

EAST AYRSHIRE COUNCIL

SOCIAL WORK COMMITTEE: 3 NOVEMBER 2005

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 “IMPROVING WITH EXPERIENCE” - EAST AYRSHIRE CONSULTATION RESPONSE

Report by the Executive Director of Educational and Social Services

1. PURPOSE OF REPORT

- 1.1 The purpose of this report is to seek Social Work Committee endorsement of an East Ayrshire response to a Scottish Executive Consultation on proposed changes to the Adults With Incapacity (Scotland) Act 2000.

2. BACKGROUND

- 2.1 The introduction of the Adults with Incapacity (Scotland) Act 2000 (AWI/the Act) introduced comprehensive legal reforms to protect the interests of adults (persons of 16 and over) who are not able to make all or some decisions for themselves. It is founded on the principles of autonomy and equity. Adults who are unable to make decisions for themselves should not be disadvantaged because of a lack of legal provisions to support them. The legislation aims to strike a fair balance between empowering and protecting adults with incapacity and enabling their carers and others to manage their day to day welfare and financial affairs.
- 2.2 It applies to individuals who are assessed as incapable of acting, making, communicating or understanding decisions because of mental disorder or an inability to communicate caused by a physical disorder. The main groups to benefit from the provisions of the Act are people with dementia, people with learning disability, people with severe acquired brain injury and people with severe mental illness.
- 2.3 In 2002, the Scottish Executive commissioned a two year consultancy to explore issues arising from those parts of the Act concerned with powers of attorney (Part 2), intromission with funds (Part 3), and intervention and guardianship orders (Part 6); to monitor usage; and to undertake research relating to the Act's operation. The project adopted the title "*Learning from Experience*".
- 2.4 The evidence from the study suggests that the Act is working and is yielding benefits for adults with incapacity and for those who care for and about them. The principles in the Act have been warmly welcomed, as has its decision-specific definition of incapacity, replacing the previous 'all or nothing' approach which did not focus on the needs, wishes and capabilities of the adult.
- 2.5 Nothing in the report leads to the conclusion that quick or radical change is needed to this major piece of legislation. It is early days and a measured approach is being taken to the possibility of changes to the Act. The findings from the *Learning from Experience* study suggested that changes to the Act

may be required to improve accessibility to and operation of the scheme for the intromission with funds. Another area of concern is the complex procedures for recalling guardianship, particularly as they affect local authority guardianships. It may be the case that the best solution to address the question of financial guardian of last resort will also require a change in legislation. Time scales for applications and reports for guardianship and intervention orders have been raised as an issue, as have bonds of caution (insurance). A number of technical points relating to the legislation were also raised.

3. CONSULTATION

3.1 The paper invites comments on the Executive's proposals to make improvements to the Adults with Incapacity (Scotland) Act 2000, when a suitable legislative opportunity is available. It relates to the following parts of the Act:

Part 1 - the principles and operation of the Act

Part 2 - powers of attorney

Part 3 - intromission with funds (IwF)

Part 6 - intervention orders and guardianship orders

Part 7 - miscellaneous provisions.

3.2 The proposals outlined in the document aim to address issues which emerged from research, commissioned by the Executive, to evaluate the implementation of the Act. In formulating proposals, the Executive has also considered the views of a number of key stakeholder groups.

3.3 The proposals aim to:

- simplify processes and procedures where experience has shown them to be overly complex for the purpose;
- improve access to justice, where certain provisions have proved to be too narrow and inflexible;
- address minor and technical issues.

3.4 The response format is by submission of views on any or all of the 18 questions set out in the consultation paper. Responses are required by **4 November 2005**. The full consultation is available at the members information point.

4. EAST AYRSHIRE RESPONSE

4.1 The proposed response from East Ayrshire is attached as Appendix 1 to this report.

4.2 The response is on the whole broadly supportive of the Scottish Executive's proposals as these would offer benefits to both individuals subject to the act, and those, including Local authorities who are seeking to provide assistance to people subject to the act.

A small number of legal issues have been highlighted as requiring further clarification from the Scottish Executive.

- 4.3 The proposal to make changes to the countersigning arrangements for applications to access and manage an adult's funds will make it easier for private individuals to make use of this provision.
- 4.4 The proposal to extend the intromission of funds scheme to local authorities and other agencies will enable Local Authorities to effectively manage the finances of adults living in the community who have no private individuals able to act on their behalf. This will maximise access to the scheme in line with the principle of minimum intervention while safeguarding the adult's interests.

5. FINANCIAL IMPLICATIONS

- 5.1 Nil.

6. LEGAL/PERSONNEL IMPLICATIONS

- 6.1 This consultation proposes changes to the Adults with Incapacity Act (Scotland) 2000.
- 6.2 There are no personnel implications at this time.

7. COMMUNITY PLANNING IMPLICATIONS

- 7.1 The Adults with Incapacity Act (Scotland) 2000 supports the Improving Health, Improving Opportunities and Eliminating Poverty themes of the Community Plan.

8. RECOMMENDATIONS

- 8.1 It is recommended that committee:
 - (i) agree the consultation response Appendix 1; and
 - (ii) otherwise note the content of this report.

John Mulgrew
Executive Director of Educational & Social Services
10th October 2005
Enc (1)

LIST OF BACKGROUND PAPERS

Adults with Incapacity (Scotland) Act 2000 Improving with Experience: Consultation
Adults with Incapacity (Scotland) Act 2000

For further information please contact:
Eddie Fraser, Senior Manager Community Care, telephone: 01563 554825

IMPLEMENTATION OFFICER: JACKIE DONNELLY

Department of Educational and Social Services
Council Offices, John Dickie Street, Kilmarnock KA1 1BY
Tel (01563) 554825 Fax (01563) 576644

APPENDIX 1

Draft Response
– awaiting Social
Work Committee
approval.

Executive Director: John Mulgrew
Executive Head of Social Work: Jackie Donnelly

If Calling Please Ask For: Eddie Fraser

Our Ref: EF/WB
Your Ref:
Date: 26 October 2005

Alasdair Menzies
Branch 1, Civil Law Division
Scottish Executive
Justice Department
2WR
St. Andrew's House
EDINBURGH
EH1 3DG

Dear Mr Menzies

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000
IMPROVING WITH EXPERIENCE: CONSULTATION

East Ayrshire Council welcomes the opportunity to respond to the Scottish Executive proposals on Adults with Incapacity (Scotland) Act 2000, Improving with Experience Consultation. This response has been compiled following consultation with Elected Members, Social Work Services and Legal Services.

If you require further information please do not hesitate to contact Eddie, Senior Manager Community Care, telephone: 01563 554825.

Yours sincerely

Jackie Donnelly
Executive Head of Social Work

Enc.

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
1	Do you support the countersignatory proposals? If you disagree with any of the proposals please say why?	Yes		<p>It is acknowledged that the existing range of counter-signatories is too narrow. It would therefore appear to be appropriate to extend the options available to applicants to increase take-up of this provision. As noted in the consultation document there are other safeguards available to protect the adult and to notify others who may wish to object or express a view about the application. It is noted that the person is expected to be able to comment on the applicant's honesty, reliability and competence to manage basic finances. Perhaps the guidance could be extended to provide suggestions as to what knowledge the person should have to be in a position to countersign the application form.</p> <p>The removal of the requirement to have known the adult for at least 2 years would seem to be appropriate. It would appear to be sufficient to have known the person for six months.</p> <p>It would seem to serve no useful purpose for the counter-signatory to know the adult. This provision does not offer any further safeguards to the adult.</p>
2	Do you support the proposal to allow for the appointment of substitute and joint withdrawers?	Yes		<p>The proposal to allow the applicant to name a joint or substitute withdrawer is sensible as it allows for the ongoing management of the adult's finances.</p> <p>There is a need to ensure that both potential withdrawers are known to the counter-signatory or that a second counter-signatory certifies that in their opinion the person is suitable to act on the adult's behalf. This would maximise benefit to the adult. It may also allow the sharing of the tasks between different parties causing less stress to the withdrawer.</p>
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?	Yes		<p>This would appear to be a sensible proposal that will allow the finances of the second account holder to be managed by the withdrawer. In order to safeguard the adult's interests it would be necessary for a doctor to certify the incapacity of the second account holder. There is also a need for an opportunity for anyone who may have an interest to be able to object to this.</p>

4	Do you support proposals to increase flexibility in the management of accounts under lwF? If not, please give your reasons.	Yes		The changes proposed to allow greater flexibility in managing the adult's financial affairs. The facility to consolidate a range of bank accounts where this is necessary is entirely appropriate. It is also proposed that the transfer of funds from the specified account would be part of the lwF authority. This would appear to be appropriate. The greater flexibility would appear to meet the principles of the Act by maximising benefit to the adult.
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?	Yes		This proposal is consistent with the principle of minimum intervention. As noted in the consultation document this will be particularly helpful for those wishing to act on behalf of adults who do not have bank accounts. This will prevent the need for applying for an intervention order solely to set up bank accounts on behalf of adults who lack capacity to set up their own bank account.
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 lwF application; and authorise banks to release the requested information?	Yes		This would appear to be appropriate given the safeguards proposed to safeguard the adult. This will enable those who do not have sufficient information about the adult's finances to act in line with the principle of minimum intervention.
6b	Do you consider that the two stage process provides an adequate safeguard to protect the adult from potential abuse?	Yes		This would allow for any objections to be raised by those with an interest. In addition to this the Public Guardian would have a responsibility to investigate to protect the adult's finances from abuse.
7a	Do you support the proposal that organisations should be allowed to intromit with funds? If not, please state your reasons.	Yes		Assistance with financial management is often an integral part of any care package. As noted in the consultation document an adult may not have a private individual able or willing to act in their place. This is often the case where people have been in long-term hospital care. The proposal to extend the intromission with funds scheme to Local Authorities and other agencies is in line with the principles of minimum intervention and benefit. It will also enable the adult to exercise their own skills as appropriate. Under the current legislation it has been necessary for Local Authorities to make applications for financial guardianship where the adult has no-one who is able or willing to act to protect their finances. This is not appropriate where the adult has a moderate income

7b	Are there any considerations which would make certain types of organisation unsuitable to lwF? If so, please state what you think these would be.	Yes		<p>The suggestion that an “arms length” scheme be set up to manage lwF schemes seems sensible. This would avoid any conflict of interest given the diversity of the Local Authority’s responsibilities as noted in the consultation document.</p> <p>There would be a need for the agency to keep accounts as required by the Public Guardian. In the case of providers commissioned by the Local Authority the contracts should be extended where appropriate to cover the management of adult’s finances using the provision to intromit with funds. Often established practice and accountability structures are in place. Provider organisations would not normally levy a direct charge to the adult. It may not be appropriate for an agency or individual employed to provide care services to an adult where this is not part of a Local Authority contract to intromit with the adult’s funds. The agency would be paying for its own services using the adult’s funds which would create a potential conflict of interest.</p> <p>It would be necessary for mechanisms to be in place to ensure that any risks to the adult arising from potential conflicts of interest are minimised and that safeguards are in place to ensure accountability.</p>
8a	Please suggest an alternative name for ‘intromission with funds’.			<p>It is acknowledged that the title “Intromission with Funds” may deter potential applicants as people are not clear about its meaning. Given the greater flexibility proposed within this consultation document the term “withdrawer” would not cover all of the interventions proposed under the scheme. Perhaps a title such as “access to funds” is less off-putting for potential applicants.</p>
8b	What do you suggest the name/title for someone authorised to manage funds under lwF should be?			<p>The term “withdrawer” does not cover all of the roles undertaken by the individual taking account of the proposed changes.</p>
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			<p>Please note it is East Ayrshire Council’s understanding of the Act that the Chief Social Work officer cannot be nominated as a financial guardian.</p> <p>It does seem appropriate that in assessing the residual need for a financial guardian of last resort that the difference between the lack of available provision where the estate is of moderate or greater means and cases where the estate value is more modest but where other means of managing the adult’s funds are not viable. In East Ayrshire a number of cases</p>

	present in such cases)?			(perhaps two or three over the course of a year) have arisen where the complexity of the case has prevented support providers from being involved in assisting or managing the adult's funds.
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.			In East Ayrshire Council there is an ongoing process to establish the availability and willingness of local professional solicitors/accountants to act in this capacity.
9c	Do you have any information on the scale of the gap ? (If so please state).			At this stage East Ayrshire Council are consulting with potential providers and the scale of the potential gap for provision of this service is not clear.
9d	Would it be helpful to see any such gap in terms of the market for wider community legal services?			The proposal to increase the availability of publicly funded legal assistance would appear to offer a viable alternative.
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?			<p>A centralised service may be necessary due to the diverse geographical spread of demand. There is a need to ensure that the financial guardian is, nevertheless, accessible to the adult. This may be problematic depending on the distances involved.</p> <p>It does seem possible that there may be a "drift" to using the last resort services for situations where there are deficits in the local provider market.</p>
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?			<p>Cases where the estate cannot support market fees for professional management where other methods are not appropriate. The proposals to extend the lwF scheme should assist to minimise this demand. However there may be situations where it is important for the support/care provider not to be involved in managing the adult's funds due to the complexity of the situation.</p> <p>It is important to minimise the likelihood of the escalation of fees for adults of moderate or greater means. Therefore it would seem sensible to minimise take-up of any centralised last resort service.</p>

9g	What would be the likely annual demand for a last resort service for such cases?			Within East Ayrshire Council on the basis of previous evidence it would appear that there would be 2-3 cases requiring this service each year. Further discussion would be needed with agencies providing support services about their capacity, willingness and the contracts required in respect of acting under the lwF scheme.
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?			There is a need to ensure equity and accessibility. It is essential that the provider would have an understanding of the complexity that can exist in relation to some of these situations.
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?	Yes		This would appear to offer appropriate safeguards to the adult. East Ayrshire Council would strongly support the inclusion of a check within the documentation to ensure that the adult has considered how and by whom the onset of incapacity is determined. It has been noted that powers of attorney have been utilised on occasion very shortly after granting/registration. The inclusion of this check would encourage discussion with the granter about the potential use of the powers and the implications. This would further establish their understanding of the process.
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?	Yes		This proposal would appear to offer sufficient safeguards to the adult.
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?	Yes		
12b	Do you agree that the Public Guardian should be granted powers to vary caution?	Yes		
13	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?	Yes		<p>This proposal would continue to safeguard the adult where their capacity may fluctuate or be variable as the cases are prescribed in which it can be used.</p> <p>This will be particularly useful in cases where a private individual is making an application where it can prove difficult to obtain all of the necessary reports within the specified timescales.</p>

				In addition to this it would be helpful for more user friendly guidance to be available to private individuals intending to make applications for guardianship or intervention orders.
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) (Scotland) Act 2003, or with a medical commissioner or medical officer of the Mental Welfare Commission for Scotland, and; - provide a report on the adult's capacity in relation to the measures sought? 	Yes		These proposals appear to be practical and to offer sufficient safeguards for the adult. The measures to ensure that the requirements of the legislation are met appear sensible and in accordance with the principles of the Act.
15	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?			It is not clear whether this is necessary to meet with the requirements of the Act.
16a	Do you support the proposal that local authorities should be able to recall their own guardianships	Yes		This would avoid delay in recalling guardianship orders and would be consistent with the principle of least restriction. The appropriate notifications would be required to ensure anyone with an interest can notify the Local Authority of their views regarding recall.
16b	Have you experienced a specific difficulty in the recall of a guardianship? Please provide details.			The only difficulties noted by East Ayrshire Council have been that the recall process can be lengthy which therefore continues to restrict the freedom of the adult unnecessarily. This requires to be considered in the light of any guidance in relation to the application of the Act in relation to any situation where an adult lacks capacity to make a decision.

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?	Yes		<p>East Ayrshire Council would support the extension of Section 4 to allow applications to the sheriff by anyone with an interest in the affairs of an adult to apply for an order that:</p> <ul style="list-style-type: none"> • Appoints a nearest relative other than the one who would be entitled to be so appointed in terms of the Act • Orders that no person shall be the nearest relative • And/or restricts disclosure of information to the nearest relative <p>This would appear to be consistent with the principle of benefit to the adult as other parties may well be aware and be in a position to act to protect the adult's interests in this regard.</p>
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?	Yes		
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.		Yes	I consider that the extension to enable certificates under Part 5 of the Act to be signed by those professionals in relation to their field of practice is appropriate. I consider that in a very limited way this could be extended in relation to certificates of incapacity provided for other purposes under the Act.
18b	To which professionals, and under which Parts of the Act should this be extended?		Yes	It may be appropriate for a clinical psychologist to complete an assessment in relation to the capacity of the adult for the purpose of supporting a guardianship or intervention order.
18c	What issues would any extension raise e.g. training, indemnity cover?			This would require to be further discussed with the proposed group of professionals. Assessment of capacity provides an input from a wide range of professionals and multi-disciplinary training in assessing capacity would be welcomed.