

NORTH LANARKSHIRE COUNCIL

REPORT

TO: Social Work Committee	Subject:
FROM: Jim Dickie Director of Social Work	DRAFT SCOTTISH OFFICE GUIDANCE:
DATE OF COMMITTEE: 24 November 1998	PROTECTION OF THE FINANCES AND OTHER PROPERTY OF PEOPLE INCAPABLE OF MANAGING THEIR OWN AFFAIRS
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REF: PROTFIN\REM	

1 PURPOSE OF REPORT

- 1.1 To inform Committee of both general and detailed comments to a draft circular on protecting the finances and property of people incapable of managing their affairs due to mental disorder. Committee is asked to endorse this corporate response as representing the view of Council's Social Work, Legal Services and Housing Departments.
- 1.2 The closing date of 31 October 1998 for comments to be received by the Scottish Office Social Work Services Group was extended until 11 November 1998. The Committee is now invited to homologate the decision by the Convener of Social Work to submit the comments contained in this report in order to meet the deadline.

2 BACKGROUND

- 2.1 The context of this draft guidance is a well established and long standing need for comprehensive reform to the legislation regarding making personal, welfare and financial decisions for people who cannot act for themselves because of a range of mental disorders including dementia, learning disability, head injury and severe mental illness.
- 2.2 The current legal framework is generally agreed to be inadequate and is known to be the cause of distress, expense and inconvenience to vulnerable people and their carers.
- 2.3 The lack of a clear legal framework frequently creates time consuming, complex and unnecessary problems for social work, housing, legal services and healthcare professionals in relation to their duties to promote and protect the interests of incapable clients.

- 2.4 Comprehensive draft legislation was in fact issued for comment to Authorities and others in 1997. Although the proposed legal framework received widespread support in relation to dealing with welfare and financial matters there was less agreement relating to medical matters, such as the concept of living wills. The legislation was subsequently shelved.
- 2.5 While the Scottish Office acknowledge the need for a clear legislative framework there is no indication of the new timescales envisaged. Many national groups campaigning on behalf of disabled people are concerned that much needed legislation may now not be given sufficient priority.

3 CONTENTS OF GUIDANCE

- 3.1 Draft legislation has now been replaced with draft guidance which aims to clarify the existing options for protecting the finances and other property of people incapable of managing their own affairs and now omits all medical related aspects. The stated imperative for the guidance is to prevent vulnerable people from exploitation and promote their individual benefit from their own resources.
- 3.2 The circular sets out the existing legal options and provides procedural guidance, but does not give definitive legal advice or detailed guidance to cover all circumstances. The guidance is in three parts:
- a) Part 1 provides guidance regarding people in, or being discharged from NHS hospital care;
 - b) Part 2 relates to people in the community, including those in residential and nursing home care and other supported accommodation;
 - c) Part 3 covers arrangements for dealing with the property and tenancies of incapable adults who enter long-term care either in hospital or community-based accommodation.
- 3.3 In consultation with the Director of Housing and the Head of Legal Services, detailed comment on each of these parts is contained in the appendix to this report.

4 SUMMARY

- 4.1 The draft guidance although generally welcomed, does not go far enough to protect vulnerable people. Aspects of the proposed guidance are too vague and there are inconsistencies around advice in different settings. The lack of emphasis on the requirement to make all arrangements undertaken on behalf of incapable adults accountable, and to record and monitor transactions is an omission at odds with the stated intention of the guidance. A further serious omission is a failure to highlight and propose steps to be taken to avoid conflict of interest or abuse arising. These matters are all addressed in the detailed comments in the Appendix.

- 4.2 Overall, the guidance is considered to be an inadequate substitute for having a proper legal structure put in place at the earliest date. Amended legislation as previously proposed would provide relevant mechanisms to resolve problems and safeguard the interests of vulnerable persons. This would potentially save vast amounts of professional time, currently tied up in dealing with disputes or problems with no clear legal solution and avoid the distress this often causes to vulnerable people and their carers.

5 RECOMMENDATIONS

5.1 Committee is asked to:

- [a] homologate the decision of the Convener of Social Work to submit a response to the consultation paper based on the comments contained in this report; and
- [b] remit the matter to Housing Committee for its interest..



Jim Dickie
Director of Social Work
17 November 1998

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APPENDIX

**DRAFT SCOTTISH OFFICE GUIDANCE:
PROTECTION OF THE FINANCES AND OTHER PROPERTY OF
PEOPLE INCAPABLE OF MANAGING THEIR OWN AFFAIRS**

Summary of Comments on the Guidance:

- Whilst the guidance is welcomed it is an inadequate substitute for legislation and does not go far enough to protect vulnerable people. In particular there is no legislative framework to underpin safeguards for people returning from hospital to the community for either their social, nursing or housing needs. Only in the hospital sector is there any relevant legal framework specifically for incapable people and this too is acknowledged to be problematic.
- The guidance is important and necessary as it attempts to deal with an oversight in the provision of suitable arrangements for the management of the funds of adults with mental incapacity discharged from hospital to the community. It attempts to clarify good practice guidelines for managers of residential and nursing homes, including the independent sector, who currently manage the funds of a substantial number of elderly people with dementia and others. Good practice issues for public sector housing managers is also highlighted.
- Within the Housing Sector the main problem is that the legislation which related to recovery of possession is not designed to deal with incapable adults. The provisions of abandonment and failing to occupy property as your main home, i.e. applicable to circumstances of wilful abandonment, are not geared towards the situation where someone is incapable or has to leave at relatively short notice. Appropriately reflecting the circumstances of incapable adults requires a clear legal framework at the earliest opportunity. In addition the guidance fails to address the non public sector such as Housing Associations, private landlords or home ownership circumstances. The power to enter property and remove goods is very wide and there is insufficient protection where the person is incapacitated.
- Each legal option currently available to incapable people has a very distinct and limited purpose and the current approach remains fragmented. There is no comprehensive system that would allow one person to deal with all the affairs of an incapable person and provide appropriate protection for them.
- The key problem with current housing legislation and the draft guidance is the reference regarding serving notices on incapable adults and initiating Court action. It is not possible to service a notice on someone who does not understand the content of it and in some circumstances there may be a need to apply to Court to have a curator ad litem appointed.
- These existing options are often prohibitively expensive which places them out of reach of the majority of incapable persons who need safeguarded.

- Comprehensive jurisdiction needs to be addressed with urgency as there are significant difficulties a lengthy process associated with each of the current options none of which on their own can address the crucial point of allowing a third party to administer, and be accountable for administering vulnerable persons finances and other property.
- Within the current framework procedures to allow banking transactions are still very problematic and unfortunately this is not tackled by the guidance. Banking issues creates a great deal of difficulty for Council and carers alike.
- Overall the guidance provided is considered too vague, and there are inconsistencies around advice in different settings. The lack of emphasis on the requirement to make accountable, monitor and record transactions is a serious omission and at odds with the stated intention of the Guidance. A further omission is a failure to highlight and propose steps to be taken to avoid conflict of interest or abuse arising.

Covering Letter to Guidance:

Draft covering letter page 3;

Definition of incapacity paragraph 4.

Line 6 delete “or may be” and replace with “meet the criteria to be”.

Also the last paragraph suggests guidance being prepared for medical practitioners in England. There is no reference to Scottish dimensions.

MAIN GUIDANCE - DETAILED COMMENTS (follows headings and refernces of draft guidance)

Part 1: PATIENTS IN HOSPITAL WHO ARE INCAPABLE OF MANAGING THEIR OWN AFFAIRS

INTRODUCTION

- 1.1 Makes reference to patients in hospital. Not clear if long stay or all patients. Should only be the former.

BACKGROUND

- 1.2 Mentions “suitable alternative arrangements”. Does this include informal arrangements?

INCAPABLE PATIENTS IN HOSPITAL

Policies for the Management of Incapable Patients’ Funds

- 1.10 Refers to continuing care patients in Nursing Homes. It would be helpful to ascertain practice in such cases i.e. contracted nursing home beds for continuing care.

Identification and Assessments

- 1.12 This is an important proposal in terms of Social Work responsibilities. It suggests the hospital based social worker should have a leading part in the assessment of capacity and makes reference to the patients family but the role is not clear or specific. The final paragraph indicates that the social worker may be able to identify a person who is suitable and willing to given time and commitment necessary to manage the patients affairs in a fair way. There is no guidance on who or in what aspects and to what extent the person would be responsible - nor the criteria to be applied or monitoring arrangements necessary.
- 1.13 Reference to the social worker taking the necessary steps to secure the patient’s movable and heritable property requires further guidance on the framework for undertaking this role including the legal basis. This could potentially put the social worker in a very difficult situation and open to legal challenge.

Day to Day Management of Patients’ Property and Affairs

- 1.18 This suggests hospitals should hold bank accounts for incapax patients. Experience suggests that transferring such accounts on discharge is problematic.

Challenges for Hospital Managers and Clinical Staff

- 1.21 - 1.27 These paragraphs are not clear enough about boundaries between essential NHS provision and what is described as “desirable extras”. The range suggested is too wide without proper safeguards. Could be too easily abused and may present difficulty in distinguishing the actual outcomes for individuals. Individual accounts and records are essential.

DISCHARGE OF INCAPABLE ADULTS TO COMMUNITY CARE SETTINGS

Planning for After Care

- 1.30 Clarification is required on the roles and responsibilities of Health Boards, their directly managed NHS Trusts, together with Social Work Departments in putting in place suitable alternative arrangements for the management of the affairs of such patients before the hospital managers relinquish the management responsibility. Where a person requires to be admitted to a care setting in the community, but is unable to consent it is possible for the Social Work Department to apply for guardianship under the Mental Health (Scotland) Act. Although this would allow admission it would not resolve the financial arrangements which might require a separate court application. A legal framework for a single intervention is required.

Access to Funds Held by Hospital Managers on Behalf of Former Patients

- 1.31 The appointment of a Curator Bonis has cost implications (see paragraphs 2.6-2.7).

It should be noted that the cost can be claimed back from the future estate. Guidance on how to resolve when vulnerable person has less than finances required for Curator Bonis or where the Social Work Department has a duty under the terms of the Mental Health (Scotland) Act 1984 needs to be addressed.

- 1.32 The reference to former patients not having access to funds held on their behalf by hospital managers urgently requires legislative change, since it will preclude suitable alternative arrangements being put in place when vulnerable people return to the community or a care setting.

Arrangements Prior to Discharge

- 1.34 Clarification on purchases and examples would be helpful regarding items which a patient will require during the period immediately following discharge.

Requires reference that this task should be undertaken in consultation with representative in community.

Part 2: PROTECTION AND MANAGEMENT OF INCAPABLE ADULTS FINANCES AND PROPERTY IN THE COMMUNITY

BACKGROUND

- 2.3 Implies that the Social Work Department, as part of its community care assessment, consider the financial capability of clients. Detailed guidance is required and clarification of role of medical practitioners particularly in light of there being no Scottish guidance proposed from medical practitioners.

KEY PRINCIPLES

- 2.4 Bullet point two - suggest delete the word “minimise” and replace with “eliminate”.

General Comment

Requires examples of good practice models to illustrate factors which indicate a particular course of action in preference to another. The key principles additionally need to emphasise two important areas:

Firstly safeguarding incapable adults in unregistered services within the community requires additional measures given that there is no regulation to underpin the veracity of arrangements and safeguard the interest and benefit of these persons.

Secondly, monitoring and other arrangements to safeguard vulnerable persons interests needs strengthening throughout, including defining measures to be taken.

In practice there are significant difficulties with

- a) carer conflicts;
- b) clients who are already incapable (but not legally defined as such) prior to first contact;
- c) banks withholding information, refusing to process transactions, freezing accounts and issue of access to capital with or without a Curator bonus;
- d) clients transferring from one establishment to another;
- e) independent sector arrangements.

Appointment of Curators - General Comments on Present Limitations

Curator Bonis

- This is usually used where there is a fairly large estate. The main problem is these powers are mainly financial so it can be necessary, for example, to also have to appoint a guardian to transfer the person from their own home into long term residential care. The curator bonis cannot deal with all the persons affairs.

- The procedure for appointment is fairly complicated and it is difficult to petition a Court without the assistance of a solicitor.
- Provides reasonable safeguards to protect the incapable person's interest. Thorough accounts being submitted to the Accountant of Court annually and the Accountant's authorise being required for significant or unusual expenditure. Additionally an insurance policy must be lodged with the Court which will pay out if there are any inappropriate dealings which reduce the estate.
- The circular reproduces the guidance of the Mental Welfare Commission on when a curator bonis should be appointed. These should be seen only as guidelines as decisions in each case depend on individual circumstances.
- Some financial institutions will not provide information on a person's bank account without a Court Order. Therefore it can be necessary to petition the Court to have a curator bonis appointed in order to ascertain the level of the estate.
- The Mental Welfare Commission's advice does not appear to be in line with the local authority's obligation to appoint to a curator bonis to protect an incapable adult's estate in terms of the Mental Health (Scotland) Act 1984.

Tutor Dative

- These deal mainly with welfare issues such as medical treatment and have a few financial powers.
- This is not a comprehensive power and does not allow the person appointed to take an overall view of the incapable adult's needs.

Power of Attorney

- This is of limited relevance as it can only be granted while a person is capable
- The biggest problem is there is no monitoring, no safeguards and no specific duties imposed on the person exercising the power.

Appointeeships

- A fairly limited power with no real safeguards.
- There is inadequate supervision especially as it is likely to be a member of the family who is appointed and there is a real potential for a conflict of interest.

Negotiorum Gescor

- This is of fairly limited value and applies mainly where, for example, one spouse takes over the management of the others affairs or a parent does the same for a child. This is only really of use where there is a close family member available to carry out day to day management.
- The main problem with this option is that there are no specific safeguards or checks.

OPTIONS FOR THE MANAGEMENT OF THE AFFAIRS OF INCAPABLE ADULTS

Appointment of Curators

- 2.8 Suggest that a reference be made to the ability to charge expenses against estate.

Appointeeships

- 2.22 Lacks clarification and detail of criteria to be applied.

Supervision

- 2.23 Suggest emphasise vigilance being necessary as potential for conflict of interest is high. Duties, obligations, controls and safeguards needs to be highlighted.

MANAGEMENT OF INCAPABLE RESIDENTS' AFFAIRS BY THE MANAGERS OF RESIDENTIAL CARE HOMES AND NURSING HOMES AND OTHER SUPPORTED ACCOMMODATION

Registered Establishments

- 2.29 Specifying the need for joint work in this area between health and social work in assessing and identifying people who are incapax is helpful and should lead to clear procedures being developed.
- 2.30 Identifies arrangements applying to non registered establishments as well as registered and the need for proper assessment of clients and proper arrangements being in place, equally being a contractual condition.

Identification of Incapable Residents

- 2.31 Suggests where there are no suitable relatives or friends the care home manager may assume the responsibility for receipt and management of DSS benefits. Since there is a high potential for conflict of interest in such circumstances safeguards and monitoring procedures should be strengthened.

Responsibilities of Care Home Managers

- 2.34 It should be a requirement that residential managers are competent in this area and systems of management of incapax affairs are transparent. The draft rightly emphasises the undesirability of management or staff taking on this role, other than in a limited way

such as appointeeship, but given the weaknesses in the established legal options, does not provide alternatives. It would not be appropriate for a person with the care and control of a person's funds to have pecuniary interest. The owner or manager of a care establishment would reasonably have an interest in what the resident would be paying for their care within that establishment. The system could be open to abuse.

2.35 Highlights certain principles and practices to be followed which would ensure greater accountability. It points to the need for competent systems for assessing need and spending money to be in place and the requirement for establishments and service purchasers to be precise about core services in order that hidden charges do not arise and that personal allowance is protected. These are generally already in place but the need is for stronger focus on the most vulnerable service users. This section requires strengthening to ensure that on no account should individuals finances be included with the homes or proprietors finances. The text of 1.18 which sets out the parameters applying to hospital managers dealing with the affairs of incapax patients should equally apply to this section of the guidance. Emphasis should be placed on every transaction being evidenced and capable of scrutiny.

2.35.6 The amount of the personal allowance is very low and not identified as a resource, for example, for the purchase of clothes or other significant expenses. There are therefore gaps between what is reasonable for a care home to provide and the limitations of personal allowance. There are differences in suggestions for using personal funds to that specified for hospital patients at 1.21 to 1.23. and consistency of approach should be considered.

2.35.7 The use of Personal Allowances is a difficult area particularly the issue of this sometimes being used as a 'top up' to basic charges needs clarification from DSS as it is open to abuse.

Confidentiality of Financial Records Of Incapable Residents

2.36 The final paragraph whilst it indicates that access to records on the management of incapax residents funds must be given by care home managers gives no indication of how detailed these records must be.

General Comment

In line with the overall emphasis it is agreed that registering authorities should take a more significant and direct interest in this entire area and that local authorities should be firmer and more explicit in their requirements on providers to establish systems which identify residents who are incapax, in order that this allows an audit trail of financial and social care practices which demonstrate appropriate regard to the residents interests.

The inspection process is suggested as the main monitoring process of these arrangements. The view that relatives permission be sought to allow examination of individual arrangements is

unnecessary as this authority is already within present powers. The regulatory processes will be critical in establishing specific systems and monitoring these. The guidance however does not give equivalent emphasis to monitoring and reviewing care management arrangements when vulnerable people are in the community.

Part 3: ARRANGEMENTS FOR DEALING WITH THE PROPERTY AND TENANCIES OF INCAPABLE ADULTS MOVING FROM THEIR OWN HOMES TO LONG TERM CARE

BACKGROUND

The guidance as outlined in the proposal restates the legislative framework that applies within the section relating to Rights of Public Sector Tenants, Security of Tenure within Part III of The Housing (Scotland) Act 1987. Therefore, the guidance outlines a minimum standard which North Lanarkshire Council Housing Department has taken cognisance of in the development of housing department policies and practices, and has developed further to provide a higher standard of service to our tenants.

CURRENT PRACTICE

For the purposes of this report, all paragraphs outlining appropriate procedures in relation to:

- Transfer of Tenancies,
- Termination of a Tenancy,
- Abandonment and Repossession Procedures,
- Securing Unoccupied Property,
- Disposal of Personal Property, and
- Storage of Moveable Property

within Section 3 of the guidance address current legislative requirements applicable to the Council and through application of the Council's adopted Housing's Estate Management Policies and Procedures are currently operated in accordance with the guidelines issued in this document.

North Lanarkshire Council's concern to protect the right of each tenant to maintain their tenancy, where this appropriate, is evident in the additional safeguards that have been adopted. Entitlement to Housing Benefit continues by right for a six month period on admission to care, thereafter, this is reviewed at regular intervals but payment continues where there is an indication that the tenant will, at a future date, be capable of taking up residence in their home.

Within the Council, Joint Liaison Working Groups have been established between the Social Work and Housing Department at area level. At these meetings any issues relevant to the social well being, or, tenancy of an individual, are tabled and roles responsibilities and appropriate

action determined. This ensures that all relevant information is passed between departments and appropriate action taken in each individual case.

Where the individual is capable of understanding the implications of terminating or transferring their tenancy, this is only processed after personal contact by the housing officer, and on the written instructions of the tenant. Prior to processing any termination or transfer verification of the individuals need for residential/nursing care is also requested in the form of a social work/medical report.

Where there is a concern regarding the ability of the tenant to be responsible for the management of their own legal affairs, the Housing Department follows the Good Practice Guidelines issued by the Chartered Institute of Housing with regard to Incapax Adults. These Guidelines have been added as an addendum to Estate management Policies and Procedures. The guidelines outline the need for appointment of a independent advocate by the Court to ensure that the rights of the individual in relation to their tenancy/property are protected.

SUMMARY

The Guidelines detail issues currently addressed within The Housing (Scotland) Act 1987, and offer no additional security to tenants of landlords outwith the local authority housing sector. In order that the provisions within the Guidelines be effective, the proposals require to be converted into legislation that would apply to all forms of tenancy agreements between tenants and landlords.

Additional shortcomings within the guidelines is seen in the failure to address issues pertaining to the owner-occupied sector, where the family have authority as next-of-kin to act on behalf of the individual in the disposal of their property moveable and heritable. This can result in applications being made for housing with the local council, that, if successful, will free up the capital within the property for disposal.

A further concern occurs when the tenant requires a form of care or support that requires the individual to make a financial contribution. To maintain in tact their financial inheritance the family may thwart attempts to place the tenant in an appropriate care setting, or have a care service provided to them within their home. Clearly in these examples given, which are taken from previous experiences of housing officers within North Lanarkshire Council, the safety and well-being of the owner/tenant of a property are not always the immediate priority of their carers.

CONCLUSION

Overall, effective implementation of the guidance relies upon the appointment of an independent third party with power to protect the incapable adult in all aspects relating to their personal welfare and rights. Currently there is no appropriate legislation that ensures this, and determines lines of accountability for those acting, through informal arrangements, on behalf of an incapax adult. Legislation that would ensure expeditious appointment of an independent third party,

directly accountable in law for any actions taken or decisions made on behalf of the client, has no substitute.