SELF-DIRECTED SUPPORT: A DRAFT BILL FOR CONSULTATION
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Social Care (Self-directed Support) (Scotland) Bill

[CONSULTATION DRAFT]

An Act to make provision about the assessment of, and the arranging of services and support for, carers and other persons; and for connected purposes.

General principles

1 General principles

(1) A local authority must have regard to the principles in subsections (2) to (4) in carrying out its functions under this Act or Part 2 of the 1968 Act.

(2) A person should have as much involvement in the assessment of the person’s needs and the provision of services or support for the person as is reasonably practicable.

(3) A person should be provided with any assistance that is reasonably required to enable the person to make an informed choice when choosing an option for self-directed support.

(4) A local authority should co-operate with a person in dealing with any matter relating to the services or support provided to the person.

Options for self-directed support

2 Options for self-directed support

(1) The options for self-directed support are—

Option 1 The selection by the supported person within the supported person’s individual budget of the support and the making of arrangements for the provision of it by the local authority.

Option 2 The making of a direct payment by the local authority to the supported person for the provision of the support.

Option 3 The making of arrangements by the local authority for the provision of the support for the supported person.

Option 4 The selection by the supported person of Option 1, 2 or 3 for each type of the support.
(2) In this section—

“individual budget”, in relation to a person, means such amount as the local authority is to make available for the provision of the services or support to the person,

“supported person” and “the support” are to be construed in accordance with section 6, 7 or 8 (as the case may be).

3 Promotion of options for self-directed support

A local authority must take all reasonable steps to promote the availability of the options for self-directed support.

4 Power to modify section 2

The Scottish Ministers may by regulations—

(a) modify section 2,

(b) so far as necessary in consequence of any modification made under paragraph (a), modify sections 6, 7 and 8.

Carers

5 Support for carers

(1) This section applies where a local authority carries out an assessment under section 12AA of the 1968 Act of the ability of a person (the “carer”) to provide or continue to provide a substantial amount of care on a regular basis for another person (the “person cared for”).

(2) The authority must—

(a) consider the assessment, and

(b) decide whether the carer has needs in relation to the care which the carer provides or intends to provide to the person cared for.

(3) If the authority decides that the carer has those needs, the authority must—

(a) consider whether the needs could be satisfied (wholly or partly) by the provision to the carer of any support, and

(b) if so, consider the matters mentioned in subsection (4).

(4) Those matters are—

(a) whether provision of the support would enable the carer to provide, or continue to provide, care for the person cared for,

(b) whether provision of the support would be likely to prevent or reduce expenditure that the authority might otherwise incur by virtue of a deterioration in the condition of the person cared for or the carer that would be likely to happen if the support were not to be provided.

(5) Subsection (2) does not apply in relation to a carer who provides care—

(a) by virtue of a contract of employment or other contract, or

(b) as a volunteer for a voluntary organisation (as defined in section 94(1) of the 1968 Act).
(6) In this section, “support” includes community care services.

Choice of options for self-directed support

6 Provision of services: adults

(1) This section applies where a local authority decides under section 12A of the 1968 Act that the needs of an adult (the “supported person”) call for the provision of community care services (“the support”).

(2) The authority must give the supported person the opportunity to choose one of the options for self-directed support unless the authority considers that the supported person is ineligible to receive direct payments.

(3) If the authority considers that the supported person is ineligible to receive direct payments the authority must—

(a) notify the supported person of—

(i) the reason why the authority considers that to be the case, and

(ii) the fact that the supported person has a right to require the authority to review that reason under section 13, and

(b) give the supported person the opportunity to choose one of the options for self-directed support other than—

(i) Option 2, and

(ii) so far as relating to that option, Option 4.

(4) If the supported person does not make a choice in pursuance of subsection (2) or (3)(b) the supported person is deemed to have chosen Option 3.

7 Provision of support: adult carers

(1) This section applies where a local authority decides under section 5(3) that the needs of an adult (the “supported person”) call for the provision of support (“the support”).

(2) The authority must give the supported person the opportunity to choose one of the options for self-directed support unless the authority considers that the supported person is ineligible to receive direct payments.

(3) If the authority considers that the supported person is ineligible to receive direct payments the authority must—

(a) notify the supported person of—

(i) the reason why the authority considers that to be the case, and

(ii) the fact that the supported person has a right to require the authority to review that reason under section 13, and

(b) give the supported person the opportunity to choose one of the options for self-directed support other than—

(i) Option 2, and

(ii) so far as relating to that option, Option 4.

(4) If the supported person does not make a choice in pursuance of subsection (2) or (3)(b) the person is deemed to have chosen Option 3.
8  **Provision of services: children and members of child’s family**

(1) This section applies where a local authority decides to provide services under section 22 of the Children (Scotland) Act 1995 (c.36) (“the support”) to a child or a member of a child’s family.

(2) The authority must give the supported person the opportunity to choose one of the options for self-directed support unless the authority considers that the supported person is ineligible to receive direct payments.

(3) If the authority considers that the supported person is ineligible to receive direct payments the authority must—

(a) notify the supported person of—

(i) the reason why the authority considers that to be the case, and

(ii) the fact that the supported person has a right to require the authority to review that reason under section 13, and

(b) give the supported person the opportunity to choose one of the options for self-directed support other than—

(i) Option 2, and

(ii) so far as relating to that option, Option 4.

(4) If the supported person does not make a choice in pursuance of subsection (2) or (3)(b) the supported person is deemed to have chosen Option 3.

(5) In this section—

“supported person” means—

(a) where the support is to be provided (wholly or partly) for the child or a member of the child’s family who is also a child—

(i) if the child is under 16 years of age, the person having parental responsibilities for the child,

(ii) otherwise, the child,

(b) where the support is to be provided (wholly or partly) for a member of the child’s family who is not a child, that person.

9  **Sections 6 to 8: additional information to be supplied**

(1) This section applies where under section 6, 7 or 8 a local authority gives a person an opportunity to choose an option for self-directed support.

(2) The authority must give the person—

(a) an explanation of the nature and effect of each of the options for self-directed support, and

(b) information about persons who can provide assistance or information to the person to assist the person in making decisions about the options.

(3) The authority must give the explanation and information required by subsection (2) in writing or (so far as is reasonably practicable) in such other form as is appropriate to the needs of the person to whom they are given.
10 **Assistance for service-users**

(1) This section applies where—

(a) a local authority decides under section 12A of the 1968 Act that the needs of an adult (the “service-user”) call for the provision of services, and

(b) it appears to the authority that the service-user would benefit from assistance from another person in relation to making decisions about relevant matters because of—

(i) mental disorder, or

(ii) difficulties in communicating due to physical disability.

(2) The authority may appoint a person (an “appropriate person”) to assist the service-user in making decisions about relevant matters.

(3) The authority may appoint a person under subsection (2) only if—

(a) the person agrees to the appointment, and

(b) the person meets such requirements as may be specified by the Scottish Ministers in regulations.

(4) The authority may not make an appointment under subsection (2) if it is aware that—

(a) there is a guardian or welfare attorney with powers in relation to the relevant matters,

(b) an intervention order has been granted in relation to the relevant matters, or

(c) an application has been made (but not yet determined) for an intervention order or guardianship order under Part 6 of the 2000 Act relating to the relevant matters.

(5) Before appointing a person under subsection (2) the authority must—

(a) take all reasonable steps to enable the service-user to make a choice under section 6(2) or (3)(b),

(b) take into account so far as is reasonably practicable the matters mentioned in subsection (6).

(6) Those matters are—

(a) the present and past wishes and feelings of the service-user so far as they can be ascertained by any means of communication whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the service-user,

(b) so far as made known to the authority, the views of—

(i) any relative of the service-user of whom the authority is aware,

(ii) any carer of the service-user,

(iii) any other person appearing to the local authority to have an interest in the welfare of the service-user or in the appointment of a person under subsection (2).

(7) In this section—

“carer” is to be construed in accordance with section 5,

“guardian”—
(a) means a guardian appointed under the 2000 Act, and
(b) includes a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during the adult’s incapacity, if the guardianship is recognised under the law of Scotland,

“intervention order” is to be construed in accordance with section 53 of the 2000 Act,

“mental disorder” has the meaning given by section 328 of the 2003 Act,

“relevant matters” means—
(a) the choice of an option for self-directed support,
(b) anything relating to the provision of services or support in pursuance of an option for self-directed support,

“welfare attorney”—
(a) means a welfare attorney within the meaning of section 16 of the 2000 Act, and
(b) includes a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter’s personal welfare and having effect during the granter’s incapacity.

11 Appropriate person: general considerations
(1) Subsection (2) applies where an appropriate person is appointed under section 10(2) for a service-user.
(2) The principles set out in subsections (2) to (4) of section 1 of the 2000 Act apply in relation to any assistance that the appropriate person proposes to give to the service-user as they apply in relation to any intervention in the affairs of an adult under or in pursuance of that Act.

12 Termination of appointment of appropriate person
(1) Subsection (2) applies where a local authority appoints an appropriate person under section 10(2) for a service-user.
(2) The authority may terminate the appointment if—
(a) the service-user requests it, or
(b) the authority considers that—
(i) the appropriate person is not complying with section 11, or
(ii) the appropriate person is not acting in the best interests of the service-user.

13 Eligibility for direct payment: review
(1) This section applies where a person receives notice under section 6(3)(a), 7(3)(a) or 8(3)(a).
(2) In specified circumstances, the local authority must on the request of the person review the reason stated in the notice.

(3) In subsection (2), “specified” means specified by the Scottish Ministers in regulations.

Further choice of option for self-directed support

14 Further choice of option for self-directed support

(1) Subsection (2) applies where—
   (a) under section 6, 7 or 8 a local authority gives a person an opportunity to choose an option for self-directed support,
   (b) the person chooses an option, and
   (c) there is a material change in the person’s circumstances after the choice is made.

(2) The authority must offer the person another opportunity to choose an option under the section concerned.

(3) The authority and the person may agree that subsection (2) also applies in other circumstances.

Local authority functions

15 Local authority functions

(1) This section applies where under section 6, 7 or 8 a local authority gives a person an opportunity to choose an option for self-directed support.

(2) The local authority must give effect to the self-directed support option chosen by the person.

(3) Compliance with the requirement imposed by subsection (2) fulfils any duty imposed on the authority by the relevant enactment to provide to the person the services or support to which the option relates.

(4) Compliance with the requirement imposed by subsection (2) does not affect—
   (a) any other function of the local authority in relation to the provision to the person of the services or support to which the option relates,
   (b) the exercise by the local authority of the power in section 12(1) of the 1968 Act to make available assistance in cash to or in respect of the person in relation to the services or support to which the option relates.

(5) In this section, “relevant enactment” means Part 2 of the 1968 Act or, as the case may be, section 22 of the Children (Scotland) Act 1995.

16 Carrying out of certain delegated functions

(1) This section applies where a function of a local authority under this Act or Part 2 of the 1968 Act is delegated under section 15 of the Community Care and Health (Scotland) Act 2002 (asp 5) to an NHS body.

(2) The local authority must take reasonable steps to ensure that, in carrying out the function, the NHS body has regard to section 1.

(3) In this section, “NHS body” has the meaning given by section 22(1) of the Community Care and Health (Scotland) Act 2002.
**Direct payments**

17 **Direct payments**

(1) A direct payment is a payment by a local authority to a person for the purpose of enabling the person to arrange for the provision of services or support by any person (including the authority).

(2) The amount of a direct payment is the amount that the local authority considers is a reasonable estimate of the cost of securing the provision of the services or support to which the payment relates during the period to which the payment relates.

(3) A direct payment may be paid in instalments.

18 **Assessment of ability to contribute**

(1) A local authority must carry out an assessment of a person’s ability to contribute to the cost of securing the services or support to which a direct payment relates.

(2) The assessment must be carried out—

   (a) before the direct payment is made, or

   (b) as soon as practicable after the payment is made (or, where it is being paid in instalments, after the first instalment is paid).

19 **Reduction and repayment of direct payment**

(1) This section applies where—

   (a) a local authority carries out an assessment under section 18 of a person’s ability to contribute to the cost of securing the services or support to which a direct payment relates, and

   (b) having regard to the assessment, the authority considers it is reasonable that the person contribute to the cost of the services or support.

(2) The authority may (but need not) reduce the amount of the direct payment by such amount as the authority considers appropriate.

(3) Subsection (4) applies where—

   (a) the authority reduces the amount of the direct payment under subsection (2), and

   (b) all or part of the direct payment has already been made.

(4) The authority may (but need not) require the person to repay a sum equal to—

   (a) the amount of the reduction (or the amount that has already been paid if less), or

   (b) such smaller amount as the authority considers appropriate.

20 **Review of reduction of direct payment**

(1) This section applies where a local authority reduces the amount of a direct payment under section 19(2).

(2) The person to whom the payment is (or is to be) made may require the authority to review its decision.
(3) If, on review, the person satisfies the authority that the person’s means are insufficient for it to be reasonably practicable for the person to contribute an amount equal to the reduction, the authority must increase the amount of the direct payment by such amount as it considers appropriate.

21 **Sanction for non-compliance with requirements**

(1) Subsection (2) applies where—

(a) a local authority makes a direct payment to a person, and

(b) the authority consider—

(i) that all or part of the direct payment has not been used to secure the provision of the services or support to which it relates, or

(ii) that there has been a contravention of regulations made under section 22 in relation to the direct payment.

(2) The authority may require the person to repay a sum equal to—

(a) the direct payment, or

(b) such part of the direct payment as the authority considers appropriate.

(3) In this section, references to a direct payment include references to an instalment of the direct payment.

22 **Direct payments: regulations**

(1) The Scottish Ministers may make regulations about direct payments.

(2) For the purposes of this Act, a person is ineligible to receive direct payments if the person is of a description specified in regulations under subsection (1).

(3) Regulations under subsection (1) may in particular, in relation to persons providing services or support to which a direct payment relates—

(a) specify descriptions of person who are prohibited from providing services or support (“specified persons”),

(b) specify circumstances in which specified persons may provide services or support,

(c) specify conditions which must be satisfied by persons before they may provide services or support.

(4) Regulations under subsection (1) may in particular—

(a) make further provision about—

(i) reviews under section 13,

(ii) the payment of direct payments by instalments,

(b) make provision about—

(i) the repayment of sums due under section 19 or 21 by instalments,

(ii) the reassessment of a person’s ability to contribute to the cost of securing the services or support to which a direct payment relates,

(c) specify conditions which must be satisfied before services or support to which a direct payment relates may be provided by the local authority that makes the direct payment,
(d) specify conditions which are to apply where services or support are to be provided by the local authority that makes the direct payment,

(e) specify circumstances in which authorities are not to be required under sections 6 to 8 to give a person the opportunity to choose—
   (i) Option 2 of the options for self-directed support, and
   (ii) so far as relating to that option, Option 4.

(f) specify circumstances in which local authorities may or must terminate the making of a direct payment,

(g) specifying circumstances in which a local authority may pay all or part of a direct payment to a person of a description specified in the regulations instead of to the person to whom the authority would otherwise be required to make the payment.

(5) For the purposes of subsection (4)(e), circumstances may in particular relate to persons or types of services or support.

General

23 Regulations: general

(1) Regulations under this Act may—
   (a) make provision for the delegation of functions to local authorities,
   (b) make different provision for different cases,
   (c) include such supplementary, incidental, consequential, transitory and transitional provision and savings as the Scottish Ministers consider appropriate.

(2) Regulations under this Act are subject to the negative procedure.

24 Interpretation

In this Act—
   “the 1968 Act” means the Social Work (Scotland) Act 1968 (c.49),
   “the 2000 Act” means the Adults with Incapacity (Scotland) Act 2000 (asp 4),
   “the 2003 Act” means the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13),
   “adult” means a person who is 18 years of age or over,
   “child” means a person who is under 18 years of age,
   “community care services” has the meaning given by section 5A of the 1968 Act,
   “direct payment” is to be construed in accordance with section 17,
   “option for self-directed support” is to be construed in accordance with section 2.

25 Consequential repeals

Sections 12B and 12C of the 1968 Act (which make provision in relation to community care services) are repealed.
26  **Short title and commencement**

(1) This Act may be cited as the Social Care (Self-directed Support) (Scotland) Act 2010.

(2) The provisions of this Act, other than this section, come into force on such day as the Scottish Ministers may appoint by order.

(3) An order under subsection (2) may contain transitional, transitory or saving provision in connection with the coming into force of this Act.
SELF-DIRECTED SUPPORT: A DRAFT BILL FOR CONSULTATION
How to respond

We welcome responses to this consultation paper by Thursday 17 March 2011. Please send your response with the completed Respondent Information Form to:

selfdirectedsupport@scotland.gsi.gov.uk

or
Kenneth Pentland
Self Directed Support Team
Adult Care and Support Division
Scottish Government
Edinburgh
EH1 3DG

If you have any queries contact Kenneth Pentland on 0131 244 5455

Please indicate in your response which questions or parts of the consultation paper you are responding to as this will help us to analyse responses.

This consultation and all other Scottish Government consultation exercises can be viewed online on the consultation web pages of the Scottish Government website at http://www.scotland.gov.uk/consultations.

The Scottish Government has an email alert system for consultations SEconsult: http://www.scotland.gov.uk/consultations/seconsult.aspx. This system allows people and organisations to register and receive a weekly email containing details of all new consultations including web links.

SEconsult complements, but in no way replaces Scottish Government distribution lists, and is designed to allow stakeholders to keep up to date with all consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and in particular whether you are happy for your response to be made public. Please complete and return the Respondent Information Form. This will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly. The Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps

Where you have given permission for your response to be made public and after we have checked that it contains no potentially defamatory material,
your response will be made available to the public in the Scottish Government Library.

You will be able to access all responses on the Scottish Government consultation web pages.

You can also make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date for the consultation, responses will be analysed and considered along with any other available evidence. We will publish a report on the consultation process shortly after the end of the consultation.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

Name: Kenneth Pentland
Address:
Self Directed Support Team
Adult Care and Support Division
2ER St Andrew's House
Edinburgh
EH1 3DG

Or e-mail: kenneth.pentland@scotland.gsi.gov.uk
Terminology

Self-directed support

Self-directed support (SDS) is defined in the national strategy on SDS as the principle that the citizen has informed choice and control over their care and support.

There are several mechanisms available to people to direct their own support. One way is taking a direct payment. A direct payment is when the local authority makes a payment in place of services that would otherwise be provided or arranged by the authority on the person’s behalf. As an alternative to managing the direct payment themselves a person can have it managed by a third party. Another way is directing the available budget. This option, sometimes called an individual service fund or individual budget, is where the person decides how their individual budget is to be allocated by the local authority to arrange support from one or more providers. The allocation of the individual budget determines the overall level of payment or service. Support can also be a combination of these.

But self-directed support is about more than one particular mechanism or another. It is about the citizen being able to make an informed choice and continuing to have as much choice and control as they wish.

Arranged service

Self-directed support allows people to make an informed choice, including that of not taking control of all of their arrangements. Some people may choose to leave the decision on how their support is provided entirely to the council. The term arranged service or arranged services is used in this document to describe situations where a local authority arranges services on behalf of a person in order to meet their assessed needs. This can include services provided directly by the local authority or purchased by the authority from a provider in the private or voluntary sector on the citizen’s behalf. It is a short-hand term to describe what might be called the traditional way of providing social care and support or community care services.

Co-production

Co-production involves support that is designed and delivered in equal partnership between people who use services/support and the professionals who are there to assist them. Before agreeing a support plan, supported self-assessment is used to help people think about their important outcomes. As part of the assessment people will discuss the budget available towards meeting these outcomes. The main purpose of the process is to give people more control over how their support needs are met, and by whom.
Personalisation

Self-directed support is often described as the personalisation of social and health care. There are three Changing Lives reports which defined the Scottish Government's position on personalisation. These are:

- 'Personalisation: A Shared Understanding';
- 'Commissioning for Personalisation'; and
- 'A Personalised Commissioning Approach to Support Care and Services'.

The Association of Directors of Social Work (ADSW) paper on Personalisation\(^1\) sets out their position on the personalisation of social work services as follows:

> 'enabling the individual alone, or in groups, to find the right solutions for them and to participate in the delivery of a service. From being a recipient of services, citizens can become actively involved in selecting and shaping the services they receive.'

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\(^1\) ADSW (2009) Personalisation: principles, challenges and a new approach; a statement by the Association of Directors of Social Work
Foreword

This is a time of great change for Scotland’s public services. The economic and financial challenges that we face are considerable. Over the next three years national and local government will have to deal with significant reductions in resources. But it is also clear that more of the same will not work. In particular, people have expressed a strong desire for greater choice and control over the services and support that they receive.

The care and support sector, central and local government, support organisations and providers must rise to this challenge.

Last month the Government together with COSLA launched a ten year strategy on self-directed support. In that document we set an ambitious vision where personalised, person-centred support becomes the mainstream approach for all.

This document, together with the draft Bill published alongside it, presents the Scottish Government’s legislative proposals to underpin the strategy. The draft Bill seeks to enshrine choice and control for the citizen, to sustain the changes outlined in the strategy and to bring the law into line with the vision that we have set.

I encourage you to respond to this consultation.

Shona Robison
Minister for Public Health and Sport

Decembe 2010
Executive Summary

Background

1. In summer 2010 the Scottish Government consulted on outline proposals for a Bill on self-directed support. This discussion document, together with the draft Bill which accompanies it, comprises the second phase of public consultation.

Bill content

2. The draft Bill contains provisions on the following matters:

- It introduces the term self-directed support into statute

- It provides general principles on user choice and control, applying them to both the Bill and to Part 2 of the Social Work (Scotland) Act 1968.

- It places a duty on local authorities to provide people with a range of options so that the citizen can decide how much choice and control they want. If enacted, this framework would be available to all social care clients including adults receiving support under the Social Work (Scotland) Act 1968 and children receiving support under the Children (Scotland) Act 1995. The choice should no longer be a default of arranged services with the option of a direct payment for particular groups of people in particular circumstances. The choice should become a more balanced one: everyone will direct their own support, to whatever extent they choose.

- Where an adult is unable to direct their support and where guardianship or power of attorney is not in place, the Bill enables the local authority to appoint a person who can help the adult to direct their support.

- It provides a power to local authorities to provide support to carers along with a duty on the local authority to empower the carer to direct their support.

- It contains provisions to encourage and underpin self-directed support in relation to packages involving joint social and health care funding.

- It consolidates and modernise current statute on direct payments.

- Finally, it contains a range of regulation-making powers allowing Ministers to bring forward secondary legislation on certain matters relating to the Bill.

3. In addition, the consultation document explores some further changes that might be made to the Social Work (Scotland) Act 1968. The aim behind these proposals is to complement and sustain the Bill’s vision to foster a
mutual, person-centred approach to care and support. Comments are invited on these proposals as well as those contained within the text of the draft Bill.

Closing date for responses

4. The Government invites views from individuals, organisations and professional bodies. The closing date for responses is Thursday 17 March 2011.
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Introduction

1. This is the right time to ask you for your views on this draft Bill on self-directed support.

2. “More of the same won’t do” - The challenges to our public services are formidable: social inequalities, an ageing population and increased public expectations about the choice and control that they expect to exert when they receive services from the state. The Scottish Government has set an ambitious vision for reform of public services. The reforms contained within this draft Bill, and those outlined in the joint COSLA/Scottish Government strategy on self-directed support, are part of that vision.

3. The gap between evolving practice and the law - Social work practice has moved on considerably from 1996 when the first piece of legislation on one of the key mechanisms of choice and control - direct payments - came into being. For one thing, direct payments are no longer the only route for people to direct their own support. The wider concept of self-directed support is, rightly, gaining a strong foothold in social care practice. But the legislation on adult social care lags behind this changing landscape. Practitioners and users alike operate under legislation that is 15, sometimes 40 years old. The language of service provision and the concept of provided, mainstream or arranged services continues to dominate.

4. A new strategy - Policy, practice, research and legislative developments in Scotland and beyond have increasingly focused on the personalisation of services. This reflects the growing expectations of people that they should be able to exercise choice and control over the services that they receive. In November 2010 the Scottish Government, together with COSLA, published a strategy to bring self-directed support into the mainstream of social care provision. The strategy sets out a ten-year framework for the development of self-directed support as the main way to deliver social care, supporting the personalisation of services in Scotland. Without legislation to underpin this strategy the task of growing self-directed support will be yet greater for national and local government, providers, support organisations and social care users.

5. Statistics - Across Scotland, increasing numbers of people are directing their support, largely through direct payments. But the numbers overall remain low. On average, Scottish local authorities make less use of direct payments per head of population than England and Wales. Anecdotal

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2 Recent reports of note include the report of Scotland’s Independent Budget Review Panel (July 2010), the 2020 Public Services Report From Social Security To Social Productivity: a vision for 2020 Public Services and the National Endowment for Science, Technology and the Arts (NESTA) report, Radical Scotland: Confronting the challenges facing Scotland’s public services (October 2010)
3 Convention of Scottish Local Authorities
4 Statistics on direct payments were published in September 2010 http://www.scotland.gov.uk/Publications/2010/09/27093422/0
evidence suggests that access to individual budgets or individual service funds is similarly low, if not lower. Taken in isolation a change to the law cannot by itself increase take up. But what it can do is to underpin a significant change in culture and practice by embedding choice and control in the assessment and support planning processes.

6. **Strong support** - Finally, there is widespread support for legislation. A National Reference Group, with representation from key interests including people who use support, representatives from central and local government, COSLA, voluntary organisations and private care providers, was established by the Minister for Public Health and Sport in 2008. There was broad support for existing direct payment to be made more concise through consolidation in a new Act and for the introduction of the term self-directed support into statute. In August 2010 the Minister for Public Health and Sport convened an expert Steering Group to advise the Government on the detail of the legislative proposals. The Steering Group will continue to meet during the consultation period and in the run up and throughout any Parliamentary process.

7. This consultation follows an earlier period of consultation completed in June this year. An analysis of responses from the first round of consultation can be found at:–
http://www.scotland.gov.uk/Publications/2010/09/16114749/0

8. The individual responses can be found at:–
http://www.scotland.gov.uk/Publications/2010/08/06131128/0

**Next steps**

9. In this document we provide a summary of the content of the draft Bill. We also pose a number of questions on both the provisions that it contains and on potential gaps. We welcome views and evidence from individuals as well as from organisations and professional bodies. We want to know if you support the proposals or not and if you think they will make a difference. We want to know what you would change in the draft Bill and why. We want to hear your views on the potential impact of the legislative changes. In particular, we want to hear your views on our draft Business Regulatory Impact Assessment which sets out our initial assessment as to the possible costs, benefits and impacts that might arise from the legislation. Finally, we want to hear your views on our draft Equality Impact Assessment.
Objectives for the draft Bill

Legislation is sometimes perceived as a negative route to enforcing change. However, it can also provide an opportunity to bring statute up to date with the significant developments in social care over recent years, and to meet the demands for clarity about rights and responsibilities.

Self-directed Support: a national strategy for Scotland (November 2010)

10. We want the rules on self-directed support to be appropriate, to be fair and to be reasonable. The following words express our vision for the draft Bill.

To provide a positive, empowering legal framework on care and support

11. The Bill should enable things to happen in the right way. It should empower people and practitioners alike to get good quality care and support in place and it should empower people to take as much control as they want.

To reformulate the “balance” in the legislation between the citizen and the state

12. The Bill should raise the profile within adult social care law of the rights and responsibilities of the citizen in relation to the state. It should ensure that the law plays its part to underpin genuine co-production, to move away from gift and service-based models towards person-centred support and better outcomes for people.

To be clear to people, practitioners, and providers

13. The Bill should be clear and relatively simple to understand because it is citizens, practitioners and providers who will implement both the letter and the spirit of the law. People must know where they stand and what they are entitled to expect.

14. We encourage you to consider whether the draft legislation achieves these objectives. If you think that it should be improved, we want you to tell us why and in what ways.

Consultation questions: objectives for the draft Bill

Question 1(a) What are your views on the objectives that we have set for the Bill?

Question 1 (b) Do you think that the draft Bill meets the objectives that we have set? If not, why not and how should the Bill change in order to meet them?
General principles
Section 1 in the draft Bill

15. Modern legislation can include a statement of fundamental principles upon which the Act is based. Statutory principles can achieve a number of things. They can establish a basis under which a decision-maker must make their decisions. They can set out general assumptions under which decision-makers should act. Finally, they can articulate the underlying aims or “spirit” of the legislation, providing a useful addition to the duties and powers provided elsewhere in the Act.

16. When we consulted on our outline proposals there was strong support for having general principles on the face of the Bill. There was less agreement about what those principles should be. For the draft Bill we have decided to limit the number of principles to those core principles that need to carry the force of law.

17. We have decided not to restate principles which appear elsewhere, such as the National Care Standards\(^5\), the Adult Support and Protection (Scotland) Act 2007, the Mental Health (Care & Treatment) (Scotland) Act 2003 and the Adults With Incapacity (Scotland) Act 2000. Similarly, we recognise that our strategy on self-directed support, published on 23 November, provides core values which complement the principles of choice and control.

18. The draft Bill therefore contains the following principles:

- A person should have as much involvement in the assessment of the person’s needs and the provision of services or support for the person as is reasonably practicable. 
  This is about the individual’s involvement and control in both the assessment of need and in deciding how to meet those needs, i.e. directing support.

- A person should be provided with any assistance that is reasonably required to enable the person to make an informed choice when choosing an option for self-directed support.
  This is about the local authority facilitating informed choice for the individual.

- A local authority should co-operate with a person in dealing with any matter relating to the services or support provided to the person.
  This is about partnership, mutuality and co-production.

\(^5\) http://www.nationalcarestandards.org/
19. Section 1, sub-section 1 in the Bill makes it clear that the above principles apply both to this Bill and to Part 2 of the 1968 Act. In other words, they apply also to local authorities’ general social welfare responsibilities under section 12 of the 1968 Act, to their duty to assess needs (section 12A), their duties with respect to carers (sections 12AA and 12AB) and to Section 13ZA (Provision of services to incapable adults). Later in this document (pages 25 to 28) we discuss the potential to make some further amendments to Part 2 of the 1968 Act.

**Consultation questions: general principles**

Question 2 (a) What are your views on the general principles included in the draft Bill? [Bill reference: section 1]
Choice and Control: the “framework” provisions
The duties and powers relating to self-directed support
Sections 2, 3, 6, 9, 13, 14 and 15 in the draft Bill

“What is crucial in the implementation of self-directed support is that all options are given equal weight, preventing some existing attitudes and practice that limit access to direct payments.”

Self-directed Support: a national strategy for Scotland (November 2010)

20. Together, sections 2 and 6 within the draft Bill provide the main “framework provisions”: the core rights, duties and powers on self-directed support. Some of these come from existing legislation, others are new, to cover gaps or apply to new circumstances. Together, they are intended to provide a clear route to informed choice and control for all.

Choice and Control: the new “default”

21. In our previous consultation, we asked about moving from an ‘opt in’ to an ‘opt out’ of self-directed support. Many of those who responded to that consultation were concerned that if the opt-out were to apply to a particular mechanism of self-directed support, such as a direct payment or even the individual budget from which the direct payment is drawn, this would effectively force people down routes that they might not wish to take and would run counter to the principle of choice for the user. We have taken note of the comments that we heard but it is our firm view that the status quo, in terms of the current imbalance in favour of arranged service provision, cannot continue. The draft Bill removes the current default, where local authority arranged services are the assumed norm, replacing it with a clear framework of options. Control should not be forced upon those who do not want it. Choice should be real and every choice should be equally valid. At the same time, people should have as much control as they wish they and should be able to select the mechanism of their choice. The aim behind sections 2 and 6, together with the general principles, is to strike the right balance of citizen choice and control, but to do so in a way that is radically different to the current assumption in favour of the state owning the decision-making process.

22. Section 6, sub-section 2 places a duty on the local authority to provide to the individual the options outlined earlier in the Bill. These are:-

| Direct payment | Directing available budget | Local authority arranged service | Combination of eligible options |

23. From these options should flow other options, such as so-called ‘indirect’ payments or “third party” direct payments.
24. To reinforce this duty, there are two specific provisions in place. The first, at section 3, says that the local authority must take all reasonable steps to promote the availability of the self-directed support options. The second, at section 15, subsection 2, places the local authority under a duty to provide the person with the option of their choice except, of course, where the person is ineligible for a particular option.

25. This legislative framework is intended to provide people with a sliding scale of control. We recognise that some people will not want to take full control of their care and support, and their choice may be to delegate all or some of this control to the local authority. At the other end of the scale there are people willing and able to take full ongoing control and to accept the responsibility and accountability that comes with that decision. The main priority, in terms of legislation, is that choice is genuine, and that duties and powers are clear and sufficiently strong in their intent.

**Informed choice**

26. Section 9 (additional information to be supplied) and the general principle in section 1 means that the citizen must be provided with an opportunity to make not just a choice but to make an *informed choice*. This means that the local authority must tell the person what self-directed support is, what each available choice means in practice and which organisations can provide them with advice and assistance in order to help them make their choice.

**Local authority duties where someone is not eligible for a direct payment**

27. Under the Bill everyone will be able to choose how they wish to direct their support. Except in some specific circumstances relating to the direct payment option, we can see no circumstances under which someone should be denied the opportunity to choose from the four options outlined in section 2 of the draft Bill. Where eligibility for a direct payment is restricted (this would be achieved via regulations) the restrictions should be limited to a very small number of circumstances. Though the local authority will not be under a duty to offer a direct payment to someone who is not eligible for one, section 6, sub-section 3 means that local authorities would be under an obligation to explain to a citizen why they are not considered to be eligible and to make it clear that they can choose one of the alternative options available.

**Right to review, or to make an alternative choice**

28. One of the issues raised in our first phase of consultation was that people are concerned about making a choice that ties them to a particular option in the long term. If a person chooses to have an arranged service but they wish to change to a direct payment they should be able to do so. Similarly, if they choose a direct payment and find the ongoing control and responsibility is not for them, they should be able to opt for less control and move to an individual budget without the direct payment. The main priority is
to ensure that it is the citizen’s choice as to how much control they wish to have.

29. In light of this the draft Bill provides section 14, which makes it clear that everyone has the option of changing their mind and that a person will have the right to review their choice of support. This will apply when there has been a material change of circumstances, or in other circumstances as must be agreed between the person and the local authority. Importantly (and subsection 2 makes this clear) when an initial decision is reviewed the user must then be offered the full range of choices once again. It is a right of review, with the local authority and person working in partnership to consider their options.

30. There is also a right to review a decision about eligibility for a direct payment. Section 13 provides that, where a local authority has decided that a person is ineligible for the direct payment option, that person may ask for this decision to be reviewed in specific circumstances. These circumstances will be set out in regulations.

31. The “right to review” the mechanism of choice does not affect regular reviews of care and support packages. At the same time, we want to ensure that all people have the opportunity to access the choices available under this new framework, not just those who are undertaking “new” assessments following enactment of this Bill. Reviews of care needs should be undertaken at regular intervals. In light of this, and in addition to inviting comments on the detail of the current review provisions, we invite comments on ensuring that all people subject to care reviews come into this new framework of choice.

**Consultation Questions: the self-directed support framework**

Question 3 (a) What are your views on our “framework” provisions? [Bill reference: Sections 2, 3, 6, 9, 13, 14 and 15]

In particular,

3 (b) Do you think that the rights, duties, powers and choices set out in the Bill are the right ones, specifically the four options, the duty on local authorities to provide those four options and the duty to provide the adult’s preferred option?

3 (c) Is there anything that you would change or do you think that something is missing from this legislative framework?
Working together: links to health, housing and beyond
Sections 16 in the draft Bill

32. When we first consulted on our outline proposals we asked about extending self-directed support to areas beyond social care. We also asked about joint working to deliver self-directed packages. Many respondents wanted to see this, particularly in relation to health care and the NHS.

33. The Scottish Government is committed to strong partnership working across health and social care through Community Health Partnerships and initiatives such as Reshaping Care for Older People. The Community Care and Health (Scotland) Act 2002 (“the 2002 Act”) already allows partnerships to put in place integrated financial arrangements so that they can work together. The 2002 Act also allows local authorities and NHS bodies to delegate functions to each other to facilitate individual care packages. In addition, Single Shared Assessment allows for local authorities to delegate the assessment function to NHS boards or Housing Authorities.

34. The Self-directed Support Strategy sets out in more detail many of the existing policy initiatives in joint working. For example, the Government has provided funding to NHS Lothian to pilot the integration of health and social care monies in self-directed support packages. The draft Bill is limited in scope to social care and to the decision-making by local authorities and citizens. It is not, at present, the vehicle to place duties on other bodies apart from the local authority. That said, we want the Bill to make it clear that, where pooling of budgets is taking place, the principles of self-directed support should be considered. For example, where an assessment under section 12A of the 1968 Act is delegated to an NHS body the draft Bill provides that a local authority must take reasonable steps to ensure that the NHS body have regard to the principles and provisions of self-directed support. This duty is found at section 16 in the draft Bill. We think that this achieves the aim that we have set for the Bill however we welcome views on whether you think that more could or should be done in terms legislation.

Consultation Questions: links to health, housing and beyond

Question 4(a) What are your views on section 16 within the draft Bill? In particular, do you think that there should be further legislative provisions relating to self-directed support, individual care packages and joint working between social care, health and beyond? If so, what should be added and why?
Children and young people
Sections 8 in the draft Bill

35. Direct payments are available in place of services provided under the Children (Scotland) Act 1995 (the 1995 Act), as well as under the Social Work (Scotland) Act 1968 (the 1968 Act). The draft Bill restates and widens this position, enabling children, young people and their families to have the same entitlement not just to direct payments but to all forms of self-directed support. In particular, the Bill provisions have been drafted to work alongside the objectives of Getting It Right For Every Child (GIRFEC), the foundation for work with all children and young people in Scotland. It is a key principle of GIRFEC that decisions about children’s well-being should involve the full engagement and participation of children themselves. It would be wrong to simply assume that a child or young person will take the same view as their parent about the care and support they need, and though it is not stated explicitly on the face of the Bill, actions taken under this Bill would be subject to section 6(1) of the 1995 Act.

Section 6(1), Children (Scotland) Act 1995

6 Views of children.
(1) A person shall, in reaching any major decision which involves—

(a) his fulfilling a parental responsibility or the responsibility mentioned in section 5(1) of this Act; or

(b) his exercising a parental right or giving consent by virtue of that section, have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child’s age and maturity, and to those of any other person who has parental responsibilities or parental rights in relation to the child (and wishes to express those views); and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.

36. The draft Bill also looks to address the fact that, arising from the needs of a child, support might be provided to other family members or indeed a whole family. Provisions at section 8, subsection 5, indicate who should have responsibility for directing support in such circumstances. We welcome views on whether or not the balance is right, and how this might work in practice.

16 and 17 year olds

37. It is important that children, young people and their families in general can direct their own support. But there is a much more focused issue around the application of self-directed support to young adults - that is, sixteen and
seventeen year olds, who are in transition between children’s and adult services.

38. Current legislation allows local authorities to provide direct payments to sixteen and seventeen year olds in some circumstances\(^6\). We understand, however, that this power is not widely used. At present sixteen and seventeen year olds must receive their support under the 1995 Act as the 1968 Act is limited to those who are eighteen or over. In considering the draft Bill, it seems inequitable that young people who are elsewhere considered to be adults are not empowered to take fundamental decisions about their own support for themselves. We think that the right to review and the local authority duty of care, contained in the framework, provide sufficient safeguards and create an environment which can support young people to exercise informed choice. The draft Bill therefore provides that sixteen and seventeen year olds should direct their own support. This leaves some outstanding questions about how the wider provisions of the Bill will apply to sixteen and seventeen year olds, in particular the provisions on those who need help to direct their support (sections 10 - 12 within the Bill).

**Consultation Questions: children and young people**

Question 5(a) What are your views on the provisions relating to self-directed support for children and young people? [Bill reference: section 8]

Question 5(b) Do you agree that all forms of self-directed support should be available to children, young people and their families, and that they should have the same options as adults directing their own care and support?

Question 5(c) Do you think that sixteen and seventeen year olds should be empowered to direct their own support?

Question 5 (d) What are your views on how the various other provisions within the Bill apply to children and young people? For example, are there any specific circumstances where you feel that a particular provision should not apply to children and young people’s support?

\(^6\) Regulation 5, The Community Care (Direct Payments) (Scotland) Regulations 2003
People who need help to direct their support
Sections 10 to 12 in the draft Bill

“Enabling risk in adult social care has no simple answer. No guidance or toolkit can outweigh the skilled judgement of practitioners who understand the balance between protecting individuals who need support while applying the values and principles of SDS.”

Self-directed Support: a national strategy for Scotland (November 2010)

39. The draft Bill underpins a new approach where individual choice and control becomes the norm, not the exception. The majority of social care clients will be capable of engaging with this new way of doing things. In other words, they will be able to decide how much control they wish to have and they will be able to make an informed choice. However, we know from the responses to our first phase of consultation that local authorities and providers work with a very wide range of people, many of whom will find it much more difficult to take control on an ongoing basis. In particular, significant challenges can be faced by people with mental illness, people with learning disabilities, people who have severe head injuries or people with dementia. The adult in question may have a welfare or financial guardian or an attorney on hand to take important decisions for them. On occasion, however, they will have no such formally appointed person to help them.

40. This part of the discussion document accompanies sections 10 to 12 within the draft Bill. The aim is to provide local authorities with a discretionary power to allow others to direct an adult’s support and, where necessary, to direct support on another person’s behalf. These powers are not intended to affect Adults with Incapacity (AWI) procedure. AWI would remain the sole route where a significant intervention is made into an incapable adult’s affairs. Similarly the powers in the draft Bill would not affect obligations and powers relating to guardianship, nor would they affect or in any way limit the right of people to take out a Power of Attorney. They are, however, intended to offer a clear route, underpinned by legislation, empowering local authorities to allow people’s family or friends to direct a person’s support where this is the logical, common sense solution. It is vital that everyone has access to flexible, person-centred support and sections 10 to 12 have been drafted to ensure that this is the case.

Safeguarding an adult’s right in the first instance to direct their own support

41. The first priority should be to obtain an informed decision from the adult themselves. There are a number of practical steps that local authorities can take and best practice guidance on AWI sets these out. These are the type of steps that we have in mind under section 10, sub-section 5.

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7 See the Adults with Incapacity (Scotland) Act 2000: Communication and Assessing Capacity: A guide for social work and health care staff [http://www.scotland.gov.uk/Publications/2008/02/01151101/0](http://www.scotland.gov.uk/Publications/2008/02/01151101/0)
What should happen when someone cannot direct their own support?

42. Where it is clear that the adult cannot direct support on their own or even with support a person appointed by the adult themselves or by a court takes precedence over all others. This means that where the adult has a guardian or attorney and where that person has the relevant powers, only the guardian or attorney would be able to take the relevant choices and make the necessary "self-directed support decisions". But where there is no guardian or attorney or where existing attorneys or guardians do not have the necessary powers, section 10, sub-section 2 provides the local authority with a discretionary power to assign responsibility for the relevant self-directed support decisions to another person. The "trigger point" for such delegated responsibility arrangements is defined under section 10, sub-section 1. The appropriate person should only be considered where the local authority conclude that an adult needs assistance in directing some or all of the elements of their own support due to a mental disorder or disability that prevents the person from being able to make the necessary decision.

Who can be appointed to this role?

43. The appointed person is defined as someone “appropriate” to direct an adult’s support to their benefit. Deliberately, the Bill itself does not provide detailed provisions to expand on the appropriate definition on the face of primary statute. We do not intend to lay down complex procedures: the aim is to reduce unnecessary bureaucracy and complexity. Some may consider that a further regulation-making power is necessary so that Ministers can expand on the definition in greater detail and define any steps that a local authority may or must take to determine if someone is appropriate and willing to take on such a role. We invite views on whether you think that such regulations would be needed and if so, what they should contain.

Safeguards

44. In any situation involving people considered to be vulnerable, safeguards are important. The following bullet points summarise the range of safeguards that would accompany and surround the “appropriate person” provisions contained within the draft Bill.

- The appropriate person would only be able to take decisions in respect of the adult’s social care and support as it has been assessed under the 1968 Act. This will involve welfare decisions that will lead to better social care outcomes for the adult.

- The appropriate person’s powers would be limited to those elements of "directing support" where the adult needs someone to assist. For example, where an adult knows which mechanism they want but can't handle that mechanism on their own, the appropriate person will not be able to change their choice, they will simply be able to step into the adult’s shoes to administer the decision. In the case of a direct payment it would involve some money management decisions.
- A person appointed to assist an adult in this way should not be able to deprive that person of their liberty.

- A person’s powers, such as they are, would extend no further than the areas outlined above. They would not, for example, have the full range of powers that would come with certain powers of guardianship or attorney, such as powers to control the adult’s estate or to make major decisions about medical interventions.

- All decisions in this area should be made in accordance with the principles of the Adults with Incapacity (Scotland) Act 2000 (see section 10, subsection 6 in the draft Bill).

- The local authority does not abdicate its duty to the adult under Part II of the 1968 Act. In other words, they will continue to have their duty of care.

- The right of review, located at section 14 within the draft Bill, provides that the adult or local authority - in this case the appropriate person, guardian, attorney, or local authority - can review the initial choice regarding the four “mechanisms” of self-directed support.

- Direct payments in particular will continue to have a range of safeguards set down in law. For example, the local authority would continue to have the power to end a direct payment on evidence of gross misuse of funds and to require the repayment of funds where necessary (section 21 in the draft Bill). In addition, we are considering bringing forward regulations alongside or following any Bill, which would prevent someone who is appointed to direct another’s support from employing themselves as a personal assistant.

- Section 13ZA of the 1968 Act allows a local authority, where they have assessed an adult as being in need of care and where they consider the adult to be incapable of making decisions about that service, to “take any steps which they consider would help the adult to benefit from the service.” We do not intend for local authorities’ powers provided via Section 13ZA to be affected by this Bill. We believe that even with the flexibility afforded by this Bill a local authority might continue to require such powers.

- Finally, there are the various other statutory powers provided within the 1968 Act and by other legislation, for example the Adult Support and Protection (Scotland) Act 2007 and the Adults with Incapacity (Scotland) Act 2000. Again, the powers provided under this Bill would not affect local authorities’ and others’ powers to intervene or apply to the courts under these Acts.

**Discussion**

45. The arrangements outlined here are intended to be clear, simple and proportionate. They recognise that capacity is not a black and white, all or nothing issue. They recognise that not all people who have difficulty coming
to or expressing an informed choice will have a guardian or attorney on hand to take decisions for them. Safeguards are important and local authorities should consider how they might give effect to some of these duties and powers. At the same time, arrangements should not lead to wasteful or counter-productive bureaucracy, nor a complex appointment procedure set down in primary statute. We would like to hear your views on whether you consider this a reasonable and proportionate way to address this question. If you disagree we would like to hear what you would do differently and how we should address this question in the draft Bill.

Consultation questions: people who need help to direct their support

Question 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 procedure would be disproportionate? [Bill reference: sections 10, 11 and 12]

Question 6(b) What are your views on the “trigger point” to allow such powers to be used?

Question 6(c) If enacted, the provisions in this Bill would join the current Section 13ZA of the 1968 Act. Section 13ZA provides quite wide ranging powers to local authorities. Do you think that Section 13ZA should be amended in any way in light of this Bill?
Self-directed support for carers
Sections 5 and 7 in the draft Bill

“the Scottish Government recognises carers as “partners in care” - partners who require to be acknowledged, supported and equipped to continue to provide unpaid care.”

Self-directed Support: a national strategy for Scotland (November 2010)

46. Carers play a crucial role in the delivery of health and social care provision in Scotland. The 657,300 carers in Scotland - 1 in 8 of the population - are an essential part of the workforce in its broadest sense, contributing savings to health and social care services in Scotland of an estimated £7.68 billion every year. Put simply, without the valuable contribution of Scotland’s carers, the health and social care system would be unsustainable.

47. Caring Together, the Government’s strategy for carers published in July this year, lays out a ten-point plan with specific commitments to help carers. This includes:

- creating a Carers Rights Charter;
- investing in carers training;
- improving the identification of carers by health and social care services;
- making carers’ own health and wellbeing a priority; and
- promoting carer-friendly employment practices and encouraging income maximisation.

48. Section 5 within the draft Bill provides a power to local authorities enabling them to provide support to a carer following a carer’s assessment. Where the local authority has decided to provide such support then section 7 in the draft Bill would apply. In other words, the local authority would have to ensure that the carer is able to direct their support in whatever way that they wish.

49. Section 7 refers specifically to provision of support for adult carers. This is because young carers can already be provided with support under section 22 of the Children (Scotland) Act 1995 and for this Bill they would therefore be covered under section 8.

The reasons behind the provisions on carers

50. Often a small expense in the short term can help to prevent problems or difficulties further down the line. The carers provisions in the Bill are intended

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http://www.scotland.gov.uk/Publications/2010/07/23153304/0
to underpin what may be fairly modest but important interventions to support and sustain carers in their role. Some examples of where we think that the Bill powers might be used are as follows:

- The local authority could release a modest budget, perhaps through a direct payment, to support the carer in the specific tasks and demands associated with caring. If the support were to be provided via a direct payment, this may be a useful alternative to the local authority paying for provision of a service to the household, or the authority arranging for a training course to be provided to the carer.

- Respite care is funded on a daily basis by local authorities. The service user is supported and the carer can benefit from a break. However, the service is often provided through traditional means on behalf of the cared for person when it may make more sense to make a direct payment to the carer so that they can make their own arrangements.

- The local authority may already be making payments towards costs to transport the cared for person. It might be of benefit to both the carer and the individual, and be more cost effective in the long-term, for the local authority to pay for driving lessons and a driving test, to enable the carer to transport the individual.

- The provision of other services and support to relieve the carer of some of their many other responsibilities such as housework, childcare or gardening, enabling the carer to focus on providing the more personal forms of care.

How and when would this new power apply?

51. Section 5, sub-section 4 defines some important matters for a local authority to consider if and when they are thinking about providing support to a carer. In particular, they should be considering using this power where the intervention would help to prevent the deterioration of the condition of the carer or cared for person or prevent greater expense at a later date. We included this provision in order to reflect the views of many people during the first phase of consultation – to make it clear when we would expect this power to be used. On the other hand, a significant minority, including some local authority respondents, said that specifying the scope for the local authority’s power in this way might in fact restrict the potential for this power to be used more than is necessary. We invite your views.

**Consultation questions: self-directed support for carers**

Question 7(a) What are your views on the provisions within the draft Bill relating to carers? [Bill reference: sections 5 and 7]
Provisions on Direct payments
Sections 17 - 22 in the draft Bill

“There are various barriers to direct payments. These include assumptions and attitudes about the characteristics of people who may benefit from them, limitations on the use of the allocated budget, and to some extent a vested interest in the status quo.”

Self-directed Support: a national strategy for Scotland (November 2010)

52. While the Bill is about self-directed support in its widest sense, the mechanism of a direct payment will continue to play a key role in achieving self-directed support and achieving better outcomes. Much of the existing law on direct payments stems from the Community Care (Direct Payments) Act 1996, with further amendment from the Regulation of Care (Scotland) Act 2001 and the Community Care and Health (Scotland) Act 2002. This means that some direct payment law is nearly 15 years old. Here we consider the direct payment provisions provided within the draft Bill. In consolidating current direct payment law we have attempted to reformulate the relevant powers and to clarify what can and cannot be done. We invite comments on whether we have achieved this aim.

The duty to offer a direct payment
Current reference: Section 12B, subsection 1 of the 1968 Act

53. The current duty to provide direct payments has been incorporated into the self-directed support framework provisions, in particular section 2 and section 6 in the draft Bill. This means that the current section 12B, subsection 1 provision in the 1968 Act would be repealed under the Bill. A local authority will no longer simply offer a direct payment, they would be required to offer a full range of choices, including the direct payment, and to respect the individual’s wishes regarding their choice. Where restrictions on access to direct payments remain, these will be dealt with in regulations.

The requirement to “consent” to a direct payment
Current reference: Section 12B, subsection 1B of the 1968 Act

54. The language of consent is unhelpful. We think that it might in fact encourage a certain suspicion about the perceived risk of direct payments, negating the many opportunities that they offer. The current section 12B, subsection 1B would be repealed under the Bill and replaced by Sections 10, 11 and 12 in the draft Bill.

Financial contributions, means testing, gross and net payments and repayments following financial assessment
Current reference: Section 12B, subsections 1A, 2, 5A and 5B of the 1968 Act Sections 18, 19, 20 and 21 in the draft Bill
55. There are a range of duties currently in force in relation to an individual’s financial contributions towards their direct payment, gross and net payments and financial assessment. For the most part the intent behind these rules has been retained within the draft Bill though some of the legal language has been modified. In detail, this means the following:

- Local authorities would retain the ability to conduct a means test and require an individual to contribute financially to the cost of the care and support they need, as they would under an individual budget without a direct payment or “arranged” service provision. The rules on financial contributions should be the same, regardless of the option selected.

- The facility for direct payments to be made either gross or net would be retained, though we envisage this being brought forward under regulations rather than via the Bill itself. The ability to make payments gross was introduced in 2002, in order to provide parity with people receiving other local authority services, and it also enables clear distinction between the payment and the individual’s own funds.

- A local authority would retain the ability to choose to disregard the means test and provide support on the basis that a person has no ability to make any financial contribution.

**Provisions reinforcing the principle that a direct payment can be used to purchase support from any person, provider or local authority**

Current reference: Section 12B, subsections 1C and 3 of the 1968 Act
Section 17 in the draft Bill

56. The current direct payment legislation contains provisions that put it beyond doubt that, with a few exceptions, a direct payment can be used to purchase support from *any person* including the local authority itself or other authorities. The draft Bill restates this very important principal. Where restrictions remain, these will be dealt with in regulations.

**Stopping a direct payment and requiring funds to be returned**

Current reference: Section 12B, subsection 5
Section 21 in the draft Bill

57. Current direct payment provisions allow a local authority to reclaim some or all of a direct payment from someone where they consider that it has been grossly misused, or where it has been used to obtain a service from someone who an individual is not allowed to purchase from. We have retained this power within the draft Bill.

**Fulfilment of duty to provide services**

Current reference: Section 12C of the 1968 Act
Section 15 in the draft Bill

58. The current direct payment provisions around what we might call the local authority ‘duty of care’ feature in section 15 of the draft Bill.
provisions has been widened out to cover all options, rather than just direct payments. Section 15 intends to show where a local authority has fulfilled its duty to provide support, and what functions they retain even when that duty has been fulfilled.

**Consultation questions: provisions on direct payments**

Question 8(a) What are your views on the provisions within the draft Bill relating to direct payments? [Bill reference: Sections 17 – 22]
Regulation-making powers: when to enable and when to restrict?
Sections 22 and 23 in the draft Bill

59. Most items of legislation contain regulation making powers. Regulations, or Statutory Instruments as they are sometimes called, provide Ministers with the right and responsibility to draw up more detailed legal obligations. Some of these would have to be in place on enactment of the Bill. Others may be placed at a later date. In this part of the discussion document we ask for your views on where and how we should use regulation making powers. For the most part, we would expect to bring forward regulations on eligibility for direct payments, who can and who cannot provide support under a direct payment and to deal with the question of use of direct payments for residential accommodation. Where should we seek to use regulations to limit access to self-directed support, in particular the direct payment, if indeed we should do this at all? Alternatively, where should we utilise regulations to provide greater clarity on when authorities and citizens can do things, as opposed to where they cannot? Our view is that restrictions of any kind should only be imposed where there are clear and justifiable reasons to do so. Here we invite your views.

Eligibility for self-directed support and direct payments

60. The Bill imposes a duty on authorities to provide four choices to people who have been assessed as needing care or support. We see no reason to restrict eligibility to the four options, aside from a very narrow range of circumstances related to the direct payment option. Currently, Regulation 2 within the 2003 Direct Payment Regulations provides a detailed list of people who are not eligible to receive direct payments. This includes:

a. people who are do not fall under the definition of “persons in need”
b. people who are “incapable of managing a direct payment, with or without assistance”
c. a child aged less than 16
d. a person who is subject to a compulsory treatment order, a compulsion order, an emergency detention certificate or a short term detention certificate
e. people who are subject to various court orders, drug and treatment testing orders, released from prison on license, on a community rehabilitation order, absent from hospital with leave or a supervision and treatment order.

61. When we first consulted on our proposals we suggested dispensing with the restriction on people with compulsory treatment orders. There was strong support for this change and it remains our policy. Other aspects, such as the group listed under c) above, will change with the new Bill – making it clear that direct payments and other forms of self-directed support are available to
children under 16 albeit with others managing the money. In this second phase of consultation we would like to hear your views on the various other categories of people currently ineligible for direct payments, specifically the people listed in d) and e) above. In some cases, for instance the restriction on people released on licence from prison, we are minded to retain the current restriction. In other cases, for example compulsion orders\(^9\), we wonder if there is a compelling case to retain the restriction.

**Consultation questions: eligibility for direct payments**

Question 9(a) We propose to remove the current restriction which prevents people subject to a Compulsory Treatment Order receiving their care and support as a direct payment. Do you believe that any of the restrictions on various other categories of people, for example the restriction on people subject to Compulsion Orders, should also be removed? If so, which ones and why?

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**The provision of services or support under a direct payment**

62. Regulation 4 in the 2003 regulations lists the people who cannot provide support under a direct payment arrangement. In other words, it lists people who cannot benefit financially from money released to a person through a direct payment. This list includes the direct payment recipient’s spouse, parent, grandparent and any other close relation. It is accompanied by a further regulation which states that the restriction can be waived by a local authority where it is satisfied that securing the support from the listed person is necessary to meet the person’s assessed need. In the current guidance on self-directed support this is described as an “exceptional circumstance”. In the first round of consultation, some people asked for an amended, less stringent, set of regulations to be laid. They asked for regulations to focus on when and where a local authority can sanction the employment of close relatives and not simply where they cannot. We are considering reforming the regulations to take on board these comments. We would like to hear if you agree and if so, your suggestions on how we should reform the current restriction.

**Consultation questions: the provision of services or support under a direct payment**

Question 9(b) Some have asked for the regulations that limit the employment of close relatives via a direct payment to be reformed. What are your views?

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\(^9\) A compulsion order may be imposed by a court in accordance with section 57A(2) of the Criminal Procedure (Scotland) Act 1995 where a person who is convicted of an offence punishable by imprisonment (other than an offence the sentence for which is fixed by law, e.g. murder) is suffering from a mental disorder. The court can authorise a range of measures in a compulsion order including detention in hospital or treatment and care in the community. The order may be renewed after the first 6 months for a further 6 months and annually thereafter.
Direct payments for residential accommodation and co-operative models of care and support

63. Current regulations restrict the use of direct payments for residential accommodation to no more than 4 weeks in any 12 month period. In effect, this places a bar on the use of direct payments for long-term residential care. When we first consulted on our proposals, we asked if we should remove the maximum time limit on direct payments for residential care. The views on this question were finely balanced. Those who wanted to remove the time limit argued that it would be fair and equitable to permit direct payments for long-term residential accommodation; that it would be in line with the principle that all methods of self-directed support should be available to all; and, that it would open up opportunities for specific client groups, such as those with fluctuating conditions, those who need end of life palliative care or those needing support with the transition from residential accommodation, to live independently in the community. Those who wanted to retain the time limit argued that direct payments for long-term residential care would make little difference to the extent of choice and control that people have. They told us that people armed with a direct payment may be encouraged to top up their direct payment and make their own contributions unnecessarily. Others said that the principle of choice for the user is enshrined already under the Scottish Office (Choice of Accommodation) Directions 1993.

64. We would like to use this further period of consultation to engage in a more comprehensive debate. We note that there is a wider context beyond the draft Bill and the strategy which accompanies it. In particular, we should consider the National Care Home Contract (NCHC) and ordinary residence rules. Under the NCHC local authorities across Scotland pay an agreed fee for publicly funded clients. Self-funders can pay significantly more than the NCHC rate and so if those in receipt of direct payments are treated in the same way as self-funders they may be faced with the prospect of topping up their direct payment in order to secure the residential care of their choice. The Ordinary Residence rules determine where responsibility lies for funding care. Where an individual uses their direct payment to move to another local authority area, under the current rules the responsibility for providing their care is likely to transfer to the new local authority.

65. On the other hand, there may be some very productive opportunities, for instance co-operative models of care and support or particular client groups, where direct payments might make a real difference. In general, our view is to resist imposing any restrictions on the use of direct payments unless there is a clear and demonstrable case to retain or impose a restriction. We invite your views.

10 Regulation 6, The Community Care (Direct Payments) (Scotland) Regulations 2003
**Consultation questions: Direct payments for residential accommodation and co-operative models of care and support**

Question 9(c) What are your views on making direct payments available for residential accommodation?

Question 9(d) If this were to be permitted under the law, do you consider that in practice there will be any adverse issues in relation to: i) The National Care Home Contract for those 65 and over – particularly in relation to the potential for top up fees being imposed; or ii) Ordinary Residence. If so, how might these issues be addressed?

Question 9(e) Should we consider an alternative to the stark choice of imposing or removing a particular time limit on residential care? Instead should we consider new, reformed regulations that provide greater scope for local practice and circumstances? For instance, to define particular circumstances where direct payments can be used in residential settings as opposed to the current situation where regulations define only where they cannot be used?
Additions and improvements
The option of making some further changes to the 1968 Act

66. Current legislation, in particular Part II of the 1968 Act, might be seen to reinforce a paternalistic, or as one of our consultation respondents put it, a "unilateral", approach. In contrast, best practice recommends a mature, mutual, bilateral approach, one of co-production with the citizen working alongside the state. The draft Bill deals with choice and control on how care and support is provided. In other words, the actions following or accompanying what might be called the core assessment of need. In this part of the discussion document we consider how we might reform the surrounding adult social care legislation, in particular those parts which deal with the triggering and the completion of the assessment of need. The aim behind such further amendments would be to complement the provisions that already feature in the draft Bill, to raise the role of the citizen and to sustain our vision of a mutual approach to social care. The specific matters that we address are:

a) local authorities' duty to provide services;
b) the legislative "trigger point" for community care assessments; and
c) the involvement and role of the individual in the main assessment of need.

67. We think that the addition of the changes outlined in this section might help to sustain the objectives for this Bill.

The “core” local authority duty to provide services and to assess need

68. Local authorities’ responsibilities for social care arise from their duties in Part 2 of the 1968 Act. We would like to consider the way that those duties are currently defined. In particular, we want to consider if there is a need to reformulate the relevant provisions in line with our aims on self-directed support. In considering this question, it is worth considering the key duties in full. The main provisions are Section 12, sub-sections 1 and 2 of the 1968 Act and Section 12A of the 1968 Act.

Section 12, sub-sections 1 and 2, Social Work (Scotland) Act 1968

12. – General social welfare services of local authorities.

(1) It shall be the duty of every local authority to promote social welfare by making available advice, guidance and assistance on such a scale as may be appropriate for their area, and in that behalf to make arrangements and to provide or secure the provision of such facilities (including the provision or arranging for the provision of residential and other establishments) as they may consider suitable and adequate, and such assistance may [, subject to subsections (3) to (5) of this section, be given in kind or in cash to, or in respect of, any relevant person.]
(2) [A person is a relevant person for the purposes of this section if, not being less than eighteen years of age, he is in need requiring assistance in kind or, in exceptional circumstances constituting an emergency, in cash, where the giving of assistance in either form would avoid the local authority being caused greater expense in the giving of assistance in another form, or where probably aggravation of the person’s need would cause greater expense to the local authority on a later occasion."

Section 12A, Social Work (Scotland) Act 1968

12A - Duty of local authority to assess needs.

(1) Subject to the provisions of this section, where it appears to a local authority that any person for whom they are under a duty or have a power to provide, or to secure the provision of, community care services may be in need of any such services, the authority—

(a) shall make an assessment of the needs of that person for those services; and

(b) shall then decide, having regard to the results of that assessment, and taking account—

(i) where it appears to them that a person (“the carer”) provides a substantial amount of care on a regular basis for that person, of such care as is being so provided; and (ii) in so far as it is reasonable and practicable to do so, both of the views of the person whose needs are being assessed and of the views of the carer (provided that, in either case, there is a wish, or as the case may be a capacity, to express a view), whether the needs of the person being assessed call for the provision of any such services.]

69. The above provisions, together with provisions that accompany them in Part 2 of the 1968 Act, mean that the core duty placed on local authorities relates not to provision of support but to the provision of community care services. The distinction is a subtle but important one. Taken in isolation, the current 1968 Act provisions might be seen to imply that if a particular intervention is not a service then the local authority may not be under a duty to provide it. Practice has moved away from the provision of services to meet needs, and towards facilitating support to achieve better outcomes for individuals. Again, a subtle difference, but one that signifies a genuine shift in emphasis, towards an enabling, mutual approach. Increasingly, where person-centred care and better outcomes are the goal, we wonder if the terminology provided in Sections 12 and 12A might serve to hinder rather than help this change in practice. We are considering revisiting Sections 12 and 12A to bring them into line with the person-centred approach underpinned elsewhere in the draft Bill. We want to know if you agree with this proposal so that we can decide how and in what ways these changes might be incorporated into the draft Bill.
The trigger point for assessment

70. Another aspect where we would welcome your views is in relation to what might be called the “trigger point” for a social care and support assessment. The effect of sub-section 1 within Section 12A is that, where it appears to a local authority that a person is in need of community care services, the local authority must make an assessment of need and decide if the adult’s needs call for the provision of such services. This means that in so far as the law is concerned an assessment can only be triggered by the local authority and not by the adult themselves. There is no specific legislative power for the adult to request an assessment. This is in contrast to carers who, under Section 12AA of the 1968 Act have a specific power to request a local authority to make an assessment of their ability to provide care. In reality, it will almost always be the case that the individual will present to the local authority. On the other hand, there may be some benefits in bringing the legislation into line with practice and into line with the changes underpinned elsewhere in the draft Bill.

Assessment

71. A third area is the citizen’s role in the assessment itself. At present, Section 12A sub-section 1b requires the local authority to take account “in so far as is reasonable and practicable to do so, both of the views of the person whose needs are being assessed and of the views of the carer.” We wonder if this is not an unhelpful form of words, affording the citizen an overly passive role and assuming that in all cases they will have, or wish to have, a carer to speak for them in all instances. We would like to hear your views on whether we should seek to make some further amendments and incorporate them into the draft Bill. The aim would be to strengthen the right and responsibility of the citizen to take an active role in the assessment process itself.

Items that do not feature in the draft Bill

72. The draft Bill does not contain detailed provisions on how local authorities should go about defining an individual budget, however we know that some people may be in favour of provisions along these lines. Similarly, the draft Bill does not deal with eligibility for care and support in the first instance, as distinct from eligibility for a particular mechanism to provide that support, which does feature. Recommendation 4 in the Self-directed Support Strategy is that the national eligibility framework will be reviewed. We take the view that this review will be sufficient; however, once again, we welcome views on whether this is the right approach to take.

Consultation questions: additions and improvements

Question 10(a) What are your views on bringing forward some additional amendments to elements of the Social Work (Scotland) Act 1968 in order to modernise the law in line with the theme of self-direction and person-centred support?
Question 10(b) In particular, what are your views on the additional changes put forward in the discussion document: the proposals to reform the “trigger point” for assessment, to secure adults’ rights to request an assessment and to raise the role and profile of the individual in the assessment process?

Question 10(c) If you think that there are major items that are missing from the draft Bill, what are your proposals for additions to the Bill and why do you think they will make a difference?

Impact Assessments

73. Alongside this discussion document you can access a draft Equality Impact Assessment and Business Regulatory Impact Assessment.

Consultation Questions: Business Regulatory Impact Assessment

Question 11(a) We have published a draft Business Regulatory Impact Assessment. What are your views about the potential costs, benefits and impacts provided within the BRIA?

Consultation Questions: Equality Impact Assessment

Question 12(a) We have published a draft Equality Impact Assessment. What are your views on the draft EIA?
Annex A: Current legislation

Direct payments

Current legislation deals with direct payments only. The relevant Acts and Regulations are:

- The Social Work (Scotland) Act 1968
  Guidance on the sections relating to direct payments can be found at: [http://www.scotland.gov.uk/Publications/2003/03/16777/20192](http://www.scotland.gov.uk/Publications/2003/03/16777/20192)
- The Community Care (Direct Payments) Act 1996
- Regulation of Care (Scotland) Act 2001
- Community Care and Health (Scotland) Act 2002
- The Community Care (Direct Payments) (Scotland) Regulations 2003 (SSI 2003 No. 243)
- The Community Care (Direct Payments) (Scotland) Amendment Regulations 2005 (SSI 2005 No. 114)
- The Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Subordinate Legislation) Order 2005 (SSI 2005 No. 445)
- The Disability Equality Duty (DED)
  [www.drc-gb.org/disabilityequalityduty/](http://www.drc-gb.org/disabilityequalityduty/)
- National Health Service Reform (Scotland) Act 2004 (asp 7)
- Adult Support and Protection (Scotland) Act 2007
- The Community Care (Direct Payments) (Scotland) Amendments Regulations 2007 (SSI 2007 No. 458)

The Community Care (Direct Payments) Act 1996 (the 1996 Act) inserted sections 12B and 12C into the Social Work (Scotland) Act 1968 (the 1968 Act). These sections were further amended by section 70 of the Regulation of Care (Scotland) Act 2001 (the 2001 Act) and section 7 of the Community Care and Health (Scotland) Act 2002 (the 2002 Act). They place a duty on local authorities, to offer direct payments to people other than those not eligible as specified in regulations made under section 12B, enabling them to arrange and purchase the community care or children's services they have been assessed as needing.

The Social Work (Scotland) Act 1968

Sections 12B and 12C of the 1968 Act place a duty on local authorities to make direct payments available to certain adults and children who wish to receive them. This includes disabled people.
Section 13A of the 1968 Act provides a power to local authorities, allowing them to take any steps which they consider would help the adult to benefit from a service. Section 13ZA is re-created in full below:

13ZA  Provision of services to incapable adults

(1) Where-
   (a) a local authority have decided under section 12A of this Act that an adult’s needs call for the provision of a community care service; and
   (b) it appears to the local authority that the adult is incapable in relation to decisions about the service,

the local authority may take any steps which they consider would help the adult to benefit from the service.

Which services direct payments can be used for

Direct payments may only be offered to eligible adults who under section 12A of the 1968 Act, have been assessed as needing community care services. They can be used to purchase all community care services and support except long term residential accommodation. For the purposes of the direct payments legislation ‘community care’ services are defined by section 5A of the 1968 Act as ‘services, which a local authority are under a duty or have a power to provide, or to secure the provision of, under Part II of the Act or section 25 (provision of care and support services for persons who have or have had a mental disorder), 26 (provision of services designed to promote well-being and social development of such persons) or 27 (assistance with travel in connection with such services) of the Mental Health Care and Treatment (Scotland) Act 2003.

This definition includes housing support services and equipment and temporary adaptations. Since December 2001 direct payments have also been available for services for children in need provided under section 22(1) of the Children (Scotland) Act 1995 (‘the 1995 Act’).

Part 2 of the 2002 Act allows delivery of health services and some continuing health needs by direct payments if the local authority and NHS Board have arrangements to allow this to happen. The choice of support people can use to meet their assessed needs is covered at sections 4 and 5.

Further information can be found in the national guidance on self-directed support.
Annex B: Distribution List

Scottish Government
Family and Property Law
Getting it Right for Every Child Team
Policy for Carers
Improving Delivery and Workforce Development (Health and NHS Scotland)
Equality Policy and Communities
Joint Improvement Team (Health and NHS Scotland)
Joint Outcomes Unit (Health and NHS Scotland)
Shifting the Balance of Care
Equalities and inclusion
Health promotion and support in schools
Equipment and adaptations

Voluntary Organisations, Providers and Support Organisations
25% M.E.Group
Aberlour
Action for Children
Advocating Together Dundee
Age Concern and Help the Aged Scotland
Ayrshire Independent Living Network
Alzheimer Scotland
Arc Scotland
Audit Scotland
Barnardo’s Scotland
BEMIS (Black and Minority Infrastructure in Scotland)
Borders Direct Payment Agency
Butterfly Trust
Camphill Scotland
Capability Scotland
Carers Scotland
Carr Gomm Scotland
Coalition of Carers In Scotland
Community Care Providers Scotland
Contact a Family Scotland
Cornerstone
Crossroads Scotland
Deafblind Scotland
Down’s Syndrome Scotland
Dundee Direct Payment Centre
ELCAP Ltd
ENABLE Scotland
Equal Futures
Glasgow Centre for Inclusive Living
Glasgow Social Care Providers
HUG, the Highland Users Group
Independent Living in Scotland (IliS) (Aberdeen)
In Control Scotland
Inclusion Scotland
Key Housing Association
Keys to Inclusion
Learning Disability Alliance, Scotland
Lothian Centre for Inclusive Living
Margaret Blackwood Housing Association
Midlothian Community Care Providers Forum
Mochriddhe
Momentum
National Autistic Society
North Lanarkshire Disability Forum
Profound and Multiple Impairment Service (PAMIS)
Partners in Advocacy
Penumbra
People First
Positive Steps Partnership
Princess Royal Trust for Carers
Quarriers
Richmond Fellowship Scotland
Royal National Institute of Blind People (RNIB)
Royal National Institute for the Deaf (and Hard of Hearing People; UK) (RNID)
Scottish Association for Mental Health (SAMH)
Scottish Care at Home (SCAH)
Scottish Council on Deafness (SCOD)
Scottish Association for Mental Health
Scottish Care
Scottish Consortium for Learning Difficulties
Scottish Development Centre for Mental Health
Scottish Recovery Network
Scottish Society for Autism
Self-directed Support Scotland
SENSE Scotland
Sleep Scotland
South Lanarkshire Disability Forum
Scottish Personal Assistant Employers Network (SPAEN)
Shared Care Scotland
Thistle Foundation
Voices of Experience (VOX)
Values into Action
WRVS

Local Authorities
Aberdeen City
Aberdeenshire
Angus
Argyll and Bute
City of Edinburgh
Clackmannanshire
Comhairle nan Eilean Siar
Dumfries and Galloway
Dundee City Council
East Ayrshire
East Dunbartonshire
East Lothian
East Renfrewshire
Falkirk
Fife
Glasgow
Highland
Inverclyde
Midlothian
Moray
North Ayrshire
North Lanarkshire
Orkney
Perth and Kinross
Renfrewshire
Scottish Borders
Shetland
South Ayrshire
South Lanarkshire
Stirling
West Dunbartonshire
West Lothian

Health Boards
NHS Ayrshire & Arran
NHS Borders
NHS Dumfries & Galloway
NHS Fife
NHS Forth Valley
NHS Grampian
NHS Greater Glasgow & Clyde
NHS Highland
NHS Lanarkshire
NHS Lothian
NHS Orkney
NHS Shetland
NHS Tayside
NHS Western isles

Other Key Interests
Association of Directors of Education
Association of Directors of Social Work
Care Commission
Clerk of the Health and Sport Committee, Scottish Parliament
Commission for Racial Equality
Convenor of Health and Sport Committee, Scottish Parliament
Convention of Scottish Local Authorities (COSLA)
Disability Rights Commission
Disclosure Scotland
Edinburgh Mental Health Forum for Voluntary Organisations
Equality and Human Rights Commission
Her Majesty’s Inspectorate of Education
Mental Welfare Commission
MSPs
MEPs
NHS Quality Improvement Scotland
Office of the Public Guardian
Royal College of Nursing Scotland
Scottish Child Law Centre
Scotland’s Commissioner for Children and Young People
Scottish Commission for the Regulation of Care
Scottish Council for Single Homeless
Scottish Federation of Housing Associations
Scottish Further and Higher Education Council
Scottish Futures Trust
Scottish Law Commission
Scottish Social Services Council
Scottish Government Legal Deposit Library
Social Work Inspection Agency (SWIA)
Scottish Parliament Information Centre (SPICe)
Skills Development Scotland
Social Care and Social Work Improvement Scotland
The Law Society of Scotland
The Scottish Human Rights Commission
Annex C: The Scottish Government Consultation Process

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (e.g. analysis of response reports) can be accessed at: Scottish Government consultations (http://www.scotland.gov.uk/consultations)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.
Annex D: Questionnaire and Respondent Information Form
Self-directed support: a draft Bill for consultation

Consultation Questions

1. Objectives for the draft Bill

Question 1(a): What are your views on the objectives that we have set for the Bill?

Question 1(b): Do you think that the draft Bill meets the objectives that we have set?

Yes ☐ No ☐

If not, why not and how might the Bill be changed in order to meet them?

Comments

2. General principles

Question 2(a): What are your views on the general principles included in the draft Bill? [Bill reference: section 1]

Comments

3. Choice and control: the “framework” provisions

Question 3(a): What are your views on our “framework” provisions? [Bill reference: sections 2, 3, 6, 9, 13, 14 and 15]

Comments

In particular,

Question 3 (b): Do you think that the rights, duties, powers and choices set out in the Bill are the right ones, specifically the four options, the duty on local authorities to provide those four options and the duty to provide the adult’s preferred option?

Comments

Question 3 (c): Is there anything that you would change or do you think that something is missing from this legislative framework?

Comments
4. Working together: links to health, housing and beyond

**Question 4(a):** What are your views on section 16 within the draft Bill? In particular, do you think that there should be further legislative provisions relating to self-directed support, individual care packages and joint working between social care, health and beyond? If so, what should be added and why?

Comments

5. Children and young people

**Question 5(a):** What are your views on the provisions relating to self-directed support for children and young people? [Bill reference: section 8]

Comments

In particular…

**Question 5(b):** Do you agree that all forms of self-directed support should be available to children, young people and their families, and that they should have the same options as adults directing their own care and support?

Yes ☐ No ☐

**Question 5(c):** Do you think that sixteen and seventeen year olds should be empowered to direct their own support?

Yes ☐ No ☐

**Question 5(d):** What are your views on how the various other provisions within the Bill apply to children and young people? For example, are there any specific circumstances where you feel that a particular provision should not apply to children and young people’s support?

Comments

6. People who need help to direct their support

**Question 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 procedure would be disproportionate? [Bill reference: sections 10 to 12]

Comments

**Question 6(b):** What are your views on the “trigger point” to allow such powers to be used?

Comments
Question 6(c): If enacted, the provisions in this Bill would join the current Section 13ZA of the 1968 Act. Section 13ZA provides quite wide ranging powers to local authorities. Do you think that section 13ZA should be amended in any way in light of this Bill?

Comments

7. Self-directed support for carers

Question 7(a): What are your views on the provisions within the draft Bill relating to carers? [Bill reference: sections 5 and 7]

Comments

8. Provisions on direct payments

Question 8(a): What are your views on the provisions within the draft Bill relating to direct payments? [Bill reference: sections 17 – 22]

Comments

9. Regulation-making powers: when to enable and when to restrict?

Eligibility for direct payments

Question 9(a): We propose to remove the current restriction which prevents people subject to a Compulsory Treatment Order receiving their care and support as a direct payment. Do you believe that any of the restrictions on various other categories of people should also be removed? If so, which ones and why?

Comments

The provision of services or support under a direct payment

Question 9(b): Some have asked for the regulations that limit the employment of close relatives via a direct payment to be reformed. What are your views?

Comments

Direct payments for residential accommodation and co-operative models of care and support

Question 9(c): What are your views on making direct payments available for residential accommodation?

Comments

Question 9(d): If this were to be permitted under the law, do you consider that in practice there will be any adverse issues in relation to: i) The National Care Home Contract for those 65 and over – particularly in relation to the potential for top up fees being imposed; or ii) Ordinary Residence. If so, how might these issues be addressed?
**Question 9(e):** Should we consider an alternative to the stark choice of imposing or removing a particular time limit on residential care? Instead should we consider new, reformed regulations that provide greater scope for local practice and circumstances? For instance, to define particular circumstances where direct payments can be used in residential settings as opposed to the current situation where regulations define only where they cannot be used?

**Question 10(a):** What are your views on bringing forward some additional amendments to elements of the Social Work (Scotland) Act 1968 in order to modernise the law in line with the theme of self-direction and person-centred support?

**Question 10(b):** In particular, what are your views on the additional changes put forward in the discussion document: the proposals to reform the “trigger point” for assessment, to secure adults’ rights to request an assessment and to raise the role and profile of the individual in the assessment process?

**Question 10(c):** If you think that there are major items that are missing from the draft Bill, what are your proposals for additions to the Bill and why do you think they will make a difference?

**Question 11(a):** We have published a draft Business Regulatory Impact Assessment. What are your views about the potential costs, benefits and impacts provided within the BRIA?

**Question 12(a):** We have published a draft Equality Impact Assessment. What are your views on the draft EIA?
Self-directed support: a draft Bill for consultation
(Dec 2010 – March 2011)

Respondent Information Form

Please Note this form must be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation

Organisation Name

Title  Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname

Forename

2. Postal Address

Postcode  Phone  Email

3. Permissions - I am responding as…

Individual  /  Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate  Yes  No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

Yes, make my response available, but not my name and address

Yes, make my response and name available, but not my address

(c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your response to be made available?

Please tick as appropriate  Yes  No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate  Yes  No
Partial Business and Regulatory Impact Assessment (BRIA)

Title of proposal

Proposed Self-directed Support (Scotland) Bill

Purpose and intended effect

- **Objectives**

Self-directed support is about achieving better outcomes for individuals, through informed choice and increased control. The Bill aims to:
  - consolidate and modernise existing legislation;
  - provide a legal framework for self-directed support;
  - remove some of the barriers to self-directed support for specific groups; and
  - enable self-directed support for carers, in specific circumstances.

The Bill is intended to complement and support the Self-Directed Support Strategy in encouraging and enabling major service redesign in adult social care and support, and thus support a significant increase in the number of people who actively direct their own support. Some of the impacts outlined here relate to both Strategy and Bill, as both are part of the same drive towards change. In considering the responses to this draft BRIA the Government will consider which aspects are specific to the Bill itself and which are concerned with the wider strategy and efforts to increase numbers more generally.

- **Background**

Self-directed support is a term that describes the ways in which individuals and families can have informed choice and control about the way that social care and support is provided to them. It includes a range of options for exercising those choices.

The Government first consulted on proposals for a Self-directed Support Bill earlier this year, and a large majority of respondents were supportive of new legislation. This second consultation invites comments on a draft Bill, and also on suggestions for further additions to the Bill.

A partial Regulatory Impact Assessment (RIA) was published alongside the first consultation.


Only four specific responses to that document were received. However, many respondents made comments on the main consultation document which were relevant to the questions of cost, benefit and impact. This partial Business and Regulatory Impact Assessment (BRIA) seeks to build on the partial RIA, taking into account the comments received.
• **Rationale for government intervention**

There is growing recognition that the current model for the provision of social care and support is not sustainable and that major service redesign is necessary, particularly with the twin pressures of public sector cuts and demographic change\(^1\). Failure to reform will not just fail those who use services but is likely to risk further avoidable demand for NHS services\(^2\).

There is also growing support for a more personalised approach. Three high profile national reports (the Independent Budget Review\(^3\), NESTA’s Radical Scotland\(^4\) and the 2020 Public Services report\(^5\)) have suggested that the current financial climate should be a key driver for the necessary modernisation of public services including social care.

Self-directed support encompasses a number of different options for directing your own support. The Scottish Government recognises all choices as equally valid, but it is seeking to encourage more people to actively direct their own support – that is, take control through a direct payment or directing the available budget. There is strong evidence of the benefits of these types of self-directed support to individuals, in terms of achieving better outcomes. Research evidence shows that the majority of people using self-directed support in an active way feel more positive about the impact on the quality of their care and support\(^6\). Self-directed support ensures that citizens are empowered to be self-reliant, where possible, and supports choice and control for all to design support tailored to their individual needs rather than assuming a one size fits all approach.

Self-directed support has a role in supporting the Government’s overarching aim of growing the Scottish economy. It supports the empowerment of individuals to gain equality of opportunity and sustain their citizenship. It also contributes to improving health and well-being and tackling health inequality. Single Outcome Agreements between the Scottish Government and local authorities provide a framework for working together, with the common ambition of improving the quality of life and opportunities in life for people across Scotland. The strong focus on outcomes associated with this Bill supports the wider government agenda of working towards better outcomes.

There has been a steady increase in use of direct payments (the most well-known mechanism of self-directed support) over the last 10 years. However, the overall numbers of people benefiting from actively directing their own support remains low. The Scottish Government wants to build on the achievements made to date, remove any unnecessary barriers put in place by existing legislation and provide a clear and consistent framework to allow for development in the future.

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\(^1\) For example, see ‘Let’s get personal – personalisation and dementia’, Alzheimer Scotland, April 2010

\(^2\) HM Government, Case for Change, 2008, p8

\(^3\) [http://www.scotland.gov.uk/About/IndependentBudgetReview/Resources/final-report/](

\(^4\) [http://www.nesta.org.uk/publications/reports/assets/features/radical_scotland](http://www.nesta.org.uk/publications/reports/assets/features/radical_scotland)


\(^6\) For example, see Tony Homer; Paula Gilder; A Review of Self-Directed Support in Scotland June 2008
Consultation

- **Within government**

Discussions with Scottish Government colleagues from relevant policy teams have been ongoing throughout the Bill development progress. These discussions will continue.

Specifically, we have consulted:

- colleagues from Justice Directorate, the Office of the Public Guardian and the Mental Welfare Commission for Scotland on proposals around people who find it difficult or impossible to direct their own support;
- colleagues from Community Care Division, on proposals around self-directed support and residential care, and self-directed support for carers;
- colleagues from Children Young People and Social Work Directorate, on self-directed support for children and young people;
- colleagues from Mental Health Division, on proposals to extend eligibility for self-directed support;
- colleagues from the Partnership Improvement and Outcomes Division; on the relationship between self-directed support and wider initiatives such as Reshaping Care for Older People and the Integrated Resource Framework.

All these colleagues have contributed to policy development and continue to be involved in the policy process, as we seek to understand the implications of self-directed support across their areas of responsibility.

In addition, the Office of the Public Guardian, the Mental Welfare Commission, the Social Work Inspection Agency and the Care Commission are all members of the Self-Directed Support Bill Steering Group. This group first met in August 2010 and has a remit to inform the development of the Bill. Other members of the group are users, care providers, support organisations, local authorities, the Association of Directors of Social Work and the Convention of Scottish Local Authorities (COSLA).

- **Public consultation**

Proposals for legislative change arose from a roundtable reference group on self-directed support, convened in June 2008 by the Scottish Government. In addition, the Government held a number of locally-based consultation events and specific events for political groups during 2009, to explore the potential content of the Bill.

Earlier this year, the Government held a first public consultation on proposals for a Self-directed Support Bill. That consultation ran from 31 March until 23 June, and comprised 2 elements: the invitation for individuals and organisations to submit written responses to a discussion document and a series of consultation events held in partnership with a range of organisations. Responses were published on the Scottish Government website in August:

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7 Further information on this group, including membership, can be found here: http://www.scotland.gov.uk/Topics/Health/care/sdsbill
An analysis report and a Scottish Government response were published in September:

Since the close of the first consultation, the Scottish Government has convened a Bill Steering Group. This is a group of key stakeholders, including COSLA, whose remit is to inform the development of the Bill.

This second consultation on a draft Bill and proposals for additions to the Bill will run until 17 March 2011.

- **Business**

Many businesses, as stakeholders, were consulted as part of the first consultation process. This included care providers, support organisations, and individuals, who have effectively become small businesses through the choices they have made in employing others to deliver their support needs. Businesses are also represented on the Bill Steering Group, as discussed above. We will continue to consult businesses throughout this second consultation phase.

**Options**

The draft Bill can be split into a number of proposals:

*Consolidation of direct payment law.* Existing law relates to direct payments rather than self-directed support (direct payments are a mechanism of self-directed support) and is spread across various Acts and Regulations. The Government proposes to consolidate existing laws on direct payments, clarifying the rules for service users and providers and modernising the law.

*Framework.* The Government proposes to create a framework which sets out the principles of self-directed support, explains what it is and provides a clear process for directing your own support.

*Choice and control: the new ‘default’.* In our previous consultation, we asked about moving from an ‘opt in’ to self-directed support, to an ‘opt out’. A large number of respondents were concerned that if the opt-out were to apply to a particular mechanism of self-directed support, such as a direct payment or even the individual budget from which the direct payment is drawn, this would effectively force people down routes that they might not wish to take and would run counter to the principle of choice for the user. The policy intention is to remove the current default of local authority arranged services, but to ensure that choice and control is ‘available to all but imposed on no-one’. The Government proposes to place a duty on local authorities, that they must offer individuals an informed choice of the full range of options for directing their own support for which they are eligible. There are a whole
spectrum of choices, from taking a direct payment, to managing an individual budget, to simply choosing to allow the local authority to arrange services on your behalf. An individual can also choose a combination of these things. The proposal aims to recognise that all choices, whether for maximum control or for minimal control, are equally valid ways for an individual to direct their own support. Our aim is to strike the right balance of citizen choice and control, albeit in a way that is radically different to the current assumption in favour of the state owning the decision-making process.

People who find it difficult or impossible to direct their support. Existing direct payment legislation stipulates that, where a person is deemed to lack capacity, consent to a direct payment can only be given on their behalf by a guardian or attorney. For the draft Bill the Government proposes that where an individual is being invited to direct their own support, where the individual is unable to direct their own support and where these formal arrangements are not in place, a local authority may appoint a person to make decisions and manage support on behalf of the individual.

Carers. The Government proposes to amend legislation in order to provide a power to local authorities to provide self-directed support to carers following a carer’s assessment. This would only be where directing their own support would help to sustain the carer in their role and prevent the aggravation of the needs of both the carer and the cared for person.

Residential care. At present direct payments cannot be used to purchase residential care for any longer than a period of 4 weeks in any 12 month period. This is to cover very short periods of respite. The Government proposes to retain the necessary regulation making power that would allow them to make restrictions. However the Government is inviting views on whether there is a convincing case to re-enact such restrictions to accompany any future Bill.

Eligibility for direct payments. Currently, the law prohibits certain groups from receiving a direct payment. One such group is people who are subject to a compulsory treatment order where the measure authorising detention in a hospital has been temporarily suspended. The Government proposes to lift this restriction and also invites views on whether other groups similarly prohibited should also have their restrictions lifted.

Additional proposals in the second consultation. The main consultation document suggests a small number of additional changes that might be made to existing social care legislation, in order to modernise it and bring it into line with the aims of the Bill and with current best practice. These are largely changes in language relating to:

- The core local authority duty to provide community care services;
- The trigger point for assessment; and
- The role of the individual in assessment.

The Government is inviting views on whether or not such additional changes would be welcome.

- **Sectors and Groups affected**

The sectors and groups that may be affected by this Bill are:
• individuals who have an assessed need for social care provided in their own home, to help them to leave their home to take up social or education opportunities, or provided in a residential setting;
• individuals who provide care and support;
• Scotland’s 32 local authorities in their role in assessing people’s social care needs, in procuring care and support and in some cases providing social care and support direct to individuals;
• third sector organisations who provide social care and support;
• businesses who provide social care and support;
• SDS Support organisations and user-led support organisations funded by local authorities to provide advice, support and advocacy services to individuals who have SDS/DP packages or individuals who are considering SDS/DPs;
• statutory bodies;
• professional bodies; and
• the NHS, on whom the impact is likely to be positive in terms of things such as hospital admissions and the effect of healthier lives.

Some of the proposals impact more on particular groups than others. These are identified for each particular proposal at Annex A.

• **Costs and benefits**

Options around each proposal, and the costs and benefits thus far identified, are set out at Annex A.

It is difficult to quantify the detailed costs and benefits of a shift towards more people actively directing their own support, and further work is necessary to provide more of the detail. This BRIA is intended to prompt discussion and we welcome comments and views – in particular, we welcome examples and evidence of costs and benefits in practice. It is important to note that some of the impacts identified arise from the Self-Directed Support Strategy as well as the Bill, particularly the more general impacts associated with a large-scale shift. The Scottish Government continues to research this aspect, and in addition we have recently commissioned a piece of independent research to investigate the likely economic and financial impacts of a whole-systems shift to self-directed support.

**Scottish Firms Impact Test**

Throughout the consultation and through the whole Bill development period, the Self-Directed Support Bill team will meet directly with a range of organisations, businesses and users affected by the proposals, so we can better assess the costs and/or benefits to them and their businesses. Specifically, the final BRIA will contain details of engagement with 6-12 businesses, to better assess the impacts of this legislation on them.

• **Competition Assessment**

Self-directed support provides informed choice and control to individuals, enabling them to make decisions about the care and support they want. This includes
decisions about who provides that care and support. In principle, therefore, any legislation which allows for an increase in this model of social care provision should support the principles of fair and open competition. Direct payments and individual budgets are in place of a provided service and so rates should not be set at a level to restrict the opportunity for individuals to opt for that particular funding option. At this stage, it is not expected that any of the options will limit the number of suppliers or their ability or incentives to compete, either directly or indirectly.

We have reached this interim conclusion after consulting guidance from the Office of Fair Trading\(^8\). A more detailed analysis of competition issues will be part of the final BRIA. We welcome views and evidence in relation to this issue.

- **Test run of Business Forms**

  There are no new business forms planned as a result of this legislation.

**Legal Aid impact test**

Our initial assessment is that the changes proposed in the consultation should not result in possible expenditure from the legal aid fund. The proposals should not have any implications for individuals’ right to access to justice through legal aid. They should not have implications for civil and criminal legal aid as long as there is a clear and distinct audit trail for services and as long as payment out is not less than income in. For advice and assistance, consideration will need to be given to making specific exclusions by regulation.

The proposed Bill will not introduce any new court procedure nor any new right of appeal. The proposed changes to consent would mean that formal guardianship would not be a pre-requisite for self-directed support to be available to individuals deemed to lack the capacity to consent. This may result in a slight reduction in the number of court applications for guardianship but this is likely to be negligible given that individuals will be likely to have other reasons to apply for such responsibilities.

**Enforcement, sanctions and monitoring**

Local authorities will be the agencies responsible for delivering the changes associated with the proposed Bill. Enforcement of standards within local authorities is the responsibility of regulatory bodies. The proposals should not introduce any significant new requirements for inspection.

The Bill does not contain any new sanctions. Those that exist for the provision of community care services will remain.

Detailed plans to monitor and evaluate changes will be published should the Bill be introduced into Parliament.

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\(^8\) [http://www.oft.gov.uk/OFTwork/policy/guidelines/#named3](http://www.oft.gov.uk/OFTwork/policy/guidelines/#named3)
Annex A – Options

Overall costs and benefits of a Bill
This table illustrates some of the general costs and benefits arising from a shift to more people actively directing their own support.

<table>
<thead>
<tr>
<th>Costs</th>
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<tbody>
<tr>
<td><strong>Costs</strong></td>
<td>The proposed new legal framework would mean that everyone will</td>
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<td></td>
<td>direct their own support, though it is difficult to estimate</td>
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<td></td>
<td>the precise numbers of people who would shift to direct</td>
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<td></td>
<td>payments or individual service funds in response to the</td>
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<td></td>
<td>legislation. The following bullet points provide a summary of</td>
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<tr>
<td></td>
<td>potential costs involved in an increase in people actively</td>
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<td></td>
<td>directing their own support, some of which might result directly</td>
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<td></td>
<td>from the legislative changes, some of which would be</td>
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<td></td>
<td>associated with a much wider shift in cultures and strategic</td>
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<td></td>
<td>provision. Costings are uncertain at this stage but areas of</td>
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<td></td>
<td>potential cost have been identified below:</td>
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<tr>
<td><strong>Costs to local authority</strong></td>
<td>Specialist implementation teams. Early results from the</td>
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<tr>
<td></td>
<td>Scottish Government’s self-directed support test sites</td>
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<td></td>
<td>suggest that dedicated self-directed support implementation</td>
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<td></td>
<td>teams may be crucial to success in delivering substantial</td>
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<td></td>
<td>shifts in the number of people actively directing their own</td>
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<td></td>
<td>support. If such teams are deemed to be necessary estimated</td>
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<td></td>
<td>costs would depend on the number of teams and the number of</td>
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<td></td>
<td>people within them.</td>
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<td></td>
<td>Bridging finance. In previous years local authorities made</td>
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<td></td>
<td>the case for bridging finance to support a move from block-</td>
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<td></td>
<td>based contracts to spot contracts. Responses to the first</td>
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<td></td>
<td>consultation were mixed on this point – some thought bridging</td>
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<td></td>
<td>finance was necessary, some thought transition could be</td>
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<td></td>
<td>achievable for little or no additional cost. However, thus</td>
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<td></td>
<td>far in consultations for the draft Bill, there has been very</td>
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<td></td>
<td>little quantitative evidence provided to support either</td>
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<td>position. This is one of the areas that we expect our recently-</td>
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<td></td>
<td>commissioned independent research will seek to investigate.</td>
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<tr>
<td></td>
<td>Commissioning. Linked to bridging, local authorities will</td>
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<td></td>
<td>need to implement reforms to the way they commission services.</td>
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<td></td>
<td>New forms of procurement for personalisation are still in</td>
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<td></td>
<td>their infancy, and transitional issues may arise.</td>
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<td></td>
<td>Training. Local authorities will need to ensure staff (not</td>
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<td></td>
<td>just in social work but also other staff i.e. finance) are</td>
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<td></td>
<td>fully aware of the principles of self-directed support, the</td>
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<td></td>
<td>rights of individuals to direct their own support and their</td>
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<td></td>
<td>own responsibilities to support and facilitate increased</td>
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<td></td>
<td>choice and control under the new legislation. Costs depend on</td>
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<td></td>
<td>numbers to be trained and method of training.</td>
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<td></td>
<td>Administration systems. Some changes to back office support</td>
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<td></td>
<td>systems (i.e. IT, standard forms) may be necessary however we</td>
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<td></td>
<td>invite comments from local authorities.</td>
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</tbody>
</table>
- **Length, complexity and volume of social care assessment.** The draft Bill seeks to put into statute concepts such as outcomes-based assessment, which are already best practice. Therefore, for many social workers who already conduct assessments in this way, change will be minimal. There may be a growth in demand for social care assessments as new clients present, thanks to the publicity surrounding any changes in the law. As these potential clients are unknown, it is difficult to quantify how many, if any, will come forward.

- **Support, advice and information.** Local authorities already fund organisations to provide support, advice and information to support users. A large-scale shift towards the most active forms of self-directed support would be likely to increase demand for these services. Long-term sustainability of these services is for the self-directed support strategy rather than the Bill to address however, there may be some short-term transitional costs in terms of organisation and building capacity that need to be addressed.

- **Reporting requirements.** There will be changes to current reporting requirements to ensure that the Scottish Government and local authorities can properly assess how self-directed support is working. These should be minimal.

**Costs to providers**

- **Training.** Providers will need to ensure that all their staff are aware of the changes in legislation, the principles of self-directed support and their role in facilitating individuals to exercise greater choice and control. The scale of any training costs would depend on the numbers to be trained and method of training selected.

- **Administration.** Some changes to back office support systems (i.e. IT, standard forms) may be necessary.

- **Increased costs of provision.** Providers may face increased costs associated with a move from a ‘wholesale’ model, with the council as block purchaser, to a ‘retail’ model of spot contracts and contractual relationships between the user and provider. Some of these may be transitional, others may be longer term. Businesses operating on tight margins may have limited scope to absorb such increases – this may lead to a reduction in either volume or quality of service.

- **Increased risk in relation to cash flow and default.** In the case of direct payments, a provider does not have the security of a block contract payment and, by contracting directly with individuals, might be seen to take on a greater portion of risk in relation to payments.

**Costs to third sector/voluntary support organisations**

- **Support, advice and information.** A shift to ensuring choice and control for all will increase demand for these services and require increased capacity. Long-term sustainability of these services is for the self-directed support strategy rather than the Bill to address however there may be some short-term transitional costs in
terms of organisation and building capacity that need to be addressed.
- **Training.** Organisations will need to ensure that all their staff are aware of the changes in legislation, the principles of self-directed support and their role in facilitating individuals to exercise greater choice and control.
- Costs uncertain, depending on numbers to be trained and method of training.
- **Administration.** Some changes to back office support systems (i.e. IT, standard forms) may be necessary.

### Costs to individuals
- **Administration.** Any administration costs to individuals would likely be focused in direct payments. Where an individual takes on a direct payment, they also take on the administrative tasks involved with managing the money they receive. This involves the investment of time on the part of the individual, as detailed records must be kept and returns submitted.
- Increased cost of provision. Providers facing increased costs may be unable to absorb them and may need to pass them on. Users, therefore, could face increased costs – for those who cannot afford increases, this may lead to either reduced quality of support or reduced volume of care.

### Costs to carers
- **Administration.** Where an individual takes on a direct payment, they also take on the administrative tasks involved with managing the money they receive. Carers may share this workload. This typically involves the investment of time on the part of the individual, as detailed records must be kept and returns submitted.

### Benefits

<table>
<thead>
<tr>
<th>Benefits to individuals</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Better outcomes.</strong> This is achieved through informed choice and control. There is considerable academic evidence to support this conclusion.</td>
</tr>
<tr>
<td><strong>Empowerment and citizenship.</strong> Individuals will have greater involvement in their communities and greater opportunities to control their own lives and be seen as valued, participating members of society.</td>
</tr>
<tr>
<td><strong>Better health and wellbeing.</strong> Through a clear focus on outcomes, self-directed support contributes to</td>
</tr>
</tbody>
</table>
improving health and well-being and tackling health inequality.

- **Increased market for care and support.** As individuals exert greater choice and control, the market for social care is likely to grow and become more competitive. Individuals will be able to choose good, high-quality services and influence the market to provide more of what they want. However, we recognise that in rural areas this effect may be limited.

### Benefits to carers
- **Better outcomes.** Carers will have a role in facilitating choice and control, allowing them to share in better outcomes.

### Benefits to local authorities
- **Meeting needs and achieving outcomes for individuals through high-quality services.** Self-directed support enables people to have the support they want, when and where they want it. It focuses on maximising individual choice and control, eliminating waste and providing a system that is as accessible, joined-up and streamlined as possible, to better meet the needs of the whole person.
- **Better health and wellbeing.** There is evidence that good quality, well targeted, social care and support which meets individual needs can help reduce pressure on health and acute social care services.\(^9\)
- **Cost neutrality and financial savings.** Studies have shown that the most active forms of self-directed support, if implemented correctly, cost the same and sometimes less than traditional “arranged” provision. They also have the potential to release savings for local authorities. Future efficiencies can be achieved by using resources in a more flexible and creative way to achieve more with less.

### Benefits to providers
- **Meeting needs and achieving outcomes for individuals through high-quality services.** Self-directed support enables people to have the support they want, when and where they want it. Providers will be encouraged to offer flexible, creative support solutions, to better meet the needs of the whole person.

### Benefits to third sector/voluntary organisations
- **Meeting needs and achieving outcomes for individuals through high-quality services.** Balancing a reduction in administrative demands for local authorities greater use of self-directed support will lead to a growth in demand

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\(^9\) I.e. Office for Disabilities, Hearstfield et al 2007, p101
for information, support, advice and advocacy. Third sector and voluntary organisations will have more opportunities to provide the support that people want in creative, flexible ways.

**Other impacts**
A number of other general issues were raised which cut across many of the points set out above and will require consideration in the final BRIA

| Workforce | Personal Assistants (PAs). Many people who choose to direct their own support in the form of a direct payment opt for a PA rather than a provider organisation. This has a number of implications – for example, recruitment of a suitable PA may be difficult, particularly in remote areas or where an individual has specialist needs. Employing a PA also raises issues such as disclosure checks, compliance with employment law, training and support (both for employee and employer). These and other issues around the PA workforce are considered in the Self-Directed Support Strategy and will be addressed in workstreams arising from that. However, it is recognised that they may have an impact on the application of provisions in the Bill. |
| General workforce | One of the key impacts of self-directed support is allowing individuals to choose the support they want, when they want it. This means that the workforce must be able to respond flexibly and accommodate shifting work patterns to meet the needs of individuals. Whilst this presents challenges, it should also present opportunities. A shift towards more active forms of self-directed support may also mean a change in the configuration of the workforce. There could be requirements for more staff in some areas or settings, and less in others. This may be unsettling and there may be a requirement for additional supports, such as training, to accompany any change. |
| Pace of change | A number of respondents to the first consultation thought that the pace of change would be crucial. Timing will impact on the costs involved – change is already happening in the social care world but it is slow and evolutionary. The Bill aims for change that is revolutionary, but must balance cost and effectiveness. |
| Rural issues | Rural areas have some specific issues that need to be considered. Effective choice may be constrained by a lack of private or voluntary providers; existing local authority services may be proportionately harder-hit by individuals who chose to shift to other forms of support, which may have a knock-on effect on the quality or availability of services for those who chose to remain; and there may be specific recruitment problems. However, it has also been suggested that self-directed support can be a positive thing in rural areas, particularly where existing services are limited, as it can give individuals the opportunity to be creative with the money |
available to them and to create new opportunities.

**Variation by user group**
Impacts on individuals are likely to vary by group, as well as case by case. Figures for the take-up of direct payments can be split by user group, and it is clear that the current methods of directing your own support are more popular with some groups than with others. There will be a number of reasons for this. A widespread shift to more people actively directing their own support will depend on these issues being identified and addressed, so all user groups feel supported to have the choice and control that they want.

**Hours versus outcomes**
In the light of additional or redistributed costs, there appears to be support for a move away from the traditional funding model of hourly rates towards a system based on achieving outcomes. This would allow creative solutions to financial challenges and a more progressive, flexible model of support for the future, more in line with the aims and principles of self-directed support. However, implementation of such a system would be challenging. One of our potential additional changes, covered in the main discussion document, proposes introducing the language of outcomes to the assessment process – this may help to initiate change.

**Cultural change**
We are very aware that alongside any legal change, cultural change is necessary for self-directed support to flourish. The Strategy particularly seeks to address this, and we also welcome views from any stakeholders on how to effect this change.

**Breakdown of costs and benefits by specific proposal**
Whilst the tables above attempt to deal with the broad impacts of the Bill, the tables below break down costs and benefits by specific proposals, as detailed in the ‘Options’ section above.

**Consolidation**
Sectors and groups affected: All

<table>
<thead>
<tr>
<th>Option 1 – Do nothing</th>
<th>Option 2 – Consolidate and modernise</th>
<th>Option 3 – Full review of all Community Care legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Costs</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- No financial cost</td>
<td>- Limited financial cost to Scottish Government local authorities and wider sector</td>
<td>- Lengthy</td>
</tr>
<tr>
<td>- Fail to modernise law and deliver clear, understandable rights and duties</td>
<td>- Potentially expensive for Scottish Government local authorities and wider sector in terms of staff resource</td>
<td></td>
</tr>
<tr>
<td>- Reputational damage to Scottish Government and local authorities</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Benefits</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- No financial cost</td>
<td>- Widespread support across all sectors</td>
<td>- Would ensure all Community Care law is reviewed and modernised</td>
</tr>
</tbody>
</table>
## Self-directed Support Framework

**Sectors and groups affected:** All

<table>
<thead>
<tr>
<th></th>
<th>Option 1 – Do nothing</th>
<th>Option 2 – introduce self-directed support framework in social care law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Costs</strong></td>
<td>- No financial cost</td>
<td>- May be costs arising from relatively minor changes to processes</td>
</tr>
<tr>
<td></td>
<td>- Self-directed support will still not exist in statute</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Reputational damage to Scottish Government.</td>
<td></td>
</tr>
<tr>
<td><strong>Benefits</strong></td>
<td>- No financial cost – no change to current situation</td>
<td>- Clear understanding of what self-directed support is and what the mechanisms for directing your own support are (i.e. direct payment, individual budget, arranged service)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- allows directing your own support to be the mainstream not an alternative</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- provides a clear framework of rights, principles and processes</td>
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<tr>
<td></td>
<td></td>
<td>- greater clarity for all leading to improved ability to make informed choices</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- increased uptake of direct payments and individual budgets</td>
</tr>
</tbody>
</table>
Choice and control: the new default
Sectors and groups affected: All

<table>
<thead>
<tr>
<th>Option 1 – duty on local authorities to offer a balanced set of options but no duty to ensure informed choice and control</th>
<th>Option 2 – Duty on local authority to offer full range of eligible options and ensure informed choice and control</th>
<th>Option 3 – direct payment as the default</th>
</tr>
</thead>
</table>
| **Costs** | - May lead to small additional take-up of actively self-directed packages, leading to some of the costs of increased take-up as set out above  
- Current situation is not significantly changed – without informed choice, little progress in giving people real control and unlocking the benefits associated with it. | - Significant increased take-up of actively self-directed packages would lead to range of costs as set out above.  
- Significant increase in numbers of people on direct payments leading to increased costs as set out above.  
- Significant risk of agenda moving too fast and alienating key stakeholder groups | - Significant increase in numbers of people on direct payments leading to increased costs as set out above.  
- Significant increase in numbers of people on direct payments leading to increased benefits as set out above.  
- Significant change to current situation – increased rights to choice and control for individuals leading to better outcomes. |
| **Benefits** | - May lead to small additional take-up of actively self-directed packages, leading to some of the benefits of increased take-up as set out above | - Significant increased take-up of actively self-directed packages would lead to increased benefits as set out above.  
- Significant change to current situation – increased rights to choice and control for individuals leading to better outcomes. | - Significant change to current situation – increased rights to choice and control for individuals leading to better outcomes. |
**Bill provisions on people who find it difficult or impossible to direct their own support**

Sectors and groups affected: Those with no, limited, uncertain or fluctuating capacity; those who care for them, provide support for them, work with them or in any way have responsibilities towards them

<table>
<thead>
<tr>
<th>Option 1 – No new categories of person who can give consent, but simplify legislation on guardianship</th>
<th>Option 2 – the proposals in the draft bill – allow local authorities the power to appoint suitable person to assist and to direct support where necessary</th>
<th>Option 3 – remove all restrictions on who can give consent and simply allow local authorities to set their own rules</th>
</tr>
</thead>
</table>
| **Costs** | - Service users and local authorities will continue to struggle with requirements which many find onerous, cumbersome and unnecessary.  
- Review of guardianship legislation would be lengthy - Scottish Law Commission consideration of this is ongoing and will not report until 2014.  
- Amendments to Adults With Incapacity procedure may attach significant implementation costs, both non-recurring and recurring. | - Incidental training costs on local authorities  
- The proposal is expected to involve only minimal levels of administration in order to identify “suitable person”  
- No new formal appeals procedures created. | - Risk of divided practice across Scotland – inequalities for users and confusion for users and providers.  
- No legal safeguards to manage risk to adult’s rights to direct their own support. |
| **Benefits** | - Simplified guardianship process, encompassing appropriate “non court” routes. | - Increased flexibility and opportunity for service users and local authorities, to enable people to access self-directed support who have previously been excluded.  
- Increased uptake of actively self-directed packages leading to the benefits set out above. | - Increased flexibility and opportunity for service users and local authorities, to enable people to access self-directed support who have previously been excluded.  
- Increased uptake of actively self-directed packages leading to the benefits set out above. |
### Self-directed support for Carers

Sectors and groups affected: Carers; those individuals who have carers; carers organisations; local authorities

<table>
<thead>
<tr>
<th>Option 1 – A power for local authorities to offer support to carers but only in extremely limited and very specific circumstances and for specific items or services at points of emergency or crisis. This would not allow for any preventative intervention</th>
<th>Option 2 – A power for local authorities to offer self-directed support to carers in specific, limited circumstances:</th>
<th>Option 3 – A duty on local authorities to provide self-directed support to carers.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Costs</strong></td>
<td>- expenditure by local authority to provide support to carer, however this would be modest and in a limited range of circumstances - extension to carers’ assessment - may lead to increased take-up of carers’ assessments - training programme necessary</td>
<td>- additional expenditure, but this would be relatively modest, only in a limited range of circumstances, and incurred with the intention of helping to prevent or delay greater expenditure by the local authority or health services - modest extension to carers’ assessment process in some cases - may lead to increased take-up of carers’ assessments - training programme necessary</td>
</tr>
<tr>
<td><strong>Benefits</strong></td>
<td>- provides local authority some flexibility but limited and cannot help preventative agenda – may have some affect on preventing or delaying more expensive interventions but with limited effectiveness compared with option 2.</td>
<td>- provides power to local authorities to make one-off or relatively small ongoing payments to help to sustain the carer in their role - provides flexibility to allow local authority to help prevent or delay deterioration in carer’s ability to cope, thus preventing or delaying more expensive interventions for service user</td>
</tr>
<tr>
<td></td>
<td>user recognises the importance of the carer and the role they play</td>
<td>to cope on their own</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>Residential Care</strong>&lt;br&gt;Sectors and groups affected: those in residential care, those considering residential care, local authorities, care homes</td>
<td><strong>Option 1</strong> – do nothing. The law will continue to state that direct payments can only be used to purchase 4 weeks of residential care in any 12 month period</td>
<td><strong>Option 2</strong> – lay a regulation to limit access to self-directed support for residential care by circumstance rather than time</td>
</tr>
<tr>
<td><strong>Costs</strong></td>
<td>- inequitable for those who need residential care &lt;br&gt;- lack of flexibility</td>
<td>- modifications to administrative processes &lt;br&gt;- training programme necessary &lt;br&gt;- additional support, advice and information costs</td>
</tr>
<tr>
<td><strong>Benefits</strong></td>
<td>- retains status quo with National Care Home Contract, Ordinary Residence and residential care sector in general</td>
<td>- provides equality for those who need residential care &lt;br&gt;- greater flexibility whilst limiting application, so could benefit those who want it whilst mitigating some of the potential unintended effect</td>
</tr>
</tbody>
</table>
### Eligibility for Direct Payments

Sectors and groups affected: those who are currently excluded from direct payments

<table>
<thead>
<tr>
<th>Option 1 – do nothing</th>
<th>Option 2 – remove restriction on those with Compulsory Treatment Orders only</th>
<th>Option 3 – remove restrictions on all categories, including various restrictions re. criminal justice measures.</th>
</tr>
</thead>
</table>
| Costs                | - reduced integrity for Bill. It is inequitable to deny choice and control to specific groups where there is no good reason to retain barriers | - training requirement  
- may be inappropriate to remove restrictions on those who have come through criminal justice system |
| Benefits             | - no change, therefore no additional costs | - small potential increase in uptake of people actively directing their own support, but numbers affected are negligible  
- increased equity for all who receive community care services  
- increased equity for all who receive community care services |
Self-directed Support: a draft Bill for consultation

Equality Impact Assessment

Introduction

1. At the end of most policies, there are people. People are not the same and policies should reflect the fact that different people have different needs. This draft equality impact assessment accompanies the government's proposals for legislation on self-directed support. We want to consider how the proposals might affect all of the people across Scotland. This is where the Equality Impact Assessment (EIA) comes in. The draft Equality Impact Assessment is provided below. It includes the following:

- a summary of the aims and purpose of our policy - please see the main consultation document for more information;
- our initial assessment of what we know about the diverse needs and/or experiences of our "target audience"; in other words the main groups of people most likely to be affected by the Bill;
- our initial assessment of what else we might need to know so that we can improve the quality of this assessment;
- our initial assessment as to the impact that our proposals might have on the groups of people who might be affected;
- whether or not we think that our proposals provide the opportunity to promote equality of opportunity or good relations, and;
- our initial assessment about the relevance of the Bill and greater use of self-directed support to the groups identified in the assessment.

2. The sections are broken down into individual assessments for each of the following:

- age;
- disability;
- gender;
- lesbian, gay, bisexual & transgender;
- race, and;
- religion and belief.

What do we want to know from you?

3. We want to hear your views on any and all aspects of the draft Equality Impact Assessment and there is a question within our Bill questionnaire on the EIA. There are five key issues where we would welcome your views:

a) What are your views on our initial assessment as to the diverse needs or experiences of the key client groups for self-directed support?

b) Do you think there are gaps in our knowledge? If so, where are those gaps and can you provide any evidence to help to fill those gaps? We are looking for views from individuals and views provided by particular groups to organisations.
If you are aware of publications such as research, responses to other consultations or evaluations please provide copies or links to those publications. Finally we are interested in any data or statistics which you can provide.

c) What do you think about our assessment as to the ways in which our proposals might impact on different groups? Are there other ways in which the proposals might have a positive impact on the groups identified in this assessment? Are there potential negative impacts or concerns about self-directed support/direct payments that might be specific to particular groups of people? If so, what are these and how might these be addressed?

d) Do you believe the policy on the whole provides the opportunity to promote equality of opportunity or good relations? If not, why not?

e) Do you have any further views on the draft Equality Impact Assessment?

How to respond

4. This is a draft assessment. It follows on from an earlier version which we published earlier this year alongside our outline proposals for the bill. It is published in draft form in order that people and organisations can provide comments alongside their views on the consultation document for the Bill. We will take account of the views and the evidence provided as part of this consultation. We will then complete a final impact assessment.

5. As with the main consultation document, comments are invited by Thursday 17 March 2011.

6. Please send your response along with a completed Respondent Information Form to:

selfdirectedsupport@scotland.gsi.gov.uk
or
Kenneth Pentland
Self Directed Support Team
Adult Care and Support Division
Scottish Government
Edinburgh
EH1 3DG

Further information

7. To help you to provide a response to this impact assessment you may find it useful to consult the following sources of information

- the Scottish Government’s consultation discussion document on its proposals for a Bill on Self-directed Support;
- the draft Bill;
- the current Scottish Government [guidance](http://www.scotland.gov.uk) on self-directed support;
- [Review of Self-directed Support](http://www.scotland.gov.uk) (published 2008), and;
- the latest statistics on direct payments.
**EQUALITY IMPACT ASSESSMENT**

**Step 1: Define the aims of your policy**

<table>
<thead>
<tr>
<th>Policy Title</th>
<th>Self-directed Support: a draft Bill for consultation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strategic Outcome</td>
<td>Healthier</td>
</tr>
<tr>
<td>Directorate or Agency</td>
<td>DIRECTOR-GENERAL HEALTH AND CHIEF EXECUTIVE NHS SCOTLAND</td>
</tr>
<tr>
<td>Group</td>
<td>PRIMARY and COMMUNITY CARE DIRECTORATE</td>
</tr>
<tr>
<td>Division</td>
<td>Adult Care and Support Division</td>
</tr>
<tr>
<td>Branch</td>
<td>Self-directed Support (direct payments)</td>
</tr>
</tbody>
</table>

**What is the purpose of the proposed policy (or changes to be made to the policy)?**

The Bill would help to underpin the joint Scottish Government/COSLA 10 year Strategy on Self-directed support


Self-directed support describes the ways in which individuals and families can have informed choice about how their health and social care support is provided to them. It includes a range of options for exercising choice. The choice may include taking a direct payment, having a direct payment managed by a third party, or directing the individual budget to arrange support from the local authority or from a commissioned provider. The choice can also be a combination of these. The Scottish Government wants to introduce the Bill in order to underpin a significant increase the uptake of self-directed support.

**Who is affected by the policy or who is intended to benefit from the proposed policy and how?**

The main group of people affected by the proposed Bill are people in receipt, or likely to be in receipt, of social care. This includes, but is not exclusive to, people with disabilities, mental health problems and the elderly. All people in need of social care support, including people identified in this impact assessment, can benefit from the positive outcomes of self-directed support which include: greater flexibility, choice and control in care arrangements, better quality care and a more independent lifestyle.

**How have you, or will you, put the policy into practice, and who is or will be delivering it?**

A steering group of experts from across the sector has been convened to guide the Bill’s development prior to its introduction to Parliament. An implementation group, composed of local authorities, support organisations, providers and others, has been set up to implement the 10-year strategy which accompanies the draft Bill.

If enacted, legislation would place legal duties on local
authorities. Health boards would also have a role to play in terms of joint funding packages and robust support planning.

Support organisations in their various forms are expected to promote Direct Payments and self-directed support whilst ensuring the best support to individuals in receipt of a package.

Other reserved agencies have a role in the delivery of self-directed support for those in receipt of these funding streams.

Finally, citizens themselves would have a key role to play in making the necessary choices about how they want their care and support to be provided, and in directing their support thereafter.

**How does the policy fit into our wider or related policy initiatives?**

This policy assists in, but is not solely focused on, delivering the independent living agenda. This is the principle that disabled people should be valued as individuals, be able to fulfil their potential as active citizens, and have control over their lives and decisions. It also contributes to shifting the balance of care out of the hospital and closer to the patients home. It supports both the Government’s Dementia Strategy and the wider personalisation agenda to ensure that services are “person-centred”, in other words that they are designed and delivered around the individual, not the service.

The type of care and support packages that can be delivered via self-directed support can help to prevent the deterioration of an individual's physical and mental health. This means that it can help to contribute to a healthier Scotland. It can contribute to a fairer and wealthier Scotland. It can be used to support a person into employment, particularly in groups that historically have had higher unemployment rates.

Have the resources for your policy been allocated?  No

**Step 2: What do you already know about the diverse needs and/or experiences of your target audience?**

Age  Yes

Evidence  Statistical data is available in relation to direct payments only, though this includes statistical data on the age of direct payment recipients.

The Scottish Government commissioned a review of Self
Directed Support in 2008. The review involved case study participants from every age group.

We know that older people account for a large percentage of direct payment users in Scotland, but that it is still small in terms of the overall number of older people receiving social care who could potentially benefit from self-directed support.

Consultation
In 2009 the Self-directed Support National Reference Group with representation from key interests, recommended legislation be brought forward. Scottish Government officials undertook a number of activities to scope the bill. This included engagement with most local authorities and a number of user led and third sector organisations. The Government held a public consultation on the Bill’s proposals between late June and April 2010. Responses came from groups representing older and younger people. Consultation events were also held in partnership with Age Scotland and Alzheimer Scotland. Consultees were asked to consider any potential negative impact from the Bill proposals on the different equality strands.

Disability
Yes
Evidence
Statistical data is available in relation to direct payments only, though this includes statistical data on disability of direct payment recipients. The statistical data shows there are clear discrepancies within this group. In particular there are disproportionately fewer people with mental health problems and learning disabilities benefiting from direct payment compared to those with physical disabilities.

The 2008 Review of Self-directed Support in Scotland involved case study participants from each disability client group.

Consultation
The Self-directed Support National Reference Group with representation from key interests, has recommended legislation and officials have undertaken a number of activities to scope the bill which included engagement with most local authorities and a number of user led and third sector organisations. The Government held a public consultation on the Bill’s proposals between April and June 2010. Responses came from groups each disability client group. Consultation events were also held in partnership with several voluntary organisation that represents the interests of disabled people from different client groups.

Gender
Yes
Evidence
The Scottish Government collects statistical data on the numbers of men and women accessing direct payments. The data shows proportionate numbers of men and women opting to take a direct payment.

From informal consultations, gender-based inequality has never been raised as an issue.

Consultation
The National Reference Group with representation from key interests, has recommended legislation and officials have undertaken a number of activities to scope the bill which included engagement with most local authorities and a number of user led and third sector organisations. The Government held a public consultation on the Bill’s proposals between late June and April 2010.

Lesbian, Gay, Bisexual & Transgender
Evidence
Yes
The Scottish Government does not collect data on the sexual orientation of direct payment recipients. We have anecdotal evidence that people from this group may have a particular need for choice and consistency in their care.

A 2008 report by the Commission for Social Care Inspection in England found that there were higher levels of satisfaction among lesbian, gay and bisexual direct payment recipients than in lesbian/gay/bisexual users of traditional social care. The report pinpointed 3 reasons for this.

- Choice and consistency of worker to ensure positive attitudes to lesbian, gay and transgender people.
- Flexibility over care tasks and times to enable people to meet with friends or attend events.
- Control in deciding what to do if a worker is discriminatory.

Consultation
The National Reference Group with representation from key interests, has recommended legislation and officials have undertaken a number of activities to scope the bill which included engagement with most local authorities and a number of user led and third sector organisations. The Government held a public consultation on the Bill’s proposals between late June and April 2010.

Race
Evidence
Yes
The Scottish Government asks for data on the number of direct payment recipients categorised by different ethnic groups however this is not provided across all areas and it is not published as part of the annual statistics publication.
The Government recognise that more robust evidence is needed and should be addressed by research to assist policy development.

Consultation
The National Reference Group with representation from key interests, has recommended legislation and officials have undertaken a number of activities to scope the bill which included engagement with most local authorities and a number of user led and third sector organisations. The Government held a public consultation on the Bill’s proposals between late June and April 2010. We received responses from organisations that represented the interests of black and ethnic minority people.

Religion & Belief
Yes
Evidence
The Scottish Government does not collect data on the religion and beliefs of direct payment recipients. No statistical data is collected centrally on other forms of self-directed support. However we have anecdotal evidence that older people may wish to spend their final years in the company of people with whom they most identify, which is often people from their own faith communities.

Consultation
The National Reference Group with representation from key interests, has recommended legislation and officials have undertaken a number of activities to scope the bill which included engagement with most local authorities and a number of user led and third sector organisations. The Government held a public consultation on the Bill’s proposals between late June and April 2010.

Step 3: What else do you need to know to help you understand the diverse needs and/or experiences of your target audience?

Age
Yes
Evidence
We have evidence on the diverse needs of this group as set out in the answer to the previous question. We have representation on our Bill Steering Group from organisations that represent the interests of older people and children and families respectively. We regularly seek the views of organisations representing older people and families and work with them to help promote the benefits of self-directed support. From this engagement we know that the benefits can be enjoyed by people from every age group and we have no reason to believe that any age group would be affect less favourably than any other if new legislation is introduced.

Disability
Yes
Evidence
We have evidence on the diverse needs of this group as
set out in the answer to the previous question. We have representation on our Bill Steering Group from organisations that represent the interests of disabled people from different client groups. We regularly seek the views of organisations representing disabled people and have consulted directly with disabled people on the bill proposals. From this engagement we know that the benefits of self-directed support can be enjoyed by people of every disability client group. A significant number of consultation responses said that certain groups could be affected negatively *if* there was not adequate support provision. For example people with variable conditions or limited capacity. The Scottish Government acknowledges the necessity of effective support and support planning is a key area covered by the Scottish Government’s National Strategy for Self-directed Support.

<table>
<thead>
<tr>
<th>Gender</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence</td>
<td>Gender has never been raised as an issue during stakeholder engagement and evidence suggests that gender is not a factor in determining whether someone benefits more or less than others. This suggests the policy may not have a negative impact on subgroups. The Scottish Government collects statistics on the gender of direct payment recipients which demonstrates the numbers of men and woman opting to take a direct payment is proportionate.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Lesbian, Gay, Bisexual &amp; Transgender</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence</td>
<td>There is no specific data collected by the Scottish Government on the sexual orientation of direct payment recipients. This should be addressed in further research to assist policy development.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Race</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence</td>
<td>The Scottish Government has some statistical data on the number of people receiving direct payments categorised by race. The Social Care Institute for Excellence in England has identified barriers to people from black and minority ethnic communities accessing direct payments which provides an indication of problems faced by this group in Scotland. It is recognised that more robust data is needed to assist policy development in the future.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Religion &amp; Belief</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence</td>
<td>There is no specific data collected by the Scottish Government on the religions and beliefs of direct payment recipients.</td>
</tr>
</tbody>
</table>
This should be addressed in further research to assist policy development.

**Step 4: What does the information you have tell you about how this policy might impact positively or negatively on the different groups within the target audience?**

**Age**

There is a large amount of evidence which suggests that this policy impacts positively on people from every age group. The research commissioned by the Scottish Government in 2008 took into account the views of people from a range of ages including children, adults and the elderly. The research found that clients from every age group could benefit from the positive outcomes of self-directed support.

Older people make up 32% of direct payment recipients. However this constitutes a small percentage of the overall number of social care service-users from this client group. It is expected that large numbers of older people could benefit from clearer, consolidated legislation and from making user choice and control the default position following assessment.

**Disability**

There is a large amount of evidence which suggests that this policy impacts positively on disabled people of every client group. The Scottish Government review of self-directed support found that self directed support enhances people's quality of life by giving them greater independence and by helping to increase their social participation. The evidence suggests that this policy positively impacts of the lives of people with disabilities.

Within this group there are large discrepancies in the uptake of self-directed support between different groups. For example, people with mental health problems and learning disabilities are significantly less likely to direct their own support than people with physical disabilities even though evidence clearly suggests that self-directed support can benefit people from every client group.

A significant number of consultation responses were concerned that certain subgroups could be affected negatively if there was not adequate support provision. For example people with variable conditions or limited capacity. The Scottish Government acknowledges the necessity of effective support and support planning is a key
area covered by the Scottish Government’s National Strategy for Self-directed Support.

If implemented the legislation would help to increase uptake across this group by consolidating legislation making it easier to understand and access self-directed support at all levels. The legislation will directly benefit to some within the learning disabled group, through extending the eligibility to people who lack the capacity to consent. A small number of people with mental health problems will also benefit from extending the eligibility to include people who are subject to community treatment orders.

**Gender**

The numbers of men and women directing their own support are equitable and proportionate. Scottish Government statistics show that 55% of direct payment recipients are female and 45% are male. The policy is not expected to impact negatively on either group.

Gender-based inequality was not raised as an issue during informal consultations held in 2009 or during the public consultation 2010.

There have been several reviews of self-directed support where the case study participants were of different genders. These reviews did not raise gender-based inequality as an issue indicating that it may not be a significant factor.

**Lesbian, Gay, Bisexual & Transgender**

Data on the sexual orientation of Direct Payment recipients is not collected centrally. Anecdotal evidence tells us that lesbian, gay, bisexual and transgender people may particularly benefit from the continuity of care that a self directed arrangement can have. There is no expectation that the policy would have an adverse affect on this group.

**Race**

The Scottish Government has data on the numbers of different racial groups receiving direct payments in 2008. The figures are not published as official statistics but they are provided in this draft Equality Impact Assessment. They showed that in 2008: 2,372 (79%) were reported as white, 30 (1%) as black or Asian, 6 (0.2%) were reported as mixed race, 232 (8%) as other and 377 (13%) were reported as not known.

The Social Care Institute for Excellence in England identified barriers to black and minority ethnic service users accessing direct payments, including difficulties in recruiting personal assistants who are able to meet the cultural, linguistic and religious requirements of individuals, confusion over the relatives’ rules and the meaning of
We also have anecdotal evidence that problems around accessing direct payments due to a language barrier have been eased by amendments to the rules on employing relatives.

Scottish Government guidance on self-directed support already advises that appropriate services such as translators, trained care managers and service providers, targeted local support, and Personal Assistants will all be necessary as part of mainstreaming self-directed support.

The Strategy Implementation Group will be active in assessing further the impact of a growth in self-directed support on people from black and minority ethnic communities and will be tasked with ensuring the delivery of strategy meets the diverse needs of this group.

Anecdotal evidence suggests there is perhaps an access issue for people within this group. The Scottish Government will investigate this further through the strategy. Self-directed support however can help people with certain religions or beliefs. For instance, a person may benefit from employing a Personal Assistant who spoke a particular language, were it is difficult for a council to provide a service in this way.

Existing Scottish Government guidance on self-directed support advises that local authorities should attempt targeted personal assistant training to make Personal Assistants available for clients who want services provided by someone of their own faith community.

**Step 5: Will you be making any changes to your policy?**

- **Age**
  - No
- **Disability**
  - No
- **Gender**
  - No
- **Lesbian, Gay, Bisexual & Transgender**
  - No
- **Race**
  - No
- **Religion & Belief**
  - No
- **Comments**
Step 6: Does your policy provide the opportunity to promote equality of opportunity or good relations?

<table>
<thead>
<tr>
<th>Category</th>
<th>Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>Yes&lt;br&gt;This policy promotes equality of opportunity for older people. Evidence strongly suggests that self-directed support encourages the wider participation of older people in public life. By enabling more older people to live independently in their communities, it will also facilitate good relations with other groups. In particular, the widening of eligibility to include residential home care will promote equality of opportunity among a significant number of older people.</td>
</tr>
<tr>
<td>Disability</td>
<td>Yes&lt;br&gt;This policy promotes equality of opportunity for disabled people. Evidence strongly suggests that self-directed support encourages disabled people from every client group to participate in public life. It can also be used to support people in to work and education. There exists large discrepancies within this group. By enabling more people from every client group to direct their own support, this policy will facilitate good relations within and outwith the client group. In particular, the widening of eligibility to include people who lack the capacity to consent, people who wish to buy residential home care and people subject to community treatment orders will promote equality of opportunity among a significant number of people within this group.</td>
</tr>
<tr>
<td>Gender</td>
<td>Yes&lt;br&gt;This policy promotes equality of opportunity for all people in receipt of Social Care Services. There is no discernable advantage or disadvantage to people of different gender.</td>
</tr>
<tr>
<td>Lesbian, Gay, Bisexual &amp; Transgender</td>
<td>Yes&lt;br&gt;This policy promotes equality of opportunity for all people in receipt of Social Care Services. There is no discernable advantage/disadvantage to people of different sexual orientations.</td>
</tr>
<tr>
<td>Race</td>
<td>Yes&lt;br&gt;This policy promotes equality of opportunity for all people in receipt of Social Care Services including people from black and minority ethnic communities.</td>
</tr>
<tr>
<td>Religion &amp; Belief</td>
<td>Yes&lt;br&gt;This policy promotes equality of opportunity for all people in receipt of Social Care Services. There is no discernable advantage/disadvantage to people from different faiths or none.</td>
</tr>
</tbody>
</table>
Step 7: Based on the work you have done – rate the level of relevance of your policy

<table>
<thead>
<tr>
<th>Category</th>
<th>Relevance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>High</td>
</tr>
<tr>
<td>Disability</td>
<td>High</td>
</tr>
<tr>
<td>Gender</td>
<td>Low</td>
</tr>
<tr>
<td>Lesbian, Gay, Bisexual &amp; Transgender</td>
<td>Low</td>
</tr>
<tr>
<td>Race</td>
<td>Medium</td>
</tr>
<tr>
<td>Religion &amp; Belief</td>
<td>Medium</td>
</tr>
</tbody>
</table>

Step 8: Do you need to carry out a further impact assessment?

<table>
<thead>
<tr>
<th>Category</th>
<th>Need for Further Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>No</td>
</tr>
<tr>
<td>Disability</td>
<td>No</td>
</tr>
<tr>
<td>Gender</td>
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</tr>
<tr>
<td>Lesbian, Gay, Bisexual &amp; Transgender</td>
<td>Yes</td>
</tr>
<tr>
<td>Race</td>
<td>Yes</td>
</tr>
<tr>
<td>Religion &amp; Belief</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Comments - Yes: There is not sufficient evidence on the effects of this policy on people of different sexual orientation, race or religion and beliefs at this time. The Equality Impact Assessment can be amended if/when this evidence is available.

Comments - No: There is sufficient evidence on the effects of the policy on people with disabilities, people of different age groups and people of different gender to make an equality impact assessment at this time.

Step 9: Please explain how you will monitor and evaluate this policy to measure progress

A reference group on Self Directed Support was established in 2007 to assist in the development of the policy and to monitor its effects. If the Bill is introduced to Parliament plans for the detailed monitoring and evaluation of the legislation will be considered prior to and during the parliamentary process. In addition, Bill Team Officials will continue to liaise with the Scottish Government Equality Unit on this policy.

Step 10: Sign off and publish impact assessment

Policy Title: Self Directed Support (Scotland) Bill
Strategic Outcome: Healthier
<table>
<thead>
<tr>
<th>Directorate or Agency</th>
<th>DIRECTOR-GENERAL HEALTH AND CHIEF EXECUTIVE NHS SCOTLAND</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group</td>
<td>PRIMARY and COMMUNITY CARE DIRECTORATE</td>
</tr>
<tr>
<td>Division</td>
<td>Adult Care and Support Division</td>
</tr>
<tr>
<td>Branch</td>
<td>Self-directed Support (direct payments)</td>
</tr>
<tr>
<td>Name</td>
<td></td>
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<tr>
<td>Position</td>
<td></td>
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<tr>
<td>Sign off date</td>
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