

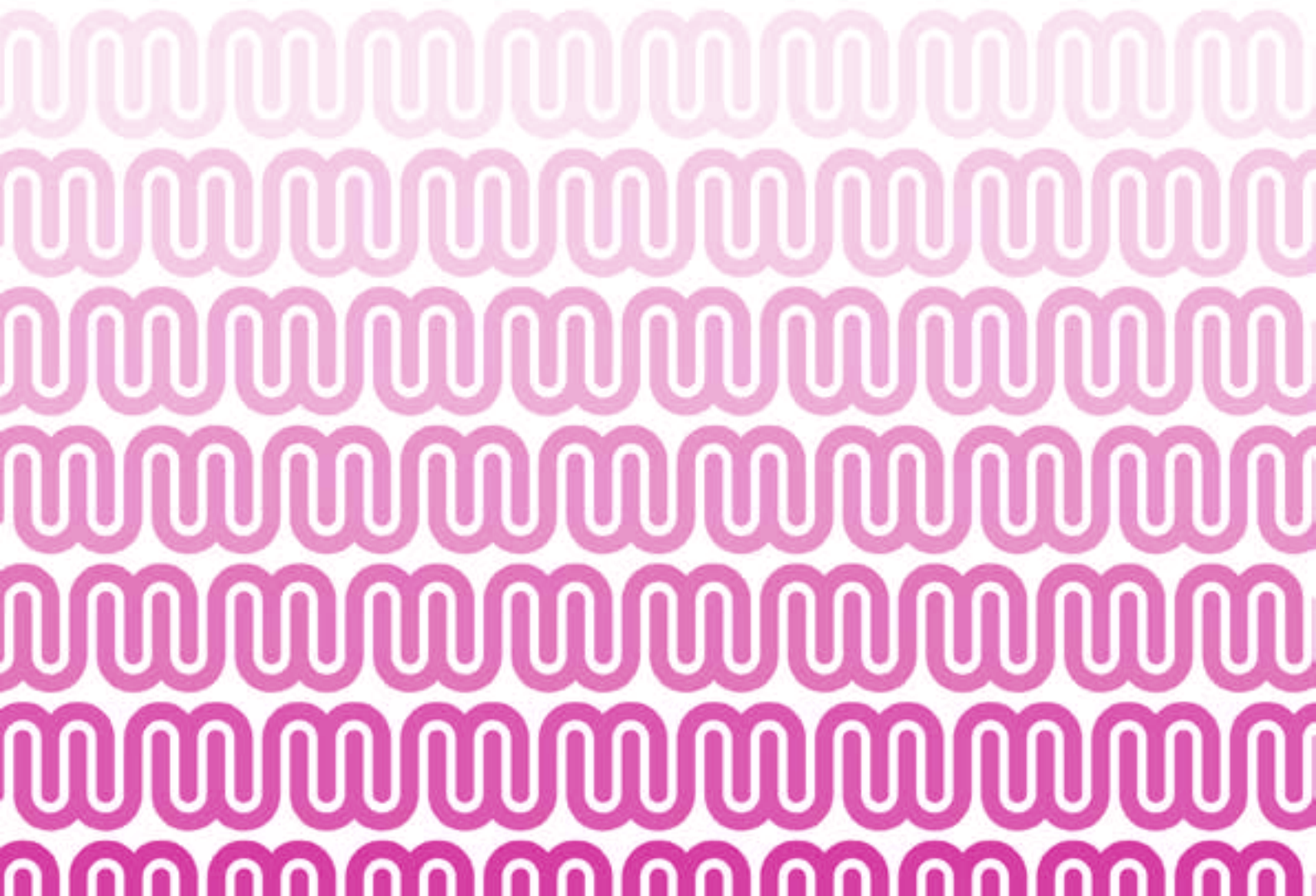


mental welfare
commission for scotland

When and how to recall a welfare guardianship order

Good practice guide

September 2024



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

When and how to recall a welfare guardianship order

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Introduction

From time to time the Mental Welfare Commission is asked by health and social care partnerships to recall a welfare guardianship order. The requests made to the Commission are made in various ways, often we receive a statutory form requesting a guardianship order is recalled or a letter from the local allocated practitioner requesting that the Commission considers recall.

Originally the Adults with Incapacity (Scotland) Act 2000 (AWI Act) was clear that where the chief social work officer of the local authority was appointed as an individual's welfare guardian, welfare powers could not be recalled by the local authority. If a local authority considered that powers conferred on their chief social work officer should be recalled, then the process was that they applied to the Mental Welfare Commission.

However, the Adult Support and Protection (Scotland) Act 2008 amended this by inserting provision for the local authority to recall powers¹, providing there are no objections to this from the relevant interested parties. Where objections are raised, the recall request requires to be remitted to the sheriff for a decision.

The Mental Welfare Commission retains the power to receive a request to consider recall of guardianship welfare powers and this can cause a degree of confusion for practitioners. This good practice guidance therefore aims to clarify the welfare guardianship recall process and support practitioners across health and social care partnerships, acting on behalf of the local authority, to decide the most appropriate route to request the recall of guardianship powers.

¹ S. 73(11) inserted (1.4.2008) by [Adult Support and Protection \(Scotland\) Act 2007 \(asp 10\)](#), ss. 60(11)(c), 79(3); [S.S.I. 2008/49](#), art. 2(1)

Capacity

An application for welfare powers under the AWI Act is based on two medical certificates of incapacity. These certificates confirm that the person has been assessed by two doctors (one of whom is an approved medical practitioner²) as lacking capacity to make informed decisions in relation to some or all aspects of their welfare. Capacity should be considered on a subject specific basis and should, therefore, not be considered as an “all or nothing” concept.

Any interventions made under the AWI Act should take account of the AWI Act principles and must:

- Be of benefit to the adult
- Be the least restrictive option
- Take the person’s past and present wishes into account
- Take the views of other relevant people into account
- Encourage the person to exercise their existing skills and develop new skills.

These principles should be considered when welfare powers are used but should also be robustly evaluated within the statutory review process. If the AWI Act principles cannot be routinely evidenced, then consideration should be given to whether or not the guardianship order is required on an ongoing basis.

Additionally, there are some conditions which can result in the adult regaining capacity for example, alcohol related brain damage (ARBD) and where capacity has been regained then the order should be recalled and care plans, where required, should revert to being delivered with consent.

It is important, particularly for young adults, that there is evidence of support for them to acquire the necessary skills to move towards more independent decision making. This can take the form of supported decision making, tailored to the individual’s needs and can result in the person being able to evidence autonomy in decision making. Supporting practitioners should, therefore, strive to adopt a supported decision making model wherever possible. Read our [supported decision making guidance](#)³ for more information.

² Approved medical practitioners have such qualifications and experience and have undertaken such training, as may be specified in directions given by the Scottish Ministers and are approved for these purposes by the Health Board in which the person resides.

Mental Health (Care and Treatment)(Scotland)Act 2003

³ *Supported decision making good practice guidance*: <https://www.mwscot.org.uk/node/503>

Who can apply to recall welfare and/or financial guardianship orders?

Anyone claiming an interest, including the adult, may apply for recall. The Public Guardian, the Mental Welfare Commission, and local authorities can all consider recall at their own instance.

Deciding which body to apply to

It is likely to be simpler and quicker for the application to be made to the local authority or the Mental Welfare Commission (for recall of welfare powers) or the Public Guardian (for recall of financial powers) than the courts. However, the local authority has a direct supervisory role and is more familiar with the adult and their circumstances and as such the application should go to them in the first place. The local authority has a duty to notify the Mental Welfare Commission of an application to recall.

Where there is opposition by those with an interest in the adult's affairs, recall should be considered by the Sheriff. The courts are, in practice, the correct forum to deal with controversial or contested applications.

Where recall of both financial and welfare powers is sought, a separate application to the Public Guardian is required to recall financial powers.

Alternatively, a single application to the sheriff could be made to recall both financial and welfare powers.

The recall process in context

Under section 73(3) of the AWI Act, the local authority may recall the personal welfare powers of a guardian, at their own instance or on the application of any person claiming an interest, if it appears that:

- the grounds for appointment of a guardian with such powers are no longer fulfilled; or
- the interests of the adult in his or her personal welfare can be satisfactorily safeguarded; or
- promoted otherwise than by guardianship.

Guardianship powers are applied for as a result of an ongoing care management process. This process will have identified a need for statutory intervention to deliver a care and support plan to meet the personal outcomes of an adult who has been assessed as lacking capacity.

This decision will have been reached following the completion of an assessment which has taken into account the views of the adult, carers, family members where appropriate, and any other relevant party and which has resulted in a proposed care

plan. The care plan will detail any intervention required and consideration should have been given to what elements of the care plan might be delivered on a voluntary basis and what elements will require more robust legal authority.

On the basis of this, an application can be made to the Sheriff seeking specific powers to authorise those elements of care and support deemed to require legal authority.

Once granted, the guardian has a duty under the AWI Act to meet the adult frequently and hold discussions with relevant others for example, the nearest relative, the primary carer, named person, and care manager and review how the powers granted are being used, whether any interventions evidence the principles of the AWI Act and if there has been any development in the adult's decision-making ability which might render the order obsolete.

The AWI Act does not exempt the local authority guardian from the requirements for supervision. Local authorities should, therefore, ensure that the specific supervisory functions are carried out by the line manager responsible for supervision of the authorised officer, who is carrying out the guardianship function.

Reviews of both local authority orders and private orders should be timeously and accurately recorded, and a template has been devised by the Mental Welfare Commission to assist in ensuring an accurate record of decisions relating to this. This template can be found in appendix 2 of the Mental Welfare Commission's [good practice guidance on supervising welfare guardians](#)⁴.

The decision to recall an order should be reached as a result of the above process and it is important that robust evidence is provided as the rationale for any such decision.

Recall of private guardianship orders

As noted above, 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.

However, some private guardians may 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

⁴ *Good practice guidance supervising welfare guardians*: <https://www.mwscot.org.uk/node/513>

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.

Where there are differing views between the local authority and the private guardian, that is, the local authority has concluded that the guardianship powers specified are no longer required but the private guardian wishes to retain them, it would not be sufficient for the local authority to make a decision to recall the order independently. An application to the sheriff could be made by the local authority or the welfare guardian or a private solicitor to make a decision under section 3 of the AWI Act (sheriff's direction).

Recall of a guardianship order under criminal proceedings

Under the Criminal Procedure (Scotland) Act 1995 (Criminal Procedure Act), a court may make an order placing an individual's personal welfare under the guardianship of a local authority or a person approved by a local authority.

Once the criminal court has appointed a welfare guardian under the Criminal Procedure Act, the guardianship order is treated in most ways as an order under the AWI Act. The exception is that an order made by the criminal court may be appealed to that court as set out in section 60 of the Criminal Procedure Act. This appeal right is in addition to the options under the AWI Act of applying to the sheriff court to have the order varied, powers recalled, or the guardian removed or replaced. It would also be possible for the local authority or the Mental Welfare Commission to recall the powers of a welfare guardian that have been conferred by the criminal court.

The process of recall

Once a decision has been reached to recall powers the process is as follows:

[Local authority recall form AWI \(15\)](#)⁵ should be completed. This is an intimation by the local authority that either they have received an application to recall powers from an interested party or that it is their intention to recall powers themselves. This form should then be sent to all interested parties, most likely this will be the same parties who received intimation of the original application. This should include the Mental Welfare Commission and the Public Guardian.

⁵ Recall of welfare guardianship forms: <https://www.gov.scot/publications/recall-of-welfare-guardianship-forms-for-professionals/>

Please note that where the person making the application to recall considers that the adult is no longer incapable and has regained capacity, [a medical report AWI \(13\)](#)⁶ is required.

Those intimated then have a 21-day period in which to raise any objections to the proposed recall. Objections should be notified in writing to the person detailed in Part E of the form.

It is good practice for a minute of the review, which reached a decision to recall powers, is attached to this intimation as this will allow for a robust consideration of the need to object – for example, if it is unclear how the adult’s welfare will be safeguarded without these powers in place.

Where the local authority proposes to refuse an application for recall, the intimation of that decision shall be confirmed on [AWI \(17\)](#)⁷.

Form AWI (19) should be used to intimate a decision by the local authority to:

- a) recall the powers under section 73(6);
- b) refuse an application to recall such powers; or
- c) remit, or not remit, the decision to recall to the sheriff under section 73(8).

There is a parallel process for recall by the Mental Welfare Commission, although there would require to be a compelling argument for the local authority not to process a recall request themselves.

It is likely that where objections to the recall by either the local authority or the Mental Welfare Commission are unable to be resolved, the proposal to recall powers will be remitted to the Sheriff whose decision is final.

Likewise, any decision made by either the local authority or the Mental Welfare Commission to recall powers may be appealed to the Sheriff whose decision is final. The initial decision reached by either agency in the first instance shall remain in force pending the final determination by the sheriff.

Recall of financial powers

Please see the information provided by the [Office of the Public Guardian](#)⁸ for further information.

⁶ Medical report AWI (13): <https://www.gov.scot/publications/end-guardianship-forms/>

⁷ Recall of welfare guardianship forms: <https://www.gov.scot/publications/recall-of-welfare-guardianship-forms-for-professionals/>

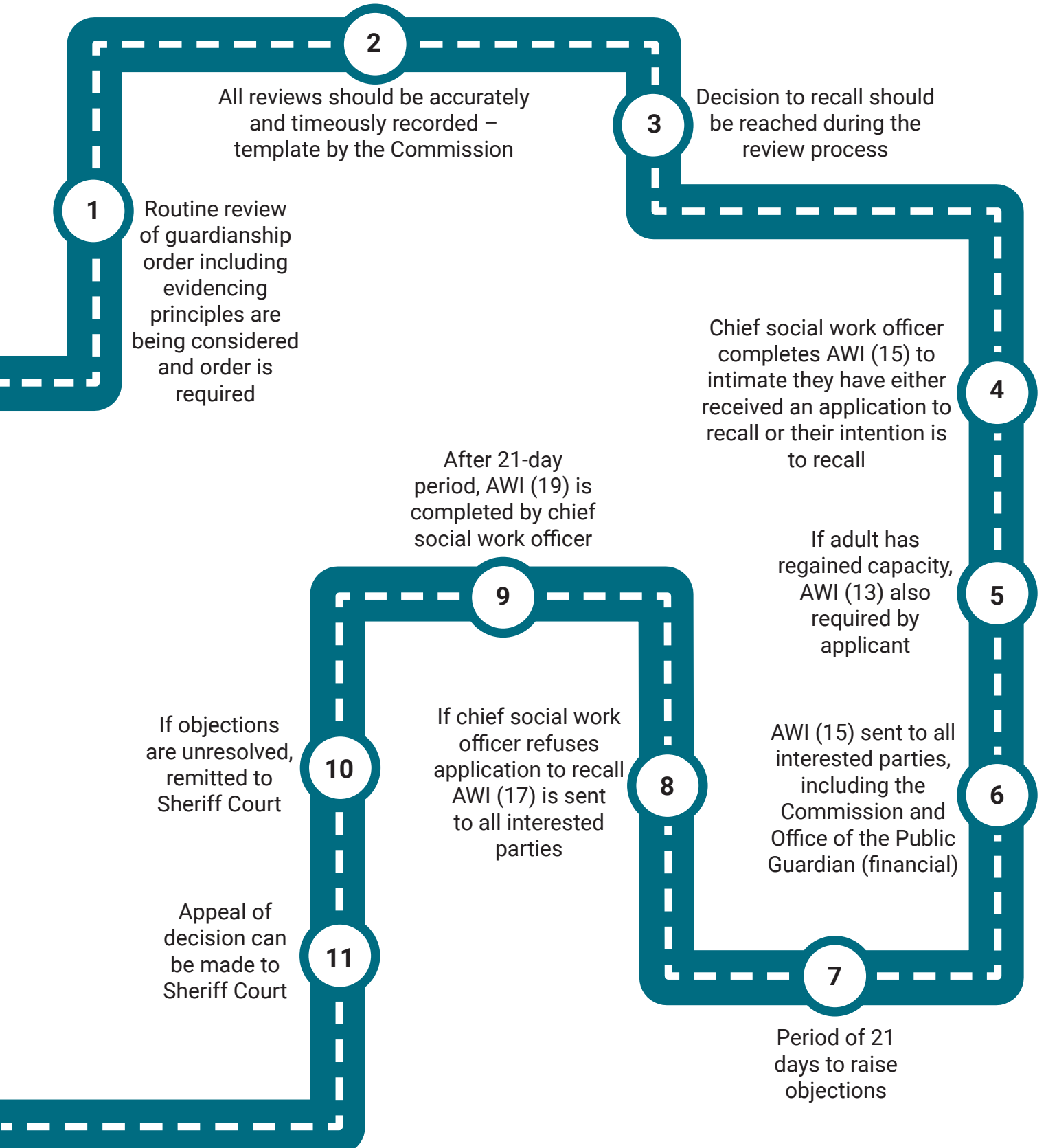
⁸ Office of the Public Guardian: www.publicguardian-scotland.gov.uk



Recall of guardianship

Any interested party can apply to recall guardianship, including:

- the adult
- private guardian
- chief social work officer
- Mental Welfare Commission for Scotland
- Office of the Public Guardian (financial powers)





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Mental Welfare Commission 2024