

# Client representative guidelines

Part 5.2.(1-5): Appointee assessment - incapacity

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## Part 5.2.1: Overview of the assessment guidelines

### What is the purpose of the guidelines

1. The Scottish Government is committed to ensuring that the human rights of people with impaired decision-making capacity are upheld. The guidelines are part of a suite of statutory guidelines and set out the legislative and policy background to the tests that should be applied in making appointments. They also provide a framework for Client Support Advisors, in the form of practical advice, on how to complete an assessment to ensure decisions are taken consistently to meet this important aim.

### Who are the assessment guidelines for

2. When Social Security Scotland staff identify that any adult client may lack the capacity to manage their benefits, a referral will be made to Local Delivery to consider whether it is appropriate to appoint another person or organisation to act for them. This person (the appointee) would manage benefits administered by Social Security Scotland which the client may apply for, or is entitled to. This could happen any time.
3. Following referral, an assessment is to be made of:
  - the client's decision making capacity and their need for an appointee to manage their benefits
  - the suitability of the person nominated to act for them
  - the views of the client, and others with an interest in their welfare or finances, about the appointment
4. These statutory guidelines are for staff of Social Security Scotland – in particular, Client Support Advisors, who are responsible for making decisions about appointments and carrying out the assessment. They introduce a lot of information – including legislative and policy detail alongside more applied practical elements.
5. Part 5.2.1 and 5.2.2 of these guidelines give an overview of the background to assessment. They include:
  - Legal framework, policy and principles - This section includes the legal framework and principles underpinning the policy.
  - Supported decision making - We have a duty to support the client to exercise capacity wherever possible and express their will and preferences. Making an appointment should only be done where the client cannot be supported to manage their benefits independently. This section covers what we mean by supported decision making in a social security context, and how clients should be supported to participate in the process of assessment, where possible.

- The definition of capacity - People may be able to make decisions on some occasions or on particular matters, but not others. They may be capable of managing their benefits, even if someone makes decisions for them in other areas of their lives. This section helps you understand capacity in the context of Social Security Scotland benefits.
6. Parts 5.2.3, 5.2.4, and 5.2.5 provide a guide to completing each stage of the assessment - from preparation, to interview, to decision.
- The Client Interview - When visiting the client, you will need to assess their capabilities and in particular their ability to manage their Social Security Scotland benefits. This section includes tips on communicating with the client and understanding their wishes, desires and capacity. Based on the information gathered during this visit, and information and views collected from others, you will need to decide if they need an appointee or not.
  - Assessing the suitability of the appointee - If the client would benefit from an appointee, you will need to assess if the potential appointee is suitable. This section covers assessing the suitability of the appointee and finding out if there are other people who could be appointed, if required. It is also important to check that the potential appointee is aware of and willing to take on the responsibilities of an appointee.
  - Getting the views of others – In making a decision about whether an appointment is needed and about who that appointee might be Social Security Scotland must, where practicable, take into account the view of others with an interest in the clients welfare and financial affairs.
  - Making the decision and record keeping - Decisions that remove a client's ability to act for themselves in managing their benefits need to be robust and well justified. This section describes what type of information must be recorded and how to go about completing the assessment form which is the main record of the process.
7. There are some appendices at the end of the guidelines with additional reference material which you may find useful. These are :
- Appendix A: Tips and Sample Questions
  - Appendix B: Case Study: visit
  - Appendix C: Case Study: Completed Appointee Referral Form

## How to use the guidelines

Throughout the guidelines, coloured boxes highlight important information.



These boxes highlight specific Social Security Scotland context



These boxes highlight corresponding sections of the Appointee Referral Form to be completed

## Legal framework, policy and principles

8. These guidelines form part of those required under section 85C of the Social Security (Scotland) Act 2018 ('the 2018 Act'). They apply where Social Security Scotland is considering appointing another person to act on behalf of an adult client who may lack capacity to manage their social security assistance. This process only applies in relation to forms of assistance paid under sections 24 and 79 of the 2018 Act.
9. Section 85B(1) and (7) of that Act set out that an appointment can be made where:
  - the client is 16 or over; and
  - 'incapable' within the meaning of the Adults with Incapacity (Scotland) Act 2000 ('the 2000 Act'); and
  - there is no guardian already acting/appointed under that Act; and
  - the individual's estate is not being administered by a judicial factor; and
  - there is no other person who has authority to act on behalf of the individual and is willing to do so.
10. Information in these guidelines relates entirely to devolved Scottish social security and to the Scottish capacity legislation. However, it should be noted that where an appointment is made under section 85B(1) & (7) of the 2018 Act, that appointee can also act in relation to benefits administered by the Department for Work and Pensions(DWP)<sup>1</sup>.

### The Adults with Incapacity (Scotland) Act 2000

11. The first test you will apply in assessing the client, is whether on the balance of probabilities they would be considered 'incapable' within the meaning of the Adults with Incapacity (Scotland) Act 2000 ('the 2000 Act').
12. The 2000 Act was introduced to protect people (aged 16 and over) who lack capacity to make some or all decisions for themselves, and to support their families and carers in managing and safeguarding their welfare and finances.
13. It concerns individuals aged 16 or over:
  - whose incapacity is caused by a mental health condition ; such as dementia, learning disability, acquired brain injury (including alcohol related brain damage), severe mental illness or personality disorder; and/or
  - who are unable to communicate due to a physical condition such as a severe stroke or sensory impairment, where this cannot be overcome, for example by using a mechanical aid or interpreter.
14. It aims to protect people who lack capacity to make particular decisions, and is designed to support their involvement in making decisions about their own lives as far as they can.
15. It is important to avoid making assumptions about the client's capacity based solely on their age, appearance, condition, or aspects of their behaviour. Remember that a diagnosis of a

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<sup>1</sup> [The Scotland Act 2016 \(Social Security\) \(Consequential Provision\) \(Miscellaneous Amendment\) Regulations 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukdsi/2021/01/03/1300000000000002/1)



particular condition does not of itself mean that the decision-making capacity of a person is impaired. There are, for example, many people with dementia or learning disabilities who are capable of making all, or many, decisions for themselves

## The 2000 Act and devolved social security

16. The 2000 Act is clear that no one else can or should act or make decisions for someone who is capable of doing so for themselves. So, any decision to limit a client's right to act for themselves in relation to their benefits must be made with great care, taking account of the principles that underpin the legislation that is there to protect this vulnerable client group. A decision to appoint someone else to deal with an adult's social security benefits in their place should not be taken lightly. It is important that the client's abilities are assessed properly so that someone who can make decisions for themselves is not prevented from doing so and is instead supported to exercise their rights.
17. Where a person seems to be having difficulties in making, or acting on financial, welfare or healthcare decisions, it may be reasonable to think that this may also impact on their ability to manage their benefits. That is the context in which an appointment may be appropriate.
18. These types of difficulties are most likely to be brought to our attention by a person helping the client to make an application, or by social or healthcare professionals asked for information to support an application. They may also become apparent in the answers to questions about help the client needs in a benefit application, particularly for disability assistance.

## What is (in)capacity?

19. The starting point of any assessment should always be that the client has capacity. Capacity is the ability to understand information relevant to a decision or action, and to recognise the types of things that could be expected to happen if that decision was taken, or not taken.
20. A person can only be considered 'incapable' if, due to mental disorder or inability to communicate because of physical disability, they can't do **one or more of the following** in relation to a particular matter:
  - act
  - make a decision;
  - communicate a decision;
  - understand a decision;
  - retain the memory of a decision

21. Before we can say that someone is completely unable to communicate, the use of mechanical, electronic or other aids such as an interpreter should always have been considered.



In a Social Security context, the types of decisions or actions you should consider are those that would be involved in applying for and receiving benefits or broadly similar tasks. For example, this might be the decision to inform Social Security Scotland of a significant change of circumstances, or decisions about how benefit payments will be managed.

22. Part 5.2.2 of these guidelines provide more information about what each of these criteria mean. Parts 5.2.4 and 5.2.5 considers the practical application of these in a decision-making assessment.

## The Principles

23. Respect for the dignity of individuals is to be at the heart of the Scottish social security system, which is underpinned by the principles in the 2018 Act and Our Charter. Social security is itself a human right, essential to the realisation of other human rights, and Social Security Scotland is committed to delivering benefits in a more accessible, positive, and supportive way. The 2000 Act also has a series of principles in its section one.
24. In the process of assessing any client who may lack capacity and making decisions about appointments you should in as far as possible apply the principles of the 2018 and 2000 Acts. These are set out below in plain English, as they apply to assessment and decision-making in the context of a client's capacity to manage their own benefits.

Take account of the circumstances of the individual case:

- We should always take a person-centred approach. This means there is no 'one size fits all' way to carry out an assessment or to make a decision about the appointment.
- The needs of each client being assessed should be considered carefully, and your approach to assessment tailored to those needs.
- A client should only be treated as unable to make a decision when all practical steps that might enable them to do so have been taken.
- You should never assume that because a person is a particular age, has a particular health condition or disability that they lack capacity.
- In deciding when an appointment should be reviewed you should consider all of the information available to you about both the client and the appointee.

The client should be encouraged to exercise whatever skills and capabilities they have, as well as be encouraged to develop new ones.

- The person must be offered help to communicate their views
- This might mean using memory aids, pictures, non-verbal communication or advice from a speech and language therapist.

- A referral to the Scottish Government’s free social security independent advocacy service may be of assistance in supporting a person to voice/express their own views.

People affected by the decision must be given adequate information and support in relation to their involvement in the decision-making process.

- The client, the appointee and others involved in the process, should be provided information at the outset about the decision they need to make, what an appointee is, why it might be necessary, what the particular consequences are for them in whatever part they play within the process. It should be provided in a way that meets their needs.

An appointment should only be made if you think it will secure a benefit for the person that could not be achieved without it. It should be the minimum intervention that would be needed to help the client manage their benefits:

- In making any appointment, you must be satisfied that the ways it would help the client are different from the ways they could be helped by, for example, an advocate, third party representative, carer, interpreter. For example, an advocate could not make the legal declaration on an application.
- An appointment should only last only as long as the client is still benefitting in this way.

In making a decision you should take account of the past and present wishes and feelings of the person, as far as these can be established.

Where it is reasonable and practical you should seek, and take account of, the views of relevant others and people who may be affected by the appointment:

- It will be for you to decide who may be affected and who the ‘relevant others’ are. Another way of saying this is ‘anyone who you think may have interest in the financial or welfare affairs of the client’.
- The nearest relative, primary carer and close relatives are people you may wish to speak to, as well as professionals involved in the client’s care.

Decisions should be taken on the basis of good information:

- It may sometimes be necessary for you to ‘test’, or validate, information with another person, or source, particularly where it is conflicting. For example, you may wish to look at other records, seek information from the person’s GP, or talk to an impartial third party (for example, a long-term friend).

## Part 5.2.2 Capacity

25. Section 85B(7) of the 2018 Act sets out that an appointment can only be made where a client is ‘incapable’ within the meaning of the 2000 Act. Capacity therefore is a key element of your decision, however it is not all or nothing.

26. Regardless of what information you have been given in the referral, you should always start with the presumption that the client is capable. This is because there is not a tipping point at which someone who is totally capable becomes totally incapable.
27. A client may be capable of some decisions, and at the same time be incapable of others. Their capacity, or mental ability, can vary, sometimes very fluidly, as a result of many factors. Where there are significant fluctuations in their capacity, this might mean they would be able to make use of other support services to help them manage their benefits independently.
28. As described earlier in Part 5.2.1, a person meets the definition of ‘when, due to mental disorder or inability to communicate because of physical disability, the client can’t carry out one or more of the following elements of decision making in relation to a particular matter.

### **Act on decisions**

➤ Can the client act in line with decisions they have made?

29. A person may show good reasoning and ability to understand and make a decision however when confronted with the situation, may not be able to use this reasoning to act on it or be easily coerced, because of mental illness or cognitive impairment.
30. For example: an adult with hoarding disorder may have shown capacity to understand and make a decision about others assisting with tidying. They may not however not act on their decision by allowing entry to their home, due to the emotional response associated with their hoarding disorder.
31. For example: an adult with brain injury may have shown capacity to understand and make decisions about day to day budgeting. However when shopping in town they spend a month’s allowance on new clothes due to difficulties inhibiting that response in the situation.

### **Make a decision**

➤ Can the client use or weigh up information about the consequences of a decision as part of the process of making it?

32. If they are given sufficient information, are they able to:
  - understand the pros and cons,
  - understand how it may impact themselves and others,
  - anticipate possible outcomes,
  - arrive at a reasoned decision.
33. Remember that different people presented with the same decision might make completely different choices. These may sometimes be seen by others as unwise, eccentric, immature or unusual, but if they have been able to think through the decision and appear aware of likely consequences, they should not be treated as unable to make a decision just because others may not agree with it.

34. There may however be cause for concern if someone repeatedly makes decisions that put them at significant risk of harm or serious exploitation, or if their decisions seem to defy all notions of rationality. In these situations it would be relevant to look at whether these are consistent with their past decisions and choices, but may require further information.

### **Communicate a decision**

35. The person must be able to communicate a decision they have made. This doesn't need to be verbally; it may be by drawing, by non-verbal signs or signals, or with use of communication aids or interpreter. A person is not to be considered incapable if an inability to communicate can be overcome by human or mechanical means. All efforts must have been made to facilitate communication where possible.

### **Understand a decision**

36. Before a client's ability to make decisions can be assessed you must be satisfied that they are able to understand the matters they would need to make decisions about.
37. A client must be given all of the facts, to be aware of, and be able to weigh up the pros and cons, risks and benefits, giving each due consideration as they may apply to their situation. They may need to receive information in an accessible manner or for information to be repeated.
38. Information should be communicated simply and without using technical jargon or complicated sentences.
39. For example, a person may not understand what you mean by 'a social security benefit' which may block their ability to make a decision, but if you changed this to 'if you were to get some money from the government' they may then understand the premise of the conversation and be able to offer you a view.

### **Retain memory of a decision**

- Can the client retain relevant information for long enough to use it to make a choice, or an effective decision?

40. Clients with cognitive difficulties may forget, even fairly rapidly, the decision they have made or something that only just happened, or they may become confused or easily overwhelmed. You may use aids such as videos and voice recorders to support the client's memory. You may need to ask a question several times or in different ways to confirm the consistency of their response. Even if person has difficulty remembering the decision, but they answer consistently, their decision is valid.
41. While you should not lead the client, you can offer a prompt to see if this may lead to a recall of a memory/decision. If, with prompting, the person is able to remember they may be considered capable in respect of the 'retention of memory' element of the definition.
42. The ability to recall relates to relevant information. For example, a person may not be able to remember, or recall, a random fact such as an address, but they may be able to recall who they chose to be their appointee.



In a Social Security context, the particular matters/decisions concerned are:

- applying for, receiving and managing benefit(s);
- how money awarded ought to be spent to best meet the person's needs/wants;
- whether they believe themselves to be capable;
- who they may wish/trust to manage their benefit(s) for them.

### Part 5.2.3: The Client Interview +

43. It may not always be possible to carry out the client interview given the particular circumstances of the client, or if they refuse to participate, but this should be the exception to the rule.
44. The Client Interview is a key part of the appointee assessment. It allows you to check on the client's general welfare, make an assessment of their ability to carry out the sorts of tasks involved in managing social security benefits, and to ask their views about the proposed appointment.
45. The way you conduct this interview (the conversation or exchange) will influence the outcome. It is important that you do not conclude that a client is incapable of decision making if, had the interview been conducted slightly differently, they may have been able to express themselves and give a view.
46. To optimise the outcome of your visit you should always ensure that you have:
  - Prepared in advance so that you fully understand the context of the visit and have made any necessary arrangements
  - Taken a person-centre approach to dealing with the client.

#### Prepare for your visit

47. Preparing properly for your visit will ensure the visit is conducted efficiently and takes account of the individual's condition and circumstances. It will allow you the best possible opportunity to make a fair assessment of the client's situation, and their possible need for an appointee. It should also mean you have a better chance of collecting detailed information to make a robust and well justified decision.
48. You must consider the approach you will adopt, as well as the process and structure of the interview itself. Before visiting a client, you should be satisfied that you have certain key information much of which should already be provided in Part 1 of the Appointee Referral Form: Initial Information Gathering.
49. If you feel you do not have enough background to allow you to prepare adequately for your visit you should contact the person nominated as the appointee directly asking for the further information.

## Gather key information for the visit

50. In deciding on an approach to the visit, you should first be satisfied that:

- You are clear what you are being asked to assess (e.g. the client's ability to make decisions about their social security benefits, and to decide whom they may wish to manage this for them if they are not able to do this themselves);
- You have sufficient information to allow you to plan the interview; and
- You feel able to put across relevant information whilst avoiding overloading the client with more detail than is necessary (e.g. information about benefits and social security, how it is usually paid, how frequently, and an explanation of appointeeship).

Ask yourself:

- What is the reason for the referral?
- What information do we have to support the need for an appointee?
- Who is the proposed appointee?
- Any special information re location of the client and appointee eg example are they in a hospital, school, care home, do they live with others?
- Do any special arrangements need to be made?
- Have any health and safety issues been identified?
- Is an advocate or other service needed to help communicate with the client or their appointee
- Do we have contact details for other relevant people/organisations
- Who are the other relevant people in the individual's life? For example, who is the nearest relative, is there a welfare guardian or welfare attorney appointed, who is the primary carer?



In preparing for and arranging the visit, the factors at Table 1 below must be fully considered, and where appropriate recorded at Part 2a of the Appointee Referral Form.

**Table 1: Factors to consider when arranging a visit**

<b>Detail</b>	<b>Important considerations</b>	<b>Information recorded at part 2a</b>
<b>Time</b>	<p>What time of day should I visit? – some people are better in the afternoons, for example, once pain medication has taken effect, some are more tired by the afternoon. What is best for this individual?</p> <p>Have I given enough notice of my visit?</p> <p>Have I allocated long enough for the visit given the circumstances?</p>	<p>Date</p> <p>Start time</p> <p>End time</p>
<b>Place</b>	<p>Where is the best place to meet? Is it a place the person is familiar and comfortable with?</p> <p>If this is a hospital, residential care home, school am I satisfied that this is appropriate and that the establishment is aware and content for the visit to take place?</p> <p>If the client and appointee are to be seen at the same location is there enough space and privacy for them to be seen separately?</p>	<p>Location</p> <p>Steps taken to engage with client</p>
<b>Client engagement</b>	<p>Does the client know I am coming, what the visit is for and what it will involve? Will the proposed appointee prepare them and if not, what is the best way to get this information to them?</p> <p>Does the proposed appointee understand the purpose of the visit and roughly what it will include and not include i.e. that you will not be making a decision on the day?</p> <p>Have you discussed whether it will be possible to speak to the client and appointee separately i.e for the appointee not to be present during the client assessment?</p> <p>Where documentation will be needed you should ensure those involved in the visit have been advised of this ahead so that it is readily available.</p>	<p>Steps taken to engage with client</p>



<p><b>ID and verification</b></p>	<p>You will have to confirm the identity of the potential appointee and client at the visit. You should follow the standard Local Delivery process but be aware that clients with severe disability may not have standard ID types like passport, driving licenses or bank accounts etc.</p> <p>You will also need to verify your own identity with them. Ensure you have suitable ID available.</p>	<p>Confirmation of successfully completed ID checks</p>
<p><b>Additional</b></p>	<p>Is there anything relevant about the individual’s personal circumstances that I ought to be advised about and so take into account? For example, if they have hearing loss, or English is not their first language, or perhaps they have a recent diagnosis which they are struggling to come to terms with, or maybe they are distressed by a change in their family situation which has necessitated this benefits review.</p> <p>Do they require an advocate to be present. What are their preferences?</p> <p>Do I need to put in place special arrangements in relation to my safety?</p>	<p>Steps taken to engage with client</p>

## Supported decision-making: adopt a person-centred approach

51. When interacting with the client it is important to consider the context surrounding their choices and responses, as these may be influenced by a range of factors – including (but not limited to):
- Their experience and confidence in decision making
  - Their emotions at that time
  - The situation
  - The likely impact of the decision, for the present and future
  - Other people
  - Their medical condition or character
  - Pain
  - Environment
  - Tiredness
  - Their communication needs
52. Take these factors into consideration when supporting someone to think about and offer their views about whether they can manage their benefits or finances, or about who they would like to manage them. Ask yourself if you can change your approach in any way to give the person the best chance to understand what they are being asked to consider, and to express themselves.
53. To rule out the possibility that the person nominated to become the appointee is putting pressure on the client, the interview should be carried out separately without the potential appointee being present. Where the appointee says this is not possible, first consider whether someone other than the potential appointee could support the client.
54. If the appointee must be present you may feel they are interjecting too much and is unduly influencing the client's responses. You should ask the person to remain quiet whilst you are speaking to the client, advising you will seek their view after your conversation with the client. You can ask the person to step out of the room if they continue to interject.

### Adapt your approach

55. Your approach will be crucial to the success of your visit and reaching the right outcome for the client. It would be against the principles of the legislation and unfair to the client to decide they were incapable of making a decision, if better support during your visit would have enabled them to demonstrate that they were capable.

### The right approach?

56. There is no one size fits all approach to interviewing clients with a range of different communication needs and impairments. Detailed tips for how to engage with the client can be found at Appendix A – Tips and Sample Questions. However in general terms the approach you take should be tailored to the circumstances and communication needs of the client, and their appointee. To ensure a good interview you should: -

- Provide appropriate information
- Explain things in simple terms,
- Use short sentences
- Take time
- Break the discussion into 'bite sized chunks, offer the client choices/options. Use others to support the client in their decision-making, if this is necessary.
- If the client is struggling for words, do not offer them a range of options hoping one of these may be the one they are searching for
- Use of past examples if these would assist
- Draw inferences where possible from similar decisions the client may have had to make in the past, or tasks they may have had to complete.

For example, if you are asking the client who they want to be their appointee, you may also ask who they choose to go with them to the shops, or perhaps to the doctors. This will give you an indication of whether they receive support already from the proposed appointee, or whether in fact there is another person that maybe would be their preferred appointee. Although remembering that circumstances can change and just because they chose one person for support in the past does not mean that they would necessarily choose that same person today.

57. No one person has the monopoly on supporting the client to participate in the interview. Consider whether there may be others who can assist, for example a long-term friend or would another close relative be more suitable.
58. The client may be better able to make a decision on some days or at some times than others. For example some medication can affect a person's ability to make decisions(e.g. medication which causes drowsiness or affects memory). If it is clear that the client is experiencing negative side effects of medication consider delaying the interview until they have subsided.
59. When someone is in an acute state of distress e.g. following bereavement, or where there are long-standing issues influencing the client's understanding, you should take these into consideration in how you carry out the interview.
60. Sometimes, no matter how much you optimise the decision-making environment and offer every support, the client will not be able to engage or demonstrate that they would be capable of managing their benefits, in which case you move to the considering the appointment of an appointee - see Part 5.2.4 of these guidelines Suitability of the Potential Appointee.

## Open the interview

- Start with a presumption that the individual has the capacity, or ability to manage their benefits themselves.
- Focus the assessment on the types of tasks that are necessary to apply for and manage benefits .
- Strike a balance between a relaxed conversational exchange, and the formal decision that has to be reached. The interview should never seem like an interrogation.
- If there is any aspect of this introductory conversation which leaves you with concerns, to the extent that you think it may impact the outcome, then you may choose not to continue in the circumstances but to continue the interview at a later time.



These questions, any pertinent information they throw up, or any inconsistencies with the referral information in Part 1 of the form should be recorded in the *Notes of the Interview* at Part 2a of the Appointee Referral Form.

## Have a conversation with the client about their personal needs

61. Although the client's care needs do not form part of your formal assessment of their need for an appointee, a general conversation about them may help to uncover the degree of insight they have into their condition, capabilities, and limitations, the types of task the client can do for themselves, and their attitude to the potential appointee.
- Does the person admit to, or recognise, any problems in meeting personal care needs? If so, do they seek appropriate assistance?
  - Is there evidence of recent change in the person's ability to self-manage? For example, has there been a deterioration in their appearance, self-care, living environment - house less clean and tidy than before, lack of food in the cupboard, etc.
  - Can the person recognise risky situations and respond accordingly?
  - Could the person ask others for help in an emergency?
  - Does the person encounter safety or physical health risks because of memory problems?
62. A person who lacks capacity may have a distorted view of their needs – often not realising when they need assistance, as their recollection is to a time when they could be fully independent.
63. As part of seeking the views of others it can also be helpful for someone else, who knows the client, to hear how they describe their situation, and for you to test whether they agree with the way the client perceives themselves. However - see Confidentiality below.
64. It is helpful to summarise what you have heard after each section and check if there are any final questions/comments/reflections from the person before moving on.



The extent to which a client understands their own needs, capabilities, and limitations is likely to inform whether they are able to recognise and report significant changes in their circumstances to Social Security Scotland.



- Information gathered and observations made here should be recorded at Part 2a of the Appointee Referral form: Assessment - the client.
- The conversation may also reveal other relevant people who you may want to speak to. If so record their contact details
  - Any relevant evidence gathered through contact with another third party who was present should be recorded in Part 2c: the views of others
  - When you have completed your conversations you should be able to determine whose view – client or proposed appointee – is closer to the real situation.
  - Information from this conversation may also feed into your decision about whether the proposed appointee is suitable at Part 3 of the form Appointment decision.

## Have a conversation with the client about how they are managing their finances



The purpose of this stage of the interview is to begin your assessment of the client's ability to apply for, receive and manage their benefits. This includes making applications, even where they may not be eligible.

65. You may already have some idea of the client's financial needs from the conversation you have had about their personal needs. However, you need to explore their understanding of these in more detail, and their ability to manage money generally.
66. People are often more uncomfortable talking about financial information than personal care needs, so it can be helpful at the outset to acknowledge although the next set of questions may seem personal, you can reassure them that you have a duty of confidentiality and can only use the information in connection with appointee application and social security.
67. It might be that the client would prefer to talk privately about their finances, you should check that they are ok with anyone in the room as a supporter remaining in the room.
68. Your interview style is critical to ensure a series of such questions does not feel like an interrogation.

Where possible:

- Find out the client's past and present role in management of their money
  - Do they know what assets, income, expenses, debts and financial dependents they have(if there are any).
  - Specifically, the client should be able to say roughly what:
    - their weekly or monthly income is;
    - their weekly or monthly expenses are; and
    - approximate savings they have.
  - Accept approximate amounts and only ask for general information on major income sources/debts.
  - Gently prompt them if they don't volunteer the information about significant aspects of their finances.
  - You may wish to ask again in a different way at a later point to see if responses can be repeated.
  - Probe for reasons behind any inconsistencies between what the client tells you and what you have already been told by others.
69. You are looking for the client to show a general awareness of their financial circumstances and of being able to understand how to manage their money.

70. It is reasonable to expect the client to show a basic awareness of their financial circumstances and an understanding of using some payment methods and managing money in the ways they always have.
71. There is no hard and fast rule as to which questions, or how many, you need to ask. However, you may wish to explore the following areas:
- Is there a discrepancy between the client's understanding of their actual income and expenses that cannot be put right through learning?
  - Could the client be helped to develop skills to manage their money, e.g. learn to count change, understand regular weekly expenditure, learn to sign a cheque and use a bank machine?
  - Does the client have a basic understanding of money and its value, e.g. coin recognition and worth; decipher a bank statement; bank card; online banking; or in some cases a cheque book (provided they have been familiar with these in the past).
  - Does the client admit to any problems with routine money management skills?
  - For those areas the client acknowledges as a problem, do they seek appropriate help?
  - Is there any evidence of a recent change in the ability of the client to manage his or her finances?
  - Can the client recognise situations of potential exploitation and respond accordingly?
  - If there have been incidents/situations where they couldn't manage their finances does the client still believe they are capable? How do they account for what happened? e.g
  - Is the client aware of obligations to financial dependants (where appropriate)?
72. Once you have heard the client's views, and if they have allowed another person to remain in the room, you should ask for their perspective. Advising the client that you are about to do so.

### **Test the client's recall**

73. On one of the key tests in the capacity assessment is whether the client can retain memory of their decisions, or other information, for long enough to use it to make future decisions. It is helpful at the close of each section to ask the client open questions which explore their ability to remember things. You should return to, or recap something from your earlier conversation and explore whether the same response is given. Do they seem to have retained what was discussed for long enough to make use of the information.
74. For example:  
"To help me be sure I've understood things properly, of the discussion we've just been having what would you say is the thing you are currently having the most difficulty with?"  
"Just to make sure I'm being accurate, can you tell me again how do you feel about paying for things on your card?"

75. You can pick any area you have discussed. If they have seemed to have got more muddled when responding to one of your questions you may wish to revisit that one.



The ability to remember decisions is one of the key criteria for assessing capacity under the 2000 Act, and any difference between the client's initial account, and their recollection, is likely to help provide supporting information for your decision at Part 3 of the form: the Appointment decision.

### **Maintain confidentiality**

76. In discussing how the client manages their personal needs and finances, they may share with you information they may want to keep private. This may also be the case when sharing with you their views about the potential appointee. You may also know information from the referral that relates to their current or past social security entitlements.
77. Bear in mind that while the potential appointee may well be very close to the client, the client still has a right to privacy. Unless and until that person is actually appointed, they do not have any right to know information that may be held by you or Social Security Scotland about the client. To reveal this to them would be a data breach.
78. If there is another person present with the client during your interview, it may be that the client would prefer to talk privately. You should check that they are happy that the other person remains in the room. If the client wants the potential appointee to leave the room, consider why this might be, and whether this might have any impact on their ability to act for the client in future.



If the person present during the interview is the potential appointee, pay particular attention to the client's decision as to whether they should remain in the room during sensitive parts of the interview, this may give an indication of their wish to have this person intimately involved in their private affairs. Record the client's response under the question 'What does the client think and feel about the potential appointee?' in Part 2a of the form: Assessment - the Client.

### **Explore conflicting information**

79. If there are significantly differing facts or opinions offered about the client's ability to manage their day to day personal care and finances, you should explore these discrepancies. You should ask questions designed to uncover the degree of insight the client has into their needs or limitations, and their relationship with the person present (especially where they are the potential appointee) – for example: 'Jim, you heard Alison say 'X' yet you told me 'Y' – why do you think Alison has a different view to you?'



80. When there are significant discrepancies, you should consider if there is an impartial/independent third party who can offer a view or corroboration and may wish to explore this with relevant others. You should tell the client that you will be asking others but reassure them that this will not involve telling the person anything you have spoken about.



Evidence from the client about their client's ability to manage their finances, and any vulnerability to financial abuse should be recorded under the corresponding questions at Part 2a of the form: Assessment - the client.

### **Seek the client's views about the appointment and appointee**

81. Where it is reasonably practicable, before decisions are made about an appointment, you must take account of the client's views (or their wishes and feelings where it is decided they are 'incapable'.)
82. This means that wherever possible you should try to gather a view, or a general impression from the client about:
- whether they think they need an appointee to help them manage benefits
  - their wishes and feelings about the person who may be appointed.
83. You should be prepared for some clients to be resistant, disagree strongly that they need an appointee, or say that they object to the person or organisation nominated to act for them. Some may agree very quickly before they have all the information they would need to make a decision or without having given it consideration.
84. Where this happens you should try to understand the reasons given, if any, and record them carefully, taking into account that they could sometimes be of a sensitive nature.
85. These views must be carefully weighed up in the context of all the other information you have gathered about the client's ability to make a decision. You will be required to explain how their views have influenced your decision in Part 3 of the form: the Appointment decision.

### **Assess how an appointment will benefit the client**

86. Before you go on to assess the suitability of the potential appointee you should be clear in your own mind that this course of action complies with the principles set out in these guidelines. You should be satisfied that the appointment brings a benefit or advantage to the client, and that it is the least restrictive way of achieving that benefit.
87. For example:
- Is there a benefit to the client in having an appointee?
  - Are there risks to the client's general welfare or finances that would be avoided by having an appointee?

- Are you sure the client couldn't be supported to do these particular tasks on their own without someone taking control of their affairs - such as the use of an advocate and/or 3<sup>rd</sup> party representative)
- Is there a particular benefit to the appointee being the nominated person/or organisation, rather than someone else? (e.g. is there another possible appointee, who may be able to offer greater benefit to the client because they live nearer or know the client better).

88. If you answer No to any of this series of questions, you must rethink whether the proposed appointment is consistent with the principles.



You must record your assessment of how an appointee would benefit the client under the appropriate question at Part 3 of the form: the Appointment decision.

### Part 5.2.4 Suitability of the potential appointee

89. If you have interviewed the client and your initial assessment is that an appointee is needed, you should proceed to assess the suitability of the nominated person/organisation. If they are present, or in the same building during the client interview, you can do this as part of the visit on the same day - but you should speak to the potential appointee separately.
90. This section sets out how you think about the qualities that are important in deciding whether a person is suitable to act for a client.

#### What are the roles and responsibilities of an appointee ?

91. The tasks an appointee will be required to carry out do not involve the client's personal care. An appointee does not need to be the nearest relative, or indeed any relative. Neither do they need to be someone who lives with the client, or their carer. An appointee can be anyone if they are considered suitable. This includes "Corporate Appointees", organisations who have a link to the client. Use criteria below to think about this.
92. To give context to your decision about who might be suitable it is important to first consider what is expected of an appointee. An appointee is fully responsible for acting on the client's behalf, standing in their shoes in relation to their social security benefits they will be responsible for:
- Applying for any and all relevant benefits
  - Completing and signing any application forms
  - Managing the benefits paid – by opening an account managed by the appointee only.
  - Spending the benefits in a way which supports the client's needs and wants
  - Repaying any benefits overpaid to the client in error
  - Providing help and guidance as required in respect of their benefits

- Paying attention to the will and preferences of the client to ensure they are (where possible) reflected in decisions made on their behalf
- Dealing with correspondence from Social Security Scotland and reporting changes in the client's and their own circumstances. This involves having regular contact and an ability to find out what if anything may have changed.

93. An appointee must act with integrity, safeguarding the client's money and acting for the benefit of the client at all times. You will want to consider:

- The background of the nominated appointee and relationship history with the client
- Knowledge and understanding of the roles and responsibilities
- Ability to assess the client's needs and manage their money
- Ability to assess changing needs
- Willingness to act



Under UK law an appointee aged 18 or over acting in relation to a benefit administered by Social Security Scotland may also act in relation to reserved (UK) benefits if they wish, so remember that even if the client turns out not to be eligible for a benefit administered by Social Security Scotland which they have applied for, any appointment you make may still mean the client's income will be managed by the person or organisation you appoint.



The details of your interview with the appointee should be recorded in Part 2b of the Appointment Referral Form: the potential appointee and you will draw on this information in Part 3: the Appointment decision.

### **What is the background of the potential appointee**

94. Open your conversation with the potential appointee, by asking them about themselves and establishing their relationship history with the client. There are some questions below; you can often ask these in a very relaxed manner but they offer valuable information. The things you need to know will differ depending on whether the potential appointee is acting in a personal capacity, or an organisation.

## Appointees acting as an individual

95. “So tell me a bit about yourself...”

- How did you and [client] meet? (assuming they are a friend /neighbour and not a direct relative of the person) –
- How long have you and [client] been friends/ neighbours etc.
- If they are a relative but not directly so you may wish to ask “so let me get the relationship straight, you are the [relative] of [client]”
- How do you get along?

96. These primary questions are making sure you are clear on the nature, type, length of the relationship.

- Where do you live? [so nearby then] or [so some way away then]
- How often do you and [client] get to meet up?

97. These questions help you determine what level of contact they may have, or be able to have, with the client if they were to act as appointee:

- ‘And, do you work’ or, if they are clearly retired, maybe something like ‘and what do you enjoy now you are retired?’
- Do you have your own family – with some subsidiary questions like how old are they now, do they have their own family

98. These questions help you get a picture of what potentially competing commitments the appointee may have.

- Do you have any financial links to the client? For example do you live in a house owned by them or use a car owned by the client, joint financial or other commitments?

99. This question may draw out potential risks, incentives or conflicts of interest the appointee may have in managing the client’s money

## Appointees acting as an organisation

100. When an organisation is appointed to act for a client, this is known as a Corporate Appointee. An organisation is usually appointed where there is no individual in the client’s life who would be suitable or willing to manage their benefits for them.

101. In most cases Corporate Appointees are Local Authorities, Care Homes or Charities or Solicitors which are all regulated and they are often acting for multiple clients at any one time. Many of these will already be on a database of Corporate Appointees held by DWP.

102. Where the potential appointee is an organisation already acting for other Social Security Scotland clients, this indicates they have already been assessed as generally suitable to act

by either DWP or Social Security Scotland. However, you should still consider what sort of service they will be able to provide to this client in their particular circumstances.

103. For all organisations acting for the client you will want to know :

- What is the process within the organisation for receiving and spending the client's benefits – is there a separate account for the client and how will this be monitored?
- How will/does the organisation ensure there is a joined up approach to administrative and in-person functions of an appointee? i.e one part of the organisation receives letters/forms and payments another sees the client and helps them spend the money?
- How often is someone from the organisation (probably the named contact) able to see the client in person?
- What other services do they provide for this individual? Is there a conflict of interest?

104. Where a new organisation has applied to act for the client you should also establish:

What type of organisation is it? A regulated body or a private entity for example:

- Limited company
- Charity or a Scottish Charitable Incorporated Organisation(SCIO)
- Co-operative
- Community Interest Company (CIC)
- Sole trader or business partnership

This can be corroborated by accessing relevant online databases, most registered bodies will have a registration number or code.

- How is the organisation linked to the client? What other services does it provide for the client?
- Has it been asked to provide the service by another person or organisation?
- How is the organisation funded for this activity?
- How large or complex is the organisation?
- If it is large or complex, how will they ensure that their responsibilities are effectively carried out for the client, including:
  - reporting changes of circumstances
  - spending benefit on the client's needs and wants
  - monitoring payments
- Do they provide training for their staff in this specific role and their responsibilities

Ask about the named contact:

- Will you be the named contact? If not, who will be?

- Who will have the most contact with the client?
- Are there contingency plans in place for the named contact leaving? How will the organisation make sure the client continues to have an effective appointee?

105. Not all of these questions correspond directly to those on the Appointee Referral Form you should record the questions asked and the answers in the box on the final page of the in the space for “any other information you want to record”.

### **Knowledge and understanding of the roles and responsibilities**

106. The potential appointee will be asked to complete a declaration form in which they will agree that they have understood the roles and responsibilities of an appointee. To do this they must be given enough information to ensure they are able to make an informed choice.

107. The referral form you received should tell you whether this was already discussed with them, however an opening question like “has the role of an appointee been explained to you?” might be helpful in satisfying yourself that before you go any further they are happy to proceed. If it had not been explained, then you should take them through the roles and responsibilities they would be taking on.

108. You may wish to use the Appointee Declaration form as a prompt when discussing this.

109. When you are sure they have been provided enough information, check if they have any questions or have any thoughts about their ability to fulfil the role.

110. You are looking for a response which suggests they appreciate it is:

- a legal appointment,
- a role of protection,
- something they are willing to undertake, will commit to and take seriously,
- something they will have sole responsibility for; and
- will offer a duty of care to the person.

111. You then need to go on to assess their understanding of the client’s needs, and ability to manage the client’s money.

### **Are they able to assess the client’s needs and manage their money?**

112. In deciding the most appropriate way to spend any benefits the client might be entitled to, the appointee is obliged to encourage the client to take part where possible in any decisions that need to be made.

113. If this is not possible then, before making any decision on the client’s behalf, the appointee should where possible, consider the client’s past and present wishes and feelings. This may help them to then think about what their will and preferences are likely to have been in the given situation and act with respect to these.

114. The appointee may not be aware that there is this obligation, and you may have to explain the difference between them making their own decision on something, and taking into account what the client would likely have opted for and acting on this.

115. Assess whether the nominated person understands the client's day to day needs. Use of open questions are helpful, for example

“What are your thoughts on what [the client] needs?” – depending on the response to this, you may only need this one question, but it may be necessary to ask probing questions about areas that you think they have overlooked; for instance:

- Prompt them to talk about the clients daily life and preferences:
  - Eating
  - Shopping
  - Cooking
  - Mobility
  - Personal hygiene
  - Laundering their clothes
  - Socialising
  - Leisure activities they enjoy
- You will be required to manage [the client]'s benefits for them. Can you talk me through how you will go about this?
- How do you see any benefits they might receive supporting them with this?
- Depending on the appointee's response you may need to ask some probing questions, for example:

“so you have told me about [the client]'s self-care and mobility needs, [or whatever else] what are your thoughts about how social security benefits might assist with this?”

116. You will also have to ask some more sensitive questions, and may wish to introduce these carefully. These questions are designed to prompt the appointee to self- identify areas of potential risk (bearing in mind that you may be asking others their view about the appointment this an opportunity to air any issues that might be raised by others).

- Have you ever been declared bankrupt, or have you been subject to another type of formal debt arrangement such as a Trust Deed or the Debt Arrangement Scheme within the last 5 years? If yes – explore possible issue with managing another person's money, taking care not to record any irrelevant personal details.
- Asked, are you aware of anyone in [client's] support circle who might say you are unsuitable or would have concerns about you managing [client]'s money? If so why?

117. The sort of responses you would be hoping for are those which suggest a responsible attitude to money management and a recognition of how the award can be used to meet the client's wants or needs.

118. Any matters of concern arising from the answers to these questions should be taken on case by case basis, weighing up whether it would impact their ability to act for the client or would represent a significant conflict of interest or risk. Consider this along with information from any relevant others you are able to contact.

119. If the potential appointee doesn't mention something that is later raised by others you contact, carefully consider whether this would make a difference to your decision and why.

## Are they able to assess the client's changing needs?

120. Circumstances and needs change over time - these may be the needs of the client (perhaps as a result of a deteriorating or improving condition), or the needs of the appointee (for example, they now have to take on a new 24/7 caring responsibility for a relative, and this new commitment is making it challenging for them to continue in their role as appointee).
121. You need to satisfy yourself that as well as appreciating the person's needs today the potential appointee is able to monitor these and adapt, or report these changes as may be required.
122. You should ask the potential appointee how they anticipate being able to monitor the client's wants and needs as circumstances change.
123. Certain circumstances may make monitoring changes more challenging, for example:
  - An appointee who lives some distance away may not readily be able to visit and so may not recognise changes.
  - An appointee who lives in the same household may be so close they don't necessarily recognise changes.
  - An appointee who has competing priorities, for example from their children's needs, their work or even their own health may lose sight of the client's needs.
124. From the background chat you had with the proposed appointee you will know if there is the prospect of challenges from some of their circumstances and in which case you may choose to ask some direct questions – for example:
  - “I know your journey here can take a long time on the bus, and we all know how reliable public transport can be, how will you be able to monitor what [client] needs as we move forwards?”; or
  - “from what you said earlier I sense you have a lot of pressure on your time, how will it be for you adding to this the responsibility as [the client]'s appointee?”



You are looking for responses which suggests the appointee is going to be able to recognise changing needs and wants of the client, that the appointee is able to adapt to changes in their own life and that if they, for any reason, become ineffective in the role that they will recognise that and should report the situation to Social Security Scotland.

125. It is important to make clear to the appointee that reporting their own changing needs, is not a failing - far from it - it is a mature and responsible action, ensuring the best protection for the client, as well as, potentially, for the appointee themselves.



## Are they willing?

126. An appointee should not feel compelled or pressured to accept the role. As part of your discussion you should check directly with the potential appointee that they are accepting the role willingly; that they feel confident, able and supported to undertake the necessary responsibilities.
127. If the appointee suggests they are not confident in their ability to manage the client's benefit you should explore their reasons for this . It may be that they aren't aware of other support available to them from Social Security Scotland, or other government or third sector organisations.
128. If having had the responsibilities of an appointee explained to them, the appointee says they have changed their mind and do not wish to act for the client, indicate that the assessment could not be completed and the reasons for this at Part 3 of the form: the Appointee decision.

## Close the visit

129. When the interview is complete:
  - Offer a final opportunity for the client or proposed appointee to tell you anything which may now have occurred to them;
  - Ensure the appointee has checked over and completed the appointee declaration form;
  - You should not tell the client or the potential appointee what you think the outcome will be, but advise them we will write to them at a later date;
  - Provide them with contact details in the event they need to contact you;
  - Ask if they have any final questions for you;
  - Thank them for their time, honesty and patience.

## Identify and get the views of relevant others

130. In making any decision about an appointment, you are required by law, insofar as practicable, to have regard to the views of anyone else who appears to have an interest in the client's welfare or financial affairs.
131. In Part 1 of the form you may have been given details people the potential appointee felt fitted that description. While you are with them you may take the opportunity to double check the contacts that have been provided. These will most commonly be relatives, friends, neighbours, carers, health and social care professionals.
132. If an appointee has not provided any names and maintains that there are no 'relevant others' in the client's life, you should treat this with caution and use prompts to suggest individuals that might have an interest.

133. The client may have mentioned people during your interview with them that the potential appointee didn't. Satisfy yourself there are no relevant others whose views should be sought, but where you are unable to identify anyone record this clearly at

### Part 2c: the views of others

134. You should usually contact relevant others by phone where possible, (though you may contact them in writing where necessary). Recording the details of actions you took such as attempts to contact, the time and means of contact at Part 2c. Explain clearly the purpose of your call and reassure them that what they tell you will be treated in confidence.
135. There can be tensions among family members around caring responsibilities, and comments of others should always be considered in the round with other information. Think about whether the matters being raised are material to the appointment.



To ensure there is not a data breach you **must not share with relevant others:**

- specific details of any benefit the client has applied for or is receiving
- other personal information about the client or appointee
- details from your discussion with the client or the appointee.

However, they may offer you information and in general terms you should ask about:

- Their opinions about whether the client has capacity to manage their benefits;
- What they know about nominated person/organisation, their relationship to the client
- Their views about them acting for the client
- Any other matters they feel may be relevant to the appointment decision (for example they may think another person or organisation would be better placed to act for the client)

136. Where someone makes an allegation or tells you other sensitive information such as about criminal conduct, coercion or abuse, escalate this to your manager and consider carefully whether any further actions needs to be taken in relation to this. Consult the operational guidance on risk of harm.



The details of your discussion with relevant others should be recorded in **Part 2c of the form: the views of others** and you will draw on this information in **Part 3: the Appointment decision**

## Part 5.2.5 Making the Decision

137. When you have completed the information gathering stages of the process you must complete Part 3 of the form- the Appointment decision.

The form:

- Leads you through the elements of the test which will help you decide whether on the balance of probabilities the client meets the definition of ‘incapable’ in the Adults with Incapacity(Scotland) Act 2000, a key part for the test for appointment.
- Ensures you comply with the principles of appointment set out in legislation
- Asks you to record:
  - a well justified opinion on whether the appointee is suitable or not
  - how you have taken into account the views of the client and others in the process of making the appointment
  - observations and impressions of the client and potential appointee
  - whether or not you have decided to make the appointment and why
  - if you have made an appointment, how soon it should be reviewed and why.

138. You should think of how the information you have gathered might be applied to each question to reach a conclusion on whether the client is capable of each element. Clearly justify your answer, so that in the case of a dispute your decision making process is recorded.

139. Remember that the decision may be part of a Subject Access Request or tribunal in future and should contain only relevant factual information and how you have used this to justify your decision.



You should ensure you maintain a focus on the person’s ability to make the sorts of decisions they will need to manage their social security benefits.

### How to make the decision on whether or not the client has capacity

140. Reaching a conclusion about whether an appointment can be made requires you to apply the capacity criteria as they relate to manage social security benefits.

141. As a reminder, the 2000 Act states that a person is unable to make a decision, or take action, if, due to mental disorder or inability to communicate because of physical disability, they are incapable of:

- acting; or
- making decision; or
- communicating decisions; or

- understanding decisions; or
- retaining the memory of decisions.

### **Does the client have a mental disorder, or are they unable to communicate because of a physical disability?**

142. If the answer to both of these questions is No, you do not need to consider the other parts of the capacity test.
143. The main disabling conditions that would fall into the category of a mental disorder are: dementia, learning disability, acquired brain injury including drug or alcohol-related brain damage, severe mental illness or personality disorder. This list is not exhaustive.
144. If you are unsure whether a particular health condition could be considered a mental disorder seek further advice about its effects. See Part 5.2 of the Client Representative Guidelines :Appointees for adults regarded as incapable
145. Although quite rare, there may be circumstances where there is no way for a person to communicate because of a purely physical disability, for example where they are unconscious or in a coma, or have a rare condition known as ‘locked-in syndrome’.
146. Where a client only has a physical disability and **can communicate through any means**, an appointment is not appropriate.

### **Can the client act?**

147. The client may show good reasoning, and the ability to understand and make decisions, but when confronted with the situation, may not be able to act on them due to mental illness, cognitive impairment, compulsions etc .
148. For example: they may have decided to make an application but are completely overwhelmed and distressed when asked to make the legal declaration and be unable to do so, even with the support of another person.
149. Where a person can make a decision, can they take the necessary next steps? It may be that they require the support of somebody to progress things, which is perfectly ok, but the nominated supporter must be aware of their role – as supporter not decision maker.

### **Can the client make a decision?**

150. The sort of things to consider here are:
- Have they received adequate support (see Part 5.2.3)
  - Was the situation and environment optimal
  - Have they considered relevant factors? In summary do they have insight into their situation and needs?
  - Have they been open to considering all the options, or just gone with an apparently spontaneous reaction to one of the suggestions. You may be alerted to this if they appear to have settled early on the first suggestion or are minded to go with the last suggestion.

- Is there evidence of them using reasoned judgment in making choices
- Are the decisions the person's free choice i.e. they are not feeling pressure to decide a particular way?
- Finally, on this point, remember that a person is not incapable just because they make what you, or their family, may consider to be an unwise decision.

### **Considering the client's ability to communicate**

151. The client has to be able to communicate their decisions to others. A person is not incapable where their communication difficulties can be overcome by the use of services, aids or one-to-one support.

152. You must ensure you have:

- Maximised the person's ability to be able to communicate e.g. use pen and paper, pictures or other creative means of communication if this seemed necessary;
- Used mechanical, technological or other aids to communication if these are necessary;
- Used appropriate language;
- Spoken at an appropriate rate, volume, tone, and pitch;
- Used short sentences and asked single questions;
- Listened actively; and
- Checked with the client your understanding of their response

153. Consider:

- Are their responses relevant to the discussion?
- Am I satisfied that any responses are their own and not words that have been given to them, or a decision that they felt they ought to give?
- Whether non-verbal behaviour is consistent with the verbal responses being given?

### **Does the client understand?**

154. Do you consider the client able to understand:

- the information they would be given in the course of applying for and managing their benefits
- the reason for your visit
- the concept of social security benefits and an appointee
- the information they have been given during the interview
- the consequences for them and the potential appointee.

155. You can test this as part of your conversation, the type and of questions they ask, the appropriateness of comments they make, will help you to decide on this. Could information been provided in way that they are able to understand?

- Do they seem to be able to weigh up the pros and cons of an appointment appropriately?
- Have they been able to think through what might happen if they were to manage their benefits on their own?
- If relevant, have they thought about long term implications of their decision as well as the here and now?

### **Can the client remember?**

156.

- Did the client appear to have retained the memory of the conversation, of the information that you gave them about social security and what an appointee does?
- Did they recall who was applying to be appointed for them, and have they consistently answered in the same way.
- If you've had to prompt a recall, has the client been able to recall with accuracy and consistency?

### **What is the benefit to the client?**

157. Record whether or not the appointment would help the client in a way that other types of support from Social Security Scotland, an advocate, third party representative or other would not.

158. If you identify that someone else in another capacity (other than a financial guardian) could support them to apply for and manage their social security benefits for themselves you should not confirm the appointment.

### **Suitability of the Appointee**

You should indicate whether you believe that the appointee is suitable or not and why. Remember there are no hard and fast rules about what makes someone 'suitable' or not. This is a discretionary decision based on your assessment of the overall circumstances and the person or organisation who has usually self-selected to become the client's appointee. You should think carefully about their ability to fulfil the responsibilities, any risk factors identified and the views of the client and others. However you should always give reasons for your decision, and explain how you have weighed up the information gathered.

### **Considering the wishes and feelings of the client**

159. As described in Part 5.2.3 the Client Interview, where it is reasonable and practicable, you must consider the client's past and present wishes and feelings about the need for an appointment, and about the potential appointee.

160. Where you were able to come to a conclusion about the wishes and feelings of the client you should explain how this influenced your decision.
161. There will be situations where it won't be reasonable or practical to get the views of the client. For example the visit would cause the client extreme distress, it may not be safe for you to do so, or they could be critically ill or incapacitated in a way that it would be not be possible to interact with them e.g in an intensive care unit.
162. If this happens, as long as you have taken all reasonable steps to meet and recorded the reasons, you will have met the requirements of the assessment
163. If this is not possible then you must consider if it is possible to draw any inferences from past decisions, or current behaviours for example which would offer you a steer on whom the client may prefer as their appointee.

### **Is undue influence or pressure being applied to the client?**

164. Adults identified as potentially lacking capacity are among the most vulnerable of Social Security Scotland's clients. When thinking about whether to make an appointment and remove a client's ability to deal with their own benefits we have a duty to consider whether they may be under undue influence. This can take many forms, it could involve manipulation, or coercion, and can be quite subtle. It is for that reason that where at all possible you should look to speak to the client on their own or without the potential appointee.
165. You are not expected to detect all undue influence, it can be subtle and hard to identify without a longer term involvement in the client's life. However, you should be alert to the possibility. Record, whether in your opinion, there was any evidence on the day, or from other relevant people, that the client was not acting as they might have done without undue influence from another person.
166. The client might have been coached or threatened with some kind of negative consequence (however small) for not agreeing to the appointment.
167. Examples of this might be that someone had been told that if they didn't tell you they agreed to the appointment, they would be put into residential care, or would be deprived access to something that they enjoyed.
168. If you have significant concerns the client may be at risk seek further advice on operational guidance on risk of harm.

### **Considering the views of others**

169. Throughout the appointee assessment process there will have been opportunities to identify other people who have an interest in or would be directly affected by the proposed appointment. These are likely to be friends, family, carers, or health and social care professionals.
170. You should have already recorded who you have been in contact with and in broad terms what they said. As part of your decision you should briefly explain how their views or other information they provided influenced your decision, whether it is a decision to appoint or deny the application.
171. If it was not practicable to contact any of those you identified you must set out why.

## Outcomes

172. Having completed your assessment you will now make a decision about whether or not to make an appointment.
173. Whether your visit was in relation to a new appointment or a review there are four possible outcomes.
- Appointment confirmed/continued – where it is a new appointment ensure the declaration is completed. \*Recommend a review period
  - Client is capable, appointee not / no longer required - The client has ability, albeit with support, to manage their own affairs, an appointee is not necessary.
  - Appointee not / no longer suitable, alternative appointee required
  - Assessment cannot be completed.



The outcome of the appointment decision should be recorded and justified at Part 3 of the form: the Appointment decision.

## Review

174. The principles of appointment in the 2018 Act are clear that an appointment should only last as long as it continues to secure a benefit to the client. In line with that principle Social Security Scotland must review all appointments at least every five years.
175. However, taking a person-centred approach you can recommend a shorter review period where you believe an earlier review would be beneficial. Whenever you decide to confirm that an appointment should be made, or continued, the final thing you must consider is the recommended review period.
176. The aim of a review is to safeguard the client, to ensure that the appointment is still necessary, and check that it is still securing the benefit it was intended to. When setting review date, and deciding how it should be reviewed, Social Security Scotland must take account of the circumstances of the individual case.

### How often should a review take place?

177. There are 4 options to choose from in setting a review period. The table below sets out those periods and a general guide to types of factors that may affect your decision about the review period. This list is not exhaustive and is only for guidance purposes.
178. Some practical examples of this are :
- The client has had a recent traumatic brain injury, from which we know people have the potential for significant recovery, especially in the earlier years, you feel it right that the client's ability to make decisions should be reassessed after three years, not five.



- The appointee is the elderly spouse of the client, she is very keen to act as appointee but you sense that she will need support with this, potentially a lot of support, yet at interview you weren't able to identify anyone who would be able to offer this. You don't want to deny her the opportunity to act as appointee so agree to her appointment but would like the situation to be reviewed in eighteen months, you do not want to leave it unassessed for five years.
- You are aware that there is disagreement within the family on the best person to be appointee. With justification and after due deliberation, you are intending to appoint the person who was nominated but would like the appointment to be subject to an earlier review to ensure that the arrangement is working.
- The client is turning 16 and has significant developmental delay, their mother wants to continue to act for them but as they have been making progress and are in full time education with the aim of fostering greater independence. You decide to recommend a three year review period to ensure that there is an opportunity to look again at whether it is still needed or whether the client could act for themselves with support.

**See Table 2: Suggested factors to consider when setting the review period below**

**Table 2: Suggested factors to consider when setting the review period**

<b>Review period</b>	<b>Client factors</b>	<b>Appointee factors</b>
<b>18 months</b>	<ul style="list-style-type: none"> <li>• Aged 16-25</li> <li>• Pattern of changeable capacity</li> <li>• Onset of impairment less than 2 years – signs that may become more independent with ongoing education, treatment, or rehabilitation</li> <li>• Client objected to appointment or appointee</li> <li>• Likely to be a change in living arrangements</li> </ul>	<ul style="list-style-type: none"> <li>• Aged 16-18</li> <li>• Deteriorating health</li> <li>• Considering application for Guardianship</li> <li>• Lives far away</li> <li>• Financial worries</li> <li>• They may need support</li> <li>• Different person than DWP appointee</li> <li>• Objections / opposition raised by a third party at the time of initial assessment</li> <li>• Subsequent risk factors raised by a third party</li> </ul>
<b>3 years</b>	<ul style="list-style-type: none"> <li>• Onset of impairment 2-5 years</li> <li>• Signs that may become more independent with ongoing education, treatment, or rehabilitation</li> </ul>	<ul style="list-style-type: none"> <li>• Recent unscheduled review (following a request from the client or a 3<sup>rd</sup> party)</li> <li>• Recent overpayment or unreported change of circumstances</li> <li>• Personal circumstances likely to change</li> <li>• Risk factors raised by a third party</li> </ul>
<b>5 years</b>	<ul style="list-style-type: none"> <li>• Onset more than 5 years ago.</li> <li>• Permanent impairment with static or progressive condition.</li> <li>• Client who has been reviewed several times before with no issues raised.</li> </ul>	<ul style="list-style-type: none"> <li>• Experienced appointee who has been in place for some time with no issues</li> <li>• Regulated Corporate appointee such as Local Authority or Care Home.</li> <li>• No unscheduled reviews required</li> </ul>
Next review of entitlement to Disability Assistance (only where award end date is less than 5 years away)	<ul style="list-style-type: none"> <li>• <b>CDP</b> – at age 18 or when transitioning to ADP</li> <li>• <b>ADP</b> – around review date of rolling award</li> </ul>	N/A