1. Are you generally in favour of the Bill?

The Commission wholeheartedly supports the objectives of the Bill to extend choice to individuals about the way support is provided to them. Given the history of the under-use of direct payments by people with mental disorder, we support attempts to enhance the access to self-directed care and support, as well as direct payments, to people with mental disorder. We are pleased to see that the Bill removes the current restrictions on direct payments for those on Compulsory Treatment Orders and Compulsion Orders as this was clearly discriminatory. We do have concerns, however, about the potential extension of self-directed support to those who, even with full and appropriate support and assistance, remain incapable of making an informed choice and who have no proxy with relevant powers under the Adults with Incapacity Act.

2. What are your views on the principles proposed?

The Commission fully supports the principles of maximum involvement and participation of individuals in the assessment of their need and the provision of services to meet these needs. We also support the principle that a person should be provided with all reasonable assistance to enable that person to make an informed choice when choosing an option for self-directed support. We do, however, have concerns that this principle may be at odds with how Section 10 assistance may be interpreted and used for substitute decision making rather than merely enhancing the capacity of an individual to make an informed choice.

6(a). What are your views on providing a power to local authorities to facilitate an ‘appropriate person’ arrangement where Guardianship or Power of Attorney is not in place and where such applications under AWI procedures would be disproportionate?

6(c). Do you think Section 13ZA should be amended in any way in light of this Bill?

We note that in the Scottish Government’s response to last summer’s consultation, it was stated it was their intention to insure that the Bill is clear and unambiguous in both policy and legal effect. We have concerns, however, that there remains ambiguity in respect of the policy as it relates to people who lack capacity to make an informed choice who do not have a proxy under the Adults with Incapacity Act to do so for them.

Section 10 of the Bill seems to suggest that assistance by a local authority, including the appointment of an appropriate person, is for the purpose of helping a service user make a decision about self-directed support. This is in accordance with principle 1(3).
The consultation documents section on ‘People who need help to direct their support’ gives a different and somewhat confusing message. While saying that the Adults with Incapacity Act ‘would remain the sole route where a significant intervention is made into an incapable adult’s affairs’, it goes on to state that the Bill is ‘intended to offer a clear route, underpinned by legislation, empowering local authorities to allow peoples family or friends to direct a person’s support where this is a logical, common sense solution’. The implication is that these will not be ‘significant’ interventions.

The consultation document goes on to suggest that Section 13ZA of the 1968 Act may be used as authority to make decisions regarding self-directed support on behalf of an adult incapable of making decisions where no proxy with relevant powers exists.

The core issue here is whether the adult, with full and proper assistance, can be helped to make an informed choice. Article 12 of the UN Convention on the Rights of Persons with Disability already asserts the right of capacity on an equal basis with all others in all aspects of life and the right to access the support needed to exercise capacity. This is basic good practice but is categorically different from appointing an appropriate person to take over decision making on behalf of another person.

Where a person can be assisted to make an informed choice about self-directed support and direct payments, even though they lack the capacity to manage the subsequent process, they would still have capacity to appoint a Welfare and Continuing Attorney under the Adults with Incapacity Act with the relevant powers to manage the process and any related fund, as incapacity under the Act is decision and action specific.

Our concern is the lack of sufficient safeguards and the creation of additional layers of local authority bureaucracy. It is clearly evident from Mental Welfare Commission research that local authorities are already falling well short of what is required of them by way of supervision of Welfare Guardianship under the Adults with Incapacity Act. It is also the case that local authorities do not routinely monitor the use of 13ZA at present. There, in fact, is no one organisation monitoring the use of 13ZA in Scotland. We feel it would be unwise to extend its use as authority for access to self-directed support, especially direct payments, when it has never been properly monitored to begin with. A recent investigation by the Mental Welfare Commission, Powers of Attorney and their Safeguards, clearly demonstrates the dangers of granting powers to individuals where the granter has impaired capacity, has been subject to undue pressure from the person to whom the powers are being granted and where the local authority did not use existing powers to investigate and manage the risk.

The 13ZA amendment to the Social Work Scotland Act was originally conceived to give further clarity to the authority of local authorities to implement care plans an individual was assessed as needing. It was brought about because of adults with incapacity remaining in hospital beds they no
longer required while awaiting the granting of guardianship by the court. Some authorities had received legal advice that they could not move such individuals to a care home without guardianship powers. We are not aware of it ever having been used to justify taking over control of an individual's finances to help implement a care plan.

We are well aware of concerns that the use of Welfare and Financial Guardianship is unduly bureaucratic and expensive when used solely for the purpose of accessing direct payments for an adult lacking capacity. We have expressed our view that the Act itself needs to be amended to allow for graded forms of Guardianship which could provide mechanisms for substitute decision making for adults lacking capacity which are more proportionate to the circumstances of individual cases.

To achieve the clarity in policy and legislation that the Scottish Government intends, we feel it would be best if, on the face of the Bill, it could be made clear that it is not intended that the Act be used for people lacking capacity to make decisions about self-directed support and direct payments where there is no proxy under the Adults with Incapacity Act with power to make such decisions. We also feel amending the current AWI legislation should be seen as a matter of some priority. It should be possible to amend the Act in such a way as to allow for a more proportionate response for such issues as self-directed support and direct payments while insuring proper safeguards are in place.

Mental Welfare Commission for Scotland

9 May 2012