

Guidance on Managing Self-Directed Support for Adults with Incapacity

Introduction

The Scottish Government believes that everyone should be in control of their life. In order to achieve this, the Scottish Government introduced The Social Care (Self-directed Support) (Scotland) Act 2013. The Act came into force on 1 April 2014 and places a duty on local authorities to offer people who are eligible for social care a range of choices over how they receive their support. Self-directed support aims to ensure that care and support is delivered in a way that supports choice and control for the individual over their own life, and respects the person's right to participate in society.

In its Self-directed Support Implementation Plan 2019-2021, the Scottish Government committed to providing guidance to build understanding of the legal powers required to manage a social care budget on behalf of an adult who lacks capacity to take some, or all, decisions for themselves. This Guidance seeks to address this.

A person with incapacity has the same rights as any other citizen. The guidance in this leaflet considers how self-directed support, underpinned as it is by informed choice, applies to those who lack the capacity to choose.

Self-directed support general overview

The general principles of the Social Care (Self-directed Support) (Scotland) Act 2013 value respect of the individual, allowing their involvement, participation, choice of options and participation in the community. More about this and the self-directed support options available can be found [here](#).

The premise of self-directed support is that it allows people, their carers and their families to make informed choices on what their support looks like and how it is delivered, making it possible to meet agreed personal outcomes. There is more information about personal outcomes in this [booklet](#).

The statutory guidance that accompanies the 2013 Act sets out that the professionals involved in the assessment and support planning should take a person-centred

approach to risk assessment, risk enablement and management in order to maximise a person's control over their own risks. This requirement applies equally to those who lack capacity.

Relevant Age

There is disparity between the Adults with Incapacity (Scotland) Act (AWI) and Social Care (Self-directed Support) (Scotland) Act 2013 (SDS Act) as to the age at which one becomes "adult", which can create both confusion and tension.

In the case of a person who lacks capacity, and thus a person who comes under the ambit of the AWI, an "adult" is a person aged 16 or over.

The SDS Act draws its definition from the Children (Scotland) Act 1995; for the purposes of the relevant sections, a person is an adult if they are age 18 years or over.

That said, it is accepted that a child of 12 years of age or more is presumed to be of sufficient age and maturity to form a view, and their participation in decisions about them should be encouraged.

The difficulty comes with individuals aged 16 and 17: are they to be treated as adults, under AWI, or children under the SDS Act? In such cases, their capacity is what determines whether to treat them as an adult.

Assessing Capacity

Capacity is not all or nothing, but is decision-specific. Capacity is not linear: someone who cannot make lower level decisions may nonetheless be capable of making a higher level decision.

In assessing capacity, the law requires the start point to be a presumption of capacity, both per se and for any given decision. What does this mean in practice? In reality, what often happens is that where a person appears incapable, a capacity assessment is done to check this assumption i.e. to determine if they are indeed incapable – which is a start point of incapacity.

A start point of a presumption of capacity requires this to be the other way round i.e. one completes the capacity assessment to establish those elements where the person has capacity.

Decision-making considerations for self-directed support

The following list offers a flavour of the number and type of decisions that one has to make when considering if they wish to self-direct their social care support. In assessing capacity, professionals may wish to consult this list, always understanding that it is not a capacity assessment checklist, nor is it exhaustive. There may be elements not included which are relevant in the individual's circumstances and vice versa, elements included that are not relevant in the given case.

In order to make a self-directed support decision an individual needs to:

- Understand the overarching premise of Self-directed support
- Appreciate that there are four options
- Understand the basic premise of each option
- Understand that they will have to select one of these options
- Be able to weigh up and balance the pro's and con's of each option
- Be able to select the option they believe is right for them, in their situation
- Appreciate the specific pro's and con's of the option they are minded to select, as it applies to their situation.
- Retain, or recall when prompted, the decision that they have made
- Be consistent in their decision making (both the outcome and the process of thinking which arrived at this outcome)
- Be aware that they can change their mind
- Understand their welfare needs
- Appreciate that there is a budget for their care and support (even if the actual budget sum has not been provided to them)
- Understand the premise of administering funds
- Know how to initiate/commission any action required, depending on the option chosen
- Be aware of issues that may indicate a review of arrangements is required
- Be able to communicate all of this (even with mechanical or other aids)
- Know that they can ask for support and advocacy, and where to obtain those services
- In addition, if they choose to employ a personal assistant, they need to be aware of their role and obligations as an employer.

A person does not have to be able to reach these decisions entirely independently; they can be supported, including via independent advocacy, to reach these decisions, so long as the decision reached is the person's autonomous choice.

Partial Participation

In reaching a decision, the person should be encouraged to participate as far as they are able.

The person may be able to decide on matters to a certain point and not thereafter. For example, they may be able to make a decision that Option 1 is their preferred option, but not actually be capable of administering the funds that come with option 1 (although they are able to nominate whom they would wish to manage this for them).

Although the person may only be able to participate partially, they retain full responsibility. For example, if the person chooses Option 1 and decides that they wish to employ a personal assistant but delegated to another the administration of the funds that paid this assistant, the person receiving the care remains the employer. If for example, contractual matters went awry and the assistant took the case to tribunal, the person receiving care is the employer and therefore is the person who would have to respond to the case, even though they may have delegated contractual negotiations to someone supporting them.

AWI Principles

The AWI has a series of underpinning principles that must be respected by anyone operating under the Act. These are outlined below:

Benefit

Any intervention must be of benefit to the incapable person, and furthermore it must not be possible to achieve the benefit without the intervention.

Least Restrictive Intervention

An intervention must be the least restrictive option, in relation to the freedom of the adult, consistent with the purpose of the intervention.

An example may be a situation where the person is able to make his or her own decision, albeit with support, then a guardianship is not required.

Present and past wishes and feelings of the adult

Account must be taken of the present and past wishes and feelings of the adult, as far as this is possible. Decisions should respect those that the person would themselves have made had they been able to do so.

Views of others

Account should be taken of the views of relevant other people, such as the next of kin, primary carer, a sibling, or even those without formal authority, for example a close family friend or neighbour. The views of these other people may offer an alternative perspective on a given matter which is relevant to the decision and will

ensure that a decision is made which should reflect the supported person's own view, had they been able to determine this personally.

Encourage participation

This has been touched on above. Encouraging the person's participation is a statutory (legal) requirement.

United Nations Convention on the Rights of Persons with Disabilities

The UK has ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), although this has not been incorporated into Scots law; nonetheless, by ratifying the UNCRPD we have undertaken that, wherever possible, Scots law will conform to the values that the UNCRPD enshrines.

Supported Decision Making

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) requires a person with a disability, (which includes an intellectual, cognitive or volitional impairment) to be supported to exercise their legal capacity. The choice of an option under self-directed support is an exercise of legal capacity as it is a right that any one of us has. Thus, if necessary, a person with a mental incapacity must be supported to exercise their legal capacity in respect of this choice.

The person themselves may not be able to arrive at a decision without support, but allowing a person of their choosing to support them with the process is permissible. However, the role of the supporter should be one of passive assistance not as active proxy decision maker.

Respect for Rights, Will and Preferences

The UNCRPD requires the incapable person's (human) rights to be respected, as well as their will and expressed preference(s) on a matter. Both will and preference can be expressed by behaviour and attitudes, they do not have to be verbal expressions. This complements the AWI requirement to take account of past and present wishes and feelings.

Power of Attorney and Guardianship

Attorney

An attorney operates under a power of attorney (PoA). A PoA is a legal document granted by a person, while still capable; nominating whom they would wish to manage their affairs should they no longer be able to do so personally. The person can grant welfare or finance and property powers and at its broadest a PoA can vest in the attorney powers to do anything the person themselves would have been entitled to do.

The PoA needs to be registered with the Office of the Public Guardian before it can come into effect.

Financial and property powers can commence immediately, following registration of the PoA, welfare powers cannot commence unless or until the person becomes incapable – in relation to the decision to be made.

As the appointment of an attorney is made by a person while capable, a PoA is considered, essentially, a private mandate or contract between granter and attorney and so is not routinely supervised by the State.

Guardian

If there is no-one with power of attorney but someone with formal authority now needs to be appointed, a guardian is the most likely appointment. A guardian is appointed under a guardianship, which is granted by the Sheriff.

Briefly, a guardianship application requires two medical reports commenting on the person's incapacity, one of which must be from a consultant psychiatrist. A third report from a Mental Health Officer (a specialist social worker) is required to comment on the suitability of both the guardianship order (as a way of meeting the person's needs) and of the person being nominated as guardian. The dates on these three reports have to be within 30 days of them being submitted to court. They have to be submitted to court under a formal process called a summary application. A layperson is entitled to make the application, for example a family member wishing to be the guardian. However, because of the legal complexities of the process the majority of people choose to ask a solicitor to make the application on their behalf.

The Local Authority is obliged to apply for a guardianship order if this is required and there is no-one else who can make this application.

Welfare or finance and property powers can be granted in a guardianship order. The Sheriff will need to be satisfied as to why the powers requested are needed.

A guardian is supervised – the welfare element by the relevant local authority and the financial element by the Office of the Public Guardian (OPG).

Where there is a direct payment (Option 1) the Local Authority are obliged to undertake financial review; they limit this to the direct payment element only, relying on the OPG to supervise the remainder of the financial administration. Where the guardianship is limited only to the administration of the self-directed support, the OPG does not supervise the financial guardian, deferring to the review of this required by the Local Authority.

Supervision should be proportionate and tailored to the incapable person's circumstances.

The Local Authority and Public Guardian can inquire into concerns about the way in which a guardian is operating – such concerns can be reported in-year, notwithstanding the supervisory regime that exists for guardians.

Legal Obligations

When fulfilling the role, both attorney and guardian must not ill-treat or wilfully neglect a person with incapacity; they must act with integrity, to the best of their ability, with fiduciary care, with respect to the AWI principles in accordance with the UNCRPD and with regard to the relevant AWI Codes of Practice.

Administering a Self-Directed Payment

Attorney or Guardian Appointed?

If the person, even with support, is not able to make an autonomous decision on their preferred self-directed support option, or is not able thereafter to facilitate their preferred option, is there an attorney, or guardian (see below), with relevant powers, who can offer a best interpretation of what the person's decision may have been?

Relevant Powers

It is not the presence of an attorney or guardian per se, but rather that the attorney or guardian has relevant powers. There is much debate about what powers are required to administer self-directed support, be this by an attorney or a guardian. This will depend on which option is selected.

Option 1	Welfare powers required - to determine the appropriate care and support that is required, commission this, adjust this, discontinue this, as may be required. And
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	Financial powers are also required to receive and administer the payment.
Option 2	Welfare powers – to make a best interpretation decision on behalf of the incapable person as to the support they would likely have selected had they been able to do so.
Option 3	If there is no attorney or guardian, or if the attorney or guardian does not have relevant welfare powers (see below) this is the only option available. Although the LA in making the decision on behalf of the supported person, is still required to comply with the AWI principles and UNCRPD.
Option 4	Powers required for option 4 will be those required for Options 1, 2 or 3 depending on the option selected.

What are “relevant” welfare or financial powers?

You may not see a specifically worded power that permits a self-directed support decision, or administration of a self-directed support payment. This does not mean the PoA or guardianship does not permit it. Not every eventuality can command its own specifically worded power. One should look for a generically worded power that may suffice, or see if there is a plenary (“catch all”) power that allows the attorney or guardian to do everything the person himself or herself would have been able to do.

By way of example, there is not a power which expressly says “power to administer a self-direct payment” but in the financial guardianship, there is one that says:

“To claim and receive on my behalf all pensions, benefits, allowances, services, financial contributions, repayments, rebates and the like to which I may be entitled”.

This would cover claiming and receiving a self-directed payment, as would any plenary power if one was included.

Thereafter you would need to check the welfare guardianship to see if they, or the welfare guardian, has power to commission care, once the financial guardian has claimed the payment.

Let us assume, as would probably be the case, that there is no specific welfare power which references “care under a self-directed payment” but there is one that says:

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

This generic power would cover commissioning care under a self-directed payment, as would any plenary power if one was included.

If you remain uncertain as to whether the attorney or guardian has the necessary powers to administer matters, you should check with the Local Authority legal department.

No Relevant Powers?

If the supported person is now incapable and if there is no attorney or guardian, or none with a relevant power on which they can rely, then Option 3 is the only option available.

If it became apparent, prior to the supported person losing capacity, that their PoA would not be sufficient to allow their Attorney to make a self-directed support decision, or to continue to administer an option one self-directed payment, then they can, if they wish, vary their PoA to add in such a power. They need to have a doctor or lawyer certify that they are capable of instructing this variation.

If a guardian does not have a relevant power on which they can rely, they can apply to the Court for a variation of their order to have such a power added.

What if the person was receiving self-directed support before incapacity?

The AWI principles require us to respect the person's past wishes and feelings. Early conversations are encouraged to establish the person's view on the self-directed support options.

If a person loses capacity and they have previously expressed a view on their choice of self-directed support option, their previous position should be respected, insofar as this is possible in their changed circumstances.

"Respect" means taking due regard for the feelings, wishes, or rights of others, rather than being a decisive requirement.

Managing Conflicts of Interest

There is no simple, or single, piece of advice that can direct one how to manage conflicts; this is very much circumstance-specific.

Conflicts of interest may relate to a conflict inherent where one body has the role of provider and guardian. Other conflicts may relate to situations when the supported person's choices conflict with welfare guardian's choices such as positive risk taking; or when the person wants something that conflicts with what the service is set up to

provide or the welfare guardian decides. Particularly when family are the welfare guardian, they might not ask the supported person for their views or needs or choices as they may consider that the supported person doesn't have capacity in all areas at all times.

Managing Conflict of Interest

A prompt sheet

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

In conflict situations, it is easy to lose sight of the key issue. As a start point to finding any resolution it is helpful to ensure you are clear exactly what the outcome is that you are trying to reach.

Am I clear of timeframes?

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

Have I reviewed objectively the position to date?

Review the position, objectively, for yourself. Do not assume that the position is as it is because a colleague tells you that is the case. If you have been managing this all along can someone else offer a view? Use this opportunity to revisit the case history, to ensure there is not something which is now relevant, which may not have been when it was first considered.

Do I need to know anything more about the person's circumstances / the situation?

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

Does the person have all the requisite information to enable them to come to a decision?

Do you need to offer any more information, or offer this in a different way?

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

The views of the individual, be these past or present opinions, should form the basis of your consideration. Are you clear what their rights are? What their will and preferences are?

Is the individual free of undue pressure, or any other vitiating factor?

Ensure the view being expressed by the person is their 'unencumbered' view i.e. that they are not being influenced by someone else, or by the situation, into thinking they have to say a certain thing.

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

See main text. Are you satisfied that you have fully supported the person to offer their own views? Do you need to involve Independent Advocacy to ascertain the person's views impartially? Independent Advocates can offer non-instructed advocacy i.e. they can offer you a best interpretation of the person's view based on their professional review of the situation.

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

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

Am I clear that all possible options are under review?

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

Is there any compromise option?

Is there an option which parties would tolerate, even if it not the ideal? This still has to be a viable solution. It may be that it presents a short-term point, whilst time is taken to consider the longer term, or broader, options.

Have I sought the opinions of all relevant parties?

Ensure you have not omitted a relevant 'player'; the views of all parties need to be given equal consideration.

Conduct a review of each option.

For each option, consider:

- What are the views of the person – on each option
- What are the views of others – on each option
- How would this option benefit the person
- Would there be any risk or detriment to the person from this options
- Is this the least restrictive way of achieving the outcome (which has been stated at point 1)

Do I have any other duties I need to consider?

It is appropriate to consider your wider responsibilities in such a review, for example, the risks that any of the options may present to others, or the impact on public resources of any of the options. Such factors may be sufficient to exclude what may otherwise seem the preferred option.

Is there anything else I need to consider?

This is a generic template, is there anything particular to your current case/situation that you need to ensure you consider before reaching any conclusions?

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

Do you wish to / need to run your proposed decision past someone else, an impartial colleague, your supervisor, and your lawyers?

Have I made a clear action plan?

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

Is there any right of appeal or complaints process I need to advise people of?

When you have reached a decision on the way you wish to progress the matter, make sure you advise parties of any right of appeal or complaints process should they remain dissatisfied and how they access this.

Have I made a comprehensive record of all matters?

Ensure you make a clear record of all the things you considered, discussion, actions, your rationale for your decision etc.