



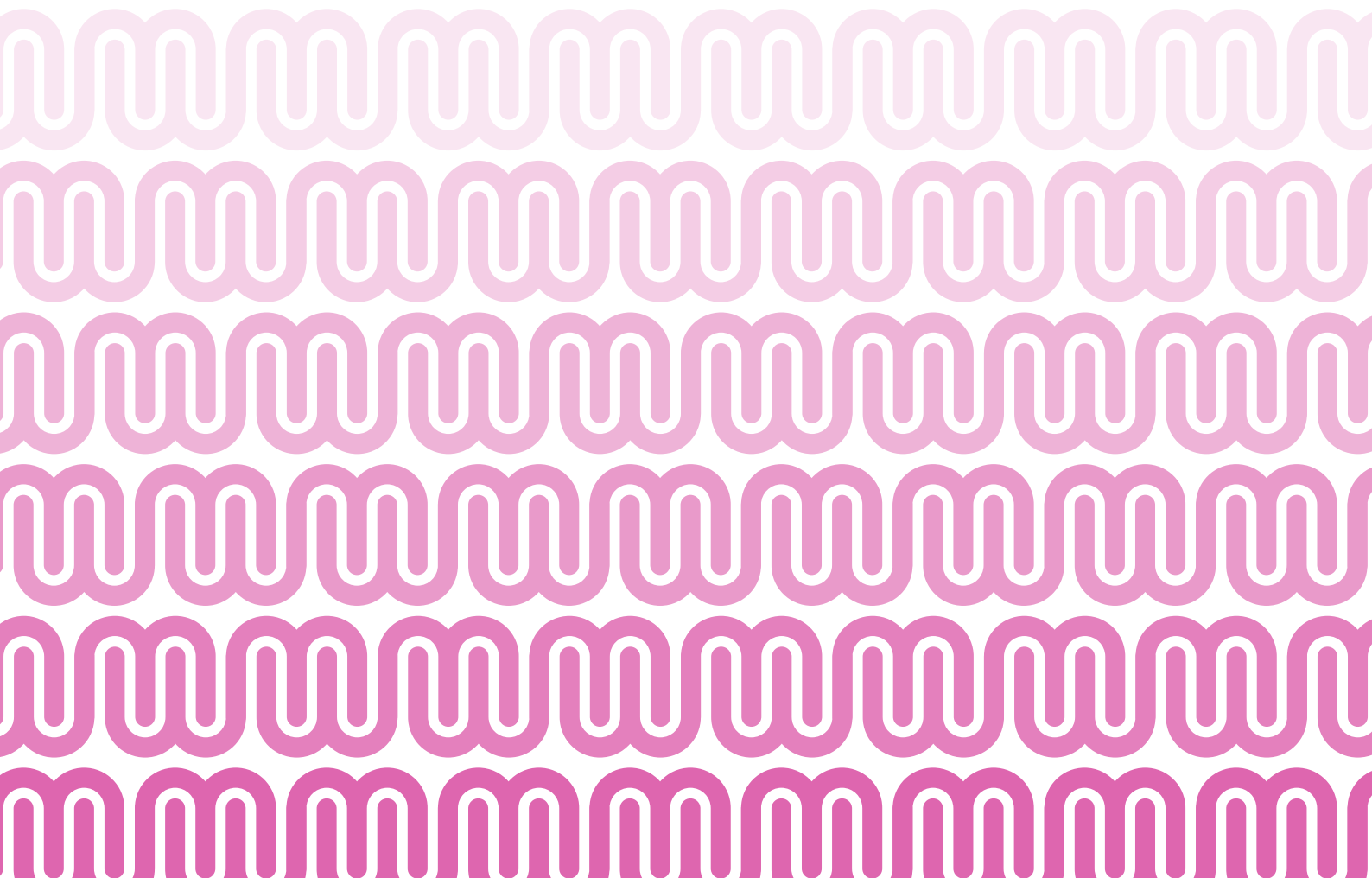
**mental welfare**  
commission for scotland

# Supervising welfare guardians and powers of attorney

Good practice guide

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May 2022



# Our mission and purpose

## Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

## Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

## Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

## Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

This guidance was originally published in 2011, and revised and updated in April 2022.

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## Background to this guidance

The Mental Welfare Commission for Scotland is concerned that some private welfare guardians are not getting the information and support they need to fulfil their role. For the purposes of this guide, private welfare guardian is used to denote any non-local authority welfare guardian (Appendix 1).

We know that local authority supervising officers and responsible officers' preparation to undertake their role is variable across Scotland, with many officers unaware of their duty to visit both the welfare guardian and the adult on welfare guardianship. This guide is aimed at local authority front line staff, line managers and chief social work officers (CSWO). This guidance is supplementary to the code of practice for local authorities and does not replace it.

Through the Adults with Incapacity (Scotland) Act 2000 (the AWI Act), welfare guardianship provides the means to protect adults who lack capacity to make particular welfare decisions or take particular actions for themselves. An adult in this Act is a person who is 16 years or over. The AWI Act provides the opportunity for people to become welfare and/or financial guardians for adults with impaired capacity and sets out how decisions can be made for them. Underpinning the AWI Act is a set of general principles<sup>1</sup>. Welfare guardians, and anyone using any part of the AWI Act, must be guided by the following principles:

- any interventions are of **benefit** to the adult;
- interventions are the **least restrictive** option in terms of the freedom of the adult;
- the adult's **present and past wishes** and feelings must be taken into account;
- the **views of the nearest relative and primary carer** of the adult should be taken into account where reasonable and practicable;
- the adult is encouraged to **exercise what skills they have and develop new skills**.

The AWI Act also gives responsibility to local authorities to support and supervise private welfare guardians. The intention is that guardianship supervisors ensure that private welfare guardians understand their new role, follow the principles of the AWI Act, and access the support they need to make proxy decisions.

Local authorities can recall an order when the CSWO is the welfare guardian. Local authorities can also initiate the recall of private welfare guardianship orders if the grounds for the appointment of a welfare guardian are no longer fulfilled or the welfare of the adult can be satisfactorily safeguarded or promoted, for example, through the use of section 13ZA of the Social Work (Scotland) Act 1968, and/or section 47 Certificates under the AWI Act.

The AWI Act created a number of checks and balances to protect people who lack some or all capacity to make decisions. The Mental Welfare Commission has a specific welfare safeguarding and monitoring role under the AWI Act.

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<sup>1</sup> AWI Act s.1

The Office of the Public Guardian (OPG) has specific responsibility for individuals who have been appointed as a power of attorney (POA) to manage the financial and property affairs of adults who lack the capacity to do so for themselves. In addition, the OPG has a duty to investigate circumstances made known to the OPG where the property or finances belonging to an incapable adult appear to be at risk. If the OPG investigation finds impropriety in the POA's management of the adult's finances, this can be referred to the local authority to seek financial guardianship for the Adult. However, the local authority is not allowed to directly exercise powers of guardianship in respect of property and financial affairs. If there is no appropriate person willing or able to act as the adult's POA, the local authority can nominate a suitable person such as an accountant or a solicitor. If the adult has state benefit income or little savings, consideration should be made for a Department of Works and Pensions (DWP) appointeeship or Access to Funds to manage the adult's financial affairs.

The AWI Act does allow for the local authority to nominate itself as a financial intervener, where appropriate.

## **What the law says about the supervisory functions of local authorities**

### **Guardianship**

Section (10)(1) of the AWI Act states that a local authority must "supervise a guardian appointed with functions relating to the personal welfare of an adult in the exercise of those functions".

### **Power of Attorney**

There is no automatic duty on a local authority to supervise welfare powers of attorney. However, anyone claiming an interest in the personal welfare of the adult may make an application to the sheriff under the AWI Act s.20(2)(c) to request the Sheriff rules that the welfare attorney be subject to the supervision of the local authority. The sheriff specifies the nature and extent of this supervision.

Scottish Ministers issued the Adults with Incapacity (Supervision of Welfare Guardians etc. by Local Authorities) (Scotland) Regulations 2002<sup>2</sup>, which provides the legal steps required for local authorities to carry out their supervision duties. The 2002 regulations were amended in 2005<sup>3</sup> and subsequently in 2014 to minimise what was considered to be onerous and intrusive visits. This approach is intended to allow local authorities to determine guardianship supervision visit intervals according to known risks for the individual.<sup>4</sup>

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<sup>2</sup> The Adults with Incapacity (Supervision of Welfare Guardians etc. by Local Authorities) (Scotland) Regulations 2002 as amended by 2005 and 2014 regulations.

<sup>3</sup> The Adults with Incapacity (Supervision of Welfare Guardians etc. by Local Authorities) (Scotland) Amendment Regulations 2005: following initial visit within three months from the date of the order; the 2005 Regulations amended local authority supervision visits from three months to six month intervals.

<sup>4</sup> [https://www.legislation.gov.uk/ssi/2014/123/pdfs/ssipn\\_20140123\\_en.pdf](https://www.legislation.gov.uk/ssi/2014/123/pdfs/ssipn_20140123_en.pdf)

## About supervision visits

### Private guardianship orders granted for over 12 months<sup>5</sup>

From June 2014 supervision of private welfare guardianships, which are granted for more than 12 months, requires the supervising local authority to carry out an initial visit within three months of the date of granting the guardianship order and thereafter at intervals of not more than 12 months, unless the local authority, based on a risk assessment, varies the visit schedule. After 12 months from the guardianship order granted date, the 2002 regulations (as amended) permits supervisory visits to the adult and the welfare guardian to exceed 12 months or the local authority can cease visits to the adult and/or the welfare guardian or both. If the adult or the welfare guardian do not agree to the variation in supervisory visit timeframes, the original timeframes must remain in place. The local authority can amend the varied or ceased timeframes in accordance with, for example, guardianship supervisor concerns and they can restart visits at any time without the agreement of the adult or welfare guardian.

If there is consensus agreement between the local authority, the private guardian and the adult to vary or cease the supervision visit schedule, the Mental Welfare Commission for Scotland must be notified on the prescribed form ([The Adults with Incapacity \(Supervision of Welfare Guardians etc. by Local Authorities\) \(Scotland\) Amendment Regulations 2014 \(legislation.gov.uk – 2A form\)](#)) (See Appendix 4).

The assumption in the adults with incapacity code of practice for local authorities is that the local authority where the application was made will always carry out the visiting functions themselves, even when the welfare guardian or the adult are not resident within their area. It is open to the local authority to delegate the visiting function, either to one of their own staff or to arrange with the local authority where the adult or welfare guardian is living to undertake this role, e.g., a social worker. The supervisory responsibility under the regulations remains with the adult's home authority however. In the event that the visiting function is delegated to a host authority, clarity of roles and responsibilities is required including agreements on recording and communication with a named local authority contact who retains the guardianship supervisory responsibility on behalf of the original local authority.

### Private guardianship orders granted for less than 12 months<sup>6</sup>

Where the private welfare guardian has been appointed for a period of less than one year the visiting requirement is more defined. The local authority must arrange to visit the adult and welfare guardian within three months of the order being granted and contact must be made with the guardian and the adult three months prior to the guardianship order end date. This is to allow the local authority a requisite period to arrange renewal and/or appropriate support arrangements. One benefit is that the guardianship supervisor can, in these circumstances, review whether welfare guardianship has served its purpose or is still required. Where an interim welfare guardianship order has been granted the guardianship supervisory arrangements are the same as those prescribed as if a full order is granted. This covers guardianship supervision requirements where a full order is taking time to be heard in court or there are challenges to the full order.

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<sup>5</sup> This does not apply to local authority guardianship orders

<sup>6</sup> This does not apply to local authority guardianship orders.

If the local authority considers it appropriate, any visit to the adult that is carried out under these arrangements can take place at the same time as a visit to the welfare guardian or nominated intervener. A nominated intervener is someone authorised to take action under an intervention order<sup>7</sup>.

The regulations also allow for the circumstances of an adult where it is not possible for a local authority to visit the adult or the welfare guardian within the time periods specified. In this instance, the visits should be as close as possible to the time when they should have taken place as the adult's circumstances will allow.

The regulations stipulate supervision arrangements for intervention orders in circumstances where the sheriff has specified this. The adult who is the subject of the intervention order, and, where appropriate, the person authorised under the intervention order (the intervener) must be visited "as often as required" for supervision. Where no frequency requirement has been specified, visits should take place at intervals of not more than one month for the period of time fixed by the sheriff. Intervention orders only persist until the action authorised has been completed. If this is soon after the granting of the order, supervision may not serve any purpose and the sheriff may not make a supervision requirement.

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<sup>7</sup> The AWI (S) Act s.53



## Local authority guardianship

### Chief social work officer

Section 5(i) of the Social Work (Scotland) Act 1968, as amended by s.45 of the Local Government, etc. (Scotland) Act 1994, requires every local authority to appoint a professionally qualified chief social work officer (CSWO). The Scottish Government published national guidance on *The Role of the CSWO: Principles, Requirements and Guidance- updated July 2016*. ([www.gov.scot/publications/role-chief-social-work-officer](http://www.gov.scot/publications/role-chief-social-work-officer))

The CSWO is required to ensure the provision of appropriate professional advice in the discharge of local authorities' statutory duties. Overall the CSWO role is to provide professional governance, leadership and accountability for the delivery of social work services, whether these are provided by the local authority or purchased from the voluntary or private sector. In addition, there are a small number of specific duties and final decisions in relation to a range of social work matters, including welfare guardianship, which must be made either by the CSWO or by a professionally qualified social worker to whom the CSWO has delegated the responsibility and for which the CSWO remains accountable.

Many of the responsibilities of the CSWO identified in the national guidance are about ensuring high professional standards in meeting statutory requirements to provide advice, guidance and support to welfare guardians including:

- ensuring that there are effective governance arrangements for managing the complex balance of need, risk and rights, in accordance with professional standards;
- actively promoting continuous improvement, raising standards and evidence-based practice, including developing person centred services that are focused on the needs of the person using services;
- ensuring that appropriate systems are in place both to promote good practice, and to identify and address weak and poor practice;
- ensuring significant case reviews are undertaken into critical incidents; and
- preparation of an annual report to the local authority on all statutory, governance and leadership functions of the role.

In order to promote high professional standards, local authorities should ensure that relevant staff have access to training on the AWI Act. Effective quality assurance, including regular audits and reviews of local policies, procedures and guidance for staff relating to the AWI Act, should also be in place.

The adults with incapacity code of practice for local authorities states that it should be the responsibility of the CSWO to ensure that this code of practice is implemented by all staff to whom it is relevant. Details of local authorities' duties can be found in Chapter 8 of the code of practice for Local Authorities Exercising Functions Under the 2000 Act ([www.gov.scot/publications/adults-incapacity-scotland-act-2000](http://www.gov.scot/publications/adults-incapacity-scotland-act-2000)).

Given the wide range of local authority staff who might be the first point of contact for a welfare guardian, the CSWO needs to ensure that social work and social care staff have a general awareness of:

- the existence of the AWI Act, its regulations, the powers and interventions available, and the duties conferred;

the principles of the Act as set out in Section 1;

- the existence of the code of practice for local authorities exercising functions under the Act;
- the co-existence of the Act with other legislation, such as the inter-relationship with the Adult Support and Protection (Scotland) Act 2007, the Mental Health (Care and Treatment) (Scotland) Act 2003; and
- the relationship to wider legislation such as the Equality Act 2010, Human Rights legislation (ECHR) and disability legislation (CRPD).

## **Dealing with disputes**

Conflicts of interest may arise for a number of reasons, including the role of the local authority in both safeguarding welfare as well as in commissioning and providing services. In the first instance, the key to dealing with potential conflict is to apply the AWI Act principles, and where appropriate, to seek professional or legal advice. Managers should be familiar with their local authority's escalation policies and procedures and ensure the CSWO is informed at the earliest stage.

Local authorities should put in place procedures for managing disputes between different proxies, and between proxies and the local authority in exercising its functions.

## **CSWO Annual Report**

Data on statutory work relating to adults with incapacity, including guardianship, has routinely featured in CSWO annual reports. In order to produce information for these high-level reports, it is essential that there are systems in place that enable the reporting of accurate and timely, aggregate information. This should include, as a minimum, data on the number, type and duration of orders for both local authority and private guardianships. Reports should also include information on assessments undertaken by mental health officers for welfare guardianship applications. Information on orders for financial guardianship should also be collected and reported, as local authorities have responsibilities for applications relating to financial powers.

The CSWO report may also include more detailed information including:

- an analysis of the implications of the level of activity for both Mental Health Officer services in the application process and community care teams in meeting local authority supervisory responsibilities;
- identifying how the welfare guardianship orders held by the CSWO and private guardianship orders are managed and supervised;
- information on the numbers of private and local authority guardianship orders;
- information on guardianship orders by care group, ethnicity, gender and age;
- feedback from private welfare guardians on the quality and frequency of support;
- identification of issues for the local authority in discharging its duties;
- the numbers of welfare guardianship orders recalled; and
- matters arising from quality assurance processes, including case file audits.
- Information on the number of supervision of guardianships undertaken by the authority.

## **Role of the social work manager/team leader**

### **Providing general information and advice**

The AWI Act requires local authorities to provide advice, guidance and support to private welfare guardians. Normal contact should be with the allocated local authority guardianship supervisor, but that staff member cannot be available 24 hours a day. Welfare guardians should know how to contact social work services, including out of hours, in the event of any crisis.

Managers and team leaders should ensure staff are aware of the names and contact details of social work staff who have specialist expertise in the AWI Act. Staff should also know where to access copies of the codes of practice, policies and procedures.

Up-to-date information and training about the AWI Act should be provided to staff and should be included as part of induction for new staff. Staff involved in assessment and care management require particular training on how the AWI Act fits into their assessment and care management role. All social work staff should have a good understanding around how the AWI Act intersects with other key legislation such as, but not limited to, the Mental Health (Care and Treatment)(Scotland) Act 2003, the Adult Support and Protection (Scotland) Act 2007 and the Social Care (Self-directed Support)(Scotland) Act 2013.

Managers and/or team leaders should encourage staff to raise awareness of powers of attorney (POA), whilst people still have the capacity to grant someone they trust powers to act as their continuing (financial) and/or welfare attorney. A welfare power of attorney only comes into effect in the event of the granter's loss of capacity. A financial power of attorney can be acted upon at the point of registration with the OPG and with the agreement of the granter, even though they still have capacity to make financial decisions.

The Commission has a good practice guide to support staff with some POA common concerns which may be useful in practice: <https://www.mwscot.org.uk/node/229>

## **Workload management**

The significant increase in the number of welfare guardians, sometimes for indefinite periods, has placed a strain on local authorities to carry out their supervisory responsibilities. In exercising supervisory responsibilities, line managers should be satisfied that their staff provide a proportionate response based on assessments of the adult's circumstances.

Staff can take on both the guardianship supervisor and care management role, although it is important for staff to be aware of their separate statutory responsibilities in supervising the welfare guardian. In complex situations, consideration should be given to allocating two people to provide these different roles.

## **Preparation and support to assist supervisors to undertake the role**

One of the most important tasks for managers is to ensure staff have access to training and development opportunities. As the number of private welfare guardians increases and more social workers and other staff take on the role of guardianship supervisor, training becomes more crucial if this duty is to be carried out effectively.

Managers and/or team leaders should include training for supervisors in their training needs analysis and training plans. Training and guidance should reflect the skills and knowledge required when operating as a guardianship supervisor, including the interface between mental health and adult support and protection legislation the 'Triangle of Protection'. It cannot be assumed that all mental health officers (MHO) will have received the necessary preparation for this role as part of their MHO training course.

All guardianship supervisors should have access to, and be familiar with, the code of practice for local authorities and the revised code of practice for welfare guardians and nominated intervener.

## **Staff supervision**

The code of practice ([www.gov.scot/publications/adults-incapacity-scotland-act-2000](http://www.gov.scot/publications/adults-incapacity-scotland-act-2000)) suggests that local authorities should ensure that the person acting as guardianship supervisor on behalf of the CSWO should be supervised formally by their line manager. Responsible officers (sometimes referred to as Authorised Officers) acting as welfare guardian on behalf of the CSWO and supervisors of private guardians (sometimes referred to as Supervising Officers) should be supervised/line managed for this purpose by a manager experienced in the operation of this role, though this need not always be an MHO.

The circumstances of all adults subject to welfare guardianship should be discussed from time to time at staff supervision sessions. Where there are complex situations, these should be kept under active discussion. These discussions should be formally recorded, noting any issues or concerns and added to case file notes, as appropriate. Managers and/or team leaders should consider with staff whether welfare and/or financial guardianship continues to be necessary, as in some situations the adult's capacity may have improved or the powers may no longer be necessary. They should also discuss whether the principles of the AWI Act are being applied appropriately.

Any potential changes to the welfare guardianship order should first be discussed with the welfare guardian and the adult as well as within formal social work supervision. (See dispute resolution below.)

## **Out of local authority area**

The guidance on the recovery of expenditure on accommodation and services encourages local authorities to enter into joint written agreements whenever an out-of-area placement is arranged. Written agreements on guardianship supervision arrangements would also be helpful whenever an adult subject to welfare guardianship, whether private or CSWO, moves from one local authority area to another. If there is any dispute between local authorities as to who has statutory responsibility under the AWI Act, either as welfare guardian or guardianship supervisor, it may be helpful to refer to the initial stages of the dispute resolution procedure and principles. These should include an Adults with Incapacity Review Case Conference where the details of concerns should be discussed with the welfare guardian and appropriate persons and a reconsideration of the principles of the Act and how they can best be met.

## **Importance of recording**

Recording is a vital part of the social work task. Welfare guardians, both private and local authority, are required to keep records to show when they have exercised their welfare guardianship powers.

We know from the Mental Welfare Commission monitoring of welfare guardianships, that even where good practice exists, the quality of recording of guardianship supervision visits is inconsistent. Templates can facilitate better recording. These should link to electronic recording systems. Local authorities who do not have one in place should develop a recording template for use by their staff. An example of a guardianship supervision review template is included at Appendix 2, which may be customised for this purpose.

Line managers should routinely audit the recording of the guardianship supervisory task to check that recording is completed on a regular basis and is of a good standard.

## Guardianship supervision

Supervision of the Welfare Guardianship order should be beneficial to the guardian and the adult and avoid being unnecessarily burdensome. The guardianship supervisor should provide advice, guidance and support to the guardian.

The guardianship supervisor should be familiar with all the particulars of the order. In providing supervision to the welfare guardian they should identify that the order continues to be appropriate, safeguards the needs of the adult and promotes their welfare.

From the outset an applicant, or proposed welfare guardian, should be informed that if a welfare guardianship order is granted the local authority has an ongoing duty to supervise the guardian (or guardians where more than one has been appointed) and that this includes regular visiting of both the adult subject to the guardianship order and the guardian. Guardianship supervisors may also have to investigate any complaints about the way in which the guardianship order is being operated, if necessary.

The adults with incapacity code of practice for local authorities sets out guidance on how to exercise the functions of a welfare guardian. Firstly, it suggests there should be frequent meetings between the welfare guardian and the person lacking capacity and regular discussions with relevant others, including the care manager (where the guardianship supervisor is not the care manager). The frequency of such meetings will depend on the extent of the welfare guardian's ordinary day-to-day contact with the adult and/or their first line care team. In some circumstances the welfare guardian will be living with the adult who lacks capacity and meeting support workers on a daily basis. Importantly, the guardianship supervisor should determine the level and frequency of contact beyond the statutory minimum based on individual requirements.

In other circumstances the private welfare guardian may live abroad and only be seeing the person who lacks capacity once or twice a year. Depending on how well settled the situation is, this might be perfectly acceptable as long as the guardianship supervisor is able to maintain contact with the welfare guardian, call on them when necessary to make decisions, and periodically have formal discussions with them about the welfare guardianship order. If there is a need for more active involvement from the welfare guardian, and they are not able to carry out their function as fully as necessary, the guardianship supervisor must consider whether someone else should replace their role, such as another relative, or the local authority. There are occasions where powers can be delegated to care providers, such as management of a care home resident's finances (Part 4 of the AWI Act) but these should be specifically agreed and managed appropriately by the welfare guardian.

The guardianship supervisor should be assessing the impact of changes in the life of the welfare guardian and the adult, and be responsive to these. It will be necessary to liaise closely with the care manager if this role is carried out by another person in the local authority. The guardianship supervisor should check that the welfare guardian is maintaining satisfactory contact with the adult through visits, phone calls or other means appropriate to the adult's circumstances. Guardianship supervisors should also ask to see the written records that the

AWI Act requires welfare guardians to keep, although the level of detail of recording will vary depending on the adult's circumstances.

Guardianship supervisors need to be able to assure themselves that the welfare guardian is using their authority in line with the principles and to the benefit of the adult on welfare guardianship. If not, they may need to give guidance to the welfare guardian on how to do this, and ultimately consider whether the welfare guardian needs to be replaced or removed.

**Practice example where the adult's father is a private guardian**

*A senior practitioner reported: "The father kept saying 'what's the point, we've always been his carers'. My approach has had to be gradual. Helping the adult's parents with their formal roles and responsibilities; giving information and guidance, and looking at the wider aspects. In situations where everything is going well, this is fine. If there are concerns regarding a person's care or where errors are made, it is usually more down to a lack of knowledge. If not ... I would have to take a far more proactive role".*

In private welfare guardianship applications, there may be a joint or substitute welfare guardian who will be identified to share or take on the role of welfare guardian or power of attorney if the original person cannot continue to carry out their role. The OPG has highlighted that some welfare guardianship orders and powers of attorney fail due to the lack of a joint or substitute nominee, even when a perfectly suitable person may exist. Although most private welfare guardianship applications now have a joint or substitute welfare guardian and this is similar for powers of attorney, it is worth the care manager/guardianship supervisor discussing this with the adult/proposed welfare guardian where this is not so, just to check that they have thought about this.

It is a requirement of the AWI Act that an MHO prepares a suitability report on an individual or joint welfare guardian(s). If a substitute guardian is also named in the application, their suitability should also be assessed for the application.

## **Planning the supervision visit**

When the guardianship supervisor meets the welfare guardian for the first time, it is important to check that the welfare guardian understands that they now have a formal legal relationship with the adult. As well as having powers they also have responsibilities and must apply the principles of the AWI Act. The guardianship supervisor should check the welfare guardian is aware of the supervisory arrangements.

Although the first visit must be within three months of a welfare guardianship order commencing, it may be necessary to visit sooner depending on the circumstances. This can be combined with care management review arrangements; however this remains a distinct welfare guardianship supervisory function, which goes beyond the normal care management role. Visits should normally be by appointment, but in certain circumstances, it may be appropriate to carry out an unannounced visit, for example to assess the adult's living circumstances. Careful thought needs to be given to when such visits are needed.

In most cases, a visit to the adult and the welfare guardian can be carried out at the same time. However, there may be circumstances where it would be appropriate to keep the visits separate. This includes, for example, where there appears to be conflict between the welfare guardian and the adult, or the guardian may not live in the same local authority area as the adult. It may be necessary to arrange for the local authority where the welfare guardian lives to visit and carry out the guardianship supervisory role if this is some distance from the home of the adult. This should only be a consideration in consultation with the supervising officer's line manager(s).

However, contact by phone, and meeting the welfare guardian when they visit the adult, for example, to attend periodic care management reviews, may be sufficient. This should also be discussed with the supervising officer's line manager.

## **Information provided by welfare guardians**

The regulations state that a welfare guardian or nominated intervener must provide the local authority with any reports or other information about the personal welfare of the adult and how their powers are being exercised. This will enable the local authority to carry out its supervisory function.

The guardianship supervisor should have a checklist of the information they would wish to receive from welfare guardians when meeting for the first time. These can be incorporated into a review template for subsequent meetings. The nature and extent of the information required should be guided by the adult's particular circumstances.

A suggested checklist can be found in Appendix 3. The guardianship supervisor must also inform the welfare guardian about what advice and level of support they can expect to receive from the guardianship supervisor.

Some private welfare guardians have been fulfilling their caring role for the adult for many years and may see the role of the guardianship supervisor as an unnecessary intrusion. This may be for a variety of reasons. In these circumstances it may be necessary to emphasise that there is a legal duty for the welfare guardian and the guardianship supervisor, to carry out these functions and to focus on the potential benefits to the welfare guardian and the adult.



### **Practice example of a private welfare guardian's views**

*Mr G told us he had looked after his sister since their mother died in 1980. As the elder brother he felt the caring responsibility naturally fell to him. The only reason he took formal measures in 2008 was because he was advised by his solicitor that as more complex decisions were needed now about his sister's care, it would be best for there to be a guardian. He did not see the sense initially in there being a supervisor as he had been doing it all for so long and staff in the care home worked well with him. However, he had more difficulties later when his sister went into hospital for a while and medical staff reportedly ignored him. "They did not appear to understand the role of guardian". He told us that at this time the supervisor "listened well and made sensible suggestions" that helped resolve this difficulty.*

If a welfare guardian refuses to be supervised, further action should be identified to address such circumstances. The guardianship supervisor should keep written records of attempts to hold meetings and the responses of the welfare guardian to these overtures. The adults with incapacity code of practice highlights that the AWI Act does not allow a local authority to issue a direction to a welfare guardian or other proxy. However, such information may be useful if it becomes necessary to return to court, either to apply to replace the welfare guardian, or to request that the sheriff give directions under s.3 of the AWI Act.

### **Supervision and care management<sup>8</sup>**

Whilst the role of care manager/social worker and guardianship supervisor are different, they are complementary. The adults with incapacity code of practice for local authorities suggests that a guardianship supervisor should ideally be someone who already knows the welfare guardian and the adult. Nevertheless, it is important for the care manager to make a distinction between the two roles with the welfare guardian. The welfare guardian needs to know what will be expected of them by the local authority in carrying out their responsibilities; and what the welfare guardian can expect from the guardianship supervisor by way of advice, guidance and support.

The care manager/guardianship supervisor should be able to combine assessing the needs and outcomes of the adult and obtaining community care services to meet those needs and outcomes, whilst ensuring that the decisions made by the welfare guardian are in accordance with the principles of the AWI Act. Some care managers and guardianship supervisors have identified times when there is a conflict in combining these separate roles, for instance, when the welfare guardian is seeking to obtain more services from the local authority. Although the care manager recognises the principle of benefit they will also be required, in many instances, to apply the local authority's eligibility criteria. It would be sensible for the care manager/guardianship supervisor to discuss these situations with their line manager who would decide when to introduce a third party. The welfare guardian should also be able to request a review in such circumstances.

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<sup>8</sup> Please note that the term 'care manager' can also be read as 'social worker'.

## Varying, recalling or renewing the powers

Throughout the period of the welfare guardianship order, the guardianship supervisor should consider whether the order requires to be varied, for instance, if more powers are required, or the order needs renewed. If renewal of the welfare guardianship order is required, guardianship supervisors should plan timeously with the welfare guardian for the renewal of the order.

Consulting close relatives before decisions are made about an adult who lacks capacity to make specific decisions should be enshrined in good practice in all care settings. Given the experience of many carers of not being routinely involved in decision making, welfare guardianship can be viewed as having importance long after the initial trigger for the application has been resolved. The principles of the AWI Act should be inherent in all transactions where the adult has been deemed not to have capacity.

Guardianship supervisors should consider whether the criteria for welfare guardianship continues to exist, either because the person has regained some or all of their capacity or because their personal welfare can be satisfactorily safeguarded or promoted without a welfare guardianship order. Many private guardians want to continue in this role, even when the view of the guardianship supervisor is that the welfare needs of the adult can be met without a welfare guardianship order. Private welfare guardians have told the Mental Welfare Commission that having a formal role gives them authority when meeting care providers and others. They report feeling more confident that they will be contacted regularly and consulted before decisions are made.

In this situation there is a potential conflict between the welfare guardian and the guardianship supervisor. If an adult no longer requires the powers specified within a welfare guardianship order to be in place, to continue with the order could be considered to be overly restrictive. In such a circumstance, good practice suggests that an Adults with Incapacity Review Case Conference is arranged to record the decision making around the prospective recall or revocation of a welfare guardianship order. An application to the sheriff could be made by the local authority or the welfare guardian to make a decision under s.3 of the AWI Act (sheriff's direction).

### **Practice example of a private welfare guardian**

*Initially, Mrs T took out guardianship because she had concerns about another relative wanting access to her son. She had concerns that he would be in physical danger and felt there needed to be measures in place to protect him. She sought powers that would allow her to make decisions as to who he could be with. He had also just moved to his own tenancy and she felt that this placed him at increased risk. Several years later things had settled and the risk had gone but Mrs T told us: "Now, guardianship increases my confidence in that I can have more of a say in relation to the services my son receives."*

Procedures indicate that recall should be considered in certain circumstances, including the following:

- for local authority guardianship orders, when the personal welfare of the adult can be satisfactorily safeguarded or promoted without a welfare guardianship order;
- whenever the adult regains capacity (except where capacity fluctuates, in which case there should be a discussion with the adult and all concerned about this decision, and whether a welfare power of attorney might be more appropriate);
- in private welfare guardianship orders where the personal welfare of the adult can be satisfactorily safeguarded or promoted without a welfare guardianship order and the welfare guardian is happy that the guardianship order is no longer serving any useful function.

There may be circumstances where the guardianship supervisor has identified that a welfare guardian, despite the support and guidance of the guardianship supervisor, is not acting in accordance with the principles of the AWI Act and therefore may not be suitable to continue to carry out their role. Local authorities should have a procedure to follow in these situations. (Code of Practice for Local Authorities Exercising Functions under 2000 Act). It may be necessary to go back to the sheriff court to replace the welfare guardian, either with a local authority guardian or another person. Involving an independent advocate to support the adult to communicate their views is important during such times. In complex situations where property and financial affairs are concerned, it may be necessary to discuss the issues with the OPG, or where welfare matters are concerned, with the Mental Welfare Commission. It may be necessary to return to the court to ask for directions under s.3 of the AWI Act (see dispute resolution).

Local authorities can recall an order when the CSWO is the welfare guardian<sup>9</sup>. Local authorities can also initiate the recall of private welfare guardianship orders, if the grounds for the appointment of a guardian are no longer fulfilled, or the welfare of the adult can be satisfactorily safeguarded or promoted, for example, through the use of the Social Work (Scotland) Act 1968. This should first be discussed with the guardian as well as in supervision.

## **Involvement of others**

We previously highlighted the importance of involving an independent advocate to support the adult to communicate their views. The code of practice for local authorities advises that where the person has no family or friends to assist, it is helpful to seek the support of advocacy services. They also have an important role to play when there are differences of view about the welfare guardianship order.

When the local authority is the welfare guardian, guardianship supervisors should seek the views of the adult, their nearest relative, primary carer, named person and anyone else the sheriff has directed to be consulted about the adult's personal welfare; and also how the local authority welfare guardian is exercising their functions.

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<sup>9</sup> AWI Act s.73A

There is an increasing trend for private guardianship applications to combine financial and welfare powers. As a result, the local authority and the OPG may supervise the same guardian, local authority for the adult's welfare and OPG for the adult's finances and property decisions. It is essential for both organisations to liaise with each other. There is an example in the code of practice for local authorities at section 8.6, where planning for the sale of an adult's house is linked to planning for where the adult will reside in future.

## **Welfare and financial power of attorney**

Anyone can set up a welfare and/or financial (also known as continuing) power of attorney, provided they have capacity to do so. They can decide who will act on their behalf in the event they lose capacity to make some or all decisions and identify what should happen before the power of attorney (POA) can begin to operate, although a financial power of attorney can begin to operate before capacity is lost if the adult wishes this. The granter may, for instance, include in the POA that a medical doctor requires to confirm loss of capacity before the welfare power of attorney can be acted upon. The POA must be registered with the Office of the Public Guardian (OPG) before the attorney can act.

As the numbers of these proxy arrangements grow, care managers will have to work alongside and understand the role of welfare attorneys. When someone claims to have a welfare and/or financial POA, the care manager should ask to see the certificate and accompanying documents, which show the powers that have been registered.

Local authorities are no longer automatically notified of newly registered POAs but staff requiring to access POA documents should be aware of how to obtain this information from their own local authority contact with OPG.

A nominated power of attorney must also abide by the principles of the AWI Act. If a care manager becomes concerned that someone acting in the role of POA may not be carrying out their responsibilities in accordance with the principles of the AWI Act, and disagrees with the decisions made where there is no resolution, they can apply to the sheriff for the welfare attorney to be supervised<sup>10</sup>. In some circumstances, it may be necessary for the local authority to apply for welfare guardianship as an alternative. The granting of welfare guardianship powers effectively terminates similar powers granted under a POA, although in some cases the welfare guardian can be the local authority and the financial power of attorney can still be effective.

## **Investigations**

In all circumstances where there is a risk to the personal welfare of an adult, the local authority should investigate under Section 10(1) (c) or (d) of the AWI Act. There are no emergency powers available under the Act. Intervention Orders and Interim welfare guardianship orders are subject to the same procedures as full orders (i.e., two medical reports and a MHO report). If urgent action is necessary, consideration should be given to using powers under either the

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<sup>10</sup> AWI Act s.20

Mental Health (Care and Treatment) (Scotland) Act 2003 or the Adult Support and Protection (Scotland) Act 2007 where criteria are met

Routine supervision by the local authority of welfare guardians appointed by foreign courts is not required by the AWI Act. However, complaints should be investigated, and if necessary a local authority can apply to the sheriff to order welfare guardianship supervision or to displace the foreign guardian. The complainant would also have recourse to the courts as a party claiming an interest in the welfare of the adult should their concerns about the exercise of a POA persist.

## **Notifying the Mental Welfare Commission**

The code of practice for local authorities requires that a local authority should inform the Mental Welfare Commission (MWC) of the outcome of all investigations where there have been concerns raised about welfare guardians and POAs not carrying out their responsibilities in accordance with the AWI Act. If, following an investigation, the local authority decides that no further action is required, this should also be reported to the MWC. If the investigation was a result of a complaint received by a third party, they too should be advised of the outcome of the investigation. If the complainant is dissatisfied with the outcome, they should be advised of the role of the MWC and its power to investigate further.

The MWC also asks guardianship supervisors to report significant incidents to them. This includes situations where there is evidence of ill treatment, neglect, serious injury and/or harm. If the concern is about a registered care service this should also be reported to the Care Inspectorate. (Appendix 1)

The OPG and MWC also require to be notified by the guardianship supervisor of changes of address and the deaths of people on guardianship or their welfare guardian. The Commission routinely asks for the date and cause of death of the adult on welfare guardianship and whether the guardianship supervisor was aware of any concerns about the care of the person.

*Please note that practice examples included in this good practice guide are from interviews carried out for “Young people and welfare guardianship” and “Supervising guardians” – two themed reports available from the Mental Welfare Commission’s website: <https://www.mwcscot.org.uk/>*

## Appendix 1

### **The role of the Mental Welfare Commission, the Care Inspectorate, Healthcare Improvement Scotland and Scottish Social Services Council**

#### **The Mental Welfare Commission**

The Mental Welfare Commission (MWC) is an independent organisation working to safeguard the rights and welfare of everyone with a mental illness, learning disability, dementia or related condition. Our duties are set out in mental health and incapacity law. We are made up of people who have understanding and experience of mental illness and learning disability. Some of us have worked in health care, social work, social care or the law. Some of us are carers or have used mental health and learning disability services ourselves.

The Mental Welfare Commission believes that everyone with a mental illness, learning disability, dementia or related condition should:

- be treated with dignity and respect;
- have the right to treatment that is allowed by law and fully meets professional standards;
- have the right to live free from abuse, neglect or discrimination;
- get the care and treatment that best suits his or her needs; and
- be enabled to lead as fulfilling a life as possible.

Further information about the MWC can be found here <https://www.mwscot.org.uk/>

#### **The Care Inspectorate**

The Care Inspectorate was set up in April 2011 by the Scottish Government as a single regulatory body for social work and social care **services** under the Public Services (Reform) Scotland Act 2010. The Care Inspectorate is the national regulator for care services in Scotland. Care services cannot operate unless they are registered by the Care Inspectorate. Their role is to inspect services and evaluate the quality of care they deliver and support improvement in individual services and across the care sector nationally. They regulate and inspect care services in Scotland to make sure that they meet the right standards (Health and Social Care Standards).

Further information about the Care Inspectorate can be found here:

[Welcome to the Care Inspectorate](#)

## Health Improvement Scotland (HIS)

The purpose of Healthcare Improvement Scotland is to enable the people of Scotland to experience the best quality of health and social care.

These are the areas on which HIS focus their efforts and resources:

- Enabling people to make informed decisions about their care and treatment.
- Helping health and social care organisations to redesign and continuously improve services.
- Provide evidence and share knowledge that enables people to get the best out of the services they use and helps services improve.
- Provide quality assurance that gives people confidence in services and supports providers to improve.
- Making the best use of resources, to ensure every pound invested in their work adds value to the care people receive.

By inspecting care, HIS seeks to ensure that healthcare services are meeting the required standards of care, good practice is identified and areas for improvement are addressed.

Similarly to MWC visits, inspectors undertake announced and unannounced inspections of healthcare services. These involve a physical inspection of the clinical areas and discussions with staff. HIS publish a written report 6 weeks after the inspection

Further information about HIS can be found here:

<https://www.healthcareimprovementscotland.org/>

The Care Inspectorate and Healthcare Improvement Scotland continue to regulate each individually registered health and social care **service**, they also now work with other regulators and scrutiny bodies to carry out strategic inspections. The Health and Social Care Standards are:

- I experience high quality care and support that is right for me
- I am fully involved in all decisions about my care and support
- I have confidence in the people who support and care for me
- I have confidence in the organisation providing my care and support
- I experience a high quality environment if the organisation provides the premises

## Scottish Social Services Council (SSSC)

The Scottish Social Services Council (SSSC) was set up under the Regulation of Care (Scotland) Act 2001 to regulate social service **workers** and to promote their education and training. All social workers are required to be registered by the SSSC in order to practice.

Further information about the SSSC can be found here

[The Scottish Social Services Council - Scottish Social Services Council \(sssc.uk.com\)](http://www.sssc.uk.com)

## Appendix 2

### Guardianship supervisor's review template to record meetings with welfare guardian(s)

#### AUTHORISING/SUPERVISING OFFICER REVIEW REPORT OF APPOINTED GUARDIAN(S)

Name of Person Subject to Guardianship:	
Date of Birth:	
Type of Guardianship Order Granted:	
Date Guardianship Order Granted:	
Duration of Guardianship:	
Date of this Review:	
Date Next Review Due:	

**\* All Guardianship orders must be reviewed 3 months prior to the date the guardianship is due to expire.**

Name and Address of Guardian:	Relationship to Adult:	Tel Number/Contact Arrangements (including Out of Hours):

	Name and Address:	Telephone Number:
Authorised Officer:		
Supervising Officer:		
Person Managing Financial Affairs.		
Person(s) for whom Access to the Adult is Restricted:		

#### Powers of Guardian(s)

Powers:	Yes/No:	Comments:
Decide where the Adult should reside	Yes <input type="checkbox"/> No <input type="checkbox"/>	<i>If no, the adult may be free to leave. Is there a policy to manage this situation?</i>



Provide social, cultural, or educational activities and holidays	Yes <input type="checkbox"/> No <input type="checkbox"/>	
Access to be given to medical, social work or care staff when required	Yes <input type="checkbox"/> No <input type="checkbox"/>	
Financial Powers of any kind (usually as financial guardian or POA)	Yes <input type="checkbox"/> No <input type="checkbox"/>	
Consent to medical treatments, research or supervise medication	Yes <input type="checkbox"/> No <input type="checkbox"/>	<b>A Section 47 Treatment Certificate to authorise medical/dental treatment is in place.</b>
<i>* The Act requires a Treatment Certificate be completed even when there is a guardian/attorney with this power.</i>		
Take legal action of any kind on behalf of the adult	Yes <input type="checkbox"/> No <input type="checkbox"/>	
Access to any confidential records or data held on the adult.	Yes <input type="checkbox"/> No <input type="checkbox"/>	<i>If Yes, guardian has the same access to Care Home's records as adults</i>
Dress, diet, personal appearance or hygiene	Yes <input type="checkbox"/> No <input type="checkbox"/>	
With whom the adult may consort or restrict or control access to certain people	Yes <input type="checkbox"/> No <input type="checkbox"/>	<i>If Yes, add details below of any person who has restrictions put on their access to the adult.</i>
Accompany the adult, or monitor or supervise the adult at all times.	Yes <input type="checkbox"/> No <input type="checkbox"/>	<i>If No, is the adult's right to freedom being respected/promoted?</i>
Other, please specify.	Yes <input type="checkbox"/> No <input type="checkbox"/>	<i>If there are more powers attach a separate sheet detailing these.</i>

Note:

If any of the above powers have been delegated to staff, please indicate within the comments box.

**Events e.g. Death or admission to hospital must be given to the Supervising/Authorising Officer detailed on page 1 of this form.**

**Review Summary**

<b>Update on the Adults Circumstances</b>	
<b>Description of how the powers are being used</b>	
<b>Are they in line with the principles?</b>	
• Do they benefit the adult?	Yes <input type="checkbox"/> No <input type="checkbox"/>
• Are the views of the person on guardianship and the carers known and taken into account?	Yes <input type="checkbox"/> No <input type="checkbox"/>

• Are only those decisions made that the adult lacks capacity to make?	Yes <input type="checkbox"/> No <input type="checkbox"/>
• Are they offered choices?	Yes <input type="checkbox"/> No <input type="checkbox"/>
• Do the decisions take into account less restrictive alternatives?	Yes <input type="checkbox"/> No <input type="checkbox"/>
• Is the adult encouraged to use existing skills and, where possible, develop new skills?	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>If no to any of the above, how is this to be addressed?</b>	
N/A.	
<b>Views of the Adult (or reason why views not included)</b>	
<b>Views of the Guardian(s)</b>	
<b>Views of the Care Manager</b>	
<b>Views of any other relevant person (Manager of Care Home, person with delegated powers etc...)</b>	
Are all the powers still required?	Yes <input type="checkbox"/> No <input type="checkbox"/>
<b>Area of Disagreement (if any)</b>	
N/A	
<b>Any other relevant information</b>	
N/A.	
Summary of Review including any further action or intervention required	

**Signature of Supervising/Authorising Officer:**

.....

**Designation of Supervising/Authorising Officer:**

.....

**Date Signed by Supervising/Authorising Officer:**

.....

Please note that the Mental Welfare Commission does not require to receive a copy of this minute; however should the review highlight concerns regarding the actions of the guardian further consideration should be given to undertaking a section 10 Inquiry – Adults with Incapacity (Scotland) 2000. Or if concerns are related to a deficiency in care and treatment in a setting other than a hospital then a s.33 Inquiry – Mental Health (Care and Treatment) (Scotland) Act 2003 should be considered.

## Appendix 3

### **Checklist of the information a guardianship supervisor would wish to receive from welfare guardians**

**(This checklist could also be used as the basis for an agenda for review meetings)**

The information a supervisor would wish to receive from guardians will include details of:

1. the guardianship order as set out on the certificate, including length, powers, and other arrangements such as substitute welfare guardians;
2. any contact details/addresses of the adult and guardian/s and changes to these;
3. the powers the guardian wishes to exercise and how to record these;
4. the powers the guardian wishes to delegate to others such as care staff;
5. awareness of the principles and how the welfare guardian is intending to apply:
  - benefit to the adult
  - past and present wishes of the adult
  - consulting carers and other relevant individuals
  - using power in the least restrictive way to achieve goals
  - promoting/developing the adult's own skills and ability to make decisions and choices;
6. discussion on actions to follow any significant events/accidents or incidents involving the person who lacks capacity;
7. the level of contact with the person who lacks capacity and their carers/others;
8. plans for the future – changes planned in care arrangements, plans for a substitute guardian if any, guardianship supervision and review dates and renewal dates.
9. guardianship supervisors may wish to provide private welfare guardians with their contact details and any contacts when they are not available. They should provide information on how to access the relevant codes of practice.

## Appendix 4

### **The Schedule under the Adults with Incapacity (Supervision of Welfare Guardians etc. by Local Authorities (Scotland) Regulations 2014 which amends the Adults with Incapacity (Supervision of Welfare Guardians etc. by Local Authorities) (Scotland) Regulations 2002**

#### FORM OF NOTICE TO THE MENTAL WELFARE COMMISSION

To the Mental Welfare Commission

**Supervision of** {insert name and address of welfare guardian] (**“the guardian”**) **who has been appointed as welfare guardian for** [insert name, address and date of birth of adult to whom the welfare guardian has been appointed] (**“the adult”**)

[Insert name of the local authority] (**“the local authority”**) has visited the adult and guardian within 3 months of the relevant guardianship order being granted, and then has visited the adult and guardian at least once at an interval of not more than 12 months.

The local authority has now decided to:

[delete (a),(b), (c) or (d)]

- a. vary the interval between visits to the adult and guardian to be no more than [insert the number of months, being more than 12 months]
- b. cease visits to the adult
- c. cease visits to the guardian
- d. cease visits to the adult and the guardian

The adult and guardian do not object to the decision. [Give details of what has been done to inform the adult and guardian and what discussions have taken place.]

[Complete where the decision is to vary the interval between visits]

The reasons for local authority’s decision to vary the interval between visits are: [insert a brief description of the current circumstances of the adult and guardian and what, if any, of these circumstances have changed since the application for guardianship was made]

[Complete where the decision is to cease visits]

The reason for the local authority’s decision to cease visits to the adult and/or the guardian are: [insert a brief description of the current circumstances of the adult and guardian and what, if any, of these circumstances have changed since the application for guardianship was made]

The local authority has provided information to the adult and the guardian on how they can contact the local authority if either person wishes visits to the adult and/or the guardian to restart.

[Complete where the decision is to vary the interval between visits or to cease visits to the adult and/or the guardian]

Other relevant details, including any care managements arrangements which will continue are: [insert any relevant details]

The dates of last visit by the local authority to the adult, and visit or contact with the guardian [insert date(s)].

Date:

Signed on behalf of the local authority:

[insert name, job title and contact details]

Send a completed copy of this form

by email, from secure networks only to the Mental Welfare Commission secure email address at: [MWC.admin@nhs.scot](mailto:MWC.admin@nhs.scot)

## References/ further information and reading

*Adults with Incapacity (Scotland) Act 2000*

(legislation.gov.uk)

<https://www.legislation.gov.uk/asp/2000/4/contents>

*Adults with incapacity: forms and guidance*

(www.gov.scot)

<https://www.gov.scot/collections/adults-with-incapacity-forms-and-guidance/>

*Adults with Incapacity: supporting discharge from hospital*

(Scottish Government and Mental Welfare Commission for Scotland, 13 October 2021)

<https://www.mwcscot.org.uk/node/1640>

*Authority to discharge: Report into decision making for people in hospital who lack capacity*

(Mental Welfare Commission for Scotland, May 2021)

<https://www.mwcscot.org.uk/node/1569>

*Guidance on s13ZA and the Cheshire West Supreme Court Decision*

(Mental Welfare Commission for Scotland, 17 September 2014)

<https://www.mwcscot.org.uk/node/1080>

*Guidance on the changes introduced by an Amendment to the Regulations concerning the Supervision of Welfare Guardians, in June 2014*

(Mental Welfare Commission for Scotland, republished August 2020)

<https://www.mwcscot.org.uk/node/1079>

*Legal aid for welfare guardianship*

(Mental Welfare Commission for Scotland, May 2021)

<https://www.mwcscot.org.uk/node/1069>

Office of the Public Guardian (Scotland)

([publicguardian-scotland.gov.uk](http://publicguardian-scotland.gov.uk))

*S47 certificate still needed if there is a welfare proxy*

(Mental Welfare Commission for Scotland, August 2020)

<https://www.mwcscot.org.uk/node/1063>

*Supporting documents - Adults with incapacity: code of practice for local authorities*

(www.gov.scot)

<https://www.gov.scot/publications/adults-incapacity-scotland-act-2000-code-practice-local-authorities-exercising-functions-under-2000-act/documents/>

*The scope and limitations of the use of section 47 of the Adults with Incapacity Act*

(Mental Welfare Commission for Scotland, October 2021)

<https://www.mwcscot.org.uk/node/1638>

*When is "AWI Incapacity" more than inability to communicate?*

(Mental Welfare Commission for Scotland, republished August 2020)

<https://www.mwcscot.org.uk/node/1064>



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