I write in relation to my appearance before the Committee on 29 May to provide evidence on the SDS Bill. I was grateful for the opportunity to explore the detail of this Bill with you and I thought that the questions the Committee raised were well-considered and insightful. I trust that our discussion was helpful to you in your ongoing consideration of the Bill and the drafting of your report. As a follow-up, I agreed to provide some further information on a range of topics.

Transformation funding

We discussed the additional investment that the Government is providing to support the change in culture associated with the strategy on self-directed support (a total of £39.5m over the current Spending Review Period). The Financial Memorandum sets out how we determined the resource required, including that for local authorities, over that period.

My officials have met with COSLA throughout the development of the Bill, and have discussed the financial requirements on a number of occasions. Officials provided views during the development of the COSLA survey, and around its completion there were 3 specific meetings to discuss the survey. Throughout those meetings, and in contacts since, COSLA were unable to share the detailed financial estimates they received from the survey for the reasons that they gave in their evidence to you. However, they shared their broad analysis of the results and discussed the range of transformation activity which should accompany the legislation.

It is clear that there is ongoing discussion around the additional investment required to engender a significant change in culture and approach surrounding this legislation. To address this, I have asked my officials to convene a regular Self-directed Support
Programme Board. One of the main tasks for this Board is to monitor and manage implementation, and this will include a remit to keep a close eye on the ongoing costs of implementation. The Board will involve COSLA and ADSW, along with a range of support organisations, user and carer groups. In addition, my officials will meet with senior COSLA and ADSW officials on a two-monthly basis up to any Bill commencement date and beyond into the first year of implementation. The first of these meetings is set for 12 June. Finally, my officials will progress a series of meetings over the next 6 months with individual local authorities. They will use this programme of engagement to discuss a range of implementation matters, including the question of how and in what ways local authorities will make use of the transformation funding provided by Scottish Government.

The Committee expressed an interest in being kept informed, and I would be happy to provide further updates to you on this activity.

Delegated powers

As indicated, I intend to respond to the range of points made in the Subordinate Legislation Committee’s report and, where appropriate, to consider their recommendations further at Stage 2. I will be writing to the Convenor of the Committee before the Stage 1 debate and I will ensure that you are copied to that more detailed correspondence.

Protecting Vulnerable Groups scheme

Fiona McLeod asked about the cost of a joining the Protecting Vulnerable Groups Scheme. An application to join the PVG Scheme costs £59. The full range of fees is available on the Disclosure Scotland website - http://www.disclosurescotland.co.uk/guidance/index.html

Section 5 and 15 within the Bill

Towards the close of the panel you referred to previous evidence panel 4 which involved the Mental Welfare Commission (MWC), Office of the Public Guardian (OPG), the Care Inspectorate and the Law Society of Scotland. You asked for an update in writing in order to respond to specific concerns raised regarding the technical definitions used in Sections 5 and 15.

I note that the MWC, OPG and the Law Society of Scotland welcomed the extent to which their previous concerns were taken on board before the Bill was introduced. Their main remaining concern was that some practitioners might assume that Sections 5 and 15 extend into powers to make formal appointments of proxies, and to allow for substitute decision-making on behalf of the individual.

I can reassure the panel members and the Committee that the purpose of Sections 5 and 15 of the Bill are to require local authorities to involve people able to assist the individual to make decisions about their care and support plan. They are not intended to provide a power to local authorities to appoint proxies in order to make decisions as substitutes for the individual.

A further concern related to the similarity between the definitions used at Section 5(1)(b) and 15(1)(b) of the Bill – which are intended to lead to assistance – and the definition deployed in Section 1(6) of the Adults with Incapacity (Scotland) Act 2000 – which leads to substitute decision-making. This is a complex and challenging area of the Bill’s drafting, not least because people with either a mental disorder or a difficulty in communicating can fall into both “groups” with respect to capacity. They can fall into the category of those who lack
capacity under the AWI legislation or they can fall into the category of those who have capacity, and who might benefit from assistance under Sections 5 and 15 of this Bill. As indicated where a person has capacity the local authority should involve persons who can help that individual to make the relevant choices. There is no specific power provided to the local authority in order to appoint an individual as a proxy decision-maker, and so no such decision-making power would be created under this Bill.

I would expect statutory guidance to elaborate on these points in detail and to make it clear that Sections 5 and 15 do not contain any power to appoint substitutes. Nevertheless I am also happy to explore this drafting issue with the Committee at Stage 2. In addition, I have asked my officials to engage with the MWC, OPG and the Law Society of Scotland in advance of Stage 2.

I hope that the Committee finds this information helpful in its consideration of the Bill.

I am copying this correspondence to the Convenor of the Subordinate Legislation Committee and to the Clerks to both Committees.

Michael Matheson