1. Scottish local authorities have been working with their community planning partners, including the communities they serve, to develop more personalised services that put individual outcomes, choice, and control at the heart of service delivery. COSLA is fully committed to self-directed support (SDS) as an approach to advancing the personalisation agenda and supporting people to live independently in the community. In order to take this forward, COSLA has been working closely with the Scottish Government and launched a joint national strategy for self-directed support in October 2010. This strategy sets out a ten-year vision for delivering social care that is fit for the future.

2. While COSLA Leaders welcome the continued focus on SDS, they are unable to support a legislative agenda at this time. It is our view that the self-directed support strategy needs to be given sufficient time to fully influence practice, before there can be a clear case for taking the next step of introducing legislation.

3. However COSLA remains fully committed to personalisation and the roll out of self-directed support. It is COSLA’s belief that self-directed support has the potential to deliver a step-change in the way support services are provided. It allows for an extension of the state’s ability to support people through providing greater flexibility, and at the same time empowers individuals and carers to help themselves by exercising greater control and entering into a more empowering partnership with the state. Scottish local authorities are determined to make best use of any new legislative powers on behalf of the people of Scotland. To this end, we would offer comment on a number of measures required to ensure any legislation is as effective as possible in supporting the policy intentions of SDS.

4. It is noted that many of our member councils will offer individual responses to the bill which will address the specific consultation questions and refer to matters of technical detail. In the interests of avoiding duplication, COSLA’s response is therefore limited to what we consider to be political or policy issues. The committee should be aware that COSLA has also been asked to submit evidence as part of the Finance Committee’s scrutiny of the bill and accompanying financial memorandum. We would direct members to this for COSLA’s views on financial matters.

5. In commenting on the contents of the bill itself, we note the need to strike the right balance between the importance of the issue and allowing enough flexibility to respond to changing circumstances without the need for further primary legislation. This necessarily results in some matters being dealt with through subsequent regulations and guidance, and we are broadly supportive of where these lines have been drawn. However, there are some matters which, while we agree they should be addressed
through regulation, we feel are of sufficient importance to warrant comment at this stage.

6. For clarity, we have divided our response in to comments on the bill itself, and then points in relation to anticipated regulation and guidance.

THE SELF-DIRECTED SUPPORT BILL

Scope of the bill

7. Firstly, we would ask that the title and scope of the bill be re-considered. The policy intention of self-directed support is to empower individuals; this includes taking an assets approach to improving well-being by drawing upon the natural capacities, support and abilities that individuals have, coupled with ensuring greater control over the resources available to meet identified needs and achieve agreed outcomes. The primacy of the term ‘social care’ in the title of the bill is misleading in terms of the overall policy intention of the bill. It also defines SDS in relation to a set of services, rather than as an action service users are empowered to take in controlling their support. We would therefore recommend that the term ‘social care’ is removed from the title of the bill.

8. If Parliament does decide to pass legislation on SDS, it needs to ensure this provides a statutory underpinning that supports the policy intentions of both SDS and the wider integration of health and social care. Our joint ambition for health and social care is to ensure that services are organised around citizens’ needs, and not institutional boundaries. If we are to realise this ambition, the principles of choice and control need to extend across all health and social care services, and the bill must act as an enabling force in this respect. While the bill does make some provision for NHS duties to deliver SDS options, this relates only to their delivery of social care services when acting on behalf of a local authority, and not to wider NHS services.

9. Extending SDS duties to these wider services, for example in relation to palliative care, or managing long-term conditions, could bring significant benefits for groups of people who currently do not have a right to SDS options. For example, people with long-term conditions could enter into a transparent discussion about the broad resource envelope services are operating within, what outcomes are most important to them, and how that translates into different intervention options. That individual could then exercise greater control in choosing interventions, for example, through choosing to whether to access a pain clinic, receive medication, or even a direct payment to allow them to access their local gym and keep mobile.

10. Despite these advantages, COSLA recognises that there are particular issues in relation to extending the principles of choice and control to NHS services more widely, especially around clinical decisions about the range of interventions that would be appropriate. Lessons learned from the two NHS SDS pilot sites, which we understand are due to report within the
next few weeks, will be helpful in exploring some of these issues in more depth. Clearly there will always be some NHS services where the provision of one or more of the SDS options may not be appropriate, for example in relation to surgery or emergency provision.

11. Another issue is the desire to ensure that health services remain free at the point of delivery; however, exercising greater choice and control over how services are provided, or even receiving a direct payment, is not the same as being charged for services. There are numerous other cultural and system challenges in applying the principles of self-directed support to the NHS; however, these are not insurmountable and do not in and of themselves constitute sufficient reason to limit the scope of the bill.

12. In fact, the balance the bill strikes between making specific provisions, versus leaving matters to be dealt with through regulation, is helpful in addressing these challenges. As the bill stands, it does not immediately introduce new duties – these will not come in to force until Ministers make regulations. Moreover, the bill itself does not set out exclusions, for example in relation to individuals, services, or circumstances where the right to access direct payments (or other SDS options) would not apply. Rather, the bill lays the legislative foundations for SDS by defining it in statute, outlining a range of duties, and establishing Ministers’ powers to bring these in to force at a later date or modify them as required. It is this foundation which COSLA would like to see extended to NHS services.

13. As is the case with the proposed council duties, Ministers would enact these duties at a later date, with exclusions being defined within subsequent regulations. This would allow for control of the scope and pace at which SDS could be selectively introduced to the NHS. What is of vital importance is that the principle is established and the foundation laid.

14. COSLA would welcome the opportunity to be involved in further discussions about how we could work together to build on those foundations, in order to bring a social care culture to parts of the health service. This would support the development of the personalisation agenda across the NHS in general, and through health and social care in particular. If we are to achieve our joint ambitions for integration and personalisation, then boundaries around access to self-directed support need to be governed by considerations such as managing risk and the pursuit of outcomes, and not organisational structures or increasingly arbitrary service boundaries.

**General principles**

15. While COSLA supports the principles of involvement, collaboration, and informed choice outlined in the bill, we would suggest that the bill also needs to highlight the balance between the rights and responsibilities of citizens. It is important that our approach to the provision of support is grounded on the principle of reciprocity. In other words, the recipient of self-directed support has an obligation to deploy any allocated budget
(whether translated into a direct payment or not) in ways that meet mutually identified outcomes agreed with the local authority. The principle of reciprocity would ensure that accountability for the use of public money (including that deployed through SDS options 2, 3 and 4), sits not just with the local authority but with the individual as well. COSLA would like to see this principle expressed within the bill.

16. Just as the bill should outline the rights and responsibilities of the citizen, so too should it detail the powers and responsibilities of the public authority. While for the most part the bill achieves this, it could be more explicit about the means by which demand for services or support should be managed. While the 1968 Social Work (Scotland) Act introduces the notion of a two-step process (assessment of need; and consideration of whether those needs call for the provision of services), this has been subject to a variety of legal interpretations and rulings. The SDS bill could usefully address this point, to more clearly define the concept of ‘eligible’ need, particularly in a climate of diminishing public finance and growing levels of need.

Support to carers

17. COSLA is clear that unpaid care has been, and will continue to be, the bedrock of supporting people with care needs in the community. In July 2010, we launched a joint national strategy for carers with the Scottish Government - Caring Together: The Carers Strategy for Scotland 2010-2015. Caring Together begins to set out a framework for developing a partnership between the state and the family in the delivery of care. The SDS bill as it stands appears to support the relationship between local authorities and carers in defining and managing this partnership, whilst allowing carers greater choice and control in how their support is delivered.

18. As the bill progresses through parliament, questions may arise about how responsibility for care should be distributed across this partnership. COSLA would not support any move to fundamentally alter the balance of this relationship to place more responsibility on the state, for example through replacing the proposed power to support carers with a duty. This would come at huge cost to the public purse with significant impact on other areas of public spending, including that required to meet other statutory duties. The issue of resources aside, introducing a duty to support carers would also shift the balance of responsibility for care between the state and the family, to an extent which raises fundamental political and philosophical questions that are arguably beyond the scope of legislation on self-directed support.

REGULATIONS AND GUIDANCE

19. COSLA is broadly supportive of the ‘presumption towards inclusion’ that underpins the bill’s approach to defining eligible groups. However, this places a requirement upon any supporting regulations and guidance to
define exemptions, and set out local authorities’ discretion to refuse access to one or more of the SDS options. This might be required, for example, in circumstances where one or more of the SDS options would carry unacceptable levels of risk, or would result in the local authority failing in another statutory duty.

20. In considering regulations and guidance, there are further choices to be made between making provision for specific circumstances or groups, versus establishing local authorities’ rights and responsibilities to exercise discretion and apply professional judgement. These matters require detailed consideration and, as such, are beyond the scope of this response.

21. However, it is clear that the bill’s presumption towards inclusion places many important issues under the auspices of regulations and guidance. It is therefore vital that the construction of regulations and guidance are properly resourced, both in terms of expertise and development time. COSLA notes the intention to use powers to make regulation ‘immediately’ (expressed in the delegated powers memorandum which accompanied the bill into parliament). For the reasons set out above, we would suggest that the regulations and guidance should be developed in partnership with key stakeholders, including experts from health and social care services, and over a timescale which ensures they will be fit for purpose.

22. The matters to be dealt with through regulation are numerous and detailed – we have restricted our comments below to those issues which are most commonly raised by our members. Similarly, the exact form that regulation should take is a matter for consideration by expert groups over a period of time – we have therefore restricted our comments to matters of principle of policy that we feel should underpin future regulations and guidance.

Children and young people

23. While the principles of SDS clearly should be applied to children and young people with support needs, there is a general question about how the principles of choice, compulsion, and guardianship can be compatible. This is brought in to particularly sharp focus in the case of children who are looked after. The bill’s provisions do not appear apply to decisions around a child becoming looked after (or looked after and accommodated), although this could be clarified. However, these children can also receive services provided under section 22 of the Children (Scotland) Act (1995), to which the SDS bill provisions do quite clearly apply. Under these circumstances, or where services are being provided in an attempt to avoid child protection measures in the future, it may on occasion be appropriate to restrict access to one or more of the SDS options - for example, in relation to direct payments to some parents or guardians where there are child protection concerns. While a blanket exemption of certain groups of children would be undesirable, regulations
need to clearly establish local authorities’ discretion to exercise professional judgement under these circumstances.

24. Although we have focused on children and young people here, it is also worth noting that these issues may arise for other groups, such as people experiencing severe mental health problems. Regulations and guidance will need to consider how to balance a presumption to entitlement and avoidance of inappropriate blanket exemptions, with the protection of local authorities’ discretion and professional judgements, across a range of groups and circumstances.

Sharing risk

25. Flowing from the need to have a clearer exposition of the rights and responsibilities within the principles on the face of the bill, is a need for regulations to address responsibility and risk in a number of key areas. The right to use a direct payment to employ staff, such as personal assistants, also carries the responsibility of managing the risks associated with becoming an employer. There are some cases where the extent to which this transfer of risk from the local authority to the individual can take place within the current legislative framework is not clear, for example in relation to disclosure checks on personal assistants. Regulations need to ensure that individuals’ rights in relation to SDS, for example to employ staff without a disclosure check, do not conflict with local authorities duties in other areas, for example in relation to protecting vulnerable groups.

Residential care

26. COSLA does not have a principled objection to the extension of direct payments to residential care but would suggest on balance that there is more to lose than gain from its inclusion. Councils are already governed by Directions on Choice that determine the right of people to select their own care home and therefore the extension of direct payments would not add value in this respect.

27. On the other hand, removing the local authority from the contracting relationship means fee levels are a matter of agreement between the care home and the individual, potentially leaving individuals without the protection of the national care home contract. If individuals were classed as self-funders, they may be charged higher rates (currently councils can procure residential care at a significantly cheaper rate than individual ‘self-funders’). Should a person then accrue arrears and be facing eviction, councils would have a duty to step in until a legal resolution could be found, incurring further cost to the council and causing unnecessary distress to the individual. Furthermore, if an individual budget is provided to the supported person at the National Care Home Contract rate, this may prevent placement in in-house council provision (which tends to be more expensive than the NCHC rate) and hence generate viability issues.
Payment methods

28. Local authorities are governed by charging regulations that mean, where an individual’s income levels are assessed as being with certain parameters, councils will recover a proportion of a person’s income as a contribution towards the cost of services. This applies to both residential care and other council services, although income thresholds can vary between them.

29. Regulations need to ensure that, when making a direct payment, councils are able to make this payment net of any contributions due from an individual. If regulations establish a requirement for payments to be made gross, councils will then have to recover the personal contribution, adding another layer of billing and associated bureaucracy at considerable cost. Such ‘double’ billing and collection systems also result in an element of non-recovery where it has not been possible to recover the personal contribution due and the cost of pursuing the debt exceeds the costs of write-off.

30. Under these circumstances, choice and control are exercised through opting to receive funds rather than particular services, and subsequent decisions on how to invest those funds towards agreed outcomes. COSLA recognises that requiring payments to be made gross would allow people who use council-run social care services to with-hold payment if they were not satisfied with the service; however, this does not benefit their choice or control, as they would be subject to the same procedures for dealing with complaints as if they were receiving payments net. They would simply now also be subject to an arrears recovery process.

31. A requirement to make direct payments gross would deliver little or no benefit to people who use social care services, and would come at considerable administrative cost to councils at a time where resources are needed to fund individual service budgets and meet rising demand.

COSLA
20 April 2012