

# Support and supervision of private welfare guardians

Report from our monitoring  
of Adults with Incapacity Act  
2000

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## **1 Who we are**

The Mental Welfare Commission (MWC) is an independent organisation working to safeguard the rights and welfare of everyone with a mental illness, learning disability or other mental disorder. Our duties are set out in mental health law. We are made up of people who have understanding and experience of mental health and learning disability. Some of us have a background in healthcare, social work or the law. Some of us are people who use services or are carers.

We believe that everyone with a mental illness, learning disability or other mental disorder should:

- Be treated with dignity and respect
- Have the right to ethical and lawful treatment and to live free from abuse, neglect or discrimination
- Get the care and treatment that best suits their needs
- Be enabled to lead as fulfilling a life as possible

## **What we do**

- We find out whether individual treatment is in line with the law and practices that we know work well.
- We challenge those who provide services for people with a mental illness or learning disability, to make sure they provide the highest standards of care.
- We provide advice information and guidance to people who use or provide mental health and learning disability services.
- We have a strong and influential voice in how services and policies are developed.

We gather information about how mental health and incapacity law are being applied. We use that information to promote good use of these laws across Scotland.

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

Before the introduction of the Adults with Incapacity (Scotland) Act 2000 which became operational in 2002 there were few ways for families and carers to make legally authorised welfare decisions for a relative who lacked capacity. Either informal arrangements were in place and these could face legal challenges and other problems, or legislation from the previous century was used (creating roles such as tutor dative, curator bonis, and tutor-in-law).

While welfare guardianship was possible under the Mental Health (Scotland) Act 1984, this was restricted to only three powers of access, attendance and residence and was used almost exclusively by local authorities to protect vulnerable individuals with mental disorder. In practice very few members of the public applied for available orders except in the most urgent need. They were difficult to obtain. Having used the authority to make a critical decision, however, the role most often continued without further scrutiny or review for an indefinite period and without formal review of either the changing needs of the individual or their social circumstances. Latterly, the old law appeared not to comply with European Community Human Rights legislation.

The Adults with Incapacity (Scotland) 2000 Act (the Act) tries to address these issues. It provides the means, amongst a raft of other new measures, for people to become welfare (and/or financial) guardians for adults who lack some or all capacity and sets out how decisions can be made for them. It also created a number of checks and balances that protect people who lack some or all capacity. The MWC and the Office of the Public Guardian (OPG), for financial matters, have a specific safeguarding and monitoring role in this Act.

The Act also gives responsibility to local authorities to support and supervise private guardians. The intention was that supervisors would ensure that private guardians understand their new role, are following the principles of the Act, and are getting the support they need to make decisions.

The revised Codes of Practice published by the Scottish Government in 2008 state that the purpose of supervision is to enable the local authority to discuss with the private guardian the adult's current circumstances and any concerns the guardian might have. This should include discussions about:

- how the powers of guardianship are being used,
- whether guardianship continues to be necessary, and
- how the welfare guardian is keeping the records he or she is required to keep under the Act.

Underpinning the Act is a set of general principles. Guardians, and in fact anyone using any part of the Act, must be guided by these principles. The principles require that in taking any actions under the Act:

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

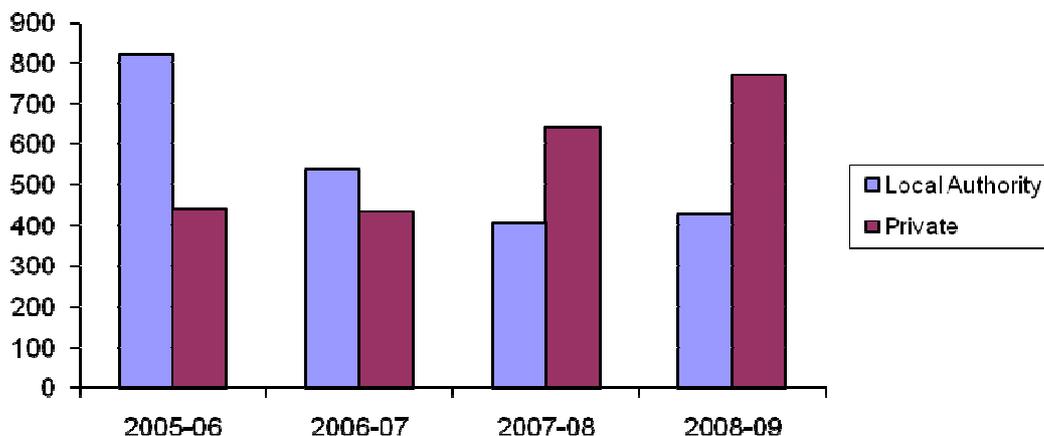
### 3 Background

In April 2009 we commissioned a report on the use of guardianship for people under 25. We had noted a sharp rise in the use of welfare guardianship for these individuals in the preceding years. As a consequence of this rise we wished to examine the response of local authorities to carry out their increased supervisory responsibilities. In August 2009 we published the report “Young People and Welfare Guardianship” available at -

[http://reports.mwscot.org.uk/themed\\_monitoring/Youngpeopleandwelfareguardianship/Young\\_people\\_and\\_welfare\\_guardianship\\_intro.aspx](http://reports.mwscot.org.uk/themed_monitoring/Youngpeopleandwelfareguardianship/Young_people_and_welfare_guardianship_intro.aspx)

We also examined a further group of private guardianship cases for adults over 25. There has been increasing pressure on local authorities to supervise private guardians as the total number of existing private guardianships on people of all age groups has increased over the years (See Table below).

**Number of applicants granted welfare guardianship  
by status  
2005 - 2009**



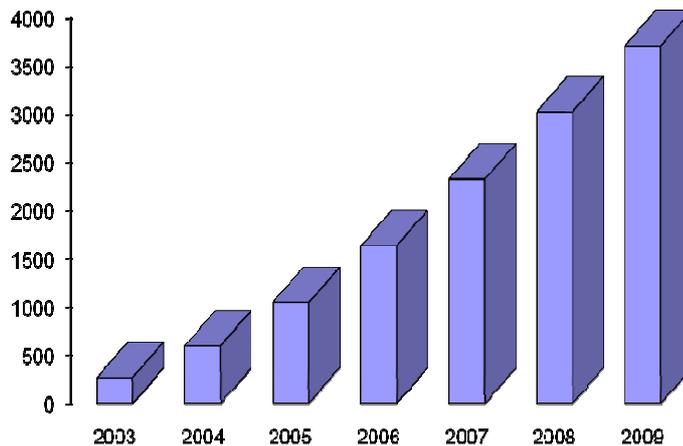
For the purposes of this report we aggregated the data from the over 25 group with that we gathered in respect of private guardians for those under 25 so as to have a broader base to support any findings. While mindful of the potential that different messages would emerge with this second group, in the event we found that the findings and recommendations in our earlier report were supported by this additional data.

#### 4 Our interest in the support and supervision of Private Welfare Guardians

The functions of the MWC under the Act are set out in section 9. These essentially give us a safeguarding role in respect of adults whose capacity to make decisions or take actions to promote or safeguard their welfare is impaired due to a mental disorder. These duties are carried out by monitoring the use of the legislation, visiting adults subject to welfare guardianship, investigating where someone's welfare may be at risk or may have been at risk due to their incapacity and giving information and advice in respect of the use of the Act.

Through our monitoring and scrutiny work we are aware that there has been a significant increase in the number of welfare guardianships from 261 new applications in 2002/03 to 1200 in 2008/09. The circumstances in which guardianship is now being sought and used has also changed dramatically since the Act began. Where local authorities used to apply for the majority of guardianship orders, it is now relatives who apply in over 70% of cases. In addition, we have seen orders being sought for longer, often indefinite periods with a larger number of powers being sought and granted. The effect of this has been to strain the capacity of local authority services to carry out all of their statutory duties.

**Total of Existing Welfare Guardianship Orders  
2003 - 2009**



As part of our safeguarding role we decided to look at the implications of this change in more detail. One area we have focussed on is how the changes have impacted on the ability of local authorities to carry out their supervisory responsibilities, and the quality of support offered to private guardians.

## 5 What the law says

Relatives seek guardianship orders to give legal authority for the interventions they need, or want to make, on behalf of a relative who has lost some capacity. The law acknowledges that as welfare guardianship removes some of an adult's rights to make decisions for him/herself, a number of safeguards must be provided. Central to these safeguards is the role of the local authority supervising officer. This role is defined by law.

### *The role of supervision*

The Act says that regulations will set out how local authorities will supervise private guardians. The revised Code of Practice<sup>1</sup> clarifies it for guardians thus:

*The local authority must supervise a welfare guardian and your supervision will take the form of regular meetings, reporting arrangements, and visits both with and without warning to yourself and the adult. However, the local authority also has a responsibility at any time to give you advice and guidance on the exercise of your welfare powers.*

(Code of Practice paragraph 6.55, page 112)

Over the years we have found a number of cases where we have been concerned about the quality of local authority supervision. In some cases, the statutory requirement placed upon the local authority to supervise guardians was not being carried out at all. In some cases where the local authority had taken on the role of guardian they were not carrying out their duty to a satisfactory standard. Regulations made under the Act set out the statutory minimum intervals during which the local authority supervising officer must visit the guardian and the adult on guardianship in carrying out these supervisory functions; initially at three months after the order is granted, and then at 6 monthly intervals subsequently.

The statutory role of the supervising officer takes on an even greater importance when one considers that the law as it stands does not set out a requirement for indefinite guardianships to be reviewed by the court within a given timescale. The onus is therefore placed on the adult, or any other interested party, to return to court to recall, or alter, the guardianship if appropriate. We believe this is at odds with human rights legislation and runs counter to the approach taken in the Mental Health (Care and Treatment) (Scotland) Act 2003 in which any detention over two years triggers an automatic review by the Mental Health Tribunal.

## **6 What we wanted to find out about**

As in our report on welfare guardianship for young adults (at least in so far as it examined the use of private welfare guardianship), we aimed to identify:

- the information private guardians were given about the role at the stage of applying to be guardians,
- how aware private guardians are of their statutory responsibilities,
- the views of private guardians about the involvement of local authority officers (usually social workers) in supporting them to exercise their powers,
- the preparation and support given to supervising officers and delegated guardians to enable them to act in this capacity,
- the governance arrangements in local authorities to ensure that supervisors are fulfilling the statutory requirement to visit the guardian and/or adult,
- the views of guardians and supervising officers on what impact they feel they have had
- the methods and standards of recording contacts/visits by local authority supervisors, and
- how congruent these findings are with those from our report Young People and Guardianship

## **7 How we gathered the information for this report**

This report is based on our analysis of a sample of 58 cases of private guardianship. The sample is in two parts:

1. 38 cases where the individual was 25 years or younger at the time guardianship was granted. These cases were initially selected for Young People and Guardianship, a study of 50 cases of guardianship in this age group, which also included cases where the Chief Social Work Officer had been appointed guardian.
2. 20 cases where the individual was older than 25 when guardianship was granted.

We selected only those cases where the person was subject to guardianship on November 2008 and had been so for at least a year prior to that. We excluded cases where the guardianship was granted before October 2005.

The sample was designed to include a range of circumstances, taking account of the following factors:

- How long ago the order had commenced

- The length of time for which the order was granted
- Whether the person was diagnosed as having solely a learning disability or not
- The age of the person when guardianship was granted
- The incidence of guardianship in the local authority concerned

Telephone interviews were carried out with the private guardians and the supervising officers. Supervising officers were also asked to send us copies of their notes of contact with the guardian in the year to 30 November 2008. Local authority mental health service managers completed postal questionnaires.

## **8 Findings from our monitoring**

### **What private guardians told us about their experiences**

In many circumstances where there is an adult who lacks some capacity and there are people helping and supporting them to make decisions, there is no necessity to seek legal authority. Carers frequently support and guide their relatives with some degree of incapacity with for instance, decisions about their support needs, or where to live, and health and social care workers most often respect their views and wishes. They may sometimes have slightly different views and offer various alternatives but, together with the individuals who lack some capacity and their relatives, it is hoped that in the majority of situations everyone will come to a consensus view on the care and support to be provided.

Where there is broad agreement between all concerned about how to meet the support needs of someone who lacks capacity, and the adult themselves is content with these arrangements, there is often no reason why further legal authority must be in place before a decision relating to welfare matters can be taken. We recommend in these circumstances that the principles of the Act are used as a guide for families and social care workers.

#### *Reasons for making the application*

We were interested to find out what triggered the application for guardianship for the 58 private guardians interviewed. Some gave more than one reason. 17 guardians told us they just wanted to have a more formal role in their relative's life and heard that guardianship was the way to achieve this, but had no other strong reason for the application. 14 stated that a range of complex welfare decisions had to be made for a relative, often about medical treatment issues, and they felt that they were in the best position to be the guardian.

Thirteen guardians told us the main reason was because guardianship had been promoted to them without any other specific factor, by their social worker (5), a carer organisation (3), a law firm (3) or another guardian (2).

Ten guardians told us that the main reason they sought guardianship was because they had experienced difficulties with their Social Work Department and wanted to be able to challenge decisions made by them.

Five guardians told us they were fearful that if they did not have guardianship someone else might step in and start making decisions for their relative.

Five guardians told us they had been applying for financial guardianship and been advised to apply for welfare powers at the same time.

Three guardians told us that the main trigger was their desire to apply for direct payments (now called self-directed care) and had been informed they could not do this without financial guardianship. (The law in this area is under review).

Two guardians had applied because they wanted to raise a legal action on behalf of their relative.

Two told us they did not have any particular reason, but just thought it was necessary.

One guardian told us that it had been necessary to protect their vulnerable relative from exploitation.

Although many of these reasons can be valid and may prove beneficial both for the adult and the guardian, we found that some relatives felt obliged to take out guardianship even where it was not clear that it was legally necessary. In one case, for example, which is typical of several, a guardian told us that their social worker:

*“advised that if she wanted a say in decisions regarding her daughter’s future that she should apply. She didn’t feel that she had any choice”*

We do not accept that relatives must be guardians in order to have a voice in a relative’s welfare decisions. Health and social care workers have a duty to take into account the views of carers and relatives and to work cooperatively with them in order to achieve the maximum benefit for the adult. It would be unfortunate as well as, at times, expensive, if relatives and carers felt it was necessary in every case to seek legal authority to have this role recognised.

Health Rights Information Scotland in their leaflet “Caring and Consent” summarise rights for carers as ( [www.hris.org.uk](http://www.hris.org.uk) ):

- you can say what you think about any planned health care or treatment,
- your views should be taken into account when a final decision is made about the care and treatment,

- you have the right to be present at any health care appointment, unless the person you care for doesn't want this,
- you have the right to ask for written information about the care and treatment to take away,
- you have the right to disagree with a decision,
- you have the right to ask for a second opinion from another doctor if you are unhappy with the decision that the health professional or the legal proxy has made.
- you have the right to go to court about a decision.
- As the person's carer, you should be involved in decisions about their health care. But you do not have the right to make any final decisions unless you are the person's legal proxy.
- If you know what the person you care for wants, you should tell the health professional looking after them. Any information you give health professionals should be kept in the person's health record.

In another case, the joint guardians told us:

*"We were told if we weren't guardians anybody could make decisions about his welfare"*

And in another a lawyer:

*"advised them to do it as anyone could come along and make important decisions based on a nonverbal response from [their son]"*

In the absence of a legal guardian, health and social care workers will consult with relatives and carers about decisions regarding individuals who lack some capacity. To be told that anyone might come along and without consultation make decisions for them, may be causing unnecessary alarm. In rare cases where this does happen, seeking guardianship if problems persist would be the way to resolve any difficulties.

Often the most appropriate use of guardianship is not just when there is a need for a decision to be made for a person who lacks some capacity, but when there is also a need to safeguard and promote that person's interests, in the face of a difference of opinion or conflict.

In some circumstances whilst guardianship might be the most appropriate solution, it is also worth considering whether there is still sufficient capacity for the individual to appoint a welfare power of attorney. An individual may not have capacity to make complex welfare decisions but have sufficient capacity to know who they wish to be their welfare power of attorney.

There are safeguards to protect against misuse of this. A sheriff can order a local authority to supervise attorneys either at their own instance or following a request from a local authority. If there continue to be concerns about an attorney's behaviour the local authority can seek to become guardian.

### *Sources of information about welfare guardianship*

Information is now widely available from a variety of sources (See Sources of further information below). The individuals we spoke to had been given leaflets, downloaded information from the internet, spoken to the Office of the Public Guardian or discussed things with a social worker/Mental Health Officer.

Many people turn to a lawyer when they are thinking about applying for guardianship and begin the process using the information the lawyers provide. It is worth bearing in mind that it is possible using the examples provided by the Scottish Government to make an application without a lawyer. The Scottish Government has published a guide called "Guardianship and Intervention Orders – making an application, A Guide for Carers" in 2006. This is downloadable from their website. Obviously the more complex the situation, the more likely it is that it will be necessary to involve a solicitor and legal aid may be available in these circumstances.

There was plenty of evidence, especially from people who had made applications in the early days of the new legislation, of problems accessing accurate information from any source. Finding a lawyer with experience and knowledge of the new Act had been difficult.

*"Lawyer wasn't helpful despite several meetings held. He was vague in detail about benefits of having guardianship, the process, and their remit as guardians"*

Now that the Act has been in operation for a few years, professionals are more familiar with it and should be able to provide better quality information:

*"Given written info, had a lot of discussion with MHO involved in doing the report. MHO went through the process, discussed individual powers, made clear the responsibility for local authority supervision"*

But it is worth checking out any information received with a variety of sources. For information regarding financial applications in particular, the OPG was found to be a very useful source of information, in writing, over the phone, or at public meetings held around the country.

### *Supervision arrangements and level of contact*

The local authority Social Work Department should appoint a supervisor for the guardian/s (usually a social worker, but in every case someone with knowledge and experience of the Act and care management) soon after the guardianship has been granted. The supervisor is required to visit the guardian and the adult with incapacity within the first 3 months, sooner if necessary, and thereafter at least every 6 months, depending on the circumstances. Supervision should be seen as a support and a help for guardians in exercising their powers as well as a check.

The role of guardian can be complex and support for individuals carrying out the duties of guardian can be very productive and is sometimes essential. The Code of Practice expects that:

“Even if you are the primary carer as well as the guardian, it would be good practice to adopt the discipline of standing back from your immediate situation and looking at the adult’s circumstances in an objective way” (Code of Practice 6.21, p100)

One of the most important roles of the supervisor is to be able to help the guardian to do this.

We asked the 58 guardians we interviewed a range of questions about the supervision arrangements, beginning with the most basic - “Do you know who your supervisor is?” Remarkably eight said “no”. Ten were not sure, because they might have had a social worker or a care manager, and they were unsure if they were also the supervisor. Often it was clear it was not a term the guardian was familiar with. The rest, 40, confirmed they knew who their supervisor was.

Of the eight who said “no”, four told us they had been given information about supervision when they applied, but did not realise they had been allocated one. When the Commission told these eight guardians who their supervisor was and asked them did they know how to contact them – three said they did, but did not appreciate they were their supervisor.

Of the ten guardians who were not sure who their supervisor was, if they had one – when they were given the name of their supervisor, all ten said they knew how to contact them. Only six of these guardians remembered being given any information about supervision at the time they applied for guardianship.

Of the 40 guardians who did know who their supervisor was, two did not know how to contact them if they needed to, and 19 said they could not remember being given any information about being supervised at the time they became guardian.

Those guardians who could remember hearing about supervision at the time they applied for guardianship most were told either by their care manager or the Mental Health Officer who had interviewed them for the application. Some had heard from their solicitor; others had read about it in leaflets. Half of all guardians interviewed, 29, said they understood the role of the supervisor. A third had a vague understanding, but ten guardians said they did not know what it would entail at all and could not remember having it explained to them.

Fourteen guardians said they had not met their supervisor in the past year or more, or had never met a supervisor. 21 had met them within the last 3 to 6 months. One or two spoke of telephone contact but no visit. Reports include:

*"We were informed by the care manager at the time that we would be visited every 3 months. Initially this happened, but then the supervisor went off sick. That was over a year ago and he hasn't been replaced"*

*"When the MHO visited they made some reference to supervision and tried to dissuade us from applying. They indicated that it would not provide benefit and that we were similar to other people who were managing the situation informally"*

*"Over a year ago someone was meant to come and see us, but they called to cancel it, and we don't have another date"*

When asked about the level of contact with the supervisor, the majority, 42, found the level of contact was about right, even if it fell short of what the legislation requires.

Eight thought it too little:

*"Once the funding was in place for the residential care she seemed to take a back seat...She visits every 6 months to review us as guardians and I feel that it is "a tick box exercise"*

and six thought it too much:

*"I feel he's not necessary as both my wife and I are retired [health care professionals] and the placement is going well. I have spoken to him over the phone only a couple of times"*

*"Too much contact. We know that we are loving and caring parents and don't need anyone "checking up on us"*

For two guardians the need for supervision varied.

*“When my son is well it is about right and I know how to contact her. When my son is unwell I could have been doing with some more support”*

The following case highlights well why there is a statutory requirement for supervision and the Commission is concerned that some local authorities are not meeting this.

*“I did not know I had supervisor so I had no expectations of what they would provide. I have seen [the person we mentioned] once and this was useful, though at that time things were better – I had a care manager in place and a care provider paying notice to my concerns. I felt that the supervisor may not have been in touch again because things were going well at that time - however currently there are difficulties”*

We will continue to monitor how consistently local authorities are providing supervision and follow up where there appears to be a short fall. Local authorities should keep a record of supervision arrangements in their area and periodically audit this to ensure standards are being met.

#### *The quality of supervision and support*

So far we had found out that about 40 of the guardians knew who their supervisor was and were happy with the level of contact. Disappointingly only half knew about the role of supervisor and were being seen regularly within the timescales set out in the legislation, but this is only part of the picture. We also wanted to find out what guardians felt about the quality of supervision and support that they were getting.

In about a half of all cases guardians, whether they were aware of what the supervisor’s role was or not, were wholly positive about the quality of support they were getting from the supervisor. Comments include:

*“She is accessible, has a great deal of knowledge, and is very experienced. She is very calm and has given good advice”*

*“It is good to touch base and discuss issues. I like to know that I am being monitored and to be given assurances that what I am doing is correct”*

About one in six told us that they did not get a lot of support from the supervisor at all but when and if they requested it they did get good quality support and they were happy with this.

However, over a quarter of guardians told us that they had concerns about the quality of contact with their supervisor. They told us supervisors were often too busy, or did not get back to them when contacted. When a supervisor moved

they were sometimes not told, and were often not re-allocated a new one. Some of the social workers allocated as supervisors had little knowledge of the supervisor's role or the circumstances of the guardianship and were effectively allocated the tasks of supervision and visiting as an addition to their care management role.

*"There is no point in sending someone along who doesn't know the details of the case. We have had different people attending the reviews that knew nothing about the circumstances and contributed little"*

*"They are cursory visits and we are expected to sign a form about being reviewed when we do not feel it was undertaken properly"*

Several guardians mentioned the conflict of interest between being the care manager and the supervisor when it came to obtaining resources. They felt the roles should be split.

*"I found them approachable in that they listened but they failed to accept what I thought was needed - due to budgetary constraints"*

*"There is a dispute with the providers over funding and I feel that the supervisor can't be objective as they are part of the social work department. They should be more independent. I don't feel that guardianship and the exercising of my powers is addressed"*

The Commission believes that supervision is an important role and that local authorities should periodically survey private guardians for feedback on the quality and frequency of support their social workers are offering.

#### *Delegation of private guardianship powers*

As previously reported by us in *Young People and Welfare Guardianship* when guardians were informed during the interview that in our experience, guardians often are not aware that they can, and in some circumstances perhaps should, formally delegate powers to others such as care home or health care staff we found:

- 65% said they had not delegated any powers
- 30% said they had delegated powers
- 5% said they were not sure

Whilst informal delegation of powers to care staff or others such as other family members, occurred in a third of cases, formal delegation, properly recorded, occurred infrequently. Decisions around diet, what to wear and medication were given as examples of the kind of decisions being made by others. Only three

guardians reported formally delegating powers to others. Examples were given of how this was recorded. These included mention in review minutes, medical notes and the social work file.

### *Recording the use of powers*

A small number (10) of the 58 private guardians interviewed were aware of their statutory duty to keep records of what powers they were exercising, particularly if these were financial records. Guardians who saw their role as an extension of the parental one viewed this requirement as too formal. Copies of minutes of reviews and care planning meetings were retained more often and considered by them to be sufficient evidence of record keeping.

Of those who did keep their own records, a variety of responses were given to the question of how they recorded their actions. These included keeping a diary/communications book in which staff supporting the person daily would write in alongside the recording of the guardian. Some kept a notebook of hospital appointments and phone calls to be made that related to the exercising of powers.

*“My husband does the paperwork. The supervisor looks over them and keeps him right. There is a folder for every month; finance and welfare issues kept separate”*

Four fifths of those interviewed said that they did not keep any record of what actions they took as guardians though many kept copies of reviews.

### *The value of guardianship*

We asked private guardians for their views on how useful they had found being guardian, whether it had made any difference:

- 33 (57%) were of the view that it had been useful.

*“Guardianship has been a good thing – [supervision] is a way of checking that the guardian is exercising powers in a proper manner to promote the welfare and interests of the individual”*

*“It has been useful at times to remind staff that I am guardian and need to be kept informed and involved in [relative]’s care and that I have some legal authority. Communication at certain points was poor between the care agency and myself. However it is now good and I feel involved. The order gives me reassurance that if necessary I have some clout and that when I am at reviews, I am not just the ‘next of kin”*

- 17 (29%) expressed the view that it had made little or no difference and they continued more or less doing what they did before they were appointed as guardians.

*“Guardianship hasn’t changed anything. I am still his mother and continue to care for him just as before”*

*“I feel disappointed. My son was sent home from placement and I am in the dark as to why things went wrong. At this moment I am doubtful about the usefulness of guardianship as I had no say in this decision”*

*“I don’t feel there is a great deal of difference now that guardianship is in place. I suppose it has increased my confidence in that I can have more of a say in relation to the services he receives”*

- Six (11%) found that it had been on the whole a negative experience. They recorded that professionals continued to ignore their views, and did not recognise their legal authority, but most would still recommend it.

*“being a guardian has been nothing but hassle and we have found that there have been no real benefits”*

*“medical staff wouldn’t speak to me as guardian on the telephone because I couldn’t prove my identity...there is an issue trying to open a bank account... I have found the law cumbersome and convoluted”*

*“The professionals need educated on what having the power of a guardian means. They do not seem to have any knowledge of the Act”*

- A small number indicated that its value had yet to be tested as they had not had to exercise any of the powers.

It is clear from our monitoring that private welfare guardianship is not a panacea for all ills. It may lead to relatives feeling they have more control; and it may improve relationships between relatives, carers and other professionals. However, it is unlikely to bring about more resources, and where relationships are strained before guardianship was applied for, it often remained so afterwards. A guardian has after all, no more power or authority than the individual would have, had they not lost their capacity.

Despite this, most private guardians would recommend it and some found it actually had direct benefit for the person with incapacity.

*“There was also an occasion when social work wanted to change some of the care arrangements. We wrote and opposed the change which then didn’t go ahead.”*

### *Guardians’ contact with the Mental Welfare Commission*

In 2009/10 the Commission scrutinised 1279 guardianship cases and visited over 330 people on guardianship. We asked the private guardians we spoke to in this exercise about their contact with us. Visits by the Commission to adults on guardianship orders were valued more than telephone conversations by those whom we contacted. Guardians appreciated the role we played in overseeing that they were exercising their powers appropriately and receiving confirmation of this on the visit.

- 44% recalled having some contact with us
- 49% could not recall having any contact with us
- 7% said that they were not sure whether they had had contact or not

Most of the feedback given was positive with comments that our visit had been helpful and the offer of advice and future contact, if needed, was well received. Guardians seemed to be reassured to know that someone else is overseeing the situation and could become involved if necessary. One private guardian commented on the possible changing role of the Commission

*“She thought the letters had been very helpful and she knows how to contact us for advice if she has concerns. She is worried what will happen if the MWC is dissolved and how a new body would take on our role in AWI”*

Of the half of private guardians who had had some contact with us, 4 had not found it helpful. In two of these cases the guardians were in disagreement with the social work department over resources and felt that our intervention had not resolved this.

### **What supervisors told us about their experiences**

In total 47 supervising officers were interviewed. 17 of the interviews were done specifically for this report, and 30 interviews were carried out for our *Young People and Welfare Guardianship* report on the use of guardianship for adults under 25. The job titles of those interviewed were as follows:

- social workers (36 (of which MHO x11))
- senior practitioners (4 (of which MHO x1))
- senior social workers (3 (of which MHO x2))
- practice team manager (1)

- community nurse (1)
- care manager (1)
- OT (1)

The length of the supervisors' experience in their role varied. About a half of those interviewed had more than three years experience. A third had less than a year's experience.

#### *Preparation and experience for undertaking the role*

Sixteen supervisors indicated that they had very little or no preparation for this role. Seven were trained as mental health officers and remembered some input on the Act from their course, but said that this training did not prepare them to be supervisors and they had received no further specific training in respect of this since.

A further 24 told us they some specific training or guidance from their senior social work or a mental health officer in their team, but mostly they had had to read up from materials made available to them and learn on the job.

Only seven of the 47 could remember being trained and given guidance specifically about the role of supervisor. In the best cases this included 1 day training on AWI and being provided with an overview of their responsibility, sometimes topped up by several inputs on an informal basis by MHOs about how to undertake the role and what to consider in relation to the private guardian exercising powers.

It is not surprising when, as happens sometimes, private guardians do find that their supervisor lacks knowledge and treats the role as a "tick box exercise", with infrequent contact and mixed quality of input.

Local authorities have a responsibility to consider the training needs of their staff and clearly as the number of private guardians increases and more and more social workers and other staff are taking on this role, the training becomes more critical if this duty is to be carried out effectively.

It cannot be assumed, either, that mental health officers will have been given the necessary preparation for this role. Mental health officer training courses need to give this area more attention and ensure that the training provided reflects the skills and knowledge that will be required when operating as a supervisor.

## Support in place to assist supervisors to undertake the role

We asked the 47 supervisors about the nature of the support they received in carrying out their functions under the Act:

- In the best 6 cases in addition to monthly sessions with a senior social worker there is a regular MHO forum where difficulties can be discussed. Some supervisors also had access to the MHO coordinator for their area

*"I have monthly supervision with my manager who is an MHO. All clients subject to guardianship are raised at every supervision. Informal support is very important from MHO colleagues. There are Forum meetings every 2 months."*

- In 17 examples we heard that supervision with a senior was more or less all the support a supervisor gets although there were informal opportunities to discuss cases with MHOs.
- In the other 24 cases whilst there was supervision with a senior, the senior was not an MHO, and there appeared little formal discussion of AWI.

*"She told me there is no support in place, apart from informal peer support. She feels that supervisors have to 'just muddle through'"*

*"None because we don't have a principal MHO; the MHO team come under the management of an OT and she can't supervise us regarding this issue. We do help each other; MHO's have 4 meetings a year specifically to look at AWI. However, a SWIA inspection recently recommended an MHO should be appointed to supervise us, now we have someone responsible for administrative support, but not supervision"*

*"A year after I became involved in this case I discovered that he was on guardianship. Often people are on orders but it is not registered on the system and you have to search the file to discover this"*

None of the respondents referred to the updated *Code of Practice for Local Authorities Exercising Functions under the Act*<sup>3</sup> which set out in chapter 8 how the Act "requires local authorities to supervise all guardians with personal welfare functions in the exercise of those functions". Only 14 supervisors reported having a copy of the Code of Practice in the office. Most of the others said they knew how to access it, but 11 neither had a copy of the Code of Practice nor seemed to know how to access one.

We recommend that all supervisors should:

- have training in this role before taking it on
- be supervised by a senior social worker (SSW) experienced in the operation of this role
- formally record discussions with their supervisor noting any issues or concerns
- have access in the absence of their SSW to a MHO with experience in the operation of this role
- have access to peer group discussions about AWI issues
- be aware of how to access the Code of Practice

### *Frequency of visits*

Regulations under the AWI Act require that local authorities must arrange for every adult subject to welfare guardianship and his or her guardian to be visited within three months of the order being granted and subsequently at intervals not exceeding six months. 32 of the supervising officers stated that they fulfilled the statutory requirement for visits to the guardian and to the adult. The responses were:

- 70% of those interviewed said they were visiting the adult/guardian within the statutory timescales (including one who thought she wasn't, but was)
- 17% said they were not visiting the adult within the timescales required by law
- Others said they were unsure of the statutory timescales, but were either visiting as care manager, having contact by telephone, or had only just taken on the case and would try to meet the requirement.

However, from analysis of the sets of notes submitted by social work staff and discussed in the *Young People and Welfare Guardianship* report, the statutory visits recorded by social work staff are significantly lower than that which was stated during interviews.

Typical of the comments from those who were not meeting the legal requirement were:

*"I have had only 1 review with the guardians. I have not seen the adult since I completed the report. I feel the guardians are good advocates for their sister and would contact me if there were difficulties"*

*"I was not aware of the duty to supervise within the first three months of the order being granted. Resources are such and demands on the MHO service are such that 6 monthly contact is unrealistic. This statutory requirement*

*should be reduced to annual contacts where there are no concerns/issues arising”*

Nearly 75% of supervisors told us that there was no other care manager involved in the review of the adult’s care. The result of this is that it is likely a significant number of adults on guardianship will not be getting the scrutiny from a local authority supervisor that was envisaged when the legislation came into force.

It is worth mentioning at this point that local authorities can initiate the recall of private welfare guardianships procedure if, the grounds for appointment of a guardian are no longer fulfilled, or they believe that the welfare of the adult can be satisfactorily safeguarded or promoted otherwise than by guardianship (such as the Social Work (Scotland) Act 1968). Guardians could challenge this decision and if they did this would lead to a court hearing.

It would seem sensible therefore, for all local authorities to have a written protocol on the circumstances which social workers should consider when deciding whether to initiate recall procedures. If the purpose for which the welfare guardianship was sought has now been achieved, and especially if the guardian is in agreement, following the recall procedure would seem to be in line with the principles of the Act and would lead to a reduction in the number of welfare guardianships that have to be supervised.

If, however, the grounds for the appointment of a guardian continue to be fulfilled, or the welfare of the adult cannot be satisfactorily safeguarded or promoted otherwise than by guardianship, then the local authority must fulfil its statutory duty to supervise the welfare guardian.

#### *Impact of involvement*

We asked the 47 supervisors what impact they thought their involvement as supervisor has had. The vast majority of those who were acting as care manager said that it was as a care manager that they were most easily able to identify a positive impact.

*“As a care manager I have had a very big impact. I assisted with ILF and obtaining respite care. I try to provide consistency, as there a lot of people involved”*

*“As supervisor very little – I always was very actively involved in the case and this has not changed since the powers have been granted”*

The supervisor’s role was even seen as a barrier in some circumstances:

*“They are not accepting of my supervisor’s role. They see it as an intrusion and view the guardianship review as yet another meeting not*

*having any fruitful purpose. However, as care manager they see me as more helpful as I am able to identify suitable resources at times”*

In a few cases though there was clearly a positive role as both care manager and supervisor:

*“Guardian had been in conflict with staff supporting her son in specialist unit. She did not like the way her son was being cared for. I was able to build bridges between them and the relationship is improving. I have also discussed her role as guardian with staff and this has been helpful in enabling her to carry out her duties”*

One of the issues that arose from this was whether there was a conflict between the two roles. One or two supervisors felt it was beneficial that they were carrying out both roles, not least because it meant fewer people were involved to the benefit of the guardians. However, some recorded that it was difficult to be both encouraging the guardians in their supervisor role to obtain the best possible services for the benefit of the adult with incapacity whilst also be “gatekeeping” those services as a care manager.

It is important in these circumstances that the supervisor/care manager is receiving good quality advice and support from the SSW and in some complex cases consideration should be given to allocating two people to provide these different roles.

### **Supervision Records**

Finally we made a judgement having read the relevant notes and interviewed the supervisor about whether the supervision sessions had been recorded adequately.

In 17 of the 47 cases no notes were made available and we could make no judgement.

In 22 of the remaining 30 cases we felt that the recording was inadequate. In most cases very little was recorded about the operation of the guardianship at all. Typical of the comments made was:

*“The notes relate to care management tasks being undertaken. There is no specific reference to the guardianship order and how the powers are being used. It is not even obvious from the records when the person is visited”*

Often a template or pro forma was being used by some but not all supervisors in a local authority area. The quality of information recorded in the pro formas

varied. Discussions often did not look at whether the guardianship continued to be necessary, or whether the principles of the act were being applied.

*“The two six-monthly reviews provided are identical in terms of recording although the dates are different. Neither were signed. They provide a brief summary of the powers used. It is unclear when the adult was seen and if statutory time scales were met”*

*“No visits and poor service, if any at all, from the supervisor. Care management is also poor despite this being one of the main reasons an application for guardianship was made”*

Although in 8 cases the recording was noted as being adequate there was no single case where we felt entirely satisfied with the recording of supervision sessions.

*“The notes were very full. However, there was no direct reference to the role of the guardian or the expectations of the supervising officer in terms of the guardian. Given the evident good relationship and good communication between them, this did not emerge as a problem”*

*“The visits are recorded well – but there is little formal mention of guardianship or the supervisor’s role and no use of the [local authority] Template for supervisors”*

It seemed that even where good work was being done there was little evidence recording this. Pro formas can facilitate better recording, and we would encourage those local authorities who have not got one to develop one, but even where they exist it is necessary for SSWs to check that they are being completed regularly and to a good standard.

## **9 Findings and Recommendations**

The analysis of the data in this report confirmed the findings in our earlier report – Young People and Guardianship - and these are accessible on our website. However, for ease of access we reproduce the findings relevant to this report here.

### **Our key findings**

**Guardianship is applied for in some circumstances when a better understanding of the rights of relatives and carers might make it unnecessary.**

**Guardianship is applied for in some circumstances when an individual still has capacity to appoint a power of attorney.**

**Many private guardians are not made aware of their statutory responsibilities.**

**Private guardians do not routinely get the information and support they need to properly fulfil their role. The majority of private guardians, however, said they were satisfied with the general level of social work input.**

**A third of all private guardians said they had not received information from us regarding our safeguarding role.**

**Many social work supervising officers seem to be unaware of their duty to visit both the guardian and the adult on guardianship.**

**Records of the exercising of powers are not adequately kept.**

**Where the powers of the guardian are delegated to another person or persons this is not formally recorded.**

**Pro formas are used to supervise guardians by some local authorities and we would encourage more to do so.**

### **Our key recommendations**

We found that often the most appropriate use of guardianship is not just when there is a need for a decision to be made for a person who lacks some capacity, but when there is also a need to safeguard and promote that person's interests, in the face of a difference of opinion or conflict. Where there is broad agreement between all concerned about how to meet the support needs of someone who lacks capacity, and the adult themselves is content with these arrangements, there is often no reason why further legal authority must be in place before a decision relating to welfare matters can be taken. We recommend in these circumstances that the principles of the Act are used as a guide for families and social care workers.

Local authorities should keep a record of supervision arrangements in their area and periodically audit this to ensure standards are being met.

We believe that supervision is an important role and we recommend that local authorities should periodically survey private guardians for feedback on the quality and frequency of support their social workers are offering.

Local authority managers should not assume that mental health officers will have been given the necessary preparation for this role. Mental health officer training courses need to give this area more attention and ensure that the training provided reflects the skills and knowledge that will be required when operating as a supervisor.

We recommend local authorities look at the training provided for all staff in the role of supervisor and ensure that no one takes on the role without having received appropriate training.

We recommend that all supervisors should:

- have training in this role before taking it on
- be supervised by a senior social worker (SSW) experienced in the operation of this role
- formally record discussions with their supervisor noting any issues or concerns
- have access in the absence of their SSW to a MHO with experience in the operation of this role
- have access to peer group discussions about AWI issues
- be aware of how to access the Code of Practice

**Chief Social Work Officers should:**

1. The Commission recognises that supervision is an important role and believes that local authorities should periodically survey private guardians for feedback on the quality and frequency of support their social workers are offering.
2. Review the findings of this report and audit governance arrangements in respect of the statutory functions of responsible officers and supervising officers under the Adults with Incapacity (Scotland) Act 2000. This audit should examine:
  - supervisory arrangements for responsible and supervising officers
  - recording arrangements, including use of templates/pro formas
  - information provided to private guardians outlining their statutory responsibilities, what the local authority supervisor will expect of them and what they can expect from the local authority supervisor
  - procedures for delegating statutory powers and duties to other parties
  - provision of information to care staff on legal status of adults placed in care, including the powers granted under the order, the names and contact details of private guardians, responsible officers and supervising officers and when they should be contacted
  - quality assurance procedures for MHO reports prepared as part of application for welfare guardianship

- training for all staff undertaking statutory duties under the Act
- access to relevant Codes of Practice under AWI Act for all staff undertaking statutory duties and functions under the Act

**The Social Work Inspection Agency should:**

Review the findings of this report to determine its potential relevance to future inspections/regulatory processes.

**Programme leaders for MHO training courses should:**

Ensure that course content includes information on the statutory duties and functions of local authority supervising and responsible officers under the Adults with Incapacity (Scotland) Act 2000.

**The Mental Welfare Commission should:**

Review its routine provision of information to private guardians to ensure this information is received and its content understood.

**Scottish Ministers should:**

Review current provisions in the Adults with Incapacity (Scotland) Act 2000 for judicial review of financial and welfare guardianship orders to ensure compliance with human rights legislation and consistency with approach taken under the Mental Health (Care and Treatment) (Scotland) Act 2003.

**References**

1 Revised Code of Practice for persons authorised under intervention orders and guardians – available on the Scottish Government website: [www.scotland.gov.uk](http://www.scotland.gov.uk)

2 Young People and Guardianship –  
[http://reports.mwscot.org.uk/themed\\_monitoring/Youngpeopleandwelfareguardianship/Young\\_people\\_and\\_welfare\\_guardianship\\_intro.aspx](http://reports.mwscot.org.uk/themed_monitoring/Youngpeopleandwelfareguardianship/Young_people_and_welfare_guardianship_intro.aspx)

3 Code of Practice For Local Authorities Exercising Functions under the 2000 Act – available on the Scottish Government website: [www.scotland.gov.uk](http://www.scotland.gov.uk)

## **Further Sources of Information**

Scottish Executive  
Justice Department  
Civil Law Division  
Floor 2 West (Rear)  
St. Andrew's House  
Regent Road  
Edinburgh EH1 3DG  
0131 244 2193

For copies of: The Adults with Incapacity Act 2000 Codes of Practice; It's Your Decision (a leaflet for adults); leaflets on different parts of the Act. Free of charge All documents may be downloaded from [www.scotland.gov.uk/justice/incapacity](http://www.scotland.gov.uk/justice/incapacity)

The Office of the Public Guardian  
Hadrian House  
Callendar Business Park  
Falkirk FK1 1XR  
Tel: 01324 678300  
Full publications list obtainable from address or downloaded [www.publicguardian-scotland.gov.uk](http://www.publicguardian-scotland.gov.uk)

Scottish Legal Aid Board  
44 Drumsheugh Gardens  
Edinburgh EH3 7SW  
Tel: 0131 226 7061  
[www.slab.org.uk/advice\\_sector/index.html](http://www.slab.org.uk/advice_sector/index.html)

Mental Welfare Commission for Scotland  
Thistle House  
91 Haymarket Street  
Edinburgh  
EH12 5HE  
0131-313-8777 (Service-user and carer freephone 0800-389-6809)  
Leaflet: Welfare Guardianship – making sure the decisions are in the person's best interests. (Free of charge)  
[www.mwscot.org.uk](http://www.mwscot.org.uk)

Sheriff Court

Check your local telephone book for address or the Scottish Court Website at [www.scotcourts.gov.uk/sheriff/fees/index.asp](http://www.scotcourts.gov.uk/sheriff/fees/index.asp)

The Social Work Service of your local authority see local telephone directory for details

Alzheimer Scotland- Action on Dementia

22 Drumsheugh Gardens

Edinburgh EH3 7RN

0131 243 1453

Publication: Dementia: Money and Legal Matters, a guide (free to carers from the Dementia Helpline – see above) £5 to professionals.

[www.alzscot.org](http://www.alzscot.org)

Dementia Helpline

Freephone 0808 808 3000

ENABLE

6th Floor

7 Buchanan Street

Glasgow G1 3HL

0141 226 4541

[www.enable.org.uk](http://www.enable.org.uk)

Advice Service Capability Scotland

11 Ellersley Road

Edinburgh EH12 6HY

0131 313 5510

[www.capability-scotland.org.uk](http://www.capability-scotland.org.uk)

Scottish Association for Mental Health

Cumbræ House

15 Carlton Court

Glasgow G5 9JP

Tel: 0141 568 7000

[www.samh.org.uk](http://www.samh.org.uk)

Sense Scotland  
43 Middlesex Street  
Kinning Park  
Glasgow G41 1EE  
Tel: 0141 429 0294  
[www.sensescotland.org.uk](http://www.sensescotland.org.uk)

Citizens Advice Bureau  
Address in your local phone book or from  
Citizen's Advice Scotland  
[www.cas.org.uk](http://www.cas.org.uk)

Age Concern Scotland  
160 Causewayside  
Edinburgh EH9 1PR  
0845 125 9732 (local call rate)  
[www.ageconcernscotland.org.uk](http://www.ageconcernscotland.org.uk)

## **Appendix A**

### **How we gathered the information for Young People and Guardianship**

We analysed the information we held about all adults under 25 who were on welfare guardianship as of November 2008 and who had been so for at least one year prior to that.

From this initial work we found that:

- there were 319 people who were aged 25 or under when their guardianship order was made. Eighty nine percent had a diagnosis of learning disability. (One third of those 50 young adults whose cases we looked at in this exercise were classified as having a mild to moderate level of learning disability.)
- Seventy nine percent had private guardians.
- Seventy two percent of orders were granted for an indefinite period. While this essentially is the same as the average of indefinite orders for all adults on welfare guardianship. Older people with dementia account for nearly 60% of all guardianship cases. Indefinite orders for those under 25 could be regarded as a much greater intrusion, in respect of their civil liberties, because there is no automatic judicial review of orders granted.
- Most orders granted include an array of powers covering all areas of activity/decision making relating to the adult's welfare. This is more the case than with orders for those between 25 and 65 and is more similar to what is observed in respect of adults on guardianship because of dementia.
- Adults under 25 were more likely to have powers granted on their behalf in nine of the twelve categories of powers granted which we record than was the case with those over 25.
- The median age at which guardianship started was 18 years. In contrast, local authority guardianship cases were, in the majority, granted for less than 5 years and the median age for the start of the order is 20 years.

We took a representative sample of 50 these guardianship cases, where the person was under 25 years old when the order was granted. The sample comprised 39 private guardianship cases and 11 local authority orders. The sampling process was designed to include a range of local authorities and to reflect the relative number of guardianship orders in existence. Nineteen of Scotland's 32 local authorities were represented in the study.

The sample was also designed to ensure that it included a range of cases, taking account of the following features:

- How long ago the order had commenced (in the range 1- 5 years)
- The length of time for which the order was granted
- Whether a private or local authority guardian was appointed
- Whether the person was diagnosed as having solely a learning disability or not
- The age of the person when guardianship was granted
- The incidence of guardianship in the local authority concerned

Private guardians of each individual were interviewed by telephone using a structured questionnaire. Supervising officers and the local authority officer responsible for carrying out the functions and duties of guardian in cases where the chief social work officer had been appointed guardian (the responsible officer) were also interviewed. We asked supervising officers and responsible officers were asked to forward notes of their contacts and visits to us in advance of the interview for the period 1 December 2007 to 30 November 2008. A total of 47 mental health officer (MHO) reports which accompanied the original guardianship application were scrutinised. Assessment criteria for MHO reports that accompanied the applications were used to assess the quality of completed reports. Managers of mental health services completed a questionnaire relating to systems in place for management and support of workers undertaking supervisory responsibilities. Detailed information about the research sample and copies of the questionnaires can be accessed from our website [www.mwcscot.org.uk](http://www.mwcscot.org.uk).

## **Appendix B**

### **What the law says on the duty of local authorities**

#### *Local authority functions under the Act*

The local authority functions under the Act that relate to this monitoring exercise are set out primarily in Part 1 of the Act (general functions) and Part 6 of the Act (guardianship and intervention orders). Essentially the main general responsibilities are:

- through the Chief Social Work Officer, to Act as the welfare guardian in respect of an adult where necessary
- to supervise private welfare guardian in the exercise of their functions
- to make an application for welfare (and financial) guardianship where necessary and appropriate
- to provide mental health officer reports to accompany application on the general appropriateness of the order and the suitability of the proposed guardian (except where that is the Chief Social Work Officer)

- to visit the adult and guardian within the first 3 months of an order being granted and at no less than 6 monthly intervals thereafter (as set out in Regulations (SSI 2005 No. 630)
- Regulations require non-local authority welfare guardians to provide certain reports and other information to the local authority. These are any report or specific piece of information about the personal welfare of the adult, or the exercise by the guardian of their personal welfare functions

The law makes certain requirements of the welfare guardian which apply to both local authority and private welfare guardians. One of the basic duties is for the guardian to make a record of when and how welfare powers have been exercised.

#### *The Codes of Practice to the Act*

*The Code of Practice for Local Authorities Exercising Functions under the 2000 Act and The Revised Code of Practice for persons authorized under intervention and guardianship orders* outline the expected standards of practice for private welfare guardians and local authority officers. While the Codes of Practice are guidance and not legally binding, it is pointed out that, “failure to comply with them may be one of the factors considered by the Public Guardian, the Mental Welfare Commission, the local authority or the sheriff in considering matters such as the continuing suitability of the person to exercise those functions, in investigating circumstances in which the adult appears to be at risk or in an application before the court.”

It is essential to read these documents to properly understand what is involved both in the local authority’s role in supervising guardianship orders, and in the guardian’s roles and responsibilities. The local authority code states that **“it should be the responsibility of the Chief Social Work Officer of each local authority to ensure that the Code of Practice is implemented by all staff for whom it is relevant.”**

Some of the fundamental points made in the Codes of Practice which have relevance to this monitoring exercise are provided on our website [www.mwscot.org.uk](http://www.mwscot.org.uk). You will have a greater appreciation of the findings and recommendations of this report if you are familiar with the relevant parts of the Codes of Practice.