Business Park
Callendar Road
FALKIRK
FK1 1XR

Dear Sir

NOTICE UNDER SECTION 76 OF THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 ADULT – (Adult's name)

As Chief Social Work Officer for The Highland Council I hereby notify you in terms of Section 76(1) of the said Act that on **(date of move to HC)**, **(name of Adult)** moved from **(original address)** to **(address in HC)** which is in the Local Authority area of The Highland Council.

I attach copy notice of change of habitual residence from the Chief Social Work Officer of **(transferring LA)** Council for your information.

I look forward to receiving a Certificate of Appointment in due course.

Yours faithfully

Chief Social Work Officer

TEMPLATE 6 – Notice to MWC re transfer

Mental Welfare Commission for Scotland

Dear Sirs

**NOTICE UNDER SECTION 76 OF THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000
ADULT (*Name of Adult)**

As Chief Social Work Officer for The Highland Council I hereby notify you in terms of Section 76(1) of the said Act that on **(date of move to HC), (name of Adult)** moved from **(original address)** to **(address in HC)** which is in the Local Authority area of The Highland Council

I attached copy notice of change of habitual residence from the Chief Social Work Officer of **(transferring LA)** Council for your information.

Yours faithfully

Chief Social Work Officer

TEMPLATE 7 – Notice to Adult

(Adult's name and address)

Dear Sir/Madam

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 INTERIM GUARDIANSHIP ORDER

I am writing to give you notice under Section 76(3) of the Adults with Incapacity (Scotland) Act 2000 that as your habitual residence has changed to **(address within HC)**, I as Chief Social Work Officer of The Highland Council am now your Guardian. **(Name / designation / address of officer)** is the officer responsible for carrying out the functions and duties of Guardian on my behalf.

This means that **(name of officer)** will meet with you regularly to ensure that you are happy with your home and the care and support being provided to you. If you have any questions or concerns, you should speak to **(name of officer)** in the first instance.

Yours faithfully

Chief Social Work Officer

Template 8 – letter to send out to Private Welfare Guardians in relation to Supervision

Dear

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000
WELFARE GUARDIAN – SUPERVISION AND SUPPORT
ADULT: (* name of Adult)

The Highland Council have received information from the Office of the Public Guardian confirming that you have been appointed Welfare Guardian for the above-named.

Local Authorities have a responsibility to supervise all those who are appointed as Welfare Guardians and this letter will provide you with information about this.

In June 2014 the Scottish Government issued a new guidance – **The Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Amendment Regulations 2014**. A copy of this guidance can be found at <http://www.legislation.gov.uk/ssi/2014/123made>.

I am writing to advise that you will be contacted by a Local Authority Supervisor within the next 3 months who will provide you with support/guidance and advice in your role as Guardian. Your Supervisor will meet with you at regular intervals but at least once every 12 months. If you have a time limited Guardianship your Supervisor will meet with you at least three months before the Guardianship is due to expire.

Support and Supervision will be made available, and recorded for you, in line with the Mental Welfare Commission's practice guide – **Supervising and Supporting Welfare Guardians**. You can access this guide via the Mental Welfare Commission for Scotland website www.mwscot.org.uk

In order to ensure timely reviews and agreed contact arrangements the Supervisor will record key meeting dates and outcomes on a password protected secure practice database, which is called CareFirst.

In keeping with the new Guidance we may agree that the requirement to meet should be **no less than every 12 months**. We may equally agree to meet for supervision and support of the Welfare Guardianship more, or even less, if circumstances support this.

There may come a time when we agree that contact and supervision arrangements can be managed less often or may no longer be required. This will be discussed with you and any request/decision to change the arrangements will be recorded. The Mental Welfare Commission will also be informed as per **The Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Amendment Regulations 2014** <http://www.legislation.gov.uk/ssi/2014/123made>.

I have arranged to visit you on to discuss your role as (Name of Adult)'s Welfare Guardian.

I trust that this information is helpful but please do not hesitate to contact me at the above address should you wish to discuss this letter.

Yours sincerely

The Highland Council – Care and Learning



PRACTICE GUIDANCE

SECTION 13ZA

Highland Council – Care and Learning

Practice Guidance - Section 13ZA

Guidance on the use of powers under Section 13 of the Social Work (Scotland) Act 1968 and amended by Section 64 of the Adults Support & Protection (Scotland) Act 2007, by the insertion of Section 13ZA to the Adults with Incapacity (Scotland) Act 2000 to provide services to Adults with assessed needs and who lack capacity to consent to receive services.

Guidance on the use of powers under Section 13 of the Social Work (Scotland) Act 1968 and amended by Section 64 of the Adults Support & Protection (Scotland) Act 2007, by the insertion of Section 13ZA to the Adults with Incapacity (Scotland) Act 2000 to provide services to Adults with assessed needs and who lack capacity to consent to receive services.

Staff should refer to the 'Guidance for local authorities: provision of community care services to adults with incapacity' issued by the then Scottish Executive in March 2007 for further background.

Author: Karin Campbell, Principal Mental Health Officer, Highland MHO Service

Authorising Officer: Fiona Palin, Head of Service, Highland Care & Learning

Introduction

A Judgement in the UK Supreme Court in March 2014 identified the need to review the use of Section 13 of the Social Work (Scotland) Act 1968, which was amended under Section 64 of the Adult Support & Protection (Scotland) Act 2007 by the insertion of Section 13ZA.

Section 13ZA took effect in March 2007 and assists Local Authorities in the provision of community care services when someone has been assessed as needing a service but lacks the capacity to consent to receiving a service. The Scottish Government issued guidance (*Guidance for Local Authorities (March 2007) Provision of Community Care Services to Adults with Incapacity*) which requires the authority to take a range of factors into account and to consider how to proceed in the light of its powers and duties under the 1968 Act and the Adults with Incapacity (Scotland) Act 2000.

The Authority is required to make any decisions using the principles of the Adults with Incapacity (Scotland) Act 2000 and the guidance sets out the decision-making process in circumstances in which a decision may require an order under the 2000 Act and those where it would be appropriate to use its powers under the 1968 Act.

This requires a multi-disciplinary approach however it is clear that the 1968 Act cannot be used in certain circumstances i.e;

- Where the Adult with impaired capacity is opposed to the action as far as can be ascertained, or
- Where there is disagreement between health and social work professionals, or
- Where there is disagreement with or between family members
- Where the adult is not compliant
- Where there is deprivation of liberty
- Where an application has been made for a guardianship order but not determined, this means that an Authority cannot make decisions under a 13ZA once an application has been lodged with the Court

The judgement of the Supreme Court (which has become known as the Cheshire West Case) http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf adds further clarification to what may be defined as Deprivation of Liberty and this will have implications for a range of practice. This judgement (immediately) puts into question the issue of whether the use of Section 13ZA of the 1968 Act is now lawful, and whether the provision is in fact compliant with the Convention and principles of Article 5 of the European Commission on Human Rights ECHR.

The judgement clarifies that even if surroundings are homely and pleasant a person may be deprived of their liberty if not free to leave (even if they are not actively trying to do so). The judgement stated the criteria to be used in considering whether a person has been deprived of their liberty are, "whether the person is under continuous supervision and control and not free to go", and that everyone has the equal protection of human rights and to be deprived of their liberty is the same for all whether or not one has a physical or mental disability. Each case needs to be considered on its own circumstances and evidenced accordingly. The judgement does not suggest that Deprivation of Liberty is not permissible, but it should have legal authority and should be subject to regular review. The judgement is critical of the lack of judicial oversight and review of Deprivation of Liberty

safeguards in the English Capacity legislation, as the cases before the Court were English, (not Scottish).

Whilst the case has immediate direct implications for English Capacity legislation it is not clear at present what the implications may be for Scottish Incapacity legislation, but judgements of the Supreme Court should be taken into account in Scotland.

The Scottish Law Commission is considering Deprivation of Liberty and Adults with Incapacity (Scotland) Act 2000 and published a report in 2014. It is anticipated that any changes to AWI 2000 legislation will require to be subject to extensive consultation.

For some time there has been a view that the AWI Act is not human rights compliant due to the lack of regular judicial review: s13ZA is a Local Authority administrative process and has no judicial review and is therefore now thought to be more open to challenge.

Consultation with Legal Services in respect of the implications of the Cheshire West judgement is strongly advised, and we should consider carefully the situations where 13ZA may be used to place an Adult. Legal Services and MHO Service must be involved in decision making process.

We should be rigorous in following the Scottish Government guidance contained within appendix 1 of the Adults with Incapacity Code of Practice for Local Authorities and, in particular follow the guidance on the process for decision making and recording and notifying the decision. 13ZA should not be used where there are repeated decisions requiring to be made, and where appropriate we need to consider guardianship orders for a defined period rather than indefinite without limit of time.

Whilst we will continue to consider 13ZA to facilitate a discharge from hospital for people who lack capacity in appropriate circumstances, it is nevertheless important that that this is followed up and kept under review and consideration given to more formal measures under the AWI 2000 Act.

The following Scottish Government Guidance points should be considered :

- Preparatory meeting with the Adult;
- Initial assessment of capacity in respect of decision to be made;
- Multi-disciplinary review;
- The Principles of the AWI 2000 Act must be adhered to;
- Assessment of needs and risk;
- Deprivation of Liberty – individual case circumstances;
- Assessment of financial arrangements;
- Recording of 13ZA decision/minute of meeting/pre guardianship Case Conference;
- Informing interested parties of decision;
- Record decision on Adult's file/carefirst client data base;
- Monitor and Review – Deprivation of Liberty should always be kept under review.

Guidance & Procedure on the use of powers under the Social Work (Scotland) Act 1968 (Section 13ZA) and the Adults with Incapacity (Scotland) Act 2000 to provide services to Adults with Assessed needs who lack capacity to consent to receive services.

Staff should refer to the 'Guidance for local authorities: provision of community care services to adults with incapacity' issued by the then Scottish Executive in March 2007 for further background.

This procedure applies to Adults for whom major decisions need to be made and who have:

- **complex and/or significant care needs; and**
- **may be incapable in relation to the decision/action in question**

It does not apply where:

- **the Adult has capacity to make decisions and consent to care arrangements**
- **there is an existing proxy with welfare powers who is consenting to services being provided to the Adult**

The 2007 guidance states that where the capacity of the Adult to consent to a proposed care plan is in doubt and it is necessary to take forward decisions and safeguard the person this will require a **'multi-disciplinary review'**. Although it states that this is likely to be done via a case conference it allows that where this is impractical the care plan can be implemented as long as certain steps are taken as part of the 'review', namely:

- a 'preparatory meeting' is held involving the adult, independent advocacy worker and (if there is one) the 'key' family carer to ensure there is agreement to the care plan and the decisions to be made. NB Legal Services and MHO Service must be consulted, and invited to attend the meeting;
- an initial assessment of capacity based on the view of the Adult Social Care Worker allocated to the case and relevant health professional and related to the specific decisions to be made;
- the principles of the AWI 2000 Act have been applied in selecting and providing community care services including;
- actions taken will be of 'most benefit' and 'least restrictive' to the Adult;
- past and present wishes and feelings of the Adult have been taken into account;

- as far as practicable the views of 'significant others' have been considered including any disagreement on the proposed care intervention;
- consideration of the need for a specialist risk assessment to be completed if protection concerns are identified within the assessment;
- consideration as to whether the proposed care intervention would amount to a 'deprivation of liberty' under Article 5 of the European Convention on Human Rights (see Annex A of the 2007 Guidance for further information);
- the need for any financial interventions under the 2000 Act if the Adult is assessed as being unable to manage his/her finances or deal with legal contracts;
- The decision of the meeting should be formally recorded and placed on the Adult's case file record on CareFirst.

In accordance with the 2007 Guidance the relevant Team Manager should arrange for a formal letter to be sent to the Adult, the primary carer, advocacy (where involved) and relevant professionals to inform them of decision and their right to object/seek legal advice.

When can the care plan be implemented without an Adults with Incapacity Case Conference?

Where implementation of the care plan is being considered under Section 13 ZA of the Social Work (Scotland) Act the provision of community care services can proceed without a formal Adults with Incapacity case conference only if the following criteria have been satisfied and fully recorded:

- a needs assessment on the adult has been completed which has :
- included consultation with the adult and significant others (including key professionals and family members) within his/her life;
- has confirmed that there is complete agreement amongst those significant others with the proposed care intervention;
- not identified any risks which would indicate the need to consider seeking an order under the 2000 Act;
- an Adults with Incapacity assessment has been completed which addresses the decisions to be taken, relates the principles of the 2000 Act to those decisions and incorporates the views of the adult and significant others as above;
- a report from an advocacy worker has been received which includes a clear indication that the adult is consenting to the care intervention or will at least be compliant with the intervention;
- if no advocacy worker has been involved the reasons for this should be given and clear alternative evidence is provided of the adult's present or past wishes or of her likely compliance with the intervention;

- there is multi-disciplinary agreement with the proposed care intervention via 'review' which can be achieved via individual discussions with relevant parties;
- the Adults with Incapacity assessment specifically addresses the issue of 'deprivation of liberty' and can demonstrate that the proposed care intervention will not constitute deprivation of liberty as set out in Annex A of the 2007 Guidance;
- the case has been considered at by a Team Manager (or senior manager) who have endorsed the provision of a service under Section 13ZA of the 1968 Act;
- issues around management of the adult's finances have been addressed, including mechanisms for ensuring that payment of charges for services provided (e.g. care home fees) are in place;

When should an Adults with Incapacity Case Conference be considered?

Wherever one or more of the following criteria apply then the requirement for an Adults with Incapacity pre guardianship case conference should be considered:

- the needs assessment and/or Adults with Incapacity assessment has identified disagreement between significant others regarding the proposed care intervention;
- one or both of the above assessments (or a separate risk assessment) has identified risks to the Adult which may require formal intervention under the 2000 Act;
- the assessment(s) or advocacy report confirms that the Adult is not consenting to (or is unlikely to be compliant with) the proposed care intervention;
- the proposed care intervention could constitute a 'deprivation of liberty' as set out in Annex A of the 2007 Guidance;
- arrangements for management of the person's finances (including payment of charges) are not clear or are unresolved;
- action under part 6 of the 2000 Act is required as:
 - ❖ the Adult is incapable
 - ❖ no-one has made an application for an order in relation to the decision in question
 - ❖ an order may be necessary for the protection of property, financial affairs or personal welfare of the Adult

What actions should follow the decision?

In all cases (whether or not a pre guardianship case conference is convened) staff are required to comply with the 2007 Guidance in relation to recording decisions and informing interested parties:

- where a review has been conducted outwith a case conference a 'record of views' should record decisions taken including:
 - ❖ which power to be used to implement care intervention
 - ❖ arrangements for future reviews
- where a case conference has been held this should be recorded within the minute.

In addition the 2007 Guidance expects that a formal letter should be sent to the Adult, his/her primary carer, independent advocacy worker (where there is one) and relevant professionals to inform them of:

- the outcome of the review/case conference;
- confirm what care services and actions were agreed;
- confirm if an order is to be sought with reasons for decision;
- arrangements for next review;
- right to object using NHS/HC complaints procedure or seek legal advice.

When formal measures under Adults with incapacity (Scotland) Act 2000 are being considered the Adult, his/her family and/or relevant others should be given information on the Adults with Incapacity (Scotland) Act 2000 and advised of the need to take legal advice. Where there is no family able/willing to progress an application for intervention under AWI 2000 Act arrangements will require to be made for a pre guardianship case conference (See 2015 AWI 2000 Procedures, Section...)

MHO advice/Duty MHO

The MHO Service operate a daily duty rota between the hours of 9.00am – 5.00pm. The duty MHO can be contacted for advice and discussion in respect of particular cases or situations where it would be deemed relevant to obtain specialist advice. MHOs are well placed to provide such advice given their training and qualification and specialist role. Advice on issues regarding the potential use of mental health legislation (AWI 2000 Act, MHCT 2003 Act, ASP 2007 Act) or the interface between these. This service is open to all staff from teams and professionals across Health & Social Care in Highland. The purpose is to ensure a consistency of advice but also to try and ensure that the MHO view is given on the basis of as full information as possible.

The Mental Welfare Commission also operate an advice line for both professionals and service users and carers.

The above is intended as an aid to help inform practice and provide a consistent approach for staff and should not be viewed as constituting legal advice on behalf of the Local Authority. It is intended as a support for decisions on management of a case for allocated workers. Workers should discuss the case with their line manager in the first instance and agree that it is appropriate to discuss with an MHO. The advice does not replace any formal AWI Case Conference or ASP Case Conference that may be required under the Local Authority's procedures, but may assist to clarify issues. If an MHO is already involved in the case then the first point of contact for discussion should be directed to the allocated MHO.

Advice given will be recorded and a short observation entry made by the MHO on the client record on CareFirst to ensure that there is a record of the discussion that appropriate staff can refer to.

DRAFT

Section 13ZA CHECKLIST

Personal Outcome Plan Assessment completed

Yes No

Date completed:

Risk Assessment completed

Yes No

If no, give reasons:

Assessment of mental capacity obtained

Yes No

Name & designation of assessor:

Date of assessment:

Use of AWI 2000 Act discussion held

Yes No

Date completed:

Review Meeting held

Yes No

Date held:

Names of participants and designation:

Criteria indicating need for further action under AWI, including case conference

Agreement to 13ZA care plan from all professionals involved

Yes No

Agreement to 13ZA care plan by significant others involved with adult

Yes No

Risks to property, financial affairs and/or personal welfare identified requiring formal intervention under AWI

Yes No

If yes, give details:

Adult is consenting (or is likely to be compliant with) the 13ZA care plan

Yes No

Proposed care intervention constitutes a 'deprivation of liberty'.

Yes

No

If yes, give details:

Arrangements for managing finances of Adult (including payment of fees for service provided) are unresolved.

Yes

No

If yes, give details:

Advocacy

Has an advocacy worker been appointed for the Adult?

Yes

No

If no, why not?

If YES does the report from advocacy worker indicate Adult's consent to / compliance with 13ZA care plan.

Yes

No

Other action

Has an application for guardianship already been lodged with the court which would not allow for implementation of the 13ZA care plan.

Yes

No

If yes, give details:

DECISION

I authorise implementation of care plan under Section 13ZA of Social Work (Scotland) Act 1968

Yes No

Signed:

Designation:

Date:

AWI 2000 - Aide Memoire - Chairing the pre Guardianship Case Conference

The Chair at a Guardianship case conference should:

- Prepare for the conference by obtaining as much information as possible in advance – Report must be provided by Adult Social Care Worker
- Give consideration to a protected period without family when there are serious concerns about a conflict of interest between the Adult and/or family members
- Begin the conference with a specific statement about the purpose, i.e. to discuss the necessity or otherwise for Guardianship - clarify reason for meeting
- Explain the process to relatives – Check whether they intend to make their own application, if not why not. LA have a duty to make an AWI application **only if it is necessary and no one else willing/able to apply**
- Ensure that everyone present or invited has an opportunity to air their views
- Ensure that the Adult's wishes and feelings are represented, either by themselves, or by an advocate. The Adult should be invited to attend at least in part, unless it's considered detrimental to their health and well-being.
- Ensure, as far as is possible, that consensus is reached, and to reconcile disagreements
- Ensure that a clear decision is reached at the end, and that decisions are properly recorded
- Allow enough time for a proper discussion without prolonging matters – 1-1 1/2 hours should be sufficient time
- Make one of the following decisions:

Apply for Guardianship – be clear what powers are being asked for, how they are going to be used and by whom taking account of principles (benefit, minimum intervention...)

No Application necessary – give reasons why.

No AWI Application for Guardianship, but consider alternative arrangements such as 13ZA, which will need to be recorded - Please see separate Highland Procedure

Sum up at the end of the conference – the following issues **must** be covered and included in the minute:

- **Capacity** – confirmation is required that Adult lacks capacity
- **Risk assessment** – current risks and reasons for Intervention
- **Give relatives the opportunity to apply** – this should have been discussed prior to case conference and family solicitor should be invited to the meeting. If relatives are wishing to progress the Application obtain name and contact details for family solicitor as notification will be sent in writing by Chair advising solicitor of decision of Case Conference and time scales/urgency as appropriate.
- Major decisions which need to be made on the Adult's behalf – if Guardianship is necessary there should be a clear decision as to **what powers will be required and how these will benefit the Adult. How will the powers be used, delegated, by/to whom?**
- Timescales – LA application estimated timescale would be around 12 weeks
- Guardianship powers – see above
- Local Authority Application - Who does what – MHO co-ordinates medicals and submits medicals plus MHO report to Legal **within 21 days of first medical**. Legal will complete summary application and **lodge papers in court by day 30**. It is the responsibility of the Health & Social Care Worker/Professional allocated to the case to prepare a report for the Case Conference and gather as much information as possible to inform the MHO and Legal Services to enable them to proceed with the completion of the application within statutory timescales.
- Agree who should inform the Adult of decisions/outcome of case conference

What to do if there is disagreement

Consensus is reached in the vast majority of case conferences, and it is usually straightforward for the Chair to sum up the decisions reached and to reflect the views of those present.

However if it is not possible to reach agreement, whether with relatives and/or other professionals, in the end **the Council, represented by the Chair**, has to make a decision as to how to proceed, based on the information available, and bearing in mind the principles, especially that of least restrictive intervention, whilst weighing up any risk factors.

If the Council decides to go ahead with Guardianship, relatives have the right to object and be heard in Court, or to apply themselves, in which case both applications will be heard by the Sheriff. If there were serious concerns about the motives of relatives, the Council has the option of making an Interim application to ensure that the Adult's Welfare and/or Finances were protected speedily.

It should be noted that local authorities have a duty to apply for Guardianship if the conditions are met, and no-one else is willing or able to apply. This includes Financial Guardianship when a solicitor or accountant would have to be identified as Guardian.

A Minute of the pre guardianship case conference **must** be completed, signed and distributed to all within 10 working days. **This is the responsibility of the Chair of the Case Conference.**

Karin Campbell

Principal Mental Health Officer

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

CASE CONFERENCE MINUTES – MEETING HELD ON (PLEASE INSERT DATE):

Forename	Surname	Date of Birth	CF NUMBER

Home Address
Current Address (if different from above)

Chair Person	Team Responsible
Minute Taker	
Mental Health Officer	
Name:	Address:
Legal Services	
Name:	Address:

Nearest Relative	Principal Carer
Name:	Name:
Address:	Address:
Relationship:	

Present	Address & Designation
Apologies	Address & Designation
Invited but did not attend	Address & Designation

Reason for Case Conference**Discussion re Incapacity**

- To include how condition affects capacity to make decisions

Discussion re decisions needed

- To include how these will benefit the Adult
- To include discussion re the least restrictive option

Views of the Adult – How these were obtained

Views of the Nearest Relative

Views of relevant other people

Summary of discussion

Assessment of Risk**Conclusion and agreed Action****Lead Officer****Address****MHO/Person responsible for report****Address****Order required (delete as required)**

- **Welfare Guardianship**
- **Financial/Property Guardianship**
- **Welfare & Financial Property Guardianship**
- **Welfare Intervention Order**
- **Financial Intervention Order**
- **Welfare & Financial/Property Intervention Order**

**Appointment to be made
(ie Guardian, Intervenor etc)****Name of person to be appointed****Address**

