INTRODUCTION:

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession.

Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Law Society of Scotland’s Mental Health and Disability Sub-Committee (the Committee) welcomes the opportunity to consider and respond to the Scottish Parliament’s call for written evidence on: Social Care (Self-directed Support) (Scotland) Bill.

COMMENTS:

The Committee were previously provided with the opportunity to provide comment of the draft consultation of the bill, and at that time raised two particular concerns.

The first of these was the Committee’s concern that in the Consultation Draft the “default position” would be to opt in to Self-directed Support. That would mean that people unable to make a decision, or who made no decision because they found it too difficult, or were too ill, or for any other reason, would be treated as having opted for Self-directed Support. The Committee are pleased to note that this concern has been addressed and the Bill, as introduced, has reversed that. The default position is to treat the person who does not respond as having not opted in to Self-directed Support.

The Committee’s second concern was with section 10 of the Consultation Draft (now sections 5 and 15 of the Bill as introduced) and relative guidance. The previous section 10 provided for the local authority to appoint an “appropriate person” to assist a service user in making decisions about Self-directed Support, if it appeared to the authority that the service user would benefit from assistance from another person in relation to making such decisions. This appeared to address the situation of people who were capable of making decisions, but needed help, and clearly not those who are unable to make decisions. However, that was contradicted by the accompanying Executive Summary which stated that this provision was intended to apply “where an adult is unable to direct their support and where guardianship or powers of attorney is not in place”. In other words, it
appeared from this comment that this was intended as a procedure to enable a local authority to appoint what would in effect be a guardian with powers to deal with Self-directed Support with absolutely none of the procedures or safeguards necessary under human rights requirements or required by our incapacity legislation.

Section 5 of the Bill as introduced refers to assistance with making decisions, and section 15 refers to assistance with assessments. The provisions are substantially similar and in this response the Committee focus on section 5, though it is helpful to commence with the comments in paragraphs 29-32 of the Policy Memorandum.

These appear to make it clear that sections 5 and 15 are for people capable of making decisions, but who would benefit from assistance. It concludes by stating that where the local authority assesses that a person lacks capacity within the definition of the Incapacity Act and does not have a guardian or attorney, then 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”.

The Committee believe that the policy intention is not yet adequately achieved by the present section 5. Sections 5 and 15 refer to the relevant adult as the “supported person”. The provisions apply where no-one holds relevant powers under a guardianship or intervention order, or a welfare power of attorney. They apply where it appears to the authority that the supported person would benefit from assistance “from another person” in relation to making decisions about relevant matters, and that the supported person’s difficulties arise from mental disorder or physical communication difficulties. The local authority’s duty is to identify persons having an interest in the care of the supported person and to involve them in assisting the supported person in making decisions.

The dangers with this formulation include the following:-

1. Because the legislation is not explicit that this provision is for people who have capacity to make decisions but would benefit from support, and not for people unable to make valid decisions, there remains a risk that the procedure may in fact be used for people who lack capacity. That would lead to the same human rights violations as were feared under the Consultation Draft. There should be a clear declaration that the provisions only apply where the person has capacity but would benefit from assistance in exercising it.

2. The risk of confusion identified at 1 above is exacerbated by the references to mental disorder or physical difficulties in communicating (the same language as is used in the definition of incapacity in the Incapacity Act) and the reference to guardians, welfare attorneys and intervention orders. Welfare powers under any of these Incapacity Act provisions can only be exercised following a determination of incapacity or (in the case of
welfare powers of attorney) incapacity or reasonable belief as to incapacity. The provisions of sections 5 and 15 should be disapplied because of the findings of incapacity, not because such Incapacity Act appointments have been made or are in operation in consequence of that incapacity. As the language equating to the Incapacity Act definition of incapacity, and the references to appointments under the Incapacity Act, clearly point to situations where capacity could be an issue, sections 5 and 15 should require an assessment of capacity.

3. Even where a person has capacity at the time when persons to provide assistance are first identified and involved, the supported person may thereafter lose capacity. There must be provisions for reassessment and for the role of assistance to end where capacity is lost, otherwise – if the persons providing assistance were to continue to act – there would, again, be human rights violations.

4. There must also be safeguards against the risk that the persons to be involved in providing assistance may exercise undue influence or act harmfully. The recent report of the Mental Welfare Commission\(^1\) on the case of “Mr and Mrs D” graphically describes what happened to two vulnerable persons when an inappropriate attorney was appointed, despite the safeguards in the powers of attorney regime. This is an accurate parallel. It is likely that the great majority of persons providing assistance will be well-motivated and acting helpfully, but inevitably there will be some who are not, and it would seem that there should be (at least) a requirement on the local authority to satisfy themselves that there is no reason to believe that the persons identified to provide assistance are exercising undue influence or their involvement in such a role otherwise is contrary to the best interests of the supported person.

5. The Policy Memorandum commences by stressing the importance of people making their own informed choices and having a greater say in matters concerning them. Given that sections 5 and 15 are intended to apply to people who are capable, it seems inconsistent that the identification of people to be involved in providing assistance should be done by the local authority rather than by the “supported person”. The Committee would suggest that a capable person should be empowered to choose who should provide assistance. It is possible that this inconsistency arises because of an instinctive concern about the immediately preceding issue, not thought through to clarify the two distinct steps of choosing candidates and then assessing their suitability (both of which should follow upon an assessment of capacity).

In addition, the Committee believe that Local Authorities will find it difficult to identify an appropriate person, and raise the question, where is that appointment to be made from unless from relatives or friends of the Adult, which begs the further question why the Local Authority needs to identify the person if the Adult is deemed capable of doing so.

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\(^1\) Mental Welfare Commission: Powers of attorney and their safeguards January 2012
This may lead to confusion about the Local Authority’s role. Is the Local Authority expected to supervise the appropriate person? Under Adult Support and Protection laws Local Authorities already have duties to investigate any potential financial abuse so this would be done even if the Local Authority does not identify such a person.

6. Finally, an inconsistency in drafting: section 5(1)(b) refers to “another person” (in the singular) whereas section 5(4) refers to “persons” (in the plural). All references should be in the plural, and indeed the identification of more than one person should be encouraged as tending to reduce the risk of undue influence or other inappropriate conduct.

Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”)

The Bill does not address the interrelation between self-directed support and community based compulsory treatment or compulsion orders made under the 2003 Act. The measures which may be authorised in an order are set out in section 66(1)(a) to (h) (compulsory treatment orders) and section 133(8)(a) to (h) (compulsion orders) of the 2003 Act. These include inter alia the imposition of a requirement on the patient to attend specified places at specified intervals with a view to receiving community care services, relevant services or any treatment, care or service; and the imposition on the patient to allow any person responsible for providing community care services etc. to visit the patient where the patient resides. It is conceivable that a patient under an order could have a preference for self directed support which could fit or conflict with the terms of the measure authorised. These scenarios should be addressed within the Bill.

The Law Society of Scotland

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