



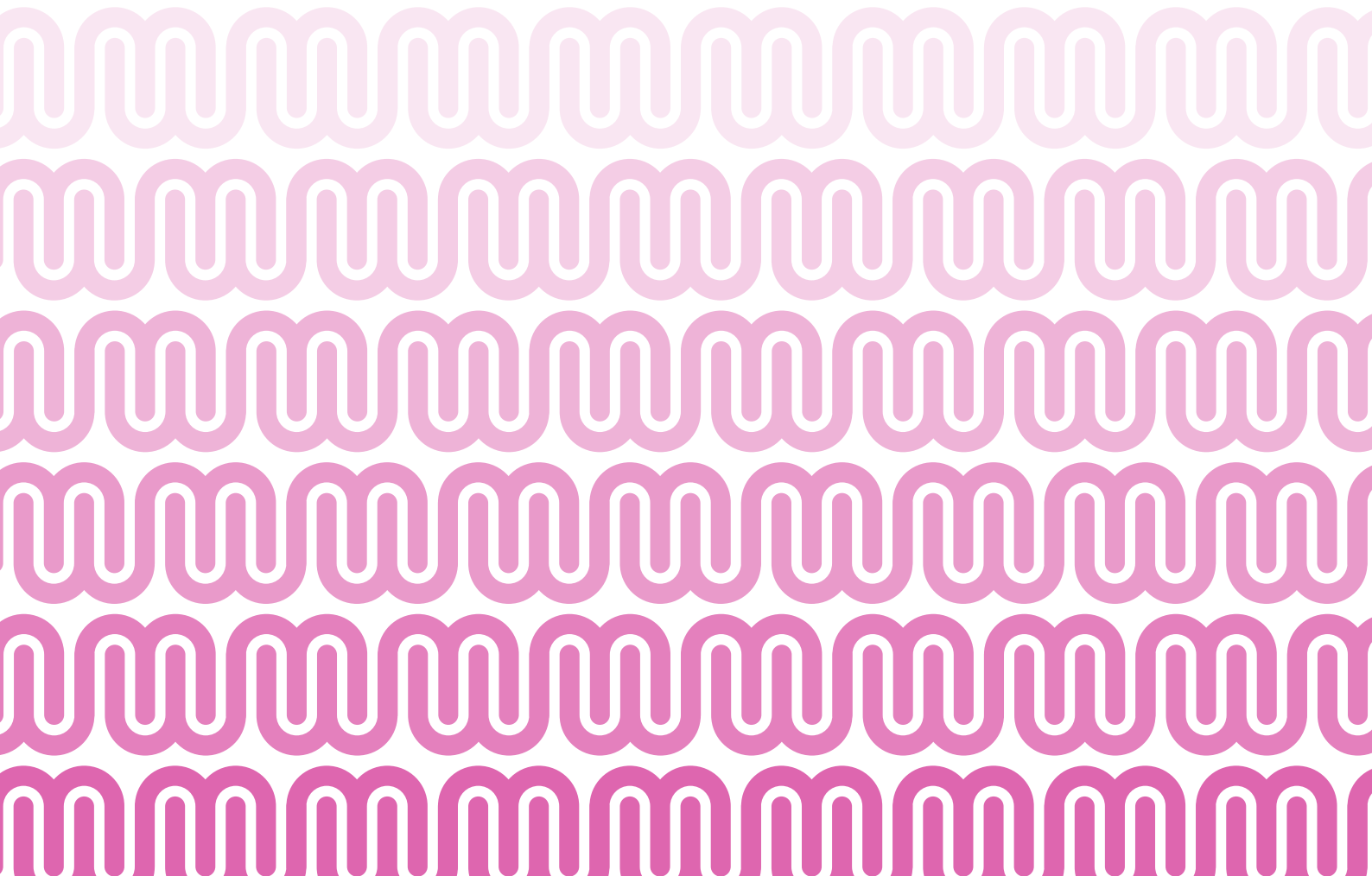
**mental welfare**  
commission for scotland

# **Tenancies for people with additional support needs – advice for landlords**

Good practice guide

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December 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

# Tenancies for people with additional support needs – advice for landlords

## Introduction

Over the last decade, we have seen a major shift in how and where people with additional support needs live and receive the care they need.

Increasingly, they are supported to live as part of communities, enjoying the benefits and experiences community living brings. Consequently, we at the Mental Welfare Commission have seen an increase in enquiries from housing association, local authority and private landlords, and from social work services, about how these arrangements can be supported legally, and how those organisations can ensure that the person's rights are upheld and promoted.

This advice note may be useful for all landlords and social work departments, advocacy and third sector organisations.

It may also be of interest to relatives and carers of people with additional support needs who are tenants or prospective tenants.

## The issue

One area which can challenge landlords and social work services is how an individual who potentially lacks capacity to understand the contractual arrangements inherent in a tenancy agreement can be supported to sign the agreement.

This is important, as the tenancy agreement offers the individual security of tenure and safeguards, while providing the landlord with the assurances they require that the rent will be paid, the accommodation maintained to an acceptable standard, and the individual understands their responsibilities as a tenant.

We have found that, for example, some housing associations and local authorities ask for extra reassurances - such as a commitment from social work to provide a package of care - before allowing a person with support needs to sign a tenancy. This can result in a delay of months, and the person losing that tenancy. Other landlords don't ask for this.

There are many challenges facing vulnerable people entering into tenancy agreements in Scotland. We hope in this document to provide some guidance for staff practising in this area. Our focus is on supported decision making.

## Capacity – how to help make understanding a tenancy agreement easier

Within the Adults with Incapacity (Scotland) Act 2000, capacity is not an 'all or nothing' concept.

People can be deemed to lack capacity in some areas of decision making, whilst retaining capacity to make decisions in other areas of their life. It is important, therefore, that where there may be some doubt in relation to a person's ability to understand the implications of a

tenancy agreement, that this specific decision making ability is appropriately assessed and not assumed.

Whilst a tenancy agreement may often be a large and detailed document, we would suggest that the basic principles of this document could be simplified and provided in a way that might help the person to understand the expectations of them as a responsible tenant – that they pay rent, that they maintain the property, that they behave as a good neighbour etc – and allow them to make this decision with support. This use of an easier-to-read document could be supported by input from a range of professionals, eg speech and language therapists, occupational therapists and housing officers.

Supported decision making should be considered as a starting point, and every effort should be made to assist the person to make sense of what the expectations are of them as a tenant and what, in turn, they can expect from their landlord.

We at the Mental Welfare Commission have produced an easy read tenancy guidance tool in conjunction with Scottish Commission for People with Learning Disabilities (SCLD) and Key Housing's My Home Group which can be found [here](#). This document can be used as a tool to support an assessment of capacity in this particular area by providing an explanation of what the tenancy agreement is and establishing if the person is able to sign this based on sufficient understanding of what it entails.

### **Incapacity – what to do if the person needs more support**

If, after a supported decision making process has been concluded and the person has been assessed as lacking capacity to sign an easier-to-read tenancy agreement, then further actions are recommended.

Historically, there has been a practice of tenancy agreements being signed on behalf of a person who lacks capacity using an old Scots Law method of *negotiorum gestio* or 'agent of necessity'. But this is outdated, and the Adults with Incapacity (Scotland) Act 2000 has provided a more appropriate statutory regime to authorise third parties to take decisions on behalf of people who cannot do so themselves, including housing decisions.

As well as being outdated, the use of *negotiorum gestio* does not offer any clear basis for establishing the rights and obligations of a tenancy agreement, or offer assurance to the housing provider, or the person, that the obligations of the other party will be observed.

The Adults with Incapacity [code of practice](#) for local authorities suggests that an intervention order may be used by a local authority to sign for or dispose of tenancies, and we have seen this practice used increasingly and effectively over the years.

Additionally, there have been increasing examples of the use of powers contained within welfare guardianships, which have granted the power to decide where the person should live and sign any legal documents related to this decision. This should be considered within individual local authority legal departments.

It is good practice for decisions to be made about applying for an intervention order or a welfare guardianship order as part of a multi-disciplinary process to ensure the powers requested are tailored to the needs of the person who lacks capacity. An application can be made by a relative or someone who can demonstrate an interest in the welfare of the person

who lacks capacity. If there is no one who is willing or suitable to make this application, then the local authority can seek the appointment of the chief social work officer (CSWO) to become welfare guardian or appoint someone with relevant experience to become an Intervenor for the specific purpose of signing a tenancy.

Local authorities are reminded of their duty to apply for an intervention or welfare guardianship order under section 57(2) where:

- a person is incapable in relation to decisions about, or of acting to safeguard or promote their interests in their property, financial affairs or personal welfare, and is likely to continue to be so incapable; and
- no other means provided by or under the 2000 Act would be sufficient to enable the person's interests in their property, financial affairs or personal welfare to be safeguarded or promoted; and
- no application for guardianship has been made or is likely to be made; and
- a guardianship order is necessary for the protection of the property, financial affairs and/or personal welfare of the person.

We at the Mental Welfare Commission appreciate that the process of applying for such an order does not offer a quick solution to this issue, however, it is unlikely that the need for either signing a tenancy agreement or surrendering a tenancy comes about as an emergency. It is more often part of an overall agreed care plan for the individual.

Consequently, housing issues should be part of any care planning process, eg discharge planning, planning for admission to care, use of s13za, Adults with Incapacity case conference, with explicit decisions about how the person will be supported to ensure that their rights are upheld in relation to their housing needs.

It would be good practice to include housing providers in this process to ensure the protection of property for any person who has been deemed to lack capacity to do so themselves.

Finally, this good practice guide is provided at a time when Adults with Incapacity legislation is undergoing a process of reform and will be updated once there is clarity in relation to the impact of this reform.

If you have any questions on this advice note please contact the Mental Welfare Commission at:

[mwc.enquiries@nhs.scot](mailto:mwc.enquiries@nhs.scot)



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Mental Welfare Commission 2022