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## A public consultation on draft regulations and statutory guidance to accompany the Social Care (Self-directed Support) (Scotland) Act 2013

### 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

WEST LOTHIAN COUNCIL

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

##### Surname

DERBY

##### Forename

JILL

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#### 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

(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 ONE of the following boxes**

Yes, make my response, name and address all available

**or**

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

**or**

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

**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

#### 4. Additional information – I am responding as:

**Please tick as appropriate**

1. Member of the public	<input type="checkbox"/>
2. Individual health/social care professional	<input type="checkbox"/>
3. Central government	<input type="checkbox"/>
4. Local authority	✓
5. Community Health Partnership	<input type="checkbox"/>
6. Health Board	<input type="checkbox"/>
7. Support & information or advocacy organisation	<input type="checkbox"/>
8. Voluntary sector organisation	<input type="checkbox"/>
9. Private Sector organisation (e.g. private social care and support provider)	<input type="checkbox"/>
10. Professional or regulatory body	<input type="checkbox"/>
11. Academic institution	<input type="checkbox"/>
12. Other – please specify	

# Consultation Questionnaire

## Draft Statutory Guidance on Care and Support

### Consultation Questions

Section 2: Values and Principles

**Question 1a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 1b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	√	<input type="checkbox"/>	<input type="checkbox"/>

**Question 1c: Do you have any further comments on this section of the guidance?**

*Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Re. the Statement of Intent on pages 3 – 4 of the Draft Statutory Guidance – it is felt that this focuses solely on disabled people and, therefore, that it does not reflect the scope of self-directed support and its implementation as the future mechanism for the delivery of social care and support to adults, older people and children and families.

West Lothian would suggest that 'Section 1: Introduction' will be perceived as setting the direction and tone for the statutory guidance and its focus on the duties and powers within the 2013 Act and, therefore, that it is important that this should be an inclusive section which highlights the changes across all service user groups and the anticipated benefits it is hoped this approach to the delivery of care and support will bring about.

Section 2 of the Draft Guidance is entitled 'The Supported Person's Pathway' (not 'Values and Principles' as suggested above) and, therefore, the comments given below pertain to the content of Section 2.

West Lothian would comment as follows:

- Whilst it is acknowledged that the Draft Guidance does contain and refer to a specific section – Section 9.1 – on Children and Families, it is still felt that Section 2 reads as rather adult focused in describing the supported person's 'pathway' through support and the core aspects of this 'pathway'. This section could perhaps be added to in order to also reflect some of the complexities and core aspects of the 'pathway' for children and their families – especially as initial responses to children and families can often be to provide crisis intervention whilst undertaking a more comprehensive assessment of need (as indeed can be the case in adult services).

- In 'Table 2: Roles and Responsibilities: The Professional' – it states that any wider legal duties should be considered – it may also be helpful to make some reference here to examples of other legislation which may need to be taken into account, e.g. Adult Support and Protection Act and the Children's Hearing Bill
- Under 'The Person's Pathway – Step 3: Eligibility and Assessment / Step 4: Support Planning' – it would be helpful if this was more outcomes-focused to support the move towards eligible needs and outcomes

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

Section 3: Values and Principles

**Question 2a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 2b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	√	<input type="checkbox"/>	<input type="checkbox"/>

**Question 2c: Do you have any further comments on this section of the guidance?**

*Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

It is to be welcomed that the Statutory Guidance on care and support includes a section on the values and principles which underpin the move towards self-directed support and which should inform professional practice.

West Lothian supports the principles of involvement and informed choice – however, it is felt that these sections may benefit from a little more detail and an acknowledgement that these processes can sometimes be extremely complex. Again, it was felt that 'Section 3' was somewhat adults focused.

West Lothian supports a collaborative and open approach to assessment and support planning. However, it may be helpful to also acknowledge here the expectations on professionals and the role of professional analysis and judgement in assessment and support planning in line with a range of statutory duties and responsibilities.

West Lothian would suggest that the need to add further references to the role of professional analysis and decision-making in carrying out a range of statutory duties is a recurring theme throughout the draft Statutory Guidance and would welcome amendments to more openly reflect this.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### Section 4: Eligibility and Assessment

**Question 3a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
√ (but a little muddled up and quite long)	<input type="checkbox"/>

**Question 3b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	√	<input type="checkbox"/>	<input type="checkbox"/>

**Question 3c: Do you have any further comments on this section of the guidance?**

*Some advice to help you to answer this question – Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Section 4 is entitled 'Eligibility and Assessment' and paragraphs on aspects of assessment and eligibility criteria are mixed up throughout the section – this would benefit from a more structured layout. As an assessment is required in order to determine needs and thereafter to determine which of those needs are eligible to be met by the local authority, it may be helpful to group the guidance paragraphs on assessment first and then to group the guidance paragraphs on eligibility after that in line with practice processes – the Section should be renamed 'Assessment and Eligibility'.

In relation to 'Eligibility criteria' (paragraphs 21-22) – this framework has been in place for some time and it was West Lothian's understanding that this was to be reviewed in the light of the introduction and requirements of the self-directed support legislation. If the eligibility framework is likely to be amended, then it may be confusing to include it here in such detail.

Paragraph 24 states that the 'authority's ... eligibility criteria should consider the application of that criteria within a broader framework of prevention, early intervention ...' However, as current eligibility is focused on critical and substantial need, it would be helpful if the content on eligibility in the Statutory Guidance included where it is anticipated prevention and early intervention will fit into any amended eligibility criteria guidelines.

As paragraph 24 acknowledges, 'a local authority can take into account its overall resources when determining eligibility criteria' and West Lothian believes that good resource management requires us to do so, both in order to maximise the use of available resources and to do so in an equitable and transparent manner. Given current policy agendas along with the current economic landscape, eligibility criteria based on eligible needs and outcomes will be a key aspect of SDS implementation and it would be helpful if the Statutory Guidance endorsed this.

Section 4 would again appear to be focused on adults and yet Section 9.1 – Children and Families does not provide similar input on the assessment process. It would be helpful if the children and families perspective could be added into Section 4 or, alternatively, added into Section 9.1 with Section 4 clearly stating it is focused on adults and giving a clear reference signpost to Section 9.1 for children and families information.

There is not a comparable eligibility framework for children’s support and services to that for adults and older people as outlined in paragraph 22 and this has been identified as a key area for development in implementing self-directed support with children and families – it may be helpful to acknowledge this within the guidance.

In relation to paragraph 26, it may also be helpful to acknowledge that, given the complexities and dynamics of the circumstances that statutory services often operate within, there will be situations where families or individuals will not wish to fully engage with the assessment process and the identification of their needs and outcomes. Therefore, in meeting wider statutory duties, the process may appropriately also rest on conversations with people other than the supported person.

Paragraph 38 – ‘Self-assessment’ – the heading ‘self-assessment’ may be somewhat misleading as it could be perceived that this forms part of the statutory assessment when, apart from in relation to carers’ assessments, the assessment function cannot currently be delegated. West Lothian welcomes an approach which encourages supported people to consider and identify their own needs and outcomes as part of the assessment process but would suggest that it may help to avoid any confusion if an alternative term for this were to be used.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### Section 5: Support Planning

This section of the guidance covered:

- general guidance on support planning
- risk
- resources
- the choices that must be made available to the supported person and
- information and support

**Question 4a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 4b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	√	<input type="checkbox"/>	<input type="checkbox"/>

**Question 4c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Section 5.3: Resources – West Lothian welcomes the recognition of the wider range of resources to be considered contained within the guidance and agrees that this is not about financial resources alone. However, in West Lothian as in many other local authorities and particularly in relation to Children's Services, there are still a number of resources which are provided in-house, e.g. Family Centres, in order to be responsive and to work within a framework of prevention and early intervention. Children's Services would welcome additional guidance on which types of service delivery would fall within the self-directed support framework and on how to offer the self-directed support options taking into account any transition period from in-house provision to alternative resources.

Section 5.4: ii) Paragraphs 64-66 – West Lothian would suggest that additional guidance would be of benefit here along with greater clarity and support for the role of professional assessment and judgement particularly in relation to wider statutory responsibilities around protection. The professional discretion as currently stated in the guidance does not relate to the choice of option but only to the choice of support to meet assessed needs. However, there will be some circumstances not covered by the regulations where the professional would have significant concerns about the potential risk of supporting a person's choice of option 1 – e.g. this may be due to the vulnerability of the supported person acting as an employer or where parents accessing support for a child have a lifestyle which is presenting potential risks. West Lothian would support a guidance position which clearly acknowledges professional discretion on direct payments as appropriate in relation to protection issues.

**Draft Statutory Guidance on Care and Support**

**Consultation Questions**

Section 6: Monitoring and Review

**Question 5a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 5b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	√	<input type="checkbox"/>	<input type="checkbox"/>

**Question 5c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Section 6: Monitoring and Review – Paragraph 79 – It may be helpful to state here that local authorities ‘should aim to conduct reviews on an annual basis as a *minimum*’. Actual review schedules will be based on need and may be more frequent in some cases.

Paragraph 80 – this paragraph outlines two types of review – the 2013 Act option review and the needs and outcomes review – that may or may not be conducted at the same time. It may be helpful to also highlight that a third, financial, review may also be required in relation to options 1 and 2.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### **Section 7: Facilitating genuine choice for individuals**

**Question 6a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 6b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	<input type="checkbox"/>	√	<input type="checkbox"/>

**Question 6c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Section 7: Facilitating Choice – this section seems to focus solely on local authority provided or commissioned support. It may of benefit for this section to be expanded and to place local authority support within a context of wider commissioning and support options, including health, third sector, private and community supports.

In the early stages of self-directed support implementation there may be issues relating to available information on provision and provider capacity when promoting choice – it would be helpful if this could be acknowledged within the guidance.

This section does not mention one of the key choices open to people under option 1 – the employment of personal assistants. The potential level of take up of the opportunity to employ personal assistants will have a direct bearing on other commissioning activity.

When discussing facilitating choice, the Children and Families Service felt it would be helpful to also make some reference to those children and families who may choose not to fully engage in this process but where local authorities will continue to be involved in offering services and support.



## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### **Section 8: The role of the NHS professional**

**Question 7a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 7b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	<input type="checkbox"/>	√	<input type="checkbox"/>

**Question 7c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

that are more appropriate for statutory guidance rather than Regulations?

In the light of the integration of health and social care, West Lothian would suggest that this section should be outlined within that context with specific reference being made to the role of the NHS as an organisation in delivering on the self-directed support agenda.

Paragraphs 84 and 85 – Clarification on what is meant by ‘... support funded or arranged by the NHS may ..... be provided in place of social care provision’ is required – is this a reference to continuing care? There should be a section on continuing care included in the guidance here.

West Lothian acknowledges that a joint approach is not simply about the pooling or transfer of budgets. However, specific support for NHS agreement to this and some guidance around protocols for shared funding of support packages within the Statutory Guidance would be most welcome and would help to address some of the inconsistencies in practice which exist nationally.

Joint assessment... – References to both the role of Single Shared Assessment and of multi-agency assessment would be appropriate here.

Monitoring and review – paragraph 91 – this section is perhaps open to interpretation and would benefit from a clear statement on the clinical governance of health interventions and support provided by others but funded by health.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

## Section 9.1: Children and Families

**Question 8a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Question 8b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Question 8c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Section 9.1: Children and families – it is felt that the Statutory Guidance as a whole is somewhat adult based and focused and that there is a lack of information in regard to working with children and families. This section of the guidance, therefore, is felt to require rather more detail and clarification in relation to how self-directed support is expected to work within children and families services and how it can be aligned with the wider statutory responsibilities placed on local authorities, particularly in relation to child protection and the priority that must be placed upon this.

In relation to whether or not Regulations should be used to place specific restrictions on options 1 and 2 with respect to children's support, it is suggested that rather than placing itemised restrictions on these, there should be clarity about the role of professional judgement and the local authority should have the power to exercise discretion in relation to these based on individual needs and circumstances. The guidance needs to reference the position regarding potential conflict in relation to children and young people subject to compulsory measures of care, on the Child Protection Register or where families do not support the identified needs and outcomes and to support the power to exercise discretion when meeting safeguarding responsibilities. It is acknowledged that the guidance states that the professional can exercise judgement in relation to the 'nature' of the support to be provided but West Lothian believes that there may be some circumstances where this discretion would be needed in relation to the choice of option as well. In addition, this discretion will support the professional in seeking to engage with parents and children in order to work with families towards agreed outcomes. As currently, the capacity of the person with parental responsibility to manage a direct payment must be taken into account when considering the choice of self-directed support option.

There are on-going issues in relation to the current Protection of Vulnerable Groups regulations as people with parental responsibility choosing a direct payment and opting to employ personal assistants are not required to ensure that their employees have PVG membership – this is an area of potential risk and it would be helpful if the guidance could reference this, make recommendations and highlight the importance of PVG membership.

'Transition ...' Paragraphs 101-102 – West Lothian would support an approach which promotes increasing responsibility and independence for young people. However, it would be helpful if the guidance could also provide additional reference to transition issues where

the young person lacks capacity, particularly in relation to direct payments being used to employ staff as, in order for support plans to continue, a guardianship order would need to be in place from the young person's 18<sup>th</sup> birthday.

'Incapacity' – Paragraph 103 – the use of the word 'opportunity' here would seem to suggest that application for power of attorney or guardianship is optional. It would be helpful if this could be reworded to reflect the statutory requirement for guardianship to be in place from the young person's 18<sup>th</sup> birthday if the young person lacks capacity and their carer wishes to select option 1 on their behalf.

A specific section on issues relating to young carers where the parent or guardian is the supported person would be helpful in this part of the guidance. Clarification on issues relating to the payment and management of direct payments and to supporting young carers to be actively considered when looking at needs and outcomes would be welcome.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### Section 9.2: Supported decision-making and circles of support

**Question 9a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 9b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	√	<input type="checkbox"/>	<input type="checkbox"/>

**Question 9c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

'Supported decision-making ...' West Lothian would suggest that the guidance should include some definition or clarification of 'circles of support' in the context of self-directed support and supported decision-making. This will not only support local authorities in engaging with supported people and their support networks but will also help to provide guidance and information to people who may be considering taking on the role of assisting supported people to make and communicate decisions – it is important for people to understand the role, responsibility and boundary which they are taking on in seeking to help people to represent their needs and wishes and to understand the important distinction between enabling someone to explore and express these rather than deciding these on their behalf.

It would be helpful if this section referenced legal capacity and the requirements pertaining to this in the context of relevant legislation as the local authority is obliged to comply with these.

The guidance should also provide more detail on situations where the capacity to consent is in doubt and should confirm the position of local authorities who have to act within the law. The introduction of self-directed support and the wider options framework is likely to lead to an increase in guardianship applications and demand on MHO services. In the past parents and carers have expressed concern at the cost and timescales of applications and it would be helpful if the guidance could confirm when this is not optional.

Paragraph 107 – the use of the term ‘reasonable steps’ is not particularly helpful in this context as it is completely undefined and open to interpretation – this needs to be clearer.

Paragraph 105 of the guidance could also be viewed as to be suggesting that almost any level of assistance required to enable the supported person to make relevant decisions should be provided and this has implications in terms of available resources, timescales, etc. – whilst not seeking to promote a prescriptive approach by the guidance, West Lothian feels it would be helpful if the guidance was a little less vague in this area.

West Lothian’s Children’s Services again suggested that the language and information in this part of the guidance was very adult focused – it was felt that a reference to parental rights and responsibilities and their support to children in relation to decision-making would be helpful. However, this section should also reference the complexities of working with children and families where there is conflict and concerns about a parent or carer’s ability to make appropriate, safe decisions on behalf of the child, e.g. where a child is on the Child Protection Register.

It is worth noting that the age at which a child is considered to be an adult within related legislation can vary according to the circumstances in which the child is being considered and the self-directed support guidance should be mindful of this.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions**

#### **Section 9.3: Carers**

**Question 10a: Was this section of the guidance clear and easy to understand?  
(Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 10b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	√	<input type="checkbox"/>	<input type="checkbox"/>

**Question 10c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

West Lothian recognises the role and contribution of unpaid carers in supporting people to live as independently as possible within their own communities and is in favour of the local authority having the power to provide support to carers to enable them to continue in their caring role and of the new requirement to offer carers who are eligible for support, the choice of option as to how they wish to receive their support. However, it is felt that this section of the guidance requires further detail and clarification.

It would be useful to have some reference to the rights and responsibilities of parents and when this role could be considered to become that of carer within the context of the 2013 Act rather than that of parent – what is the understanding in this context of the definition of ‘substantial amount of care’?

The draft regulations currently being consulted on propose a relaxation of the ‘exceptional circumstances’ rule under which family members can be employed as personal assistants by people in receipt of direct payments and West Lothian will be responding to that consultation. However, should this proposal go ahead, the guidance would need to be expanded to include in the Carers section, information on how the issues raised by this change are to be addressed in practice as, e.g., there will be family members acting as both paid and unpaid carers. Clarification around the role of carers’ assessments and eligibility for short breaks from caring should be referenced.

The guidance would again benefit from a specific reference to young carers in this section, especially in relation to direct payments if a young carer under the age of 18 wishes to choose this self-directed support option – who will receive this and who will manage it?

‘Charging for support to carers’ – West Lothian will be responding to this consultation but would wish to highlight here that the finalised guidance should include information based on the outcome of this consultation and how this policy is to be applied. Any waiving of charges will have financial implications for local authorities and, therefore, wider service delivery, and we would request that this be acknowledged in the guidance – for example, in relation to financial support from other sources such as the Carers’ Allowance which local authorities should be encouraged to consider as they should not be expected to waive charges and also to not take relevant allowances into account.

**Draft Statutory Guidance on Care and Support**

**Consultation Questions**

**Section 9.4: Direct payments**

**Question 11a: Was this section of the guidance clear and easy to understand? (Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 11b: How useful did you find this section of the guidance?  
(Please tick)**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Question 11c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Section 9.4: Direct Payments – Paragraphs 124 and 130 – these sections should make it explicit that the role and responsibilities of the professional in liaising with the supported person in relation to direct payments does not extend to advice on employment issues but rather only to referring the person to an appropriate organisation – this is specialist advice and support on being an employer should be provided by those with the relevant level of expertise.

Paragraph 125: Third Party Direct Payments – it is felt that a little more detail is needed in this section, including being clear about the expectations that the supported person can have of any person or organisation they are seeking to act as a Third Party on their behalf. In addition, the guidance should be explicit in supporting the role of professional assessment and judgement in whether or not to agree to a Third Party arrangement, e.g. if there are some concerns that the supported person is experiencing undue pressure to agree to such an arrangement from a friend or family member who is known to have financial difficulties.

It would be helpful if the guidance were to also confirm here that a personal assistant employed to provide care should not be appointed to also manage the finances on which their job depends. In addition, it would be of use if the guidance could confirm that anyone employed as a personal assistant should not be the appointed guardian or attorney due to the potential conflict of interest between these roles.

'The choices available ...' – Paragraph 127 – would it be more accurate to replace the term 'assessed need' with 'eligible need' here? The list of examples of what a person can use a direct payment to purchase is rather traditional – it might be helpful to reword this.

'Welfare monitoring' – Paragraph 133 – local authorities already monitor welfare via their care management and review frameworks. As highlighted in 7c above, the guidance needs to provide more detail on the role of health and health professionals in the monitoring and review of care and support packages and should be clear about the specific expectations on health services which they will be required to meet.

Paragraph 138 – it may be helpful for the guidance to state that the continued payment of any direct payment in these and any other relevant circumstances applies to both the social care *and* the health funding components of the direct payment.

It was felt that a specific reference to direct payments for children's services would be useful within this section of the guidance – there was also a suggestion that giving the local authority a discretionary power to decide eligibility for a direct payment in cases where there may be a conflict of interest, e.g. child protection cases, was desirable and would allow for more consideration of the individual circumstances of the child and the family.

## Draft Statutory Guidance on Care and Support

### Section 9.5: Wider legal duties and strategic responsibilities

**Question 12a: Was this section of the guidance clear and easy to understand? (Please tick)**

Yes	No
√	<input type="checkbox"/>

**Question 12b: How useful did you find this section of the guidance? (please**

Very useful	Quite Useful	Not very useful	Not at all useful
<input type="checkbox"/>	√	<input type="checkbox"/>	<input type="checkbox"/>

**Question 12c: Do you have any further comments on this section of the guidance?**

*Please provide your suggestions for improvements or additions to this section. Are there any further topics that you would like to see included, any changes that should be made or any other comments you'd like to make?*

Section 9.5: Wider legal duties ... – Adult support and protection – it is felt that the section on adult support and protection and self-directed support needs considerably more detail, particularly in relation to managing the interface between the statutory, and sometimes competing, requirements of both pieces of legislation. The self-directed support legislation outlines a small number of specific exclusions from access to direct payments but there will be other situations where the local authority believes that, in order to meet their duty of care, access to direct payments should be restricted due to safeguarding issues and concerns about risk. It worth noting that these protection duties may relate, not just to the supported person, but also to others, e.g. carers. It would be helpful to anyone who may be affected if the guidance gave a clear direction on prioritising protection duties in relation to self-directed support duties.

'Reablement' – West Lothian welcomes the position that reablement services are part of the assessment process and not subject to the self-directed support requirements and is in agreement with this view. West Lothian would not object to a firm statement in relation to this. However, it would be helpful if the guidance could make reference to how it anticipates reablement support will interface with existing self-directed support packages, especially where the supported person may be employing personal assistants.

'Residential Care' – it would be helpful if clarification could be given in relation to what is included under residential care in this context – e.g. does this just refer to the care costs? In relation to Children's Services, clarification on the definition of residential care would be helpful – e.g. does this include secure accommodation or residential school placements and, if so, is it just term times?

'Equipment and adaptations (including housing adaptations)' – current guidance on direct payments states that these are payable only in lieu of 'temporary adaptations' but the proposed guidance does not appear to make that distinction – is it the intention that all housing adaptations should be eligible? If this is the case, the guidance will require considerably more information and detail on how the self-directed support legislation will interface with all other affected legislation, including housing legislation, which governs adaptations to property, funding streams and so on. West Lothian would support retention

of the current position whereby direct payments apply only in the case of equipment and temporary adaptations.

It is suggested that the guidance should also include recommendations in relation to the ownership, maintenance and repair of equipment purchased using a direct payment as this will help to promote a consistent approach in relation to these nationally.

'Other forms of social welfare ...' – West Lothian believes that local authorities should not be required by law to offer all four self-directed support options to people fleeing domestic abuse or in need of assistance to address homelessness or drug or alcohol addiction but nor should they be prevented from doing so – they should have the discretionary power, but not the duty, to offer the four options as this will allow professionals to assess each case on the basis of individual circumstances, needs and outcomes and to reach an informed professional judgement on the most appropriate support mechanism for that person or family. It would be helpful if the guidance could also reference the interface between other forms of social welfare support and the legislation governing children and families support.

## **Draft Statutory Guidance on Care and Support**

### **Consultation Questions – General Questions**

#### The Guidance document as a whole

#### **Question 13: Do you have any further general comments on the guidance?**

*For example, are there any gaps in terms of the topics covered by the guidance? Are there any major changes that you would recommend? Do you have any comments on the style and layout of the guidance, or the language used in the guidance?*

West Lothian has welcomed the opportunity to respond to the consultation on the proposed statutory guidance on care and support to accompany the 2013 Act and would wish to note that the council is supportive of the principles underpinning this approach to social care delivery and intent on implementing self-directed support locally as successfully as possible.

However, further to the answers above in response to specific questions, West Lothian would offer the following additional comments in relation to the guidance as a whole:

- The guidance is generally very adult focused and also more focused on disability and would benefit from a more inclusive approach throughout
- In relation to Children's Services:
  - The complexity of some childcare work is not felt to be much acknowledged, particularly in relation to child protection and welfare in situations where the parental view differs from that outlined in the professional assessment
  - Capacity to understand and manage their chosen self-directed support option is embedded in the guidance but the assessment and review of this capacity in relation to their role as an employer, if opting for a direct payment and employing personal assistants, is not referenced and yet taking on this role may exacerbate parental stress and the professional should have the discretion to address this as required
  - The guidance would benefit from further clarification when considering the role of a parent or other relative or family member and the relevant expectations attached to these and when these roles change to that of a carer where there may be eligibility for additional support to meet needs



- Rather than some lists of specific exclusions, it is felt that it would be more helpful for the emphasis to be on the role of professional assessment and judgement with a focus on risk enablement and management
- The role of professional judgement throughout the various processes of supporting people is not referenced or supported in the guidance as much as West Lothian believes it should be – this includes in relation to the selection of the self-directed support option. Professionals have to be aware of the vulnerability of supported people and the need to meet their safeguarding responsibilities and duty of care when assessing eligible need and agreeing outcomes and support plans – the supported person exists within a wider context and professionals would not be meeting their obligations if they did not take this into account as part of the assessment process. West Lothian does not raise this issue as a consequence of not wishing to support greater choice and control for supported people and their families and carers which is an aspiration the local authority firmly believes in but rather, does so to balance this aspiration with the context of wider statutory duties and responsibilities in a way which is open and transparent to the people seeking support.
- West Lothian would note that the timescale between the anticipated release of the finalised guidance in January 2014 and the date of implementation two months later is extremely tight and would ask that the Scottish Government take this into account when assessing local authorities' progress towards full implementation. The scale of the organisational and cultural change being initiated cannot be overestimated and in order to maximise the chances of getting as much right in the initial stages as possible, time will be needed to implement new systems and processes and to prepare staff for these changes.
- Whilst significant changes to the 'exceptional circumstances' rule on the employment of close relatives are proposed within the draft Regulations, there is no reference to these within the guidance and yet, if introduced, this would have major implications for local authorities and, indeed, for supported people and their families. The employment of a close relative can affect family dynamics and the relationships between family members and can blur the boundaries between them and the supported person as their employer and as their relative. There is also, e.g., the potential for vulnerable people to be pressurised into employing a close relative in response to the current economic climate and, conversely, there is the potential for family members to feel under pressure to take on a caring role as the supported person is stating that they can pay them for this.
- West Lothian would suggest that some of the risks outlined in relation to the current Protection of Vulnerable Groups regulations could be enhanced by the removal of the 'exceptional circumstances rule'.
- West Lothian would note that the 'exceptional circumstances' rule has been in place for some years but is not aware of having received any formal complaints in relation to the local operation of this rule – this would suggest that the balance between having the discretion to approve the employment of close relatives in such circumstances but not having a blanket duty to do so is the right approach.
- If the finalised statutory guidance and regulations will have the effect of revoking the 2007 Guidelines, then there is an issue in relation to the content on capacity – the guidance does not explicitly state that a person cannot receive a direct payment of behalf of a person who lacks capacity unless they have either power of attorney or guardianship empowering them to do so. This requirement needs to be made clear and added into the guidance.
- West Lothian is aware that a number of additional sets of guidance are also being produced targeted at particular groups and would ask that all guidance be rationalised as much as possible to avoid confusion and minimise duplication.

- West Lothian is concerned that whilst there appears to be an expectation that health services will engage with local authorities in a joined up way concerning the process and delivery of self-directed support, there is no requirement for them to do so. It is felt that this has to be addressed as we move the health and social care integration agenda forward and that some level of requirement should be placed upon NHS Services as part of the integration process.

### The costs and benefits arising from this guidance

#### **Question 14: Do you have any comments on the financial costs or benefits of the requirements set out in the guidance?**

*Can you identify any financial costs or benefits to individuals, local authorities, health boards, providers or any other person or organisation affected by the guidance? In considering the costs and benefits you may wish to consult the Business Regulatory Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink:*

<http://www.scotland.gov.uk/Publications/2012/03/5525>

*We plan to update the BRIA in light of the comments and information from this consultation.*

Whilst being supportive of the aims of self-directed support and the principles underpinning it, West Lothian remains concerned that the implementation of self-directed support as outlined within the 2013 Act, the draft Statutory Guidance on Care and Support and the draft Self-Directed Support (Direct Payments) (Scotland) Regulations 2013 has the potential to have serious financial implications for the local authority at a time when it faces an overall reduction in funding.

West Lothian is aware that it is anticipated that, after implementation, the delivery of self-directed support will be cost-neutral but has concerns that this may not be the case – the national strategy has a ten year timeframe but implementation funding has been provided for only the three years to 2014/15. It may be the case that self-directed support will help to promote efficiencies in the longer term by improving outcomes and reducing demand for traditional service provision but it will take time to determine if this is, in fact, the case and the council believes that recurring costs will be incurred.

The implementation of self-directed support requires local authorities to undertake a major shift in culture and infrastructure and whilst the funding provided to support implementation is welcomed, West Lothian remains concerned that the funding allocated will not be sufficient to cover local implementation costs.

West Lothian recognises that in order to manage available resources equitably and effectively, the development of deliverable eligibility criteria and resource allocation models will be crucial and that, as part of implementation, there will be a transition period within which the local authority will require to deliver both cash and individual budget funding to people opting for these as well as continuing to fund traditional service provision. However, future eligibility thresholds must be determined by resource availability and operational procedures and charging policies will reflect this.

West Lothian will be responding separately to the consultation on the waiving of charges to carers but would wish to also highlight here that this will have significant cost implications for the local authority and, therefore, if this goes ahead, there would be a need for central government to meet the cost of this new policy.

The following is a summary of the cost implications of self-directed support implementation as underpinned by the draft Statutory Guidance identified by West Lothian:

- Workforce development costs – training programme development and delivery and associated materials
- Change costs as the self-directed support framework provisions are mainstreamed across all service areas – supporting infrastructure
- Increased assessment, care and support planning and review timeframes as the requirements of the 2013 Act are implemented
- Increased administration and financial services costs – systems and process development and delivery and individual budget management and administration – there will need to be an increase in individual financial monitoring to ensure appropriate use of council funding
- Commissioning new and additional services from a range of information, advice and support providers to support the delivery of self-directed support requirements
- The move towards more individualised support planning and contractual arrangements will have an impact on current and future commissioning and procurement practice and there will be costs incurred by the move away from economies of scale linked to, e.g., block contracts

The 2013 Act places statutory duties upon the local authority and, therefore, any costs associated with meeting these obligations which are not met by the provision of implementation funding will require to be met from elsewhere and this would have an impact on other service delivery. It should be noted that the greater the level of regulation and requirements, the greater the potential costs of delivering these and this needs to be taken into account when finalising the proposed guidance and regulations and when determining future financial settlements.

West Lothian recognises that jointly funded health and social care individual budgets and packages can improve the outcomes, wellbeing and social inclusion of citizens, especially those with complex care and support needs, and can also demonstrate the maximisation of resources and a more cost effective approach to meeting people's needs and outcomes. It is felt that the move towards the integration of health and social care cannot avoid the inclusion of measures to place some responsibilities linked to self-directed support delivery upon NHS services.

### The equality and human rights impacts of the guidance

**Question 15 (a): Do you have any views on the impact of the guidance on any or all of the following equality categories:**

- i) age;**
- ii) disability**
- iii) gender;**
- iv) lesbian, gay, bisexual and transgender;**
- v) race, and;**
- vi) religion and belief**

*Some advice to help you to answer this question - By "equality impacts" we mean whether or not the guidance will affect certain groups in a positive or a negative way. In considering the impacts you may wish to consult the Equality Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink:*

<http://www.scotland.gov.uk/Publications/2012/03/9876>

*We plan to update the Equality Impact Assessment in light of the comments and information from this consultation.*

West Lothian does not have any concerns in relation to the equality impact of the guidance.

**Question 15 (b): Do you have any views on the impact of the guidance on human rights?**

For more information about human rights please see the Scottish Human Rights Commission's website at:

<http://www.scottishhumanrights.com/abouthumanrights/whatarehumanrights>

As outlined in the responses above, West Lothian has some concern at the potential tension between the statutory duties contained within the 2013 Act and wider statutory duties, particularly in relation to duty of care and protection issues – it is important for local authorities to have the discretion to act in a way which supports people who are potentially at risk and which, therefore, recognises their human rights.

## Consultation Questionnaire

### Draft Regulations

#### Consultation Questions

**Question 1: What are your views on Part 2 of the draft Regulations (calculation, payment and termination of direct payments)?**

West Lothian welcomes Regulation 4 which now allows direct payments to be made net of any charges. However, giving service users the choice to receive their direct payment gross of any contribution will mean that the local authority will potentially incur administration costs which could reasonably have been avoided.

In relation to the termination of direct payments, it would be helpful if it was clarified that Paragraph 7 (1) (a) applies where a child becomes subject to compulsory measures of care.

**Question 2: What are your views on Part 3 of the draft Regulations (appropriate/inappropriate circumstances for the employment of close relatives)?**

Part 3 – 'Circumstances where a family member may provide support' – Paragraph 9 (3) – West Lothian would suggest that the list of factors which allow a direct payment to be used to employ a family member as a personal assistant are so broad as to have the effect of allowing anyone to employ a family member who wishes to do so. West Lothian is concerned that if the Regulation is introduced as it is written it will have the following implications:

- The paid employment of a close relative to provide support can affect family dynamics and the relationships between family members and can blur the boundaries between them and the supported person as their employer and as their relative.
- The needs and outcomes of carers and of supported people can be very different and yet it will be difficult to establish the needs of carers as part of a carer's assessment if the family member is acting as both a paid and unpaid carer
- There is the potential for vulnerable people to experience undue pressure to employ a close relative, perhaps in response to current economic pressures
- There is the potential for family members to feel under pressure to take on a caring role when the supported person is stating that they can pay them for this. In addition, support from other family members may decline if there is a belief that another relative is being paid to carry out support tasks.
- How will the paid employment of a close relative via a direct payment interface with the proposed waiving of charges for carer support?
- West Lothian would suggest that some of the risks outlined in relation to the current Protection of Vulnerable Groups regulations could be enhanced by the removal of the 'exceptional circumstances rule'.
- West Lothian would note that the 'exceptional circumstances' rule has been in place for some years but is not aware of having received any formal complaints in relation to the local operation of this rule – this would suggest that the balance between having the discretion to approve the employment of close relatives in such circumstances but not having a blanket duty to do so is the right approach

West Lothian would, therefore, support the retention of the current 'exceptional circumstances' rule which gives the local authority the discretionary power to approve the employment of close relatives.

**Question 3: What are your views on Regulation 11 which deems individuals who are placed under a variety of criminal justice orders to be ineligible to receive direct payments?**

For example, is it appropriate to impose the exclusions listed in Regulation 11? Are there any persons not listed in regulation 11 to whom it would be inappropriate to offer the option of a direct payment?

West Lothian believes that, rather than focusing on specific lists of exclusions, it may be more helpful to consider making the requirement to offer a direct payment discretionary where the local authority has concerns related to the safeguarding of a supported person or carer – adult support and protection and child protection duties should be able to be prioritised over the provision of a direct payment in order for local authorities to be able to comply with their statutory obligations.

**Question 4: What are your views on restricting access to direct payments for those who are homeless, those who are fleeing domestic abuse or those who require support in relation to drug or alcohol addiction?**

West Lothian believes that local authorities should not be required by law to offer all four self-directed support options to people fleeing domestic abuse or in need of assistance to address homelessness or drug or alcohol addiction but nor should they be prevented from doing so – they should have the discretionary power, but not the duty, to offer the four options as this will allow professionals to assess each case on the basis of individual circumstances, needs and outcomes and to reach an informed professional judgement on the most appropriate support mechanism for that person or family.

**Question 5: What are your views on restricting access to direct payments in relation to the provision of long-term residential care?**

This question was raised during the initial consultations on a draft SDS Bill. The Scottish Government would like to invite detailed views before making a final decision prior to the laying of the Regulations before the Scottish Parliament. Should the restriction be removed from the final regulations, thereby allowing direct payments for residential care? Or should it be retained? Please provide reasons as to your support or opposition to requiring authorities to provide direct payments for residential care.

West Lothian is not aware of any demand for direct payments to be made available for residential care and, given the local arrangements on choice already in place, it is difficult to determine what the potential advantages of this would be for the supported person – indeed, it could open up the risk of the supported person being subject to ‘top-up’ fees from providers if they chose to view people in receipt of a direct payment to purchase their own care placement as self-funders.

However, if the introduction of direct payments for residential care were to be proposed, the following would need to be considered:

- In relation to Children’s Services, it would be helpful to have some clarification on what is meant by ‘residential care’ in this context – some young people may be placed in residential school for 38 weeks p.a. but may benefit from the discretionary power to approve a direct payment for support during school holidays or weekends if these are viewed as part of the overall residential placement.
- Would the different aspects of a residential placement be split into the different components, e.g. meals, personal care and activities, with the supported person having access to a choice of provider for each component?
- How flexibly could a direct payment, awarded on the basis of eligibility for residential care, be used to meet eligible needs and outcomes?

West Lothian remains to be convinced that the restriction on access to direct payments in relation to the provision of long-term residential care should be removed.

**Question 6: The draft Regulations do not specify circumstances where the direct payment option should be unavailable for care and support to children/families. *Should* there be specific restrictions on choice of support in relation to children/families support (i.e. support provided under Section 22 of the Children (Scotland) Act 1995) and should these restrictions apply to the direct payment only, or to other options as well?**

West Lothian would suggest that, rather than placing specific restrictions on the choice of support in relation to children and families support, it would perhaps be more effective to give the local authority the professional discretionary power to determine when a direct payment or other self-directed support option was appropriate – this would allow professionals the flexibility to work with children and their families to plan support which is based on their individual assessed needs, outcomes and circumstances but also to respond to issues relating to child protection and compulsory measures of care.

### **Question 7: Do you have any further comments on the draft Regulations?**

For example, are there any gaps in terms of the topics covered by the Regulations? Are there any major changes that you would recommend? Are there any topics that are more appropriate for statutory guidance rather than Regulations?

The Regulations, rather like the guidance, would appear to be somewhat adult focused or focused on disability. Children's Services would suggest that outlining the main legal duties and powers under Section 22 of the Children (Scotland) Act 1995 alone is a little too vague and does not sufficiently highlight the complexities of working with children and families or the reasons why children may come to the attention of statutory services.

## **Draft Regulations**

### **Consultation Questions – General Questions**

#### The costs and benefits arising from these regulations

### **Question 8: Do you have any comments on the financial costs or benefits of the Regulations?**

Can you identify any financial costs or benefits to individuals, local authorities, health boards, providers or any other person or organisation affected by the Regulations. In considering the costs and benefits you may wish to consult the Business Regulatory Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act available at the following hyperlink:

<http://www.scotland.gov.uk/Publications/2012/03/5525>

We plan to update the BRIA in light of the comments and information from this consultation.

Whilst being supportive of the aims of self-directed support and the principles underpinning it, West Lothian remains concerned that the implementation of self-directed support as outlined within the 2013 Act, the draft Statutory Guidance on Care and Support and the draft Self-Directed Support (Direct Payments) (Scotland) Regulations 2013 has the potential to have serious financial implications for the local authority at a time when it faces an overall reduction in funding. West Lothian would suggest that the full costs which will be incurred in the implementation of self-directed support cannot yet be finalised.

Please refer to the response to Question 14 above for a fuller answer and information in relation to financial implications.

#### The equality and human rights impacts of the regulations

### **Question 9 (a): Do you have any views on the impact of the Regulations on any or all of the following equality categories:**

- i) age;**
- ii) disability**
- iii) gender;**
- iv) lesbian, gay, bisexual and transgender;**
- v) race, and;**
- vi) religion and belief**

By “equality impacts” we mean whether or not, and in what ways, the Regulations will affect certain groups, and whether they will impact on those groups in a positive or a negative way. In considering the impacts you may wish to consult the Equality Impact Assessment published for the Social Care (Self-directed Support) (Scotland) Act 2013, available at the following hyperlink:

<http://www.scotland.gov.uk/Publications/2012/03/9876>

We plan to update the Equality Impact Assessment in light of this consultation.

West Lothian does not have any concerns in relation to the equality impact of the Regulations.

**Question 9 (b): Do you have any views on the impact of the Regulations on human rights?**

For more information about human rights please see the Scottish Human Rights Commission’s website at:

<http://www.scottishhumanrights.com/abouthumanrights/whatarehumanrights>

As outlined in the responses above, West Lothian has some concern at the potential tension between the statutory duties contained within the 2013 Act and wider statutory duties, particularly in relation to duty of care and protection issues – it is important for local authorities to have the discretion to act in a way which supports people who are potentially at risk and which, therefore, recognises their human rights.