1. Are you generally in favour of the Bill and its provisions?

Yes

11. Do you have any comments on any other provisions contained in the Bill that you wish to raise with the Committee?

Yes

1. The consultation on self directed support (SDS) included a section, section 10, on how, via the allocation of an “appropriate person” nominated by the local authority, an incapable person may self direct their support.

2. Currently, the appointment of a guardian is required to facilitate self directed support for an incapable person, if the person has not already granted power of attorney. It is accepted that the current guardianship process is overly burdensome merely for the administration of a direct payment but it offers a robust mechanism of protection.

3. The proposed ‘appropriate person’ process removed the bureaucracy associated with guardianship but it also, in the Public Guardian’s opinion, removed all of the safeguards. Consequently, the Public Guardian’s formal response to the consultation expressed serious concerns about the proposals.

4. The Bill as introduced has removed the section relating to incapable adults.

5. Sections 5 and 15 of the Bill as introduced, which are largely in similar terms, refer to assisted decision making for those who, because of mental disorder or difficulties in communicating due to physical disability, would benefit from this.

6. The implication is that such assistance is for those adults who have a level of decision making ability but need support with this. However, the terminology echoes that used in the Adults with Incapacity Act which could create confusion and may lead practitioners to believe they can provide assistance to incapable adults also.

7. Paragraph 32 of the accompanying Policy Memorandum essentially makes the intention clear.
“Where a person has a guardian or attorney with the relevant powers authorities must allow the appointed proxy to decide how they want to arrange support for the supported person. Where the authority assesses that a person lacks capacity in the AWI definition, and where that person does not have a guardian or attorney, the authority should proceed to make decisions and arrange support, utilising its powers, in line with guidance, under section 13ZA of the Social Work (Scotland) Act 1968 or, where required, by seeking an appropriate order under the AWI legislation”.

8. It would be preferable if the policy intention, not to offer supported decision making to those who are incapable of making the necessary decisions [on directing their support and direction of a payment] was explicit on the face of the Bill.

9. This said, the Public Guardian has some concerns with the phrasing of the above policy memorandum excerpt.

10. Reference to use of section 13ZA suggests the local authority could use their powers therein to provide an incapable person with support to receive self-directed support. This which be substituted, rather than supported, decision making.

11. Section 13ZA facilitates welfare matters, where there is no opposition to the matter proposed, eg to move a person from an NHS bed to a care home. Section 13ZA does not allow management of monies even in non-contentious situations. The suggestion that Section 13ZA could be used to support individuals to self direct their care, and thus administer a direct payment, would extend the current use of Section 13ZA.

12. It is appreciated that much of the process detail may be for subordinate legislation but the Bill contains no provisions for reassessment of any assistance provided and specifically for the role of assistance to end should incapacity be diagnosed. The continuation of assistance in such circumstances would circumvent the guardianship process with its associated protections.

13. A person receiving assistance all be they considered capable may nonetheless be highly vulnerable. The Bill does not narrate any safeguards against the risk of those providing assistance exerting undue influence on the vulnerable person.

14. The ethos of self directed support is personal choice. Given that sections 5 and 15 are intended to apply to people who are capable, it seems
contrary to this ethos that the identification of people to provide assistance is a matter for the local authority rather than the individual themselves.

Office of the Public Guardian
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