

SOCIAL CARE (SELF-DIRECTED SUPPORT) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Social Care (Self-directed Support) (Scotland) Bill introduced in the Scottish Parliament on 29 February 2012. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 10–EN.

POLICY OVERVIEW

“Self-directed support is a term that describes the ways in which individuals and families can have informed choice about the way support is provided to them. It includes a range of options for exercising those choices... available resources can be used so people can have greater levels of control over how their support needs are met, and by whom.”

Scottish Government, Self-directed Support Strategy (November 2010)

”The Commission supports the wider principle of individuals having a greater say in how public resources are used, and how services are provided...take-up of current opportunities for self-directed support has been low and action is needed to build capacity and awareness to encourage broader participation.”

Christie Commission on the Future Delivery of Public Services, June 2011

2. Demographic change, reductions in budgets and rising expectations from citizens present three significant challenges for Scotland's health and social care sector. In response our public services should be of the highest quality, continually improving, efficient and responsive to people's needs. The Scottish Government is addressing the challenges ahead through a range of policies including the NHS Quality Strategy, reshaping care for older people, the closer integration of health and social care and a variety of strategies on carers and young carers, people with dementia, autism, people with mental health problems and, in relation to children and young people, Getting it right for every child.¹

¹ Scottish Government (2010) *NHSScotland Quality Strategy - putting people at the heart of our NHS* [Online] Available at: <http://www.scotland.gov.uk/Publications/2010/05/10102307/0> [Accessed: 17 January 2012]; Scottish Government (n.d.) *Reshaping Care for Older People*. [Online] Available at: <http://www.scotland.gov.uk/Topics/Health/care/reshaping> [Accessed: 17 January 2012]; Scottish Government

3. The Scottish Government's policy to grow and develop self-directed support for social care (a concept which embraces direct payments but goes beyond one particular mechanism) helps to address the Christie Commission's recommendation and it helps to address the third of the challenges listed above: rising expectations from users. In recent years a number of prominent reports, including the Scottish Independent Budget Review, NESTA's Radical Scotland and the 2020 Public Services report, have recognised the necessity, in the words of the Christie Commission, to ensure that services are "built around people and communities, their needs, aspirations, capacities and skills".² The further development of self-directed support will help to respond to this call.

4. It is also clear from the available statistics that there is scope to increase the number of people who direct their support. Since 2001 the number of people receiving direct payments (one of the mechanisms of self-directed support) has increased from 207 (in 2001) to 4,392 (in the year to 31st March 2011).³ However, direct payment users remain a small proportion of social care clients. It is estimated that more than 200,000 adults and nearly 16,000 children receive some form of social care and support. This includes approximately 64,000 people who receive home care, 111,000 with Community Alarms or Telecare systems, 10,000 who receive meals services, 23,000 who attend day centres and 38,000 people in care homes. Also, direct payments remain more common among physically disabled people compared to other client groups such as people with learning disabilities, people with mental health problems, older people and people with dementia.⁴ This means that despite the strides taken in the past 10 years the conclusions of the Scottish Parliament's Health Committee in 2006 remain pertinent:

"direct payments in Scotland are still running at half the level of England and Wales. There is also a wide variation in take-up across Scottish local authority areas. There is significant scope for those local authorities that still exhibit low take-up rates to engage at the level of those with higher take-up rates."⁵

BACKGROUND

5. The roots of self-directed support can be traced to the activism of disabled people in Hampshire in the late 1970s where direct payments were one of a range of solutions to a lack of choice and control for disabled people. In recent years there has been a further evolution in approach. A number of authorities have worked with people to develop new mechanisms which can include the direct payment option. Examples include individual budgets, personal budgets

(2010) *Caring Together: The Carers Strategy for Scotland 2010 – 2015*. [Online] Available at: <http://www.scotland.gov.uk/Publications/2010/07/23153304/0> [Accessed: 17 January 2012]; Scottish Government

(2010) *Scotland's National Dementia Strategy*. [Online] Available at:

<http://www.scotland.gov.uk/Publications/2010/09/10151751/17> [Accessed: 17 January 2012]; Scottish Government

(2011) *Mental Health Strategy for Scotland 2011-15: A Consultation*. [Online] Available at:

<http://scotland.gov.uk/Publications/2011/09/01163037/0> [Accessed: 17 January 2012]; Scottish Government (n.d.)

Getting it right for every child and young person. [Online] Available at:

<http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright> [Accessed: 17 January 2012]

² Christie Commission on the Future Delivery of Public Services, June 2011

³ Scottish Government (2011) *Self-directed support (Direct Payments), Scotland, 2011*. [Online] Available from: <http://www.scotland.gov.uk/Publications/2011/09/27143400/0> [Accessed 9 January 2012].

⁴ According to the latest Scottish Government statistics on direct payments (2011) 40.3% of people receiving direct payments in 2010/11 had a physical disability, 25.6% had a learning disability and 32.7% were aged 65 or over.

⁵ Scottish Parliament Health Committee (2006) 10th Report, 2006 (Session 2) Care Inquiry [Accessed 13 February 2012]

and individual service funds. The Bill reflects this evolution in practice whereby the direct payment option is one of a range of options of self-directed support.

6. A significant body of research evidence has concluded that people using self-directed support can achieve a better quality of care and support and an improvement in the outcomes which they achieve.

7. The key benefits are summarised below:

- Individuals can enhance their health and wellbeing through exercising greater choice and control over their support.⁶ Self-directed support can encourage and sustain independent living (the principle that all disabled people having the same freedom, choice, dignity and control as other citizens at home, at work and in the community) foster better engagement with the community and provide a greater sense of citizenship.⁷ In addition, unpaid carers can benefit indirectly when the person they care for has greater choice and control over their support. A study completed by Stirling University on behalf of the Scottish Government noted that individual budgets were found to positively impact on carers' quality of life.
- Local authorities and providers have a close interest in delivering high-quality services which respond to and meet individual needs. Self-directed support enables people to have the support that *they* want, and *when* and *where* they want it. It focuses on maximising individual choice and control, eliminating waste and providing a system that is accessible and better suited to the needs of the whole person.
- For the public sector as a whole good quality, well targeted support can help to reduce pressure on the health sector and those parts of social care services which deal with crisis or emergency assistance⁸. This supports Scottish Government targets for the NHS, and fits with the aims to stay healthier longer and to tackle health inequality.

8. Drawing on this body of evidence - and recognising the pressing need for change - the Scottish Government, together with COSLA, published in November 2010 the National Strategy on Self-Directed Support⁹. The strategy seeks to encourage a significant increase in the number of people who actively direct their own support. The Bill's contribution will be to lay a clear framework in law, one which will enable professionals and citizens to deliver improved outcomes for individuals.

⁶ Ridley, J., Spandler, H., *et al* (2011) *Evaluation of self-directed support test sites in Scotland*. [Online] Scottish Government, Social Research Report. Available at: <http://www.scotland.gov.uk/Publications/2011/09/20090337/0> [Accessed: 9 January 2012]

⁷ Definition of independent living taken from Independent Living in Scotland (n.d.) [Online] Available at: <http://www.ilis.co.uk/> [Accessed: 17 January 2012]

⁸ Hurstfield, J., Parashar, U. and Schofield, K. (2007) *The Costs and Benefits of Independent Living*. London, Office for Disability Issues, p.101

⁹ Scottish Government (2010) *Self-directed support: A National Strategy for Scotland*. [Online] Available from: <http://www.scotland.gov.uk/Publications/2010/11/05120810/0> [Accessed 30 January 2012].

CONSULTATION

9. Proposals for legislation were first discussed by the Self-directed Support National Reference Group in 2009.

10. In summer 2010 the Scottish Government completed a 12-week consultation on outline proposals for legislation. The government received 130 written responses and held 12 consultation events across Scotland. The analysis from the consultation concluded that there was strong support for legislation from the majority of respondent groups.

11. Between December 2010 and March 2011 the Scottish Government held a further consultation on a draft Bill. Written responses were invited, including responses via an on-line questionnaire. A total of 113 responses were received including 28 from local authorities. On behalf of the then Minister for Public Health and Sport, officials held six consultation events across Scotland involving more than 200 attendees. This included events with the Glasgow Centre for Inclusive Living, Alzheimer Scotland and a national discussion event in Stirling which was attended by local authority social workers, lawyers and commissioning staff. Mirroring the first phase of consultation there was strong support to introduce a Bill but a range of views on items of detail. The relevant consultation documents, analysis reports and Scottish Government responses can be found at the following hyperlinks.

Consultation on outline proposals (March – June 2010)

- Consultation documents
<http://www.scotland.gov.uk/Publications/2010/03/23102019/0>
- Analysis report
<http://www.scotland.gov.uk/Publications/2010/09/16114749/0>
- Scottish Government response
<http://www.scotland.gov.uk/Publications/2010/09/16114826/0>

Consultation on a draft Bill (Dec 2010 – March 2011)

- Consultation documents and draft Bill
<http://www.scotland.gov.uk/Publications/2010/12/15105332/0>
- Analysis Report
<http://www.scotland.gov.uk/Publications/2011/06/15152937/0>
- Scottish Government response
<http://www.scotland.gov.uk/Publications/2011/10/10131045/0>

12. The Scottish Government adapted its proposals in response to the views that it heard in consultation with users, professionals and organisations. In particular, it adapted its proposals in relation to the question of whether there should be a “default position” in law, and whether this should be direct payments, individual budgets or arranged services. Ministers concluded that choice itself should be the default rather than any particular mechanism. The Bill’s role should be to set out a clear set of choices and to impose duties on authorities to offer those choices and to give effect to the citizen’s preferred choice.

13. The Scottish Government convened a Bill steering group in 2010. This included representatives from a range of organisations and individuals with an interest in social care and support. Its remit was to advise about the opportunities and challenges presented by the Bill, to guide the development of the legislation, to comment on the potential impact on practice and to comment on any work to investigate the financial and other costs and benefits of the Bill. As of February 2012 the steering group had met a total of six times and it had discussed a range of matters associated with the Bill.¹⁰

14. In addition, Ministers and officials met with officials from a range of stakeholders including:

- The Convention of Scottish Local Authorities (COSLA);
- The Association of Directors of Social Work (ADSW);
- The Coalition of Care and Support Providers in Scotland (CCPS);
- The Princess Royal Trust for Carers, Carers Scotland, Coalition of Carers in Scotland, Shared Care Scotland and VOCAL;
- Alzheimer Scotland;
- The Care Inspectorate;
- The Scottish Consortium for Learning Disability;
- The Scottish Social Services Council;
- UNISON;
- Scotland's Commissioner for Children and Young People, and
- The Royal College of Nursing.

15. The Scottish Government will continue to engage with representatives from the bodies listed above in order to discuss the Bill and its implications. The steering group will continue to meet throughout the Parliamentary process.

POLICY OBJECTIVES

16. The Bill, which applies both to adult and children's social care, aims to provide people with choice and control over their support. The wider policy aims are to ensure that services and support become more flexible and responsive to people's needs (in line with the Christie Commission's recommendations), and to drive a cultural shift around the delivery of support that views people as equal citizens with rights and responsibilities rather than people who receive services. If Parliament enacts the Bill this would mean that in implementing the strategies and policies listed in paragraph 2 local authorities and the NHS (where social care functions are delegated to them) would be under a legal requirement to ensure that the options for self-directed support and associated Bill duties are part of the assessment and review process for every client.

¹⁰ Agenda and minutes from steering group meetings are available on the Scottish Government website at:- <http://www.scotland.gov.uk/Topics/Health/care/sdsbill>

SECTION 1: GENERAL PRINCIPLES

17. The general principles provided in section 1 of the Bill help to define self-directed support. They provide general assumptions under which professionals and individuals should operate. They set the tone for the legislation and they mark out the way in which the Bill is to be interpreted. Where exercising discretion as to how to implement the legislation, both parties should return to the principles on the face of the Act together with the statutory guidance which would accompany the Bill.

Principle 1 (Section 1, subsection (2) in the Bill)

A person must have as much involvement as the person wishes in relation to: a) the assessment of the person's needs for support and services, and; b) the provision of support or services for the person.

18. Social care is at its best when it helps people to achieve their desired outcomes, independent living¹¹ and better wellbeing. The individual should be empowered to play a full and equal part in informing the initial assessment of need. This should lay the foundation for them to determine and then to meet their agreed outcomes. This principle is in line with current best practice on assessment.

Principle 2 (section 1, subsection (3) in the Bill)

A person must be provided with any assistance that is reasonably required to enable the person: a) to express any views the person may have about the options for self-directed support, and; b) to make an informed choice when choosing an option for self-directed support.

19. Local authorities should facilitate genuine and informed choice for the individual. Good quality advice and information services are an essential component in helping people to take greater control. This principle complements the duty to provide information regarding choices detailed in paragraph 24.

Principle 3 (section 1, subsection (4) in the Bill)

A local authority must collaborate with a person in relation to: a) the assessment of the person's needs for support or services, and b) the provision of support or services for the person.

20. The professional and the individual should collaborate in producing and implementing the care and support plan. Plans should be based on a mutual relationship and should involve the two parties working together towards a positive, empowering set of outcomes. Assessment processes based on identifying strengths, assets and opportunities and agreeing desired outcomes, represent best practice in relation to this principle. For example the Talking Points: Personal Outcomes Approach is one of a range of tools and approaches which can assist health and social care partnerships in this respect.¹¹ Outcomes in this context are understood both as the goals that users and carers want to achieve, in partnership with services, and the impact of services on an individual's life. The statutory guidance accompanying the Bill will elaborate on

¹¹ For a summary of the Talking Points approach see Joint Improvement Team (n.d.) *Talking Points: A Personal Outcomes Approach*. [Online] Available at: <http://www.jitscotland.org.uk/action-areas/talking-points-user-and-carer-involvement/> [Accessed: 17 January 2012]

individuals' responsibilities as well as their rights, stressing that self-directed support must be based on a mutual relationship and the responsible use of public funds by both parties.

SECTIONS 3 – 4, SECTIONS 6 – 12 AND SECTION 17: THE “FRAMEWORK” PROVISIONS

21. Sections 3-4, 6-12 and 17 provide the core provisions within the Bill. Together, they help to modernise and underpin a new approach to social care assessment and planning. The new approach will be one where: individuals are provided with a range of options as to how they meet their assessed needs; individuals are provided with information and advice to help them to make their choice; the options for self-directed support are promoted by local authorities; and, people who have difficulty in making informed choices are provided with appropriate support to assist them to make the necessary decisions. The legal duty to assess a person's social care needs is found in section 12A of the 1968 Act. While that duty will not change, the new duties placed on local authorities by this Bill will necessitate a new approach to those section 12A assessments. The diagram provided in Annex A illustrates what this will mean for adults who participate in the assessment and care planning process. Paragraphs 33 – 41 provide further detail on the impact for children and carers.

Section 3: Options for self-directed support

22. The Bill requires the authority to offer the individual a “sliding scale” of four options as to how they would like to direct their support. This recognises that some people will be willing and able to take full control (and to embrace the responsibility and accountability that comes with that decision) while others may not want to take on this degree of responsibility and control.

23. The policy intentions behind the four options are described below.

- **Option 1** describes a **direct payment**, whereby the local authority defines a monetary resource available to a person in order to meet agreed outcomes. As stated, social care legislation already allows for this option. The person receives the sum of money into a bank account so that they can purchase and commission support as a private individual. Money can be spent however the individual chooses provided it meets the agreed outcomes in their care and support plan. Certain choices which are not available under options 2 and 3, such as employing a personal assistant, are available using a direct payment. However a person can also choose to use their payment to purchase services from a registered care provider or from a local authority. In short, option 1 describes the maximum flexibility but also the maximum responsibility which a person can choose to take.
- **Option 2** describes situations where the individual selects the support that they want and the local authority makes various administrative arrangements on the person's behalf. Under current law there is no specific restriction *preventing* local authorities from providing this option. However, it is also the case that there is no clear right for a person to request or to receive this option. The Bill seeks to address this gap. Typically, individuals are informed of a transparent, single amount of money or resource. The resource can remain with the local authority or it can be delegated to a provider to hold and distribute under the individual's direction. In contrast to Option 3 (below) the individual will have greater ongoing control and will be able to

determine how the available resource is used. There are a number of mechanisms which may be available. One example is the Individual Service Fund where the individual has access to an identified resource, where they choose what support they would like and the local authority contracts with one or more care and support providers on the individual's behalf.

- Under **option 3** the local authority selects the appropriate support in consultation with the individual and commissions services on the individual's behalf. In contrast to option 2 the individual will tend to leave certain decisions to the local authority, though the authority should continue to maximise the degree of choice and control available to the individual in line with the Bill's guiding principles. While the support should be based on meeting agreed outcomes the individual is not seeking direct and ongoing involvement in deciding how the available resource is used.
- **Option 4**, a combination of eligible options, recognises that some people will want their authority to arrange services to cover some but not all of their support. This seeks to underpin a "mix and match" approach, ensuring maximum flexibility in the options available.

Section 8: Provision of information about self-directed support

24. People must be empowered to make an informed choice and information should be made available to individuals as soon as possible in the assessment process. The Bill requires authorities to take steps to promote the availability of the options for self-directed support (section 17). It also requires local authorities to explain the nature and effect of each self-directed support option and to point people towards available advice and information, including independent sources (section 8). This means that authorities will be required to provide information in writing and, where necessary, in a format suitable to individual's communication needs. In order to ensure that these duties translate into practice the Scottish Government is investing in support organisations over the course of the current spending review period. In addition, officials from the Scottish Government will work with national and local support organisations through the Self-directed Support National Implementation Group. The Group will review the capacity of support organisations. It will evaluate existing models of support provision to inform a more efficient and sustainable approach at both local and national level, suitable for all client groups. Further detail on the investment provided to support organisations is provided in the Financial Memorandum.

Section 11: Review

25. A person may decide that they no longer wish to continue with their initial choice. This is why all options will be subject to review. Section 11 in the Bill makes it clear that where there is a material change in circumstance either the individual or the local authority (or both) can trigger a review of the options and the selection of a different option. The Bill's section 10 contains an additional right to review in relation to a person's eligibility for direct payments. Paragraph 47 provides further detail on the policy aims of section 10.

Other matters associated with decision-making under the Bill's framework provisions

Individuals' responsibilities and risk enablement

26. Individuals and families must understand the responsibilities that come with the choices available to them, particularly in managing and choosing to take risks. The greatest degree of control comes with the decision to employ a personal assistant, as current legislation permits. This choice is available under option 1 (direct payment). The Scottish Government does not wish to place restrictions on the categories of people that may be employed by an individual. However the statutory guidance under the Bill will recommend robust approaches to ensure that individuals understand their duties as an employer and the risks in failing to adopt safe recruitment practice.

Local authorities' discretion to deny a person their preferred choice

27. The duty to give effect to the preferred option (Section 9, subsection (2) in the Bill) will make the full range of choices available to all rather than to those considered as being likely to benefit. Self-directed support does not replace or overrule legislation to protect people at risk of harm, nor does it affect the duty on local authorities to arrange suitable and adequate support. Local authorities must comply with these broader duties and will still need to be satisfied that the option chosen can meet the desired outcomes. This means that there may be certain exceptions to the rule to give effect to the person's choice. For instance:

- where it is clear that the option itself or the implementation of a particular option will fail to meet assessed needs and desired outcomes. This reflects the local authority's ongoing duty of care to meet assessed needs, or
- in the case of direct payments, where the individual or type of support selected is one of the people or circumstances defined in regulations as being ineligible for direct payments.

28. Balancing empowering practice with support for people to manage risk will require the input of skilled social care professionals and statutory guidance will elaborate on this question in greater detail.

SECTIONS 5 AND 15: ASSISTANCE

29. The consultation on the Bill signalled that a certain proportion of social care clients will encounter difficulties in expressing informed decisions. In some cases a person may lack capacity in terms of the definition provided in the Adults with Incapacity (Scotland) Act 2000 (AWI Act). In other cases, the person may not lack capacity in the AWI sense but may have profound difficulties in making choices or coming to informed decisions without some kind of assistance.

30. This presents a challenge in relation to the type of decisions made under the Bill which, by their very nature, involve passing over greater choice and control to the individual.

31. The Scottish Government's policy is to ensure equal access for all clients to all of the self-directed options. The opportunity to choose Options 1 or 2 must be available to people with mental health problems, people with dementia and people with severe learning difficulties and

any other individual who has difficulty making decisions on their own. Individuals must be given the opportunity to receive an appropriate level of assistance to help them to make informed choice, in line with AWI best practice. The emphasis throughout should be on finding ways to support people to direct their support and to facilitate a wide range of assistance mechanisms to help both individuals and their circles of support.

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

SECTION 7: CHILDREN AND FAMILY MEMBERS

“Self-directed support has meant increased freedom and choices for both me and my eight year old daughter. Our social work home help service was unable to adapt to our needs and the times we needed support when I attended college. Self-directed support has enabled me to employ a person that we are both happy with, this person comes at a time that meets my needs and the needs of my family. The flexibility this provides means I am able to change the times my P.A¹². comes to our home so I no longer have to worry about my other commitments fitting in with someone else’s timetable. This means both of us have a better quality of life and are able to be more spontaneous.”¹³

33. Getting it right for every child (GIRFEC) is at the heart of the Scottish Government’s approach to children and young people. GIRFEC aims to improve outcomes for children, making sure that all agencies respond appropriately to needs and risks. It provides mechanisms for identifying and planning how we help children and young people. It seeks to improve services and measure the impact they have on a child’s well-being as expressed through the eight well-being indicators. It directly supports work to achieve many of the agreed national outcomes, such as ensuring that our children have the best start in life, and our public services are high quality, continually improving and responsive to people’s needs.

34. Direct payments have been available to children supported under section 22 of the Children (Scotland) Act 1995, through their parents or guardians since 1996. However, all of the self-directed support options can offer a range of innovative practical solutions amidst the logistical complexities of families’ daily lives. For instance, approaches under Options 1 and 2 may be particularly valuable for those whose needs have been recognised as being less well served by available local authority services.

35. Parents should be encouraged and supported to use self-directed support with a view to enabling their children and young people to access the same kinds of opportunities and activities as their non-disabled peers and self-directed support should play a key role in sustaining and

¹² Personal Assistant.

¹³ Scottish Government (2007) *National Guidance on Self-directed Support* [Online] Available at <http://www.scotland.gov.uk/Publications/2007/07/04093127/0> [Accessed: 13 February 2012]

delivering the GIRFEC approach. Reflecting this, the Bill's framework of choice and control will apply to children's social care and support in the same way that it applies to adults' support. This will mean that:

- where children are aged between 16 and 18 they will be able to choose and to manage all available options, including the direct payment;
- where children are under 16 their parent or the person/s with parental responsibility will be able to choose the relevant self-directed support option, and they will have full powers to manage the available resource or direct payment where that is their preference, and;
- to ensure compliance with duties under both the Children (Scotland) Act 1995 and the UN Convention on the Rights of the Child, the child should be able to exercise the maximum possible input to the initial decision and all subsequent decisions on how to meet their assessed needs. Children aged 12 or over will be presumed to be of sufficient age and maturity to form a view as to how they wish to receive their support.

36. This will mean that a wide range of children supported under section 22 of the 1995 Act will have access to self-directed support including disabled children, children who are carers and relatives of children who are either disabled or young carers.

37. Local authorities already have wider powers and duties in relation to their responsibility regarding child protection. The Bill in no way interferes or negates these wider duties, though its framework of choice should extend to the full range of positive, enabling interventions which local authorities may choose to take under section 22 of the 1995 Act. Statutory guidance will clarify what this should mean in practice and how local authorities should go about balancing their duties on protection with their duties on self-directed support.

SECTIONS 2, 6 AND 16: PROVISIONS RELATING TO CARERS

38. Without the contribution of Scotland's carers the health and social care system would be unsustainable.

39. Caring Together¹⁴, the Scottish Government's strategy for carers published in July 2010, 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.

40. The Bill helps to deliver the strategy by providing a power to local authorities to release support to a carer following a carer's assessment.¹⁵ This power applies both to carers of adults (addressed under the 1968 Act) and carers of children (under section 24 of the 1995 Act). No

¹⁴ Scottish Government (2010) op.cit.

¹⁵ In line with other community care responsibilities local authorities would have the discretion to charge for support provided to carers under this Bill. This discretion is underpinned by section 16 in the Bill which modifies section 87 of the Social Work (Scotland) Act 1968.

specific power exists for this at present although in practice authorities can and do provide a range of services and support to carers.

41. The impact of the Bill will be to ensure that choice and flexibility is factored in to this decision. Where a local authority decides to provide some form of support to a carer they will be under a duty to offer the carer the four options of self-directed support. A local authority may choose to define a resource to support the carer in the tasks and demands associated with caring. If the carer elects to take this as a direct payment this may be a positive alternative to the other options, for example a local authority paying for provision of a service to the carer. Specific examples are provided in the Bill consultation document.¹⁶

SECTION 18: DELEGATION

42. On 15 December 2011, the Cabinet Secretary for Health, Wellbeing and Cities Strategy announced the Scottish Government's plans for the closer integration of adult health and social care. The proposals, which will include legislation, will help to address a major policy question which has challenged successive governments both north and south of the border.

43. A small number of direct payment recipients benefit from jointly funded health and social care budgets. These can allow individuals to tailor support that holistically promotes their health and wellbeing. In order to encourage further reform the Scottish Government provided funding to NHS Lothian and NHS Fife in order to promote and address the barriers to self-directed support through jointly funded budgets at individual level, particularly to promote a greater health involvement in self-directed support for those with complex care packages. A full evaluation from the pilots will be published later in 2012 but it is clear already that jointly funded self-directed support packages to meet health and social care outcomes can and do demonstrate integration in action at individual level.

44. Positive, empowering social work practice such as self-directed support should be at the heart of any new landscape emerging from the integration agenda. It is with this in mind – and building on the positive experiences in the pilot and the relatively small number of people who have benefitted from jointly funded direct payments – that the Bill and accompanying regulations and guidance will ensure that self-directed support duties and principles apply in the following circumstances:

- where health and social care budgets are combined in the form of a direct payment;
- where a healthcare professional undertakes a social care assessment on behalf of a local authority under section 12A of the 1968 Act; and
- where a local authority delegates to an NHS partner relevant 1968 Act social care responsibilities, as per the delegated arrangements currently under implementation in the Highland partnership (NHS Highland and the Highland Council).

¹⁶ All consultation documents associated with the Bill are available at <http://www.scotland.gov.uk/Publications/2010/12/15105332/14>

45. The Bill will bring forward an amendment to the Community Care and Health (Scotland) Act 2002 which will allow Ministers to amend the 2002 Act regulations. An amendment to those regulations will mean that where 1968 Act social care functions are being delegated to NHS bodies the SDS Bill's duties will automatically follow alongside the 1968 Act duties. Health authorities will be required to implement the Bill's duties and will have the full range of SDS powers where they are assuming social care functions. This will not mean that direct payments will be obligatory for all clinical NHS care (such as general practice or accident and emergency) but it will require more effective partnership working across services to develop a system for enshrining choice and control for those who require both health and social care. The Financial Memorandum contains further information on the funding which will be invested to deliver self-directed support training to NHS professionals.

SECTIONS 10 AND 13 – 14: DIRECT PAYMENTS

46. Despite the steps taken to improve uptake of direct payments there has been limited success in terms of the practical delivery of existing law. Experience has ranged from good practice – giving people freedom to meet outcomes flexibly - to quite rigid “time and task” approaches¹⁷ which in reality offer little more than arranged services. Reflecting on this experience the Bill seeks to both consolidate and modernise the current 1968 Act duties and powers in relation to direct payments. All forms of self-directed support, including the direct payment, should be flexible and able to be utilised in any way provided they meet the agreed outcomes and assessed needs set out in the individual's care and support plan. By placing direct payment provisions within a wider framework the Bill points the direct payment mechanism towards its ultimate purpose, and the one for which it was intended: flexible support and better outcomes for individuals.

47. Local authorities will of course retain a range of duties and powers in relation to direct payments. Some of these are set out on the face of the Bill. Others will be contained in Regulations. Local authorities must have the necessary discretion in order to allow practitioners the freedom and flexibility that they need to develop creative, empowering solutions for individuals. However, authorities' powers must not extend authorities' discretion to the point of impinging in an excessive or unfair way on people's rights to determine their own support. For example:

- If a person meets certain criteria which will be set down in regulations, a local authority may decide they are ineligible for direct payments. The reason for the decision may, however, materially change and in such a situation a person has a right to request a local authority to reconsider whether that person is still ineligible. If they are not, they must be provided with the full range of choices. This right to return to the direct payment option, when circumstances change, is underpinned by section 10 of the Bill.
- Local authorities must have the necessary powers to stop direct payments or to require repayment of some or all of the direct payment amount. However, their discretion to do so should be limited to instances of gross misuse or instances where a person's assessed needs or agreed outcomes are not being met. It should not be a discretion without limit, encompassing strategic or administrative convenience.

¹⁷ “Time and task” is used describe approaches whereby a certain numbers of hours of care are provided to assist a person with a certain list of prescribed tasks.

- Ministers should be able to restrict access to direct payments, but they should only do so where there is clear policy justification and where it would be an inappropriate method for particular circumstances or for particular groups of people. Ineligible groups should be as narrow as possible and should not be based on general assumptions about particular client groups and their competence to manage the money.
- In general, regulations laid by Scottish Ministers should not place a restriction on access to direct payments simply because a person wishes to choose a particular form of social care service.
- Local authorities should be empowered to allow the employment of close family members where this is the supported person's and carer's informed choice and where it is appropriate to do so. The Bill therefore contains a power for Ministers to issue regulations in order that they can guide authorities who may need to sanction such arrangements.
- Local authorities will continue to use criteria to determine someone's eligibility for support. With the exception of free personal and nursing care authorities will continue to be able to charge individuals. However, there should be no differential treatment for those who choose to direct their own resource.

ALTERNATIVE APPROACHES

48. The two alternatives to the Bill which was introduced to the Scottish Parliament in 2012 were: a) to deliver the national strategy in the absence of a comprehensive legislative framework to underpin this approach in social care law, and b) to introduce a default assumption that all social care and support will be provided under a direct payment only.

a) Implement the national strategy for self-directed support in the absence of legislation

49. The Scottish Government considered progressing with its strategy in the absence of any reform to legislation. However, it concluded that the current legislation, which addresses the direct payment mechanism only, failed to place direct payments in their proper context and failed to provide a comprehensive framework of choice. It concluded that social care law should provide a consistent, clear and comprehensive framework, which is essential in order to empower professionals and individuals. Despite the progress made over the past two decades it is still the case that under the current legal framework, the default assumption for the vast majority of clients remains that of direct delivery, with comparatively little emphasis on the individual's role to shape their own care and support plan. The current legislation does not include provisions on advice services to help people to make an informed choice. It does not include guiding principles to set the tone for further detailed statutory guidance. Current legal duties in relation to carers' assessments do not include a specific power to support carers as partners in care. The Scottish Government concluded that it was clear that despite numerous policy drivers for outcome-focused and person-centred support the right to choice needed to be embedded in the legal framework. The Scottish Government's self-directed support strategy takes a longer term approach to the cultural change needed and it supports the necessary changes to systems and processes.

b) Introduce a default assumption in law in favour of direct payments

50. The initial phase of Bill consultation considered a proposal for the direct payment mechanism to be the favoured mechanism for arranging social care and support. This “assumption in favour of direct payments” would apply to all users. It would replace the current assumption perceived, by some, to be in favour of services which are selected and arranged by the local authority, with minimum opportunity for the user to direct their support. However it was clear that very few respondents supported a bias in favour of one particular mechanism of any kind, whether that bias was to be in favour of the direct payment, arranged services or any other particular way of arranging support. The Scottish Government considered the full range of views and it decided that the most appropriate presumption should be one which is based on choices for the individual. This would be an assumption in favour of providing a range of choice, empowering individual citizens to make their own decision rather than prescribing one option or another. It is this assumption – that of a sliding scale of choices referred to in paragraph 22 - which is reflected in the Bill.

EVALUATION AND MONITORING

51. The Scottish Government will monitor compliance with the Bill through a number of existing or soon to be established measures. The Scottish Government is undertaking a review of the statistics collected on direct payments, with a view to amending the categories of information and to cover a wider range of self-directed support options. Implementation of the self-directed support strategy will be subject to ongoing monitoring and review through the activity of the national Self-directed Support Implementation Group. This group includes Scottish Government officials, the Association of Directors of Social Work, the Convention of Scottish Local Authorities, user-led organisations and provider-led organisations. In addition to the review of data collection, implementation will look to shift to measuring improved outcomes for people directing their support. This will be achieved through a number of routes including the Community Care Outcomes framework, the work of the Care Inspectorate and specific evaluation of progress in co-production with citizens who require support.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Human Rights

52. The Bill does not give rise to any issues under the European Convention on Human Rights. In fact, it is arguable that the Bill goes further in enhancing the relevant rights under the Convention for social care users. For example, it could be argued that local authority intervention into an adult’s life could have impacts on their article 8 right to protection of private and family life. The Bill will ensure that those impacts are minimised by allowing the individual to exercise control over how their care and support is provided to them. The Bill also ensures that individuals are given as much information and assistance as is possible to allow that individual to make a choice.

53. The national strategy for self-directed support reiterates that public bodies are subject to human rights and equalities legislation and that self-directed support, if implemented in line with its core values and principles, can *enhance* wider human rights principles beyond those

enshrined directly in legislation. The key human rights principles in this respect are equality and non-discrimination (the principle that all individuals are equal as human beings and by virtue of the inherent dignity of each human person) and participation and inclusion (the principle that all people have the right to participate in and access information relating to the decision-making processes that affect their lives and well-being). Self-directed support sustains an approach in which those who use care and support are viewed as being entitled to have control and responsibility over both their support in particular and their lives more generally. It allows individuals to integrate their care and support into their social and private lives and maximise their opportunity to achieve independent living. The Bill makes its own specific contribution in this respect by helping to sustain the human rights principles of participation (underpinned by the Bill's principles of collaboration and involvement) and inclusion (underpinned by the Bill's principle of informed choice along with the associated duties contained within sections 3 and 8).

Equal Opportunities

54. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website. The Scottish Government considered the potential impacts, both positive and negative, across the five protected characteristics required for EQIAs.

55. The EQIA concluded that the Bill's provisions are not discriminatory on the basis of age, gender, race, disability, religion or sexual orientation.

56. The Bill will help to empower individuals to gain equality of opportunity and to sustain their citizenship. It will ensure that the law plays its part to underpin genuine co-production, to move away from direct delivery models towards person-centred support and a focus on designing solutions on the basis of ensuring improved outcomes for individuals.

57. The EQIA found that, while the key benefit of self-directed support - improved health and social care outcomes - applies equally to everyone receiving support, the available evidence indicates that there are positive impacts for individual groups that share a protected characteristic, for example reduced discrimination and the ability to receive care consistent with faith or lifestyle. Self-directed support is key to the progress of independent living. It enables disabled people to increase their participation in, and exercise greater choice and control over, key aspects of their lives, helping to secure them the same independence, freedom and dignity as any other member of society. Encouraging independence and wider participation in society advances equality of opportunity.

58. The Bill has been drafted in order to ensure that social care recipients and practitioners are aware of their rights and responsibilities. Existing laws on direct payments will be consolidated in one place together with new provisions for other options of self-directed support. This will help to encourage better access for groups that are currently underrepresented. Finally, the Bill and accompanying regulations, if implemented as planned, will extend self-directed support to a wider group of individuals by extending to those who have been excluded up to this point such as carers and people who use residential care.

59. The EQIA did not identify any group that would be adversely affected by new legislation on self-directed support. However, the assessment acknowledged that there is limited evidence

around the effects of self-directed support on groups that share certain characteristics. The Scottish Government's Health Analytical Services Division is currently reviewing data collection on self-directed support in relation to the protected characteristics of age, disability, gender and race.

Island Communities

60. The Bill will apply to all local authority areas and therefore to all communities across Scotland, including island communities. Self-directed support does not resolve all of the challenges of providing social care in island communities. In particular, choice of provider may be restricted to a greater degree, compared to urban areas. However, by placing greater choice and control in the hands of individuals, social care provision can be more responsive to the needs of island populations. Methods under Options 1 and 2 within the Bill can unlock greater flexibility in order that individuals and professionals can work together to produce creative solutions. This is in contrast to a "one size fits all" direct delivery model of support. Self-directed support may, therefore, offer a solution where there is a limited supply of appropriate care and support providers and where there are suitable family carers who are willing to become paid employees for the supported person.

Local government

61. The Bill will directly impact on local authorities in discharging their duties under social care legislation. The effect is already set out in this Policy Memorandum and in the other Accompanying Documents to the Bill.

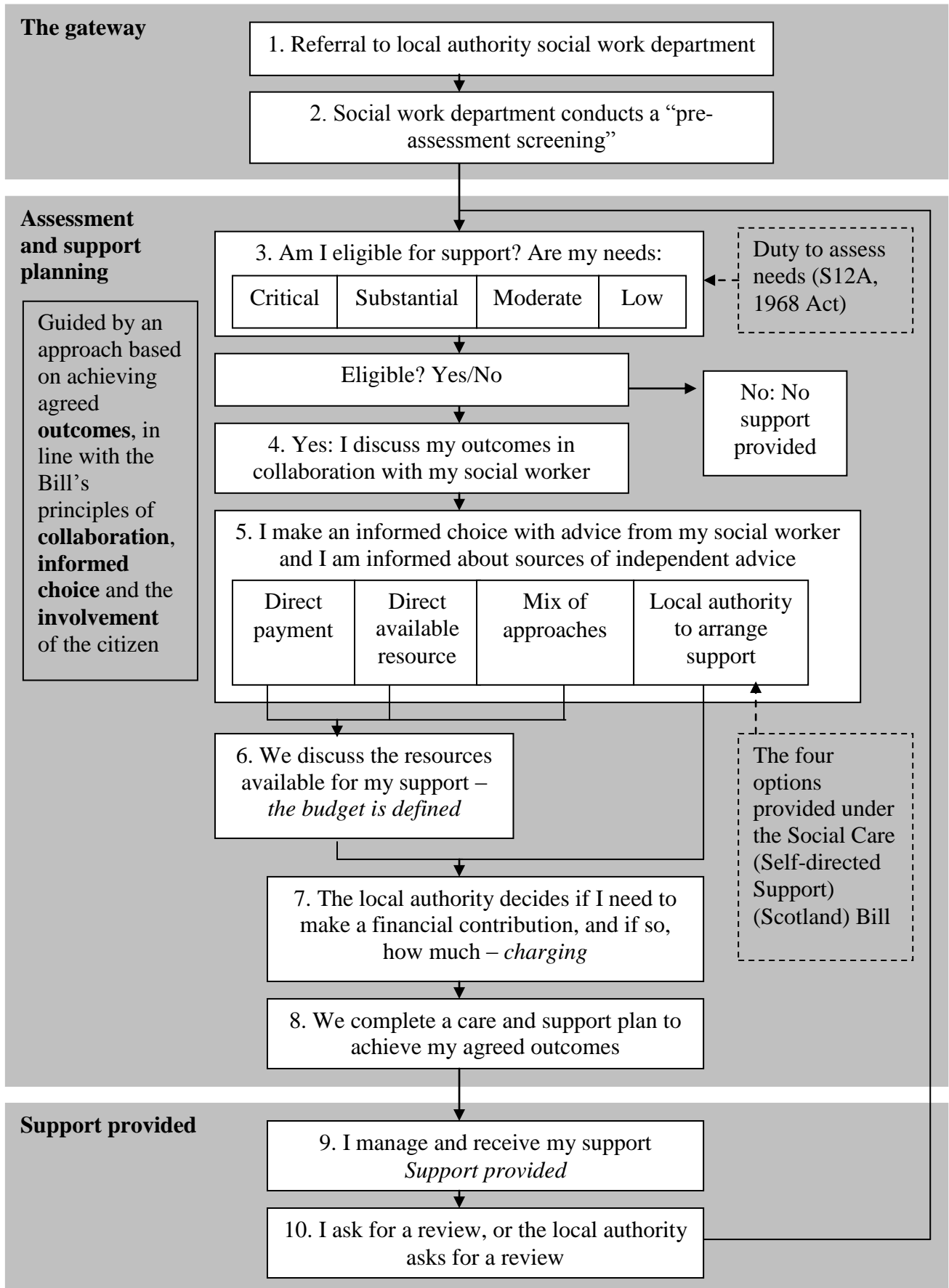
Sustainable Development and Environmental Issues

62. The Bill will have no negative impact on sustainable development and will have a strong positive effect on the health and wellbeing of the people of Scotland by helping to make social care and support more responsive to individual needs.

63. The environmental impact of the Bill has been considered and the Scottish Government considers the policies within the Bill as a qualifying plan within the meaning of section 5(4) of the Environmental Assessment (Scotland) Act 2005. It is considered that the Bill is likely to have minimal effect in relation to the environment and, as such, is exempt for the purposes of section 7 of the 2005 Act. A pre-screening report has been completed. This confirmed that the Bill will have minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment did not need to be undertaken. The pre-screening report is published on the Scottish Government website under case number PRE\00259.¹⁸

¹⁸ The pre-screening report is available at: <http://www.scotland.gov.uk/Topics/Environment/environmental-assessment/sea/SEAG/Q/editmode/on/forceupdate/on>

Annex A: Adult assessment and support planning journey following enactment of the Bill



This document relates to the Social Care (Self-directed Support) (Scotland) Bill (SP Bill 10) as introduced in the Scottish Parliament on 29 February 2012

SOCIAL CARE (SELF-DIRECTED SUPPORT) (SCOTLAND) BILL

POLICY MEMORANDUM

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2012.

Applications for reproduction should be made in writing to the Information Policy Team, Office of the Queen's Printer for Scotland, Admail ADM4058, Edinburgh, EH1 1NG, or by email to: licensing@oqps.gov.uk

OQPS administers the copyright on behalf of the Scottish Parliamentary Corporate Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland.

ISBN 978-1-4061-8448-8