

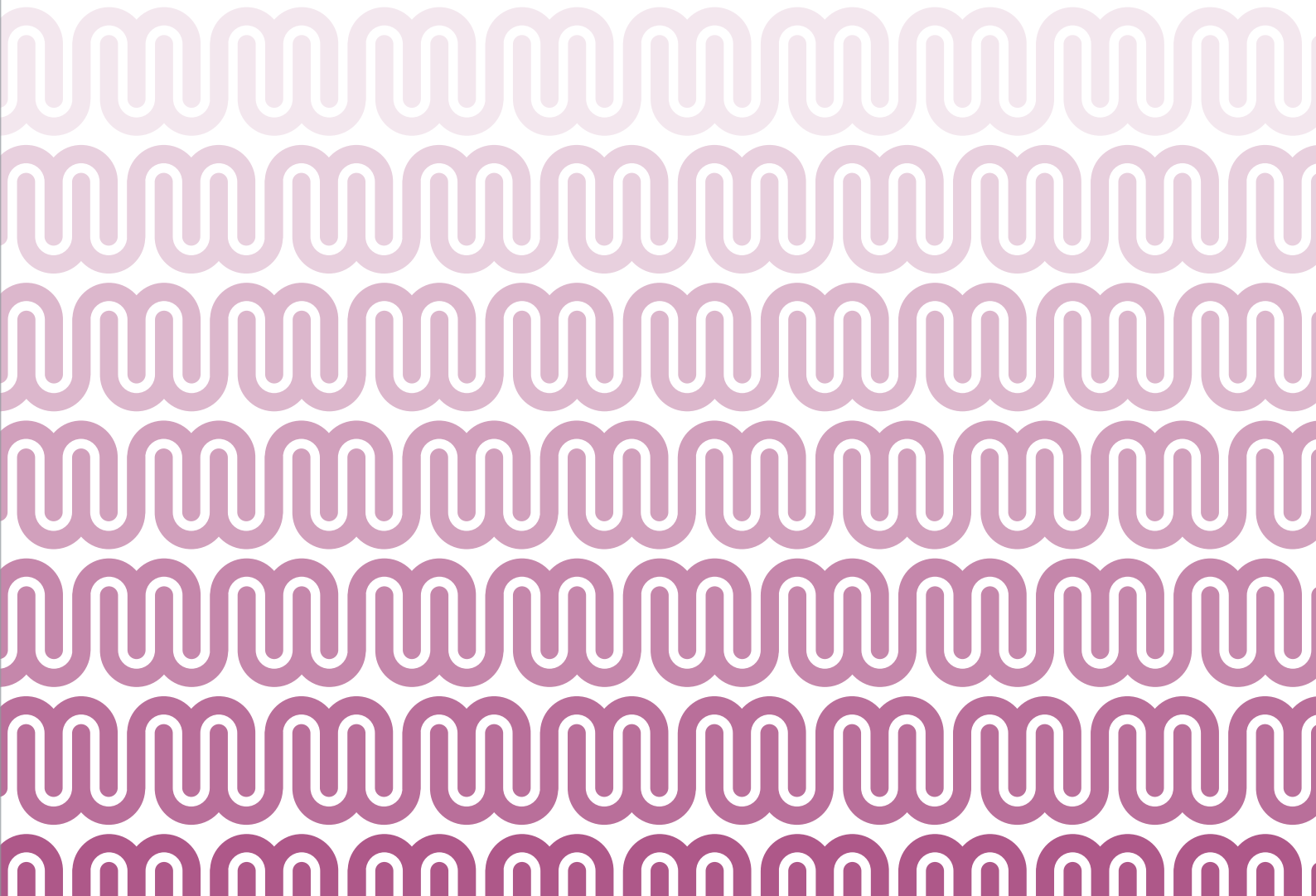


mental welfare
commission for scotland

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

Advice notes

Republished August 2020



Our mission and purpose

Our Mission

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

Our Purpose

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

Our Priorities

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

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

Our Activity

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

This information was first published in 2014. It was reviewed in July 2020 and remains current. Minor changes include updated links and small changes to improve readability.

Introduction

This amendment was sought because in many cases it appeared to be consistent with the social work priorities of the local authority to reduce or cease supervision in some circumstances, but there was no legal way to do this, and no measure in place to protect the rights of the adult on guardianship if supervision did stop. The guardian and adult were often not involved in the decision or told that supervision was stopping.

Those local authorities who were not complying with the legislation and were not allocating a supervisor in every case, also often did not have a system in place for deciding which guardians to supervise and which not. There was no mechanism in place for the adults on guardianship, and their guardians, to be allocated a supervisor if they wanted one.

Following a period of consultation with various voluntary organisations and local authorities the [Adults with Incapacity \(Supervision of Welfare Guardians etc by Local Authorities\) \(Scotland\) Amendment Regulations 2014 \(the regulations\)](#) were laid before the Scottish Parliament on the 8th May 2014 and came into force on the 9th June 2014.

In the policy note produced by the Scottish Government to accompany the new regulations it stated that the Mental Welfare Commission would publish guidance to assist local authorities on how to complete the form of notification that shall be used to vary or cease supervision of a welfare guardian.

This guidance outlines the circumstances in which it would be appropriate, with the agreement of the guardian and the adult, either to reduce the frequency of supervision, or cease to supervise a welfare guardianship altogether.

We also thought it would be useful to consider how to ensure the views of an adult with incapacity can be taken into account, and what to do if there are differences of opinion between the adult, the guardian and the local authority.

The regulations

The regulations apply in particular where a guardian with functions in relation to the personal welfare of an adult has been appointed for a period of one year or more. However, there are changes to what happens when a guardian has been appointed for a period of less than one year. The local authority must arrange for the adult, and the guardian, to be visited within 3 months of the guardianship order being granted and for the guardian to be contacted no less than 3 months before the expiry of the guardianship in order to consider renewal and any other arrangements for the welfare of the adult. Contact has been redefined to include email or telephone contact.

Most guardians are appointed for more than a year and as before it is still necessary in compliance with the law to supervise the adult and the guardian:

- within three months of the guardianship order being granted *and*
- at least once at an interval of not more than twelve months after the order has been granted.

The new regulations:

- Increase the minimum time permitted between supervision contacts thereafter to every twelve months (unless otherwise agreed, see below).
- Allow that supervision would meet the requirements of the legislation whether the supervision contact *with the guardian* was by email, telephone or a visit.
- Give flexibility to local authorities to vary the interval between supervision contacts with the agreement of the guardian and adult, so that it is more than every twelve months, or
- Give flexibility to local authorities to cease the supervision arrangements with the agreement of the guardian and adult.

If the period is to be varied, or ceased, certain protective measures have been put in place and these are detailed in the next section. It is worth highlighting here that if the local authority, the guardian or the adult, wish the supervision arrangements to resume then they will resume, with a frequency of at least every twelve months.

Although the regulations set out the minimum supervision contact between the supervisor and the adult and guardian, the supervision should occur more regularly if the circumstances are such that this is considered necessary.

The circumstances where supervision should be more frequent than every twelve months are not defined, but may include:

- Where the use of powers has a significant impact on the freedom of the adult, such as the use of seclusion or restraint (see Commission good practice guides on [Use of seclusion](#) and [Rights, risks and limits to freedom](#).)
- Where the use of powers is contrary to the expressed wishes of the adult, or other significant people, and is used to overcome resistance.
- Where there is significant risk to the welfare of the adult, or other people, if the care arrangements break down.
- Where the application of the principles of the AWI Act are complex and can be conflicting, such as the benefit to the adult versus their past and present views.

- Where the care arrangements are complex and there are no other care management review arrangements in place.
- Where an application has been made to the sheriff for directions, or to recall, replace or remove the guardian, or powers to force compliance have been sought.

It is worth noting that the regulations also changed to establish that a welfare guardian must, on request by the local authority, provide a report or information about the personal welfare of the adult, the operation of the welfare guardianship, and the use of welfare powers, as may be 'reasonably required' (i.e. it should avoid being a burden on the guardian). This report could be used to help the local authority decide if supervision frequency needed to increase again, or recommence.

Varying or ceasing supervision

As mentioned above, the change to the Act was sought because there was no legal way to vary or cease supervision even where this seemed to be appropriate and consistent with local authority priorities.

In the past, adults on guardianship and their guardians were not involved in the decision and there was no mechanism in place for them to be allocated a supervisor if they wanted one. It was important therefore that if supervision was to be reduced or stopped, measures should also be put in place to protect the rights of adults and guardians.

The new regulations set out a process for local authorities to follow where they believe supervision of the guardian and adult serves no continuing purpose, or where the guardianship arrangements can be safely supervised at longer intervals than every twelve months. They also set out a protective mechanism to ensure that if the local authority, the guardian or the adult believe supervision should recommence, or increase in frequency to every twelve months again, then they can so order this.

Where a local authority decides in consultation with guardians and adults, to cease, or lengthen the period of supervision visits beyond every twelve months, it must notify the Mental Welfare Commission in the form prescribed in the Schedule to the regulations.

Where either the adult or the guardian objects to the proposed variation or cessation then the arrangements shall not be varied or ceased.

The form of notice requires the local authority to confirm that the initial visit within 3 months of the order being granted, and the subsequent visit within twelve months of the order being granted, have been carried out. If either of these supervision visits have not been carried out then the local authority is already in breach of its legal duty. We would recommend that a supervision visit is carried out now that complies with the guidance set out in the Good Practice Guide: [Supervising and supporting welfare guardians](#). The legal duty of the local authority to provide supervision, and its potential benefits, should be made clear to the guardian, and to the adult where this is practicable.

In normal circumstances where the initial visit and the visit after 12 months have been carried out, it will be necessary for the local authority to next confirm on the form that the adult and guardian do not object to the decision to cease or vary. Where the adult does not have capacity to understand this discussion this should be stated. It was fully intended that should the adult not have the capacity to take part in the decision that it would be for the guardian and the local authority to make it in accordance with the principles of the Act. So for instance, any previously expressed views of the adult should be considered.

It is necessary for the supervisor to give details on the form of the discussions that have taken place and what has been done to inform the adult and guardian of the decision.

Reasons should be given to justify the decision to vary or cease supervision. The reasons may include:

- That although the guardian continues to want to hold welfare powers they are not actively being used, or
- That the guardian has authorised a care arrangement that is now stable and uncontroversial, or
- That the guardian has evidenced through the exercise of welfare powers over time that they are competent to continue in the role without further need for supervision, and/or
- That the local authority has robust alternative care management arrangements in place that would alert the person with responsibility for allocating supervisors to any changes or concerns in the use of welfare powers.

The supervisor should then provide a brief description of the current circumstances of the adult and guardian and note what, if any, of these have changed since the application for guardianship was made.

The local authority must confirm that they have provided information to the adult and guardian on how they can contact the local authority if either wishes the supervision of the guardianship arrangements to restart. It would be best practice to give the guardian and adult a letter or leaflet about the process of how the decision to vary or cease supervision has been reached, and how they can restart these by contacting a named person within the local authority. It may be possible in some circumstances to develop an easy read leaflet that would make this information accessible for people with a learning disability.

Once the form of notice to cease or vary has been completed a copy of it should be sent to the Mental Welfare Commission by email, **from secure networks only**, to:
mwc.admin@nhs.scot



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