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| TO: SOCIAL WORK (OPERATIONS AND SERVICES) COMMITTEE | Subject: ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 LEARNING FROM EXPERIENCE |
| FROM: DIRECTOR OF SOCIAL WORK | |
| DATE OF COMMITTEE: 6 DECEMBER 2006 | |
| REF: /MD | |

1. PURPOSE OF REPORT/INTRODUCTION REPORT

This report advises Committee of a Scottish Executive Consultation Document, which highlights key issues and lessons to be learned from the first three years of the Act, and sends homologation of the Council's response.

2. BACKGROUND

2.1. The Adults with Incapacity (Scotland) Act 2000 (Act) provides a new legal framework for adults who may be incapable of acting; or making decision; or communicating decisions; or understanding decisions; or retaining the memory of decisions by reason of mental disorder or of inability to communicate because of physical disability. The Act makes interventions in a wide range of property, financial or welfare matters where the adult lacks capacity.

2.2. In 2002, the Scottish Executive commissioned a partnership of Alzheimers Scotland – Action on Dementia and the Scottish Development Centre for Mental Health to undertake a two year consultancy contract to explore issues arising from the implementation of Parts 2, (Power of Attorney) 3 (Intromission with Funds) and 6 (Welfare and Financial Guardianship) of the Act.

2.3. The Consultancy had three main aims:

- To explore issues arising from the implementation of the Act;
- To monitor usage;
- To undertake research into the operation of the legislation.

3. PROPOSALS/CONSIDERATIONS

3.1 The consultation document highlighted that the Act is meeting its central aim of enhancing protection for the people who may potentially benefit from the legislation and to offer more flexible and specifically appropriate interventions.

3.2 The research documents also revealed possible legislative, procedural and practice issues, which may inhibit the full realisation of the objectives behind the legislation. The Scottish Executive in response to the findings is addressing some of these issues.

- 3.3 Data suggests that uptake of different provisions under the Act has varied, however usage has been consistently increasing as awareness of, and confidence in the legislation has grown.
- 3.4 Part 2 (Power of Attorney) and Part 3 (Intromission with Funds) has offered choice for the individual to plan ahead, lessening the possibility of future disagreements. However the latter process was found by some as an overly bureaucratic and onerous process.
- 3.5 A number of consultancy methods were adopted which facilitated a deeper and more subtle appreciation of the emerging issues. Some of the methodology used was data collection, sampling of applications and semi structured interviews.
- 3.6 The Council's response to the document is attached at Appendix 1.

4. FINANCIAL/PERSONNEL/LEGAL/POLICY IMPLICATIONS

- 4.1. Local authorities continue to have a duty to protect the finances of an adult where there is no one willing or able to undertake this role. Under Part 6 (Financial Guardianship) of the Act local authorities will continue to be responsible for this cost.

5. CONCLUSIONS

5.1 Committee is asked to:

- (i) homologate the report attached at Appendix 1; and
- (ii) otherwise note the contents of this report.



Jim Dickie
Director of Social Work
24 November 2005

*For further information on this report please contact Robert Miller, Development Manager, Adults,
(TEL: 01698 332069)*

LIST OF CONSULTATION QUESTIONS *(If you need more space please add pages, clearly number your answers and attach securely – thank you for your response).*

| Ref. | Your Views | Yes | No | Comments |
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| 1 | Do you support the countersignatory proposals? If you disagree with any of the proposals please say why? | √ | | |
| 2 | Do you support the proposal to allow for the appointment of substitute and joint withdrawers? | √ | | |
| 3 | Do you support a change to allow for intromission with a joint account on behalf of both account holders, in circumstances where one and then the other becomes incapable? | √ | | |
| 4 | Do you support proposals to increase flexibility in the management of accounts under IwF? If not, please give your reasons. | √ | | This flexibility is to be welcomed as present systems can be very cumbersome. |
| 5 | Do you agree that the Public Guardian should be empowered to authorise the opening of a bank account in the name of the adult, so that the applicant can intromit with funds? | √ | | This would be more in line with the principles of benefit and minimal intervention. |
| 6a | Do you support the proposal for the Public Guardian to be able to; authorise applicants to request confidential financial data from the adult's bank/building society for the purpose of completing the IwF application; and authorise banks to release the requested information? | √ | | |

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| 6b | Do you consider that the two stage process provides an adequate safeguard to protect the adult from potential abuse? | √ | | |
| 7a | Do you support the proposal that organisations should be allowed to intromit with funds? If not, please state your reasons. | √ | | I'm not sure I understand the Consultation's comments re. "arms length" schemes for managing IwF. This should be clarified if local authorities are to be given the opportunity to IwF, which in general North Lanarkshire Council agree with. |
| 7b | Are there any considerations which would make certain types of organisation unsuitable to IwF? If so, please state what you think these would be. | | | |
| 8a | Please suggest an alternative name for 'intromission with funds'. | | | |
| 8b | What do you suggest the name/title for someone authorised to manage funds under IwF should be? | √ | | Again it is not user friendly and would have to change if the above title was changed. |
| 9a | Do you agree that, in considering the need for a financial guardian of last resort, it is important to draw a distinction between – cases where the <u>challenge is to identify a willing nominee</u> and supply is restricted or absent - and cases where the <u>nature of the case</u> makes it difficult to attract a nominee on any commercial basis (supply side constraints may also be present in such cases)? | √ | | In North Lanarkshire there is reluctance amongst many local solicitors to be nominated as financial guardians. They do not consider it lucrative enough. That being said, where an Adult's estate is modest or minimal, but they still require a FG, the Council has been agreeing to meet the fees of the FG in as much as they exceed those allowed by the OPG. Accordingly, cases may not be seen as commercially viable on the face of it, but solicitors will take them on provided they know that the Council will meet any shortfall in the fee recoverable from the Adult's estate. This has long term implications for local authorities |

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| 9b | Do you think there is a gap in the 'universal' provider market for guardianship at the moment, i.e. are there cases which would have supported the payment of a professional fee but where no professional was available to administer the guardianship? If so, please say why you think this gap arises. | | | So far, North Lanarkshire Council has always been able to identify someone willing to take on Financial Guardianship. It tends always to be the same few solicitors who are willing to act. |
| 9c | Do you have any information on the scale of the gap ? (If so please state). | | | |
| 9d | Would it be helpful to see any such gap in terms of the market for wider community legal services? | | √ | Not necessarily. Accountants could also act as financial guardians. The matter of legal advice is a separate issue. The main problem is remuneration for the service provided by the guardian. |
| 9e | Do you have any ideas about how the gap in the provision of professional financial guardians in such circumstances could be met? For example, would it be helpful to have a central referral system for the allocation of a suitable professional from a panel? Would that ensure a suitable service even in remote areas? | | | Clarity is needed on what the status of any such panel would be? In order for it to be effective, the members would have to be under a legal duty to carry out the role of financial guardian North Lanarkshire Council recommend that one of the existing statutory bodies may be better placed to provide financial guardianship, for example the OPG. Within that organisation a position could be created which would deal with the guardianships. If there is simply a panel whose members have no statutory responsibilities then the same difficulties as before could arise i.e. No one is willing to take on a particular case. |
| 9f | What are the key features of cases which, even if a referral and panel system were to be in place, would require a guardian of last resort? | | | At the moment, many cases which would require a guardian of last resort are those where the Adult needs ongoing financial assistance but their estate is minimal. It is in those situations where it is most difficult to find a willing financial guardian. If the role of IwF is widened then that should assist in dealing with that particular care group. Other circumstances could be: the Adult has |

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| | | | | finances/property which they cannot manage due to incapacity; no one is willing or able to act on their behalf; the local authority has assessed that person as requiring financial assistance in terms of the principals of AWI. |
| 9g | What would be the likely annual demand for a last resort service for such cases? | | | If IwF is widened it is anticipated that the demand for that service in North Lanarkshire would be almost negligible. |
| 9h | Taking into account the nature and volume of last resort cases, what kind of skills and organisational arrangements would the provider of a last resort service have to have? | | | |
| 10 | Do you support the proposal to include a check in the registration process for powers of attorney to ensure that the granter has considered how and by whom incapacity is to be determined? | √ | | This would not only protect the granter but the Attorney. |
| 11 | Do you support the proposal to amend the Act to provide that only one supporting certificate by an approved person is required when a power of attorney contains both continuing financial and welfare powers? | √ | | |
| 12a | Do you agree that it would be beneficial to make specific provision for sheriffs to dispense with caution if they consider it appropriate in the circumstances? | √ | | Most Sheriffs in North Lanarkshire are dispensing with caution where funds are limited. This decision appears to have come from experience of the Act. However a specific provision would add clarity and continuity. |
| 12b | Do you agree that the Public Guardian should be granted powers to vary caution? | √ | | |

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| 13 | <p>Do you support the proposal to make specific provision to allow sheriffs discretion to extend the period for lodging reports to a maximum of 60 days in cases where an adult's condition is stable and long term, or deteriorating and long term?</p> | √ | | <p>There are benefits to the Sheriff having discretion to extend the period for lodging reports to a maximum of 60 days however this would need to be closely monitored to ensure it still met the Principles of the Act and in the best interest of the Adult</p> |
| 14 | <p>Do you support the proposal to deal with situations where the adult for whom the report by the approved medical practitioner is required lives outwith Scotland, to enable an appropriately qualified medical practitioner with experience recognised by the country in which he/she works to:</p> <ul style="list-style-type: none"> - make an examination of the adult. - discuss that examination with a medical practitioner approved under section 22 of the Mental Health (Care and Treatment) <p>(Scotland) Act 2003, or with a medical commissioner or medical officer of the Mental Welfare Commission for Scotland, and;</p> <ul style="list-style-type: none"> -provide a report on the adult's capacity in relation to the measures sought? | √ | | |
| 15 | <p>Should sheriffs be given discretion to make interim orders for a period of more than three months where this is appropriate in the circumstances of the case?</p> | √ | | |
| 16a | <p>Do you support the proposal that local authorities should be able to recall their own guardianships</p> | √ | | |

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| 16b | Have you experienced a specific difficulty in the recall of a guardianship? Please provide details. | | | |
| 17a | Do you support the proposal to broaden section 4 to allow for an application to the sheriff by a person having an interest in the affairs of an adult with incapacity? | √ | | North Lanarkshire Council has had situations where it has been inappropriate to intimate the application upon the nearest relative (for example, they have capacity/mental health issues themselves). I think it is important that section 4 is broadened out so that local authorities as applicants can seek to dispense with intimation upon the nearest relative. The Act requires that nearest relatives have to be consulted so far as is reasonably practicable, yet the rules state that intimation upon the same relative is mandatory. This is inconsistent. |
| 17b | In addition, do you support the proposal that the court should have, on its own initiative, the power to make an order under section 4, subject to intimation to (informing) the adult and any other person the court considers has an interest? | √ | | This would be consistent with some the other legislation. |
| 18a | Would it be appropriate to consider widening the categories of professionals who sign certificates of incapacity under the Act? If 'yes' please answer the following questions. | | √ | This could potentially lead to difficulties, particularly if the person signed a certificate of incapacity where they had no expertise. It is North Lanarkshire Council view that a person's capacity to make decisions should be determined by a medical professional. |
| 18b | To which professionals, and under which Parts of the Act should this be extended? | | | |
| 18c | What issues would any extension raise e.g. training, indemnity cover? | | | |