

JUDICIAL PROTOCOL REGULATING DIRECT JUDICIAL COMMUNICATIONS BETWEEN SCOTLAND, ENGLAND & WALES, AND NORTHERN IRELAND IN CASES OF ADULTS WHO LACK CAPACITY

Jointly signed by Lord Pentland, Lord President of the Court of Session, Sir Andrew McFarlane, President of the Court of Protection, and Dame Siobhan Keegan, Lady Chief Justice of Northern Ireland on 4 April 2025.

Foreword

The Lord President of the Court of Session in Scotland, the President of the Court of Protection in England & Wales, and the Lady Chief Justice of Northern Ireland, having consulted with members of the senior judiciary, are pleased to publish this *Judicial Protocol Regulating Direct Judicial Communications Between Scotland, England & Wales, and Northern Ireland in Cases of Adults Who Lack Capacity*.

Scotland, England & Wales, and Northern Ireland share a common commitment to the rule of law and to the principle there should be adequate protection for adults who lack the capacity to protect themselves.

Increasingly, proceedings involving adults who lack capacity contain a cross-jurisdiction element, giving rise to a unique range of challenges. The Hague Convention on the International Protection of Adults has been ratified by Scotland but not England & Wales or Northern Ireland.

Cross-judicial co-operation can be of critical importance in such cases, but there is an absence of mechanisms to facilitate and encourage collaborative decision making of this kind. This is compounded by there being limited understanding across jurisdictions of how the other system operates.

It was with such concerns in mind that a series of meetings took place between members of the judiciary in Scotland, England & Wales, and Northern Ireland over 2019 - 2024, which have led to the creation of this Judicial Protocol. The aim of the Protocol is to allow judges to communicate on a cross-jurisdiction basis and to provide a framework for the mutual exchange of information through a centralised

procedure. The Protocol sets out the key principles of this procedure, and how these are to operate in practice.

The Protocol will be supported by supplementary information in the form of a Handbook summarising the law in Scotland, England & Wales, and Northern Ireland relating to adults who lack capacity. This Handbook, prepared by mental capacity law barristers and advocates, will summarise the respective legal principles in Scotland, in England (and, where these differ, in Wales), and in Northern Ireland, and will provide a central source of guidance.

Signed PAUL CULLEN

The Rt Hon Lord Pentland, Lord President of the Court of Session

Signed ANDREW MCFARLANE

The Rt Hon Sir Andrew McFarlane, President of the Court of Protection

Signed SIOBHAN KEEGAN

The Rt Hon Dame Siobhan Keegan, Lady Chief Justice of Northern Ireland

JUDICIAL PROTOCOL REGULATING DIRECT JUDICIAL COMMUNICATIONS BETWEEN SCOTLAND, ENGLAND & WALES, AND NORTHERN IRELAND IN CASES OF ADULTS WHO LACK CAPACITY

The Lord President of the Court of Session in Scotland, the President of the Court of Protection in England & Wales, and the Lady Chief Justice of Northern Ireland, having consulted with members of the senior judiciary in Scotland, England & Wales, have agreed the following Protocol for the regulation of direct judicial communications between Scotland, England & Wales, and Northern Ireland in cases of adults who lack capacity:

Whereas the Lord President, the President of the Court of Protection and the Lady Chief Justice:

- Recognise that Scotland, England & Wales, and Northern Ireland share a common commitment to the rule of law and to the principle there should be adequate protection for adults who lack the capacity to protect themselves;
- Recognise that in cases involving adults who lack capacity which have a cross-jurisdiction element, judicial co-operation is of critical importance;
- Consider that cross-jurisdiction judicial co-operation should include the early identification of cases, clear lines of communication, the free flow of relevant information and the facilitation of effective case management;
- Recognise that the removal of adults who lack capacity from one country to another may have a harmful effect on such adults;
- Recognise that it is desirable that in the regulation of cross-jurisdiction judicial communications as between Scotland, England & Wales, and Northern Ireland the judiciary has regard to the Principles for Direct Judicial Communications as published by the Hague Conference on Private International Law;
- Recognise the importance of negotiation, mediation and conciliation in the resolution of relevant disputes where appropriate; and
- Recognise the value of ongoing cross-jurisdiction judicial engagement in the preceding matters.

Now therefore the Lord President, the President of the Court of Protection and the Lady Chief Justice agree as follows:

Key principles

1. The Protocol will apply to all cases involving adults who lack capacity which have a cross-jurisdiction element, as between Scotland, England & Wales, and Northern Ireland. It can be invoked where proceedings may be raised in both jurisdictions.
2. In the Protocol, 'adults':
 1. for proceedings raised in England and Wales, includes persons who are aged 16 or over (section 2(5) of the Mental Capacity Act 2005);
 2. for proceedings raised in Scotland, includes persons who are aged 18 or over (section 1(6) of the Adults with Incapacity (Scotland) Act 2000, as glossed by section 1(2), 24 and 29 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024); and
 3. for proceedings raised in Northern Ireland, includes persons who are aged 16 or over (section 1(1) of the Mental Capacity Act (Northern Ireland) 2016).
3. The Protocol will allow members of the judiciary to communicate on a cross-jurisdiction basis and provides for mutual exchange of information as to proceedings, or impending proceedings in the two legal jurisdictions in an appropriate and effective manner.
4. The Lord President, the President of the Court of Protection and the Lady Chief Justice will each nominate at least one liaison judge and one alternate as the primary point of contact for their jurisdiction. All communication from a judge in one jurisdiction ('the requesting judge') should be centrally transmitted through the liaison judge in that jurisdiction to the liaison judge in the other jurisdiction ('the receiving jurisdiction') who will take such steps as are necessary to have the case dealt with appropriately. The liaison judges should work with each other to advance the objectives of the Protocol. Whenever possible such communications will be in accordance with the arrangements set out in Annex I to this Protocol.
5. Nothing contained in the Protocol shall have any effect on established legal rights, or remedies, or provisions for mutual recognition of court orders which are available to any party to the proceedings as a matter of law.
5. Every judge engaging in direct judicial communications under the Protocol must ensure that he or she adheres to the laws of his or her own jurisdiction and maintains his or her independence when using the Protocol in his or her own jurisdiction.
6. The Protocol will be facilitated by a standard request form to be completed by the requesting Judge and which can be found in Annex II to this Protocol.
7. The Protocol will be supported by supplementary information in the form of a handbook serving as a summary of the law in Scotland, England & Wales, and Northern Ireland relating to adults who lack capacity.

8. The Protocol and the accompanying handbook shall be published but should not be regarded as providing legal advice to any legal practitioner or court user.
9. The operation of this Protocol will be kept under review.

Operation of the principles

The requesting judge

- (i) It shall be for the requesting judge to prepare or approve an information sharing request ('a request') and a summary of information for the liaison judge in his or her jurisdiction, for onward transmission to the receiving jurisdiction. The request shall be made by way of the standard request form at Annex II to this Protocol.
- (ii) The request should contain sufficient details to allow any proceedings in the receiving jurisdiction to be identified. This may include case references, details of the parties, the names and dates of birth of the adult, the name of the local authority involved, if any or other agency involved (if applicable), the background circumstances of the parties, and any known addresses in the receiving jurisdiction.
- (iii) The request should set out in clear and concise terms the question, or questions, being asked of the liaison judge in the receiving jurisdiction, and any information sought. It should advise whether there is any urgency and, if so, the nature of the urgency. Where appropriate, the request may specify a deadline by which a response is sought.
- (iv) The request should be supported by a summary of information. The summary of information should be confined to those matters which are necessary and appropriate for the purposes of the request and should consist of (i) essential and relevant facts relating to the case in question; (ii) matters of practice and procedure, including the scope and effects of any court order or other remedy or potential remedy.
- (v) Courts in Scotland may only request information from England, Wales and Northern Ireland for adults aged 18 or over while the courts in England, Wales and Northern Ireland may request information from Scotland for persons aged 16 and over.

The information provided may include details of:

- Proceedings that are raised, or may be raised, in either jurisdiction;
- The registration/recognition of orders in either jurisdiction;

- The timetabling of cases in either jurisdiction;
- The effect of interim orders or undertakings made in one jurisdiction upon the other;
- The option and effect of making of ‘mirror orders’ in either jurisdiction;
- The current stage and effect of court proceedings (whether live or concluded);
- Whether certain preliminary or protective steps – e.g. the granting of a stay of proceedings, or an order for non-disclosure to a party to the action – have been made; and
- Whether the parties appearing before the requesting judge have consented to the request.

The liaison judge

- (vi) It will be for the liaison judge to provide for relevant cases, clear lines of communication and the free flow of relevant information to facilitate effective case management of those cases.
- (vii) It will be for the liaison judge to receive the request from the requesting judge and transmit it with any modifications he or she considers necessary to the liaison judge in the receiving jurisdiction.
- (viii) It will be for the liaison judge to receive any response from the receiving jurisdiction and transmit that response to the requesting judge in his or her own jurisdiction.

Documents

- (ix) Any request or response to a request in terms of the Protocol may have annexed to it documents which contain details of proceedings which have been or may be raised. These should be confined to documents necessary for the purposes of the request. They may include orders, decisions and judgments of any decision-making body.

Communications

- (x) All those operating the Protocol should have regard to the following:
 - The need for the request and any response to be shared where appropriate with the parties; and
 - The need for all communication to be in writing.

Signed PAUL CULLEN

The Rt Hon Lord Pentland, Lord President of the Court of Session

Signed ANDREW MCFARLANE

The Rt Hon Sir Andrew McFarlane, President of the Court of Protection

Signed SIOBHAN KEEGAN

The Rt Hon Dame Siobhan Keegan, Lady Chief Justice of Northern Ireland

ANNEX I

A request from Scotland for information from a liaison judge in England & Wales or Northern Ireland should be sent in the first instance to: The Scottish International Family Justice Office, Parliament House, Edinburgh by email address to:

FamilyCourt@scotcourts.gov.uk

A request from England & Wales for information from a liaison judge in Scotland or Northern Ireland should be sent in the first instance to: The International Family Justice Office, Royal Courts of Justice, London by email address to:

IFJOffice@justice.gov.uk

A request from Northern Ireland for information from a liaison judge in Scotland or England & Wales should be sent in the first instance to: The Lady Chief Justice's Office, Royal Courts of Justice, Belfast by email address to:

LCJOffice@judiciaryni.uk

ANNEX II

Judicial Protocol Regulating Direct Judicial Communications Between Scotland, England & Wales, and Northern Ireland in Cases of Adults who Lack Capacity

<i>Details of proceedings in requesting jurisdiction</i>	
Jurisdiction	☐ Scotland ☐ England & Wales ☐ Northern Ireland
Name of court	
Name of judge	
Case reference	
Date of last hearing	Click or tap to enter a date.
Date of next hearing	Click or tap to enter a date.
Date of request	Click or tap to enter a date.

To the judge: Please read the Protocol before completing this form. Each section of this form should be completed.

<i>Details of person who lacks capacity</i>	
Name	Date of birth
	Click or tap to enter a date.

<i>Details of any relevant parties</i>	
Name	Relationship to person who lacks capacity

<i>Details of proceedings in receiving jurisdiction</i>	
If unknown, please provide as much information as possible.	
Jurisdiction	☐ Scotland ☐ England & Wales ☐ Northern Ireland
Name and address of court	
Name of judge	
Case reference	
Date of relevant hearings	

<i>Details of request</i>	
Please summarise the essential and relevant facts of the case	

Please summarise the current stage of court proceedings	
Specific information requested from Scotland or England and Wales or Northern Ireland	
Reasons for request	
Have all parties consented to this request? If no, please provide details	☐ Yes ☐ No
Have you made a court order setting out this request? If yes, please attach the order(s) to your request	☐ Yes ☐ No

To the judge: Send your completed form and relevant documents to the appropriate office in your jurisdiction:

- Requests from Scotland (to England & Wales or Northern Ireland): the Scottish International Family Justice Office, FamilyCourt@ScotCourts.gov.uk
- Requests from England & Wales (to Scotland or Northern Ireland): the International Family Justice Office, IFJOffice@Justice.gov.uk.
- Requests from Northern Ireland (to Scotland or England & Wales): the Lady Chief Justice's Office, LCJOffice@judiciaryni.uk