Health and Sport Committee

10th Report, 2012 (Session 4)

Stage 1 Report on the Social Care (Self-directed Support) (Scotland) Bill

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Health and Sport Committee

Remit and membership

Remit:

To consider and report on health policy, the NHS in Scotland, anti poverty measures, equalities, sport and other matters falling within the responsibility of the Cabinet Secretary for Health, Wellbeing and Cities Strategy apart from those covered by the remit of the Economy, Energy and Tourism Committee.

Membership:

Bob Doris (Deputy Convener)
Jim Eadie
Richard Lyle
Fiona McLeod
Duncan McNeil (Convener)
Nanette Milne
Gil Paterson
Dr Richard Simpson
Drew Smith

Committee Clerking Team:

Clerk to the Committee
Douglas Wands

Senior Assistant Clerk
Rodger Evans

Assistant Clerk
Rebecca Lamb

Committee Assistant
Myra Leckie
The Social Care (Self Directed Support) (Scotland) Bill seeks to ensure adults and children (including carers and young carers) are given more choice and control over how their social care needs are met. The Bill would enshrine “self-directed support” (SDS) into legislation, and stipulate the forms of SDS that must be offered by local authorities to those assessed as requiring community care services, namely: Direct Payments; directing the available resource; local authority arranged support; or a mix of the first three options.

The Committee has scrutinised the Bill closely focusing on the impact it would have on service users and service providers. The Committee recognises that under the Bill, service users and their carers will require information and advice in order to make informed choices about their care and support. Local authorities will need to redesign services to become more flexible and responsive to people’s needs and wishes. The independent and voluntary sector providers will also need to adjust to a market for social care in which many more individuals purchase their own bespoke care packages.

The Committee recognises that these changes present significant challenges for service users and service providers alike. However, the Committee believes that self-directed support is a policy which should be promoted and progressed. SDS offers an opportunity for service users to achieve greater independence. Placing SDS in legislation will ensure uptake and promote greater consistency of approach across local authorities.
INTRODUCTION

Procedure

1. The Social Care (Self-directed Support) (Scotland) Bill (“the Bill”) was introduced by Michael Matheson MSP, Minister for Public Health (“the Minister”) on 29 February 2012. The Scottish Government also produced an Equality Impact Assessment on the Bill, which was published on the Scottish Government’s website.

2. On 6 March the Parliamentary Bureau designated the Health and Sport Committee as the lead committee to report to the Parliament on the general principles of the Bill.

Purpose of the Bill

3. The Bill concerns a new regime for implementing Self-directed Support (SDS). If passed, it would make provision for adults and children to be given greater choice about how they are provided with social care services and support. The Bill would enshrine “self-directed support” into legislation, and stipulate the forms of SDS that must be offered by local authorities to those assessed as requiring community care services: Direct Payments; directing the available resource; local authority arranged support; or a mix of the first three options.¹

4. Whilst current legislation does not prevent these options from being offered already, the Bill would place a specific duty on local authorities to offer the different options together with other obligations, such as in providing advice and support to service users in order to be able to make the best choice for them.²

Parliamentary scrutiny

5. The Committee issued a call for written views on the Bill, from 1 March to 24 April, to which it received 101 submissions. The Committee took oral evidence on the Bill at four meetings between 8 May and 29 May, hearing from service users, social care providers, academics, support organisations, local authorities, professional bodies and the Minister. The Committee thanks all those who provided written views and oral evidence to the Committee.

6. As part of the Committee’s scrutiny of the Bill it also conducted an informal fact-finding visit to Glasgow on 14 May. During the course of the visit the Committee met with representatives of Glasgow City Council Social Work Services. The Committee also held discussion sessions, with carers and service users, co-ordinated by the Princess Royal Trust for Carers and the Independent Living in Scotland Project. These discussion sessions provided the Committee with an opportunity to engage directly with those individuals who would be affected

by the proposals in the Bill. The Committee thanks those who attended for giving up their valuable time to contribute to the discussions.

GENERAL PRINCIPLES OF THE BILL: KEY ISSUES

General principles – Section 1

Background

7. Section 1 of the Bill places a duty on local authorities to have regard to three principles, which it calls the general principles, – involvement, informed choice and collaboration – when undertaking their functions in relation to community care assessments and the provision of community care services under the Social Work (Scotland) Act 1968, the Children (Scotland) Act 1995 and the Bill itself.³

8. The Policy Memorandum explains that the Scottish Government expects these principles to underpin decisions made under the Bill by professionals and individual service users and to influence how the legislation is implemented. The Policy Memorandum states that, should issues arise in implementing provisions in the Bill, it will be assumed that the parties involved will have regard to the principles when resolving them.⁴

Evidence received

9. There was significant support for the general principles set out in section 1 of the Bill, in the evidence the Committee received. The Scottish Association of Social Work (SASW) believed that the changes would fit with its code of ethics and the principles by which it wanted to work.⁵ Several local authorities believed that the principles underpinned their current policy and activities and were fundamental to underpinning good social work practice.⁶ Andy Martin of East Dunbartonshire Council told the Committee—

“I think that there is strong commitment to and support for not only the principles of SDS but the practicalities of delivering it across social work in Scotland.”⁷

10. The Committee did however receive evidence calling for the principles to be developed further to enshrine the right to independent living, citizenship and human rights. In written evidence Independent Living in Scotland (ILIS) stated—

“Whilst we welcome the existing principles, we still feel they are too focussed on process and imply that SDS is an end itself. This does not account for the wider independent living context in which SDS plays a part.”⁸

⁴ Social Care (Self-directed Support) (Scotland) Bill. Policy Memorandum (SP Bill 10-PM, Session 4 (2012)), paragraph 17. Available at: http://www.scottish.parliament.uk/S4_Bills/Social%20Care%20(Self%20directed%20Support)%20(Scotland)%20Bill/Policy_Memo.pdf
⁶ Shetland Islands Council and NHS Shetland, written submission; NHS Fife, written submission; Aberdeen City Council, written submission.
11. This view was supported by Angela Henderson of The Scottish Consortium for Learning Disability (SCLD) who also emphasised the importance of the principles focusing on the outcomes of SDS—

“The strong focus on choice and control in the general principles of the Bill would be enhanced by a more explicit connection to the outcomes for individual citizens that we are looking for and a more explicit connection with human rights and the goal of independent living for people who access community care services.”

12. In oral evidence, Pam Duncan of ILIS called for the Bill to have a “statement of intent” and an amended set of principles that recognised the role of SDS in promoting and preserving human rights and independent living. ILIS proposed that the statement of intent should include the following text—

“SDS is one type of provision society makes, among several, which underpins disabled people’s right to independent living. Together with the other rights of independent living, it is intended that SDS, through this Bill, will empower those using self-directed support, to lead independent lives, to have the same freedom, choice, dignity and control as other citizens at home, at work, and in the community, so that they may participate in society and live an ordinary life.”

13. The Scottish Disability Equality Forum’s written submission also called for more of the language of independent living to be used within the principles and believed that it would help demonstrate a commitment to upholding a disabled person’s right to independent living under Article 19 of the UN Convention on the Rights of Disabled People.

14. Self-Directed Support Scotland (SDSS) recommended that the Bill should contain an amended set of principles that included: freedom; choice; dignity; control; better outcomes for individuals; mutuality; equality and portability. SDSS’s written submission provided details of each of the principles it proposed and stated that each principle would be in keeping with a human rights based approach to policy making—

“It is our belief that without such principles, not only are we missing an opportunity on which to build on the rights of disabled people and other service users, but that the basic underlying intentions of SDS; control and choice, citizenship, equality; cannot be truly realised.”

Scottish Government

15. Asked about why independent living was not referred to explicitly in the Bill, the Minister told the Committee that it was a key part of the independent living

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8 Independent Living In Scotland. Written submission.
11 Independent Living In Scotland. Written submission.
12 Scottish Disability Equality Forum. Written submission.
13 Self-directed Support Scotland. Written submission.
14 Self-directed Support Scotland. Written submission,
agenda as it would provide choice and flexibility for the individual about their care arrangements—

“Of course, all that fits very well with the concept of promoting independent living and, given that the principle behind the Bill is to deliver just that, I see no particular reason to say anything specific about it in the Bill. That said, in light of the evidence received, I am more than happy to explore with the committee how that might be expressed more explicitly and in a way that members might find useful. Any such move will, of course, need to fit in with necessary technical drafting requirements if the Bill itself is to work.”

Conclusion

16. The Committee supports the inclusion of specific principles within the Bill. They provide a reference point for the implementation of the Bill and will underpin the work of local authority social work professionals in the future.

17. The Committee recognises that the principles of independent living, in which all citizens have the same freedom, choice, dignity and control in their lives, is at the heart of what this Bill is striving to achieve.

18. Whilst independent living is implicit, the Committee recommends that consideration should be given to making the principles of independent living more explicit with direct reference being made on the face of the Bill. The Committee therefore welcomes the commitment by the Minister to give further consideration to this issue.

Options for self-directed support

Background

19. The Scottish Government refers to the SDS support framework provisions as “the core” of the Bill, as they provide the framework for service users to choose how they wish their care and support to be delivered. The Policy Memorandum states that these provisions will “help to modernise and underpin a new approach to social care assessment and planning”.

20. Section 3 of the Bill provides that, following a care assessment and if an individual is assessed as needing care and support, or support as an adult carer, they must be offered a “sliding scale” of four options (the SDS options) for directing their own support needs.

21. The Policy Memorandum explains why a suite of options, with no single option being a default, would be offered under the Bill—

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17 Policy Memorandum, paragraph 21.
18 Policy Memorandum, paragraph 22.
“... 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.”  

22. The four options as to how support can be directed are listed in the Bill as the following—

- Option 1: The making of a direct payment by the local authority to the supported person for the provision of support.
- Option 2: The selection of support by the supported person and the making of arrangements for the provision of it by the local authority on behalf of the supported person.
- Option 3: The selection of support and making of arrangements for the provision of it by the local authority.
- Option 4: The selection by the supported person of Option 1, 2 or 3 for each type of support.

23. There is currently nothing to prevent the SDS options being offered to service users. The Bill would, however, place a duty on local authorities both to offer them and act on the service user’s choice.

**Views on self-directed Support**

24. There was broad support for a duty to be placed on local authorities to provide SDS. One of the reasons given for the need for legislation was that in comparison with England overall uptake of direct payments had been low. In 2010-11 whilst England had an uptake of 23.9 per 10,000 population, Scotland had just 8.4.  

25. The Committee noted that the Christie Commission had stated in its report on the Future Delivery of Public Services, that—

“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.”

26. John Alexander of Dumfries and Galloway Council told the Committee that whilst progress could be made without legislation by working on an informal basis to change the culture and approach, legislation was “extremely helpful.”

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19 Policy Memorandum, paragraph 22.
Alexander believed that placing duties on and assigning powers to local authorities would send a clear message regarding what was required.  

27. Written evidence from the Scottish Social Services Council (SSSC) was positive about the underlying philosophy of personal choice and empowerment in the Bill. The submission from ILIS highlighted how the Bill recognised disabled people and other community care users as people with equal rights and as equal citizens in the delivery of social care, which ILIS viewed as “not only morally, but legally and financially just.”

28. The Committee also received evidence which supported the range of options for SDS listed in the Bill. NHS Lothian believed the range took into consideration the degree of control, willingness or capacity that an individual may have to manage the options.

29. The Committee heard from Elaine Torrance, Scottish Borders Council, that the Bill would offer people greater choice and control.

30. While supportive of the continuance of a central focus on SDS, COSLA did not support the need for legislation. COSLA’s written submission stated it was—

   “… 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.”

31. Ron Culley of COSLA told the Committee that it was premature to introduce legislation. COSLA considered it to be an admission that, collectively, the objectives under the current statutory framework had not been met—

   “In 2010, we developed along with the Scottish Government a strategy on self-directed support. That was a 10-year strategy and we want to implement it over that period, so we feel that it is premature to legislate. Of course, that is not to say that we would never arrive at that point but with such a relatively young agenda, we wanted to take things forward in a more developmental way. That was the rationale behind our overall position of not endorsing the legislative route.”

Scottish Government

32. The Minister explained that a duty on local authorities was necessary to promote greater consistency of provision across local authorities—

   “It is worth keeping in mind the Bill’s purpose, which is to put the choices that people must be provided with on a statutory footing. Local authorities will be

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23 Scottish Social Services Council. Written submission.
24 Independent Living in Scotland. Written submission.
25 NHS Lothian. Written submission.
27 COSLA. Written submission.
legally obliged to provide people with the options that are set out in the Bill when taking forward their care […]

Local authorities cannot decide that they will not provide one of the four options because they do not offer that option—people have a legal entitlement to all the options.”

**Conclusion**

33. The Committee recognises that self-directed support is a tool which can be used to give service users greater independence and a chance to take control of the care they receive. The Committee supports the range of options proposed in the Bill to give people the opportunity to choose the degree of control that they wish over managing their care.

34. Whilst it notes the view from COSLA that it is premature to introduce legislation on self-directed support, the Committee believes that legislation is necessary to ensure uptake and promote greater consistency of approach across local authorities.

**Delivery of self-directed support**

*Implementation of self-directed support*

35. Whilst it endorses the need for legislation, the Committee explored issues during its consideration around the practical implementation of the legislation.

36. A recurring theme during the Committee’s consideration of the Bill was the scale of the change for local authorities, providers and service users that would need to occur for the policy to be delivered successfully.

37. ADSW told the Committee that SDS would bring changes in the balance of the relationship between the parties involved in SDS.  

38. Local authorities described the changes that they would need to undertake as “seismic”, a “major mindset shift” and requiring a “whole-system change”.

39. David Williams of Glasgow City Council explained that the infrastructure to support individuals wishing to take up SDS would need to be well established—

“That involves care managers and social work professionals taking a different view about how they should go about their business. It involves infrastructure to support the availability to service users of the range of resources and provision that is out there and the development of a different marketplace for the provision of services. There are also infrastructure issues to do with how we assess need and involve individuals in the assessment of need so that there is genuine co-production.”

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40. Dee Fraser of the Coalition of Care and Support Providers in Scotland ("CCPS") explained that under SDS potential changes for providers could include delivering a more flexible and skilled workforce, responding to a higher demand for out-of-hours services and moving from dealing with large block contracts to individual contracts.\(^\text{33}\)

41. John Alexander of Dumfries and Galloway Council felt that the potential move to providers having multiple commissioners was where the real challenge for providers lay.\(^\text{34}\) CCPS expressed a similar concern—

"The core anxiety for providers relates to core costs and how they carry an increased business risk-to be frank-when they are moving to a less assured funding stream."\(^\text{35}\)

**Transition to self-directed support**

42. The Committee received evidence on the state of readiness of local authorities and providers to deliver SDS. Duncan Mackay of ADSW explained that the 32 local authorities were in a variety of states of readiness, with some local authorities requiring a greater level of investment to make the transition. He explained that some of the factors determining a local authority’s readiness to deliver SDS were whether it had decommissioned group services, created individual budgets around packages, and embedded the concept of SDS in its own assessment and care management procedures.\(^\text{36}\)

43. Duncan Mackay painted a similar picture for providers. He told the Committee that his local authority’s experience of working with 18 providers over the course of implementing SDS had shown that some had changed their financial systems, tackled their cultural issues, and become flexible and dynamic in their practice. Other providers, however, had struggled to make the transition, were perhaps wedded to existing ways of doing things, and would ultimately find it more difficult to meet the expectations that people would have through the allocation of individual budgets.\(^\text{37}\) Mr Mackay added that in relation to providers—

"... those who adapt will be well placed to be cutting-edge providers in the new world."\(^\text{38}\)

44. One further issue explored in relation to the transition to SDS was how the system would operate where local authorities were required to run dual services. Whilst a system would need to be in place to offer SDS options to individuals, there would still be a need to maintain services for people choosing direct provision of support by their local authority. RCN raised concern of a risk that core services would be lost as more people opted out and took the SDS route."\(^\text{39}\)


45. However, ADSW felt that core local authority services would survive if they delivered what the service user wanted—

“Our experience is that, when traditional services are highly flexible, outcome focused and delivered at times and in ways such that people can have their needs met and have an active choice about who supports them and about where, how and when they are supported, they often choose the traditional services and do not necessarily seek a direct payment to have the support provided in a different way.”

46. A recurring example given in relation to service delivery was the provision of day centres. Elaine Torrance of Scottish Borders Council highlighted the practical consequences of the transition towards SDS—

“If an individual chooses to have an activity in the community, as is right and proper, and not to take a day centre place, the cost per head can go up substantially until the number of places drops and we can free up that day centre or do something different with it. There are issues about how we fund that.”

**Scottish Government**

47. When asked about the readiness of local authorities to deliver SDS, the Minister explained that the strategy meant that SDS had been the direction of travel for some years—

“The way in which social care is delivered and local authorities engage in that process has constantly evolved. Self-directed support is a further phase in that process, and local authorities must manage the process of change as people take more control and are more discerning about their choices. The challenge for councils is to ensure that they provide people with flexibility and choice in the decisions that they make.”

48. The Minister told the Committee how he envisaged services would be delivered in the long term. He believed that in 10 years’ time people would be using a variety of services, some provided by the local authority and some by the voluntary or independent sectors.

49. The Minister considered that the challenge for some local authorities concerned the point at which some of the services being provided were felt to be no longer sustainable because user numbers were insufficient. A local authority’s experience would differ depending on whether its resources lay in capital infrastructure or if it used spot purchasing of services from the independent and voluntary sectors and was therefore less restricted. The Minister added—

“Each local authority will have to look at the model that is used to deliver services. If people are voting with their feet because they do not wish to use a service, the challenge for local authorities will lie in ensuring that they

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redirect the resource towards the services that people wish to use and in how they manage that process. That will happen over a number of years, as people gradually take more control of the way in which their care is organised.”

**Conclusion**

50. The Committee notes that self-directed support will require fundamental changes in the balance of the relationship between the supported person, the commissioner and the provider of services. The Committee recognises that this will present a number of challenges to local authority, independent or voluntary sector providers.

51. However, the Committee heard evidence, that there are existing examples where providers have risen to these challenges and have adapted to provide highly flexible, outcome-focused services. The Committee therefore believes that, with appropriate forward planning, support and assistance, providers will be able to deliver the types of service envisaged in the Bill.

**Allocation of budgets**

*Local authorities determining allocation*

52. A key issue raised during the Committee’s consideration of the Bill was how local authorities determined the relevant amount for an individual’s social care package.

53. This issue was raised in particular within the context of Glasgow City Council’s implementation of SDS.

54. Glasgow City Council initially developed SDS in the east of the city with people with learning disabilities. The Council implemented a new system which allocated resources on the basis of people’s needs. Every individual was reassessed with a new outcome-based support plan. The previous system had meant that the level of support and service that was provided for someone with an identified learning disability need was dependent on the point at which they entered the system.

55. David Williams of Glasgow City Council explained its approach—

“We need to ensure ahead of legislation that, regardless of their disability, people with particular identified needs can be involved in a system that is fair and equitable. The way in which we have developed personalisation in Glasgow provides for that. Other local authorities may not choose to take that route, but citizens throughout the country have the right to fair and equitable services.”

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45 Further information is available in the Scottish Parliament Information Centre. (2012) Social Care (Self-directed Support) (Scotland) Bill. SPICe Briefing 12/32.
56. The Committee, however, received a volume of evidence, particularly during its fact-finding visit to Glasgow, which raised concerns that Glasgow City Council’s personalisation agenda had been perceived by some as an attempt to cut budgets. The Committee received evidence from service users of dissatisfaction with the reassessment process which had been conducted in parallel with the implementation of SDS. The Committee was told that some individuals had received 50-70% cuts to their budgets.47

57. Experiences of personalisation in Glasgow chimed with other people’s perceptions of how SDS was being implemented. Peter Brawley of the Scottish Personal Assistants Employers Network (“SPAEN”) commented—

“As for individuals, all I can say is that under the resource allocation programme there seems to be a push to reassess and cut people’s packages. At a time when we are looking for money to implement this new system, the resource allocation to people—those who, I would argue, are the most important because with individualisation they will hold the purse strings—is being cut. That is sad.”48

58. The Committee heard evidence about the challenges faced by local authorities with the introduction of SDS during a period of tightening resources. ADSW told the Committee—

“In the situation that we face, there will have to be some budget reductions because resources in future will not be at the level that they are at now. There is a risk that self-directed support gets slightly discredited because it is being introduced at a time when cuts are having to be made. The message to the public has to be that the cuts must be made regardless of whether self-directed support exists […].”49

59. ADSW added that SDS may offer a legitimate opportunity to release resources that can be used for reinvestment, or indeed to contribute to the savings agenda—

“Self-directed support offers a way to navigate through some of the funding problems that face statutory agencies, because our experience is that people will choose to use the resources on what are not necessarily formal services but are perhaps more economic and more directly related to outcomes.”50

Scottish Government

60. The Minister was asked about concerns regarding implementation of SDS being perceived as part of a cuts agenda. He told the Committee that local authorities’ responsibilities would remain the same under SDS—

“It is important to realise from the outset that a local authority’s duty of care will not change as a result of the implementation of the Bill’s measures. There will be no change to the local authority’s duty to perform an

47 Note of meeting with service users. Annexe D.
assessment and meet an individual’s needs. I understand that local authorities can sometimes find that challenging.\(^{51}\)

61. The Minister explained that some of the transitional resource provided by the Government would be used to assist local authorities in looking at best practice from other local authority areas in order to help them to manage the process. He also highlighted that communication between the social worker and the individual who has concerns about changes in their care packages should be a key part of managing the transition.\(^{52}\)

**Conclusion**

62. The Committee heard strong views expressed about the implementation of self-directed support alongside a reassessment process in Glasgow. The Committee is firmly of the view that self-directed support must not be, or be seen to be, a cover for cuts.

63. The Committee recommends that the Scottish Government makes clear that in implementing self-directed support, local authorities must ensure that the assessment process is robust and service users are offered a package which meets their needs.

**Local authority eligibility criteria**

64. Another issue raised in connection with local authorities' determination of social care allocations was the application of eligibility criteria. Annexe A of the Policy Memorandum shows the adult assessment and support planning journey as it would be if the Bill was passed. It highlights that local authorities would still use eligibility criteria to determine whether the individual required services to meet their assessed needs.\(^{53}\)

65. According to the Scottish Government’s Self-directed Support Strategy, the Social Work (Scotland) Act 1968 recognises the central role of the local authority in determining where there is a need for the provision of community care services and how such need should be met—

“The legislation describes assessment as a two-stage process: first the assessment of needs and then, having regard to the results of that assessment, the local authority shall decide whether the needs of that person call for the provision of services. The use of eligibility criteria applies to this second stage of the assessment process; they are used by councils to determine whether a person assessed as needing social care requires a service to be put in place in order to meet those needs.”\(^{54}\)

66. There is a national eligibility framework which employs a four criterion approach, categorising risk as being critical, substantial, moderate or low. However, it is a matter for each local authority to manage the framework in their own area and set the thresholds. The Scottish Government’s Self-directed Support Strategy stated—


\(^{53}\) Policy Memorandum, Annexe A.

“While councils undoubtedly value the ability to set eligibility thresholds in line with local priorities, a key concern amongst people who use services is the fact that provision can vary in different council areas in Scotland. To that end, further work will be undertaken by the Scottish Government and COSLA to assess whether there is merit in establishing national thresholds for access to formal support across all client groups.”

67. The Committee received evidence which raised concerns regarding the level at which local authorities were setting eligibility for services. ILIS told the Committee—

“As eligibility criteria rise, disabled people are finding that they are getting support only to get up, go to bed and be fed; in fact, we have heard horrific stories of people celebrating the discovery of 12-hour incontinence pads, because it means they do not have to send someone in every six hours to change those being cared for. This massive issue is a result of the fiscal challenges that we face. I realise that that sounds quite provocative, but some people are having to live with this reality and until we address the wider public issue of the funding of social care and examine the current resources, self-directed support will have only limited potential.”

68. Duncan Mackay explained that as part of the steering group which developed the Bill, ADSW had made the point that the capacity to meet people’s needs, whether through an individual budget or traditional services, was not infinite—

“… if the Bill did not recognise eligibility in some way, it might be interpreted that anyone could access an individual budget. Clearly, resources would not permit that and, given the low level of need in many cases, that would not be the most appropriate way of meeting those needs.”

Scottish Government
69. The Minister told the Committee that as part of the SDS Strategy the Scottish Government had been addressing issues around eligibility—

“One of the issues is the various ways in which local authorities apply eligibility criteria for certain services that they provide, which can have a bearing on the outcome of someone’s assessment. That can leave us with a situation in which two people with very similar needs, in two local authority areas, can end up with two different care plans because of different eligibility criteria. We are engaged in a work stream with local authorities on eligibility criteria. Is there a way of addressing those issues so that we can get greater consistency in local authority service provision? We need to respect the fact that local authorities, as corporate bodies, have a level of flexibility in deciding how to deliver services locally. We need to find a way of addressing that.”

Conclusion

70. The Committee notes concerns regarding the way in which local authorities assess need and set eligibility criteria for social care services. The Committee recognises that there are challenges associated with trying to strike a balance between applying the national eligibility framework consistently and local priorities. The Committee therefore welcomes the work of the Scottish Government and COSLA to assess whether there is merit in establishing national thresholds for access to formal support.

Call for a formal appeals process

71. The Committee also received written and oral evidence from organisations calling for the establishment of a formal appeals process for individuals who wished to challenge the outcome of a local authority care assessment.

72. Both Glasgow City Council and Dumfries and Galloway Council told the Committee that, rather than a formal appeals process, they had risk panels to which cases could be referred when there was an issue of dispute to be considered.\(^59\)

73. ADSW was asked by the Committee for its view about an appeals procedure. Duncan Mackay told the Committee—

“There is an appeals mechanism-social work has to have a statutory complaints procedure. The Association of Directors of Social Work would strongly suggest that that procedure should be used, rather than creating a separate appeals mechanism.”\(^60\)

74. Whilst ADSW pointed to existing complaints procedures as the route for challenging an assessment, several witnesses told the Committee that it was important that a distinction be made between appeals and complaints procedures. The Law Society of Scotland’s Mental Health and Disability Sub-Committee (“the Law Society”) explained how they differed—

“An appeals procedure is about saying that we think that something has not gone right and asking where we want to get to and what we want to put in place. Complaints procedures tend to be backwards looking and about criticising individuals.”\(^61\)

75. Ranald Mair of Scottish Care also believed that there was a distinction to be made—

“I favour a basic right of appeal in relation to the package that has been allocated, which is separate from complaining about the process.”\(^62\)

76. Jim Pearson from Alzheimer Scotland also called for an appeals process—

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“The area of legality is where the right of appeal sits, as legality includes the need for people to have effective remedy when they disagree with a decision. The current internal complaints procedure does not deliver that.”

77. Mr Pearson explained that an appeals process would improve accountability for decision making in local authorities—

“… an independent appeals process supported by advocacy would not only give people the right to appeal against decisions that they disagree with when the law has perhaps not been applied correctly but, ultimately, make decision makers in local authorities who are responsible for developing individual budgets and assessing individuals much more accountable for how they do that, how they explain how decisions are reached and how they explain someone’s ultimate settlement and the individual budget.”

78. The Committee explored with some witnesses whether the additional costs required for an appeals system could be justified. Some witnesses, including the Law Society, pointed to there being more resource implications from a protracted complaints procedure than a focused and clear appeals procedure. Ranald Mair of Scottish Care also suggested that there were potential savings to be made, as local authorities may be more inclined to mediate if they knew that there was a right of appeal. He added—

“I do not know whether an appeals process would be cost neutral, cost saving or cost incurring, but I think that it would be a price worth paying to make it clear that people have rights and that they can assert them, so I will stick with that view.”

Scottish Government
79. In response to calls for an appeals system, the Scottish Government responded that it had no plans to include the provision. The Minister said an individual can already request a review of an assessment and, for those individuals refused one of the SDS options, they can request a review of that decision. He told the Committee that an appeals system—

“… goes beyond the Bill’s purpose. There has never been a formal assessment process in social work for the outcome of a social care assessment. However, a review of the outcome of an assessment can be requested to reconsider the situation if a person feels that the agreed outcomes from their assessment are not appropriate or do not necessarily meet their needs. That review would be undertaken by the local authority. If we introduced an appeals process for the outcome of social care assessments, we would need to consider carefully the wider implications.”

80. The Minister explained that there would need to be a wider ranging consultation on the issue to consider who would hear the appeal and how the appeal mechanism would be constructed. He also believed that consideration would have to be given to the costs of introducing an appeals process.⁶⁹

Conclusion
81. The Committee acknowledges the strength of feeling among witnesses about the perceived need for a formal appeals process to adjudicate over disputes arising from social care assessments. The Committee considers that the statutory complaints procedure is inappropriate for this purpose and believes that local authorities need to make a clear distinction between complaints and appeals.

82. The Committee notes the evidence from the Minister that a review of the outcome of a social care assessment can already be requested by a service user. The Committee also notes that some local authorities have established risk panels to review disputed decisions. These represent two alternatives to the creation of a statutory appeals system. The Committee therefore invites the Scottish Government to provide its view on how best practice in this area can be identified and shared.

Advocacy

Evidence received
83. The Committee received several written submissions from advocacy organisations and others which expressed the view that, to ensure people can engage effectively, the Bill should explicitly include reference to independent advocacy, “as distinct and separate from provision of information and advice”.⁷⁰

Independent advocacy was thought to offer recognisable advantages, not least an independent source of information.

84. In its submission, the Scottish Independent Advocacy Alliance (SIAA) set out the role of an independent advocate—

   “An independent advocate helps people express their views and make informed decisions. An advocate helps people to find out information, explore options and decide for themselves what they want. An advocate can be a voice for the person and encourage them to speak out for themselves. Advocates do not tell or advise someone what they think they should do.”⁷¹

85. To ensure that advocacy was explicitly recognised in the Bill, SIAA suggested that—

   “The Bill should be amended to include a right of access to independent advocacy as defined by Section 259 of the Mental Health (Care and Treatment) (Scotland) Act 2003. This right should be available to all who are

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⁷⁰ Scottish Independent Advocacy Alliance. Written submission.
⁷¹ Scottish Independent Advocacy Alliance. Written submission.
offered SDS under the legislation, including adults, children and young people... and carers.”

86. The right of access to independent advocacy under section 259 applies to anyone with a mental disorder. The term "mental disorder" is defined in section 328 of the 2003 Act and means any mental illness, personality disorder or learning disability, however caused or manifested.

87. In oral evidence, representatives of both the SCLD and ILIS expressed support for the submission from SIAA in order to ensure that disabled people and other care users had adequate support to make informed choices.

88. Peter Brawley, SPAEN, expressed support for the role of the advocate but stated that advocacy was “under-resourced”. He told the Committee—

“Investment to ensure that advocacy is high profile for the people who need it is good investment.”

89. Duncan Mackay told the Committee that ADSW “would be content with a statement that people should have access to advocacy, because some people will need that”.

90. George Kappler, of the Mental Welfare Commission (MWC), was firmly of the view that advocacy had a role to play. He said—

“I am not sure whether it is necessary to put it in the Bill—I am open to debating that—but advocates definitely have a role. The problem is that advocacy is a bit overstretched in many areas. Some attention would have to be paid to the funding of advocacy services if they are to be formally extended.”

Scottish Government
91. Asked whether the Scottish Government had considered giving a right of access to independent advocacy as part of the Bill, the Minister replied—

“We have considered it, and one of the reasons why it is not in the Bill is because not everyone will want or require independent advocacy to help them to make their choice. We have put section 8 in the Bill to place a duty on local authorities to provide information and advice on the implications of the decisions that they make, and to direct people towards services that can provide such advocacy support. Some of the financial support that we have provided around the Bill is to support organisations that can provide that advocacy role.”

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72 Scottish Independent Advocacy Alliance. Written submission.
92. The Minister confirmed that under section 8—

“... information about how to manage support, and ... information about persons (including persons who are not employed by the authority) who can provide ... assistance or information ... to assist the person in making decisions about the options”.79

Conclusion

93. The Committee recognises the valuable role an independent advocate can play in helping a person to express their views and make informed decisions. This type of support will be of undoubted benefit to many people faced with making decisions about self-directed support. The question is whether a right to independent advocacy should be enshrined in the Bill.

94. Although there are previous precedents for the inclusion of such a right in existing statute law, the Committee is not convinced that they should be considered analogous with self-directed support. The advocacy provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003, for example, are intended to support people with a mental disorder.

95. The Committee accepts the evidence of the Minister that not everyone will want or require independent advocacy to help them to make their choice about self-directed support and was reassured that, as presently drafted, section 8(2)(c)(i) of the Bill requires local authorities to direct people towards services that can provide such advocacy support.

Support for adult carers

Background

96. Under the Social Work (Scotland) Act 1968 (in relation to adults) and the Children (Scotland) Act 1995 Act (in relation to children), adult carers are able to request an assessment of their own needs in relation to their caring responsibilities.

97. However, section 2 of the Bill would provide local authorities with a discretionary power to provide support services following an assessment. Where a local authority decides to provide some form of support to a carer, they would be under a duty to offer the carer the four options of SDS.80

98. The Bill acknowledges the role that carers play in the provision of social care in Scotland. The Policy Memorandum states that “[w]ithout the contribution of Scotland’s carers the health and social care system would be unsustainable.”81

99. In exploring the issues of support for adult carers, the evidence received by the Committee emphasised the key role played by unpaid carers in meeting individual support needs. VOCAL highlighted, for example, that the current shift

79 Social Care (Self-directed Support) (Scotland) Bill, section 8.
80 Policy Memorandum, paragraph 41.
81 Policy Memorandum, paragraph 38.
towards more personalisation would not be achievable without the support and participation of unpaid carers.\textsuperscript{82}

\textit{Power or duty?}

100. The Committee received several written submissions from carers’ organisations calling for the discretionary power proposed in the Bill to be changed to a duty.

101. Carers Scotland stated in its written submission—

“Carers Scotland supports the proposal to extend self-directed support to carers and young carers. However, we continue to believe that this should be made a duty… rather than simply a power. We believe that enacting the legislation, simply as a power will result in inequity with significant variances in practice, and thus support for carers, across local authorities…”\textsuperscript{83}

102. In its written submission, Cross Reach told the Committee—

“It is important that carers, including the many who are unpaid, are able to access assessment and support […] including the same range of 4 options, to help them to continue to care. However, as this is only a ‘power’ and not a ‘duty’ local authorities are under no legal obligation to provide services for carers than they have been to date. Thus, it is of concern that, in a period of continuing financial austerity, this may be unlikely to change.”\textsuperscript{84}

103. Scotland’s Commissioner for Children and Young People (“SCCYP”) considered that not making the provision a duty would result in significant variation in provision of support for carers across Scotland and added—

“… in the majority of cases, support is unlikely to be offered to adult carers in the current financial situation.”\textsuperscript{85}

104. This view was supported by the evidence the Committee heard during its discussion session with carers in Glasgow. Some carers told the Committee that they had never been offered a carer’s assessment. Other carers suggested that, although they had received an assessment, it had not led to support being put in place for them. As a consequence, repeated calls were made for the Bill to include a duty rather than a discretionary power.

105. Carers Scotland also considered that there was a strong economic case for supporting carers—

“Providing small interventions at an early stage and/or at the right time can prevent a crisis and a consequent breakdown of care, necessitating the provision of significantly more costly services. Providing support at the right time can also prevent carers from having to give up paid employment and

\textsuperscript{82} VOCAL. Written submission.
\textsuperscript{83} Carers Scotland. Written submission.
\textsuperscript{84} CrossReach. Written submission.
\textsuperscript{85} SCCYP. Written submission.
activities that sustain their life outside caring, resulting in negative consequences for their finances, health and wellbeing.\(^86\)

106. In oral evidence to the Committee, Florence Burke of the Carers Trust emphasised this point—

“Potentially, a small investment for carers in Scotland who want to take up self-directed support in their own right could help to maintain the £10 billion savings to the public purse that carers provide by giving unpaid support. Making it a duty to offer carers access to SDS is certainly something that carers and carers organisations want to push.”\(^87\)

107. In its written submission, however, COSLA expressed concern at this possibility—

“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.”\(^88\)

108. In oral evidence, Ron Culley explained the reasons for COSLA’s position—

“… first, it could leave us with a Bill that has not been properly costed, which would be quite significant, and secondly, there is the philosophical issue about the role that we want carers to play in our society and whether remuneration should come with that. It raises a whole set of issues that require, at the very least, further discussion. We would be strongly against the inclusion of any prescription in respect of the powers that have been given to local authorities on the carers agenda.”\(^89\)

109. One specific concern, regarding the inclusion in the Bill of the discretionary power, was the potential impact on the resources available for service users. The SCLD stated that it did not believe additional support for carers should in any way affect or detract from the support that the disabled person chooses.\(^90\) ILIS expressed a similar view—

“We believe that any move to offer support to unpaid carers directly, must be supported by a separate system of assessment and a ring fenced budget for this provision, so that provision of support to a user doesn’t impact on the funding available to the carer and vice versa.”\(^91\)

**Conclusion**

110. **The Committee recognises the vital role that unpaid carers play in the provision of care in Scotland. The Committee welcomes acknowledgement by the Scottish Government that without the contribution of Scotland’s carers the health and social care system would be unsustainable.**

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\(^86\) Carers Scotland. Written submission.
\(^88\) COSLA. Written submission.
\(^90\) Scottish Consortium for Learning Disability. Written submission.
\(^91\) ILIS. Written submission.
111. The Committee believes that it is extremely important that carers’ health and wellbeing is supported to ensure that they can continue to provide their caring role. The Committee acknowledges the desire of many carers and their representatives to strengthen the Bill’s provisions, so that the discretionary power proposed becomes a duty on local authorities to provide support following an assessment. During Stage 1 scrutiny, the Committee did not obtain the view of the Scottish Government on this request. The Committee therefore invites the Government to reflect on this issue and confirm its position in its response to this report.

Power to charge for services provided under section 2

Background

112. Other than personal care for over 65s, which cannot be charged for, Scottish local authorities have discretionary powers under section 87 of the Social Work (Scotland) Act 1968 to charge for non-personal services they provide to people in their own homes. Charges should be reasonable, take account of the ability to pay, and be no more than the cost of providing the service.  

113. Section 16 amends Section 87 of the 1968 Act (authorities’ power to charge for services or support). This has the effect that authorities may charge for support provided to carers under section 2 of the Bill. The Policy Memorandum explains that, in line with other community care responsibilities, local authorities would have the discretion to charge for support provided to carers under this Bill.

114. Carers’ organisations reacted negatively to this proposal. For example, the Coalition of Carers in Scotland stated—

“Carers must be viewed as contributors to care provision, rather than as service users. They should not be expected to contribute financially to the cost of services provided to the person they care for, or to the cost of services which enable them to continue in their caring role.”

115. Carers Scotland argued that this proposed approach could lead to further inequality for carers based upon whether or not their local authority chose to make charges for support or the levels of local charging.

Conclusion

116. The Committee notes that local authorities currently have discretionary powers to charge for non-personal care services. The Committee invites the Scottish Government to clarify its policy intention regarding the power contained in section 16 of the Bill when it responds to this report.

93 Explanatory Notes, paragraph 54.
94 Policy Memorandum, footnote 15.
95 Coalition of Carers in Scotland. Written submission.
96 Carers Scotland. Written submission.
Specific choice provisions related to children and their families

Policy Memorandum

117. The Policy Memorandum stated that direct payments have been available to children supported under section 22 of the Children (Scotland) Act 1995 ("the 1995 Act"), through their parents or guardians since 1996. However, the Scottish Government considered that all of the self-directed support options "could offer a range of innovative practical solutions amidst the logistical complexities of families' daily lives". 97

118. In this respect, section 7 of the Bill consolidates current rights for children and their families to access direct payments, but broadens this to apply across all four options in the Bill. Section 7 of the Bill stipulates that—

- children aged between 16 and 18 will be able to choose and manage all the available SDS options
- where a child is under 16, the parent or the person with parental responsibilities will be able to choose the relevant SDS option and they will have full powers to manage the available resource or DP where that is their preference
- 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.

119. The Scottish Government stated that the Bill would also support its efforts to improve services for children through its "Getting it Right for Every Child" ("GIRFEC") framework—

"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 delivering the GIRFEC approach." 98

120. The Policy Memorandum noted that the Bill will have no effect on the child protection responsibilities and duties that local authorities have under the 1995 Act, and that statutory guidance under the Bill would—

"… 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." 99

Issues regarding provisions related to children and their families

121. The written submissions received by the Committee were generally supportive of SDS being extended to children and families where support was identified as being required under the 1995 Act. Some submissions highlighted that including the provision built on current practice. NHS Fife recognised that it

97 Policy Memorandum, paragraph 34.
98 Policy Memorandum, paragraph 35.
99 Policy Memorandum, paragraph 37.
linked to GIRFEC and “complements well established child/family centred planning approaches practiced by integrated children’s services”. 100

122. SCCYP requested that young carers should be explicitly mentioned on the face of the Bill as a group that would benefit from these provisions “given their special position of being children (some of them may be looked after themselves) and carers.” 101

123. Carers Scotland also argued that young carers should be involved in discussions and decisions on self-directed support; and local authorities may want to work with young carer projects to help develop local guidance for professionals and appropriate information for young carers. 102

124. While ADSW believed that there were “some exciting opportunities” in relation to the Bill’s focus on children, attaching it to Section 22 of the 1995 Act “could cause significant difficulties”. ADSW went on to explain—

“As Section 22 covers a wider multitude of childcare situations from straightforward welfare advice and assistance (where we could be very innovative) through to high profile cases where the child is on the child protection register but we do not have sufficient evidence to pursue compulsory measure of care. The reality is that in some of these situations children can come to serious harm.” 103

125. While children can receive services under Section 22, public authorities suggested that it may be appropriate to restrict access to one or more of the SDS options where this situation applies. City of Edinburgh Council stated that it was concerned that the provisions of the Bill did not take adequate account of the fact that some children deemed to be “in need” under the 1995 Act were—

“… living in chaotic families who would not be able to take on additional self-directed support responsibilities or management of the child’s support.” 104

126. The Committee received written evidence which welcomed planned statutory guidance highlighting where exceptions will allow local authorities to use discretion to deny the preferred choice of SDS options (where appropriate). COSLA stated that the guidance would need to provide a balance between the “presumption to entitlement and avoidance of inappropriate blanket exemptions”. 105

127. A number of written submissions referred to provisions relating to age set out in the Bill. While many agreed that the current provision on this issue was reasonable, there were some concerns raised about this point. CCPS noted that

100 NHS Fife. Written submission.
101 SCCYP. Written submission.
102 Carers Scotland. Written submission.
103 ADSW. Written submission.
104 City of Edinburgh Council. Written submission.
105 COSLA. Written submission.
“age may not be the best determinant of a child’s capacity to exercise control”, with maturity recognised as more important.\textsuperscript{106} SCLD noted—

“… we would suggest that a person-centred approach would allow for discretion, so that, for example, a child under the age of 12 who had formed a view of the way they wish to receive their support, should be allowed to express this.” Inclusion Scotland further states that: “Most children will be able to understand and express their choice, and this should also be reflected in the Bill.”\textsuperscript{107}

128. The Committee also received evidence from SCCYP of poor practice at present, including some local authorities not being aware of the duties relating to children, families being refused direct payments as budgets were already allocated, and some families feeling rushed into accepting direct payments. SCCYP stated—

“[There is] strong cultural resistance to SDS within children’s services in Scotland, with some staff concerned about quality of care and risks to vulnerable children being exposed to the largely unregulated private market which is personal assistance. I would therefore urge the Scottish Parliament to seek assurances from the Scottish Government that it will take steps to ensure that the full range of options of self-directed support proposed in the Bill are going to be available to all eligible children and families in Scotland no matter where they live and will work to raise professionals’ awareness of the benefits of self-directed support.”\textsuperscript{108}

**Implications of self-directed support for transitions planning**

129. Another area of concern expressed by SCCYP was how the transitions from secondary school to college and generally to adulthood were being managed and the role for SDS within this—

“Young people across Scotland are experiencing serious problems because of the way transition planning is currently managed. Part of the problem is that the existing transitions planning guidance is not being implemented, but the underlying problem may be that there is no single agency responsible for coordinating transitions planning.”\textsuperscript{109}

130. The Committee also received evidence during its discussion session with carers that there could be a lack of forward planning when a service user moved from children to adult services. The Committee heard about a particular example where a service user with complex care needs had not been supported to make the transition from school to further education and was therefore no longer in education, placing increased pressure on the family who supported them.

131. SCCYP called for assurances that those involved in transitions planning would be made aware of the support available under the Bill and suggested that amending guidance on transitions planning may also be useful.

\textsuperscript{106} Coalition of Care and Support Providers in Scotland. Written submission.
\textsuperscript{107} Scottish Coalition on Learning Disability. Written submission.
\textsuperscript{108} SCCYP. Written submission.
\textsuperscript{109} SCCYP. Written submission.
Implementation of choice provisions related to children and their families

132. Brian Houston of Barnardo’s Scotland raised concern about the lack of comprehensive evidence from the pilots about the implications of SDS for children—

“In the test sites, not a lot of testing was done for children’s services. Young people were identified who were probably young adults moving into that transitional age. We have a concern that there has been no testing that would build collective confidence in the changes to the system among children’s services and families with children.”

133. Barnardo’s Scotland believed that, as a result, the Scottish Government should consider a longer lead-in time for implementation of this section so that comprehensive evidence could be gathered and a full analysis of pilot programmes had been completed on SDS for children and young people—

“There are currently a number of projects and programmes being undertaken to assess how SDS can and will work for children and families and we believe that the findings from this work should be considered before this element of the legislation comes into force.”

Conclusion

134. The Committee welcomes provisions in the Bill that would extend self-directed support to children and their families.

135. The Committee notes concerns from organisations about the potential complexities of offering self-directed support to children supported under Section 22 of the Children (Scotland) Act 1995. The Committee welcomes the Scottish Government’s plans to clarify in statutory guidance how local authorities would balance their duty for protection with the new duty to offer options for self-directed support.

136. The Committee received evidence which raised concerns regarding how transition planning from children’s services to adult services (particularly from school to further education) was currently being managed and the role self-directed support could play within this. The Committee seeks further information from the Scottish Government on how those involved in transition planning will be made aware of the support available under the Bill and whether guidance on transition planning will be amended to reflect this.

137. The Committee also received evidence calling for implementation of the provisions relating to children and young people to be delayed until a full analysis of current projects regarding self-directed support and children and families had been analysed. The Committee seeks further information from the Scottish Government regarding how the findings of these pilots would be incorporated into the development of SDS for children and their families.

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111 Barnardo’s Scotland. Written submission.
**Assistance**

**Background**

138. Section 15 inserts section 12AZA after Section 12A of the 1968 Act. It applies where the authority is assessing a person’s needs under section 12A of the 1968 Act. It is similar to, although at an earlier stage than, the duty under section 5 requiring assistance to an adult making a choice of an option for self-directed support.  

**Policy Memorandum**

139. The Policy Memorandum stated that the Scottish Government’s policy is to ensure equal access for all clients to all of the self-directed options including, “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”.  

140. However, the Scottish Government’s consultation on the Bill had identified that some social care clients will encounter difficulties in expressing informed decisions. The Policy Memorandum stated that, 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.  

141. The Policy Memorandum explained how the Scottish Government envisaged this working in practice—

> “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.”

**Evidence received**

142. In its written submission the Office of the Public Guardian (“OPG”) expressed concern that as drafted, the provisions “could create confusion and may lead practitioners to believe they can provide assistance to incapable adults also”.  

143. In oral evidence, the OPG told the Committee—

> “Our concern related to the confusions that might be created by the use of the term “assisted decision making” alongside language that is very much the kind of language that is used in relation to adults with incapacity. We do not

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112 Explanatory notes, paragraph 49.  
113 Policy Memorandum, paragraph 31.  
114 Policy Memorandum, paragraph 29.  
115 Policy Memorandum, paragraph 32.  
116 Office of the Public Guardian. Written submission.
know whether practitioners might feel that they can assist those who truly lack capacity to make a decision, which would go beyond assisted decision making and towards substitute decision making. The policy memorandum makes it clear that that is not intended to be the case, but it is not clear in the Bill.”¹¹⁷

144. The Law Society considered that the Scottish Government’s policy intention was “not yet adequately achieved” by the present section 5 [and 15]. Its written submission continued—

“Because the legislation is not explicit that this provision is for people who have capacity to make decisions but would benefit from support, and not for people unable to make valid decisions, there remains a risk that the procedure may in fact be used for people who lack capacity.”¹¹⁸

145. In its written submission, the MWC echoed this concern and proposed the following solution—

“To achieve the clarity in policy and legislation that the Scottish Government intends, we feel it would be best if, on the face of the Bill, it could be made clear that it is not intended that the Act be used for people lacking capacity to make decisions about self-directed support and direct payments where there is no proxy under the Adults with Incapacity Act with power to make such decisions. We also feel amending the current AWI legislation should be seen as a matter of some priority. It should be possible to amend the Act in such a way as to allow for a more proportionate response for such issues as self-directed support and direct payments while insuring proper safeguards are in place.”¹¹⁹

Scottish Government

146. Following his appearance at the Committee, the Minister wrote to provide the Scottish Government’s response to the concerns raised by witnesses.

147. In his response, the Minister sought to provide reassurance that the purpose of Sections 5 and 15 of the Bill was to require local authorities to involve people able to assist the individual to make decisions about their care and support plan, and not to provide a power to local authorities to appoint proxies in order to make decisions as substitutes for the individual.¹²⁰

148. Referring to the concern related to the similarity between the definitions used at Section 5(1)(b) and 15(1)(b) of the Bill and the definition deployed in section 1(6) of the AWI Act, the Minister acknowledged that this was “a complex and challenging area of the Bill’s drafting”.

149. The response explained that people with either a mental disorder or a difficulty in communicating can fall into the category of those who lack capacity under the AWI legislation or they can fall into the category of those who have

¹¹⁸ Law Society of Scotland. Written submission.
¹¹⁹ Mental Welfare Commission. Written submission.
¹²⁰ Minister for Public Health. Written submission, 6 June 2012.
capacity, and who might benefit from assistance under Sections 5 and 15 of the Bill. It continued—

“As indicated where a person has capacity the local authority should involve persons who can help that individual to make the relevant choices. There is no specific power provided to the local authority in order to appoint an individual as a proxy decision-maker, and so no such decision-making power would be created under this Bill.”

150. The Minister’s response concluded—

“I would expect statutory guidance to elaborate on these points in detail and to make it clear that Sections 5 and 15 do not contain any power to appoint substitutes. Nevertheless I am also happy to explore this drafting issue with the Committee at Stage 2. In addition, I have asked my officials to engage with the MWC, OPG and the Law Society of Scotland in advance of Stage 2.”

Conclusion
151. The Committee welcomes the Minister’s commitment to engage with the Mental Welfare Commission, Office of the Public Guardian, and the Law Society of Scotland regarding the drafting of these complex sections of the Bill. The Committee wishes to receive an update on the outcome of these discussions in advance of the Stage 1 debate.

DIRECT PAYMENTS

Background
152. Direct payments have been available in Scotland, and in England and Wales, since 1996. Carers are entitled to have their needs assessed by local authorities but are currently unable to receive a DP themselves. Currently, DPs may not be offered to certain people who are restricted by certain mental health or criminal justice legislation (for example those on Compulsory Treatment Orders).

153. Despite steps taken to encourage the take-up of direct payments, the Scottish Government considers that there has been limited success in terms of the practical delivery of existing law in this area. In its Policy Memorandum, it stated—

“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.”

154. Section 13 provides for Scottish Ministers to make regulations about direct payments and the provision of support to which they relate. Examples of areas

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121 Minister for Public Health. Written submission, 6 June 2012.
122 Minister for Public Health. Written submission, 6 June 2012.
124 Policy Memorandum, paragraph 46.
125 Explanatory Notes, paragraph 40.
that may be covered by such regulations include: employment of close relatives as personal assistants; gross and net payment of direct payments; direct payments for residential accommodation; and eligibility of those on Community Treatment Orders to receive direct payments. Further information about each of these areas can be found in the SPICE briefing on the Bill.\textsuperscript{126}

155. Section 14 provides for the local authority to require repayment of all or part of the direct payment from the supported person if they have used all or part of the direct payment on things other than the assessed services or support required or where the person has contravened any regulations made under section 13.\textsuperscript{127}

**Evidence received**

156. With the introduction of the Bill, ADSW noted that this should lead to a shift in emphasis that will see direct payments as only one of a range of options available to people identified as in need of support. ADSW stated that this was to be welcomed.\textsuperscript{128}

157. Views on the modernisation of direct payments were varied, with some respondents supportive of the suggested changes including on matters such as introducing greater consistency of provision across Scotland—

“The Bill is a welcome step forward in rationalising legislation surrounding Direct Payments and introducing a uniformity of approach throughout Scotland.”\textsuperscript{129} (CrossReach)

“Regulation and Ministerial guidance [relating to direct payments] will be critical to provide clarity, unity of purpose and achieve favourable outcomes. Regulations will help avoid regional variations that could arise from local interpretations of the new Act.”\textsuperscript{130} (Loretto Care)

**Issues to be addressed through regulations**

158. There were a number of issues respondents wished to be addressed through regulations. These included—

- The position with regard to possible extension of direct payments to close family members (Carers Scotland)
- Addressing some of the challenges of uptake that have faced direct payments to date, around complexity (CCPS) and take up by specific groups, e.g. older people and people with dementia (Scottish Care)
- Extending the provision of SDS to people who lack capacity and those in residential care, with clarity on the arrangements that would be put in place so that a named person, appointee or financial guardian can

\textsuperscript{127} Explanatory Notes, paragraph 48.
\textsuperscript{128} ADSW. Written submission.
\textsuperscript{129} CrossReach. Written submission.
\textsuperscript{130} Loretto Care. Written submission.
receive direct payments on another person’s behalf, with monitoring arrangements also put in place (Loretto Care)

- Regulation, accreditation or other safety checks being put in place for unregulated support workers (SSSC), although there were recognised to be clear resource implications arising from regulating personal assistants (Loretto Care).

**Employment of personal assistants**

**Background**

159. Direct payments are often used by recipients to employ personal assistants (PAs). In 2011 around 39% of all direct payment packages involved the employment of personal assistants, 34% on service providers, and a further 3% using a mixture. The Committee noted that this had fallen recently – in 2009 51% of those in receipt of direct payments employed a PA. ¹³¹

**Regulation of personal assistants**

160. As part of its inquiry into the regulation of care for older people, the Committee received evidence about the challenges associated with ensuring proper scrutiny of services and protection of care at home users. At that time, the Committee was informed that under the Regulation of Care (Scotland) Act 2001 the SSSC did not regulate personal assistants in a one-to-one arrangement. The Committee concluded that concerns raised with it about the need for a regulatory framework for self-directed support would need to be addressed by the Scottish Government in the Bill. ¹³²

161. A number of written submissions called for some form of regulation or registration of personal assistants to take place as part of the development of self-directed support legislation. For example, the City of Edinburgh Council expressed concern about—

“… the creation of a two tier workforce, i.e. those working in regulated services who are subject to PVG⁰¹³ legislation and required to undertake mandatory training in key care subjects, and those employed as Personal Assistants who are not subject to any specific requirements.”¹³⁴

162. In its written submission, CCPS stated—

“We would wish to see some basic level of accreditation for Personal Assistants, and as a minimum a requirement that they be made subject to PVG checks. Where the nature of the role to be performed requires it,

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¹³³ Protecting Vulnerable Groups (PVG) is a membership scheme for people doing, seeking to do, or planning to do regulated work with children or protected adults. Certain professional regulatory bodies ask their members to join the PVG Scheme.

¹³⁴ City of Edinburgh Council. Written submission.
employed staff (excluding family members) should also have an appropriate SVQ qualification.”

163. Meanwhile, RCN Scotland argued—

“...the risk could be mitigated by ensuring that local authorities (or an NHS board in terms of delegated function) develop contracts with service users that insist on the production of a PVG Scheme record for anyone engaged by a personal employer to undertake regulated work through a direct payment.”

164. The SSSC made several recommendations about regulation in its written submission—

- agencies providing personal assistants, and indeed other social service workers, should be regarded as care services and required to register with the Care Inspectorate;

- all personal assistants should be made aware of the Code of Practice for Social Service Workers and encouraged to adhere to them, and all employers of personal assistants should be made aware of the Code of Practice of Social Service Employers and encouraged to adhere to them;

- minimum induction training is made available to personal assistants, and their employers, covering things like rights-based care as has been produced by the Scottish Human Rights Commissioner in the Care About Rights programme, and professional boundaries guidance;

- complex care and care for particularly vulnerable service users is provided by workers regulated by the SSSC. The underlined terms requiring careful and consistent definition so as not to be used to limit personal choice unfairly;

- the Scottish Government should access the resource available through the SSSC sector skills council to explore workforce development and planning for personal assistants.

165. Noni Cobban, United Kingdom Homecare Association, suggested that registration under the PVG scheme would be an appropriate safeguard. She said—

“I would tend to put such a system under the umbrella of the SSSC, because it regulates the workforce.”

166. However, Peter Brawley, SPAEN, argued in favour of regulation being conducted by service users themselves—

135 Coalition of Care and Support Providers in Scotland. Written submission.
136 RCN Scotland. Written submission.
137 Scottish Social Services Council. Written submission.
“With or without support, we will take responsibility for the PAs to ensure that our workforce within the home is regulated. Collectively, a network for good practice in personal assistance is automatically starting to be created. We are still at the dawn of the new age, but we are aware of the challenges in front of us and we are up for them. I think that we are not bad at regulating PAs just now.”

Scottish Government
167. In oral evidence, the Minister explained why the Scottish Government did not intend to regulate personal assistants—

“...When we consulted on the Bill, it was clear that there was considerable anxiety among some stakeholders about the potential overprofessionalisation of personal assistants or medicalisation of the care they provide and the challenges and difficulties that that could create for individuals. We have to weigh that against having flexibility in the system to allow people to make informed choices on the best provision of care to meet their needs. Because of the concerns expressed in the course of the consultation on the Bill, we decided that we did not wish to regulate personal assistants.”

168. However, the Minister did acknowledge that there were risks associated with this approach and the Scottish Government was working with local authorities and stakeholders to consider how these could be managed—

“...Some local authorities have user agreements with individuals who use direct payments for the provision of their care. Part of the user agreement is about the individual’s awareness of the protecting vulnerable groups scheme and the benefits that they can get from it. That is a way of helping to reduce some of the risks associated with being an employer.”

169. The Minister told the Committee that the Scottish Government would encourage someone who was going to employ a personal assistant to ensure that they were a member of the scheme. He explained that the burden of registration under the scheme would rest with PAs rather than employers—

“...For individuals who wish to be employed as PAs, the message will be clear: they will be expected to be part of the scheme. Moreover, if Disclosure Scotland’s system has something on a personal assistant that would prevent them from applying for a job, the person will be committing a criminal offence if they try to do so. It is important that we maintain flexibility and choice by ensuring that individuals are aware not only of the risks, but of mechanisms to reduce the potential of such risks and by placing the onus on the person applying for the post of personal assistant rather than the cared-for person to ensure that all the checks have been done.”

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170. In a subsequent written submission, the Minister confirmed that the cost of joining the PVG Scheme was £59.\(^{143}\)

**Conclusion**

171. The Committee noted in its earlier report on the regulation of care for older people that there were concerns about the regulatory framework for social care as self-directed support was rolled out. It concluded that the Scottish Government would need to address these concerns through provisions in this Bill.

172. The Committee notes the Scottish Government’s decision not to regulate personal assistants, but instead to rely upon the protecting vulnerable groups scheme in order to mitigate some of the risks for those who wish to employ a PA. However, the Committee considers that more could be done to reduce the risks associated with this form of self-directed support, while at the same time enhancing the status and value of the PA workforce. To this end, the Committee invites the Scottish Government to give consideration to the recommendations made by the SSSC in its submission to this Committee and to set out its views in its response to this report.

**Employment of close family members**

**Background**

173. The Community Care (Direct Payments) (Scotland) Regulations 2003\(^ {144}\) state that a recipient's spouse, parent, grandparent and any other close relation cannot be employed via a direct payment, except where the local authority is satisfied that securing the support from that person is necessary to meet the recipient’s assessed need.\(^ {145}\)

174. Following its consultation on a draft Bill, the Scottish Government accepted there was varied use of the exception rule across the country. It stated it would consider the range of inappropriate and appropriate circumstances for employing a relative as a PA, with a view to laying fresh regulations.\(^ {146}\)

175. The Scottish Government confirmed its policy on this issue in the Policy Memorandum—

"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

\(^{143}\) Minister for Public Health. Written submission, 6 June 2012.


power for Ministers to issue regulations in order that they can guide authorities who may need to sanction such arrangements.”

**Evidence received**

176. In its written submission, Carers Scotland welcomed the recognition that the employment of close relatives was “often the best solution for individuals and will help deliver better outcomes”. However, it argued that to prevent any inequality, “it is essential that regulations are developed in a way that provides a nationally agreed framework for consistent delivery”.

177. When Committee members met with carers in Glasgow, participants called for a relaxation on exemptions so that family members could be PAs, particularly in circumstances where the individual service user had profound and complex needs.

178. In its written evidence, ADSW recognised that an individual has the right to choose who to employ, and that this should be done without interference – unless there are capacity or other concerns that require the local authority to exercise a duty of care. However, ADSW made clear that current restrictions on the employment of close family members should be preserved as they are at present.

179. In oral evidence, Peter Brawley felt that employing a family member would change the relationship with the supported person—

“I am not knocking the opportunity for some family members to be employed in exceptional circumstances, but so far nobody has come up with a very good exceptional circumstance.”

180. Ranald Mair, Scottish Care, argued that, where it was appropriate, SDS should include the employment of family members—

“... individuals have the right to say that a family member is the person who most understands their needs, who is most available to them and who not only provides care as a relative but does a quasi-job of work so there is scope for them to be remunerated. When that happens, there must be some element of oversight. That is about non-exploitation.”

**Scottish Government**

181. The Minister expressed the view that some local authorities had been inconsistent in how they had applied the threshold for direct payments with regard to individuals who might wish to employ family members. He continued—

“Under the existing threshold for direct payments, such a move is possible in exceptional circumstances. However, I feel that the threshold is too high and

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147 Policy Memorandum, paragraph 47.
148 Carers Scotland. Written submission.
149 Note of meeting with carers. Annexe D.
150 ADSW. Written submission.
is not being applied consistently and we intend, through regulations, to provide guidance on the circumstances in which the employment of a family member as a personal assistant would be appropriate. That will make the system clearer, give people more of an opportunity to take a family member on as a PA and help to address some stakeholders’ concerns about difficulties in that respect.”

**Conclusion**

182. The Committee respects the desire of service users to determine for themselves who is best placed to deliver their care and support and that this may be a family member. The Committee considers that the current definition of exceptional circumstances is no longer appropriate. However, the Committee believes that in order to protect the interests of the supported person, appropriate safeguards must be put in place by the local authority. The Committee would welcome additional information from the Scottish Government about how these safeguards can be applied in practice.

183. The Committee welcomes the commitment from the Minister that, through regulations, a more consistent and pragmatic approach to this question may be achieved.

**Delegation**

**Background**

184. In the Policy Memorandum, the Scottish Government noted that a “small number of direct payment recipients benefit from jointly funded health and social care budgets”. The Scottish Government wishes to encourage further reform in order to promote “a greater health involvement in self-directed support for those with complex care packages”.

185. Section 18 amends section 15 of the Community Care and Health (Scotland) Act 2002 (“the 2002 Act”) which will allow Ministers to amend the 2002 Act regulations. The effect is 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. In this way, 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.

186. The Policy Memorandum also acknowledges the Scottish Government’s plans for the closer integration of adult health and social care, which will include legislation.

**Integration of health and social care**

187. In relation to the title of the Bill, a number of respondents to the Committee’s call for evidence felt that this did not accurately depict its focus and that reference to “social care” should be removed. The title of the Bill as introduced was seen

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154 Policy Memorandum, paragraph 43.

155 Policy Memorandum, paragraph 45.

156 Policy Memorandum, paragraph 42.

157 For example, see NHS Fife and ADSW written submissions.
as too limiting and failing to embrace the wider health and well-being of individuals. NHS Fife stated—

“...if reference to social care [is] removed, [this] provides more flexibility for future guidance on links between SDS and health boards particularly as integration agenda progresses.”\(^{158}\)

188. During oral evidence, the Committee explored with witnesses several issues surrounding the interaction between SDS and further integration of health and social care.

189. Discussing the care assessment process, Professor Frank Clark, Care Inspectorate, told the Committee—

“I worry about any artificial separation of health and social care, because a health condition can drive a social need and vice versa. I do not think that we should be artificially constrained by a need to separate out whose budget it is. That issue came up earlier. The assessment process must transcend the health and social care spectrum so that the right solutions are arrived at for the individual. The whole purpose of the integration of health and social care is to move away from the tribal or territorial separation of functions, and I think that that is true of SDS as well.”\(^{159}\)

190. Ellen Hudson, Royal College of Nursing Scotland, expressed concern about the delegation provisions in section 18, which would require NHS bodies to fulfil the duties in the Bill if they had been delegated functions under the 2002 Act. She argued—

“If we pool our NHS and local authority moneys within an integration agenda, the edges are bound to blur and we could incrementally end up using self-directed support moneys to pay for health services. We consider that to be scope creep. There is not enough detail on that, which is why we call for further consultation and detailed discussions on the matter.”\(^{160}\)

191. Duncan Mackay, ADSW, provided an example of social care funding being used to purchase health care services when the NHS could not deliver directly a service which met a paralysed man’s specific health care needs. But he stated—

“If the Bill continues as it stands and does not permit the use of NHS resources to meet needs, that will impair, not facilitate, integration.”\(^{161}\)

192. Acknowledging that the scope of the current Bill would preclude it, Mr Mackay nevertheless argued in favour of allowing access to health budgets as part of future integration—

“It is not a mad social experiment to use health budgets to meet individual need; the practice has been established elsewhere for some time, although it

\(^{158}\) NHS Fife. Written submission.


needs to be joined together. Overall, there is a strong body of evidence that outcomes improve for people if they not only have greater control over the support that they require but have the choice to exercise control over the resources that are allocated to providing their support.\textsuperscript{162}

193. In a subsequent oral evidence session, Omar Haq, a service user in receipt of direct payments, told the Committee that he used part of his budget to pay for physiotherapy services in order to improve his mobility.\textsuperscript{163}

Scottish Government

194. In oral evidence, the Minister reflected on the examples which the Committee had been told about. He explained that under present arrangements a health board could provide resources to a local authority that could be utilised as a direct payment. However, he foresaw benefits from the integration of health and social care as different budgets would be combined—

“It will not be a case of whether a person can get a direct payment under the health service; a budget will be available to help to support people through social care assessments that have health elements as a result of both the Bill and the integration of health and social care. I hope that that will give greater clarity and certainty about the process and reduce the tension that can often exist between those two areas.”\textsuperscript{164}

195. The Minister stated that using a direct payment for a service such as physiotherapy was a “good example of how self-directed support gives people greater flexibility and choice” in making decisions to address their needs.\textsuperscript{165}

196. Asked whether the Bill might simply result in the transfer of health responsibilities to individuals and carers, the Minister argued that examples of that nature made the case for greater integration of health and social care—

“Greater integration will enable us to ensure that local authorities and the health service are much more effectively aligned with one another and that the health service is much more focused on helping to support people in the community and giving them the advice that they require.”\textsuperscript{166}

Conclusion

197. The Committee was struck by the real life experiences of people using direct payments to improve their lives. Some individuals with complex needs, often associated with a disability or long-term medical condition, will rely on a package of support which encompasses both health and social care. The Committee recognises that the flexibility offered by a direct payment can allow a person to take control of their care and meet their personal needs more effectively.

198. The Committee supports wholeheartedly all efforts to enhance collaboration between NHS boards and local authorities for the benefit of patients and service users. The long-standing resource transfer between NHS boards and local authorities associated with the resettlement of people from long-stay institutions into community care is one example of joint working which has resulted in considerable improvements to the lives of service users.

199. As the proposals for the closer integration of health and social care progress, the Committee encourages the Scottish Government to ensure that the principles of self-directed support enshrined in this Bill can be extended to address the health needs of people also in receipt of social care.

FINANCIAL IMPLICATIONS OF THE BILL

Background

200. As required by Standing Orders Rule 9.3.2, the Bill was accompanied by a Financial Memorandum.

201. Standing Orders also require the Committee to consider and report on the Financial Memorandum and, in doing so, to take into account any views submitted by the Finance Committee.

202. The Scottish Government expects SDS to be “cost-neutral in the long term”. In the Financial Memorandum it also stated that savings from self-directed support, in terms of long-term health benefits, “may accrue to bodies such as the NHS rather than local authorities”. 167

203. However, the Government also considers that as health and social care become more integrated, it is expected that the boundaries between these budgets will be more flexible. 168

Cost estimates

Finance Committee scrutiny

204. The Finance Committee invited a number of organisations, including all 32 local authorities, to respond to a series of specific questions. Responses were received from nine local authorities and from COSLA. 169 The Finance Committee also heard oral evidence from the Scottish Government’s Bill team. 170

205. The Scottish Government is to make £23 million available across the years 2012-13 to 2014-15 to assist local authorities with transformation (bridging finance, leadership, commissioning and contracting, IT and accounting systems, information material, administration and reporting requirements) to implement the

167 Social Care (Self-directed Support) (Scotland) Bill, Financial Memorandum, paragraph 83.
168 Financial Memorandum, paragraph 83.
Bill’s provisions. The Finance Committee noted that this was the main issue raised in the local authority and COSLA responses. Views were expressed that the funding was not enough and should be available over a longer period.\textsuperscript{171}

206. In its written submission to the Finance Committee, COSLA stated—

“Both the financial memorandum, and indeed previous research studies, acknowledges it is difficult to accurately estimate the costs that will arise from the changes outlined above. Indeed, the timing and extent of these shifts in commissioning arrangements, administrative costs, and dual running costs are partly dependent of the choices individuals make under SDS. That said, the £23m identified falls far short of even councils’ most conservative estimates. Whilst it is difficult to fully estimate the exact cost for all Councils, from the information provided by Councils even the lowest estimate for each of the cost areas outlined above over three years would total just over £50m nationally. Given that councils are at different stages in implementing SDS, it is highly likely that these costs would be higher, and indeed even based on the median of the estimates which were received the total cost to councils, over the next three years would be over £90m. Clearly this is very different to the actual level of funding which has been provided.”\textsuperscript{172}

\textbf{Evidence received}

207. Several local authorities and COSLA made similar points in their submissions to the Health and Sport Committee. West Lothian Council, for example, stated that its share of the Scottish Government funding was “significantly below the costs we anticipate will be incurred in local implementation”.\textsuperscript{173} In its written submission, Scottish Borders Council commented that it was difficult to estimate transitional costs associated with funding block contracts and building based services whilst providing a more flexible approach—

“Although commissioning arrangements are addressing this change it is taking time and the funding may not be sufficient to cover this cost, in addition to the other requirements to progress SDS. The timescale of three years may also not be sufficient to make the transition.”\textsuperscript{174}

208. In oral evidence to the Health and Sport Committee, COSLA was asked to clarify its position. Ron Culley explained—

“Although the Scottish Government has set aside a generous £23 million for implementation, our survey work with our member councils indicates that that amount is insufficient to cover the Bill’s objectives. In fact, our lowest estimate for a more appropriate figure, given the Bill’s scale and ambition and the timeframe, is £50 million. That said, we have an on-going political partnership with the Scottish Government and will continue to work within the current realities of public finance.”\textsuperscript{175}

\textsuperscript{171} Scottish Parliament Finance Committee. Written submission to the Health and Sport Committee.
\textsuperscript{172} COSLA. Written submission to the Finance Committee.
\textsuperscript{173} West Lothian Council. Written submission.
\textsuperscript{174} Scottish Borders Council. Written submission.
209. In a supplementary submission, COSLA repeated its view, based on the median of the estimates which it received from member councils, that the total cost to implement the Bill over the next three years would be over £90m. The submission stated—

“Clearly the more resource that is available to support change, the more quickly progress can be made. However, if insufficient resource is available, we may need to take a more pragmatic approach and focus on the timescales for implementation that are possible within different resource envelopes. Longer implementation timescales would help spread costs associated with assessment, supporting choices and review, but would prolong dual running costs; conversely, shorter implementation timescales may represent a more efficient approach to decommissioning, but would carry greater cost in terms of assessment, supporting choices and review.”

210. COSLA also provided the Committee with details of the pro-forma it had used to survey councils but it did not provide details from individual local authorities as it considered that it did not have permission to do so.

Scottish Government
211. In oral evidence, the Minister explained that, in total, the Scottish Government was providing £43 million for short to medium-term work on the Bill, £23 million of which would go to local authorities for assistance with transition.

212. Asked about the apparent disparity between the Scottish Government figures set out in the Financial Memorandum and COSLA’s estimates, the Minister replied—

“Although we have asked COSLA for details of how it arrived at its figures and although we have indicated that we are more than happy to explore the issue, it has been unable to provide that information.”

213. The Minister confirmed that there was an on-going dialogue between the Scottish Government and COSLA including representation on the working group preparing for implementation of the Bill should it be passed by the Parliament.

214. In a subsequent written submission, the Minister reflected further on the “on-going discussion” about the investment “required to engender a significant change in culture and approach surrounding this legislation”. He informed the Committee that he had asked his officials to convene a regular Self-directed Support Programme Board—

“One of the main tasks for this Board is to monitor and manage implementation, and this will include a remit to keep a close eye on the ongoing costs of implementation. The Board will involve COSLA and ADSW, along with a range of support organisations, user and carer groups. In addition, my officials will meet with senior COSLA and ADSW officials on a
two-monthly basis up to any Bill commencement date and beyond into the first year of implementation. The first of these meetings is set for 12 June. Finally, my officials will progress a series of meetings over the next 6 months with individual local authorities. They will use this programme of engagement to discuss a range of implementation matters, including the question of how and in what ways local authorities will make use of the transformation funding provided by Scottish Government."180

Conclusion

215. The Committee notes the extremely wide disparity between the estimates produced by the Scottish Government and COSLA regarding the costs of implementing the Bill. The Committee considers that the difference is so great that it cannot be explained simply by the use of a different methodology by the two organisations.

216. The Committee considers that the failure of COSLA to share the detail of individual council cost estimates was unacceptable as it prevented the Committee from being able to determine whether implementation of the Bill may be jeopardised by a significant gap in funding. The Committee believes that it is vital that witnesses are able to substantiate assertions made in written and oral evidence provided to the Parliament.

217. The Committee notes that there is a continuing dialogue between the Scottish Government and COSLA and welcomes the establishment of a Self-directed Support Programme Board. However, in order to allow meaningful discussions to take place between central and local authorities regarding the level of funding required to support the implementation of the Bill, the Committee encourages COSLA to share its data with the Scottish Government as soon as possible.

218. The Committee received assurances from the Scottish Government about the financial resources accompanying the Bill. Following further discussions between the Scottish Government and COSLA, the Committee seeks confirmation from the Scottish Government that these resources are indeed sufficient to facilitate the process of change required in order to implement the provisions of the Bill.

SUBORDINATE LEGISLATION

Subordinate Legislation Committee scrutiny

219. Under Rule 9.6.2 of Standing Orders, where a bill contains provisions conferring powers to make subordinate legislation, the Subordinate Legislation Committee (“SLC”) must consider and report to the lead committee on those provisions.

220. The SLC reported that it did not need to draw the attention of the Parliament to the delegated powers contained in sections 18 (new section 15(4)(h) of the Community care and Health (Scotland) Act 2002) or 26 (commencement) of the Bill.

180 Minister for Public Health. Written submission, 6 June 2012.
221. In relation to the powers contained in sections 13 (power to make further provision about direct payments) and 19 (guidance and directions) the SLC reported that the powers were acceptable in principle.

222. The SLC reported at considerable length on other delegated powers in the Bill. The report can be found on the Scottish Parliament website.¹⁸¹

223. The key conclusions from the SLC report are summarised below. The conclusions of this Committee are included at the appropriate points.

**Section 12 – Power to modify section 3**

224. Section 12 enables the Scottish Ministers to make regulations which modify section 3 of the Bill. So far as it is necessary in consequence of any modification to section 3, they may also modify sections 4, 6 and 7.

225. The SLC drew the power in section 12 to the attention of the lead Committee as it considered it to be particularly broad in its scope, and observed that it appears to be possible for it to operate in the future so as to defeat the entire policy and purpose of the Bill by reducing the options for choice in section 3 to a single option.

226. The SLC recommended that the Scottish Government consider whether the power might be revised so that it may not be used in that manner, while still enabling the Government to achieve its stated aim of preserving sufficient flexibility to adapt the Bill to keep pace with changing social work practice in future.

227. The SLC also considered that the section 12 power ought to be subject to a statutory requirement to consult interested bodies on any draft regulations. Were it subject to such a requirement, the SLC would be content that the regulations are subject to the affirmative procedure.

228. **The Health and Sport Committee endorses the recommendation of the Subordinate Legislation Committee.**

**Section 20(1)(b) – Regulations: general**

229. Section 20(1)(b) provides a “bolt on” ancillary power to allow the Scottish Ministers to include supplementary, incidental, consequential, transitory, transitional and savings provision when making subordinate legislation under any of the other regulation-making powers in the Bill (i.e. the powers in sections 12, 13 and 21). The inclusion of bolt-on provision does not alter the level of parliamentary scrutiny which applies in relation to the individual powers themselves.

230. The SLC recommended that the Scottish Government consider whether it is appropriate that the significant powers in section 12(a) and 21(1) are capable of

attracting two separate sets of ancillary powers, and whether as a result the power in section 20(1)(b) is necessary save in relation to section 13.

231. The Health and Sport Committee endorses the recommendation of the Subordinate Legislation Committee and looks forward to receiving the Scottish Government's response.

**Section 21 – Power to modify application of Act**

232. Section 21 confers power upon the Scottish Ministers to make provision for or in connection with disapplying sections 4(2) or 7(2) of the Bill. Sections 4(2) and 7(2) are key to the Bill, as it is those provisions which require local authorities to give supported persons the opportunity to choose one of the section 3 options for delivery of support.

233. The SLC accepted that the power in section 21(1) to disapply section 4(2) or 7(2) of the Bill is, in principle, appropriate.

234. However, the SLC recommended that the Scottish Government explain whether it considers it necessary to remove the element of choice entirely using section 21(1) if Option 2 is considered not to be appropriate in any given situation. If this is not the case, then it is asked to explain how this may be reconciled with its stated position that section 21 should only be used to remove choice entirely, and not to interfere with the available options.

235. The SLC also recommended that the Scottish Government consider whether it is sufficient to rely on the disapplication of section 4(2) or 7(2) impliedly to disapply the remainder of those sections, given that it is arguable that subsection (4) could sensibly continue to operate despite such a disapplication.

236. The SLC did not accept that the supplementary power in section 21(2)(b) to modify or disapply any other section of the Bill in consequence of a disapplication of section 4(2) or 7(2) – as presently drafted – is appropriate.

237. The SLC called on the Scottish Government to identify the sections of the Bill to which section 21(2)(b) might apply, given that a number of sections are expressed to apply only where a local authority has given a person the opportunity to choose one of the options.

238. Given that it appears to be intended that certain sections of the Bill, such as section 6(2), should not be modified, the SLC invited the Scottish Government to consider whether it is necessary that the power in section 21(2)(b) permit the modification of any other section of the Bill, or if it could feasibly identify the provisions which should be protected from modification using this power.

239. Finally, the SLC considered that the section 21 power ought to be subject to a statutory requirement to consult with interested bodies on any draft regulations. Were it subject to such a requirement, the SLC would be content that the regulations are subject to the affirmative procedure.
240. The Health and Sport Committee endorses the recommendations of the Subordinate Legislation Committee and looks forward to receiving the Scottish Government's response to the points raised.

Section 24 – Ancillary provision

241. Section 24(1) allows the Scottish Ministers to make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision of the Act. Section 24(2) provides that this power may be used to modify any enactment. Section 24(3) provides that where the power is exercised so as to amend any part of the text of an Act, then the affirmative procedure applies. Otherwise, negative procedure applies.

242. The SLC was satisfied in principle with the power in section 24, subject to the recommendation that it is subject to the affirmative procedure when making textual amendments to primary legislation, and otherwise to the negative procedure.

243. The SLC also recommended that the Scottish Government, in light of its stated intention not to use the power in section 24 to modify the Bill itself, consider whether section 24(2) might be revised so as to put the matter beyond doubt in order to make it clear that it may not be used to modify the Bill itself.

244. The Health and Sport Committee endorses the recommendations of the Subordinate Legislation Committee.

Section 25 – Transitional provision etc.

245. Section 25 confers power on the Scottish Ministers to make such provision as they consider necessary or expedient for transitory, transitional or saving purposes in connection with the coming into force of the Act. Section 25(2) provides that an order made under this section may modify any enactment, and orders under this section are subject to the negative procedure in all cases.

246. The SLC was satisfied in principle with the power in section 25, but recommended that the Scottish Government consider whether section 25(2) might be revised so as to put it beyond doubt that the power in section 25 may not be used to modify the Bill itself.

247. The SLC also recommended that, as is the case with the power under section 24, the power in section 25 should be subject to the affirmative procedure where it is used to make textual amendments to primary legislation, and to the negative procedure otherwise.

248. The Health and Sport Committee endorses the recommendations of the Subordinate Legislation Committee.

Scottish Government

249. In correspondence following his appearance before the Health and Sport Committee, the Minister indicated that he intended to respond to the range of points made in the Subordinate Legislation Committee's report and, where
appropriate, to consider their recommendations further at Stage 2. He confirmed that he would be writing to the Convener of the Subordinate Legislation Committee before the Stage 1 debate and would ensure that a copy of that more detailed correspondence was provided to the Health and Sport Committee.\textsuperscript{182}

250. The Committee welcomes this commitment from the Minister and looks forward to receiving this correspondence prior to the Stage 1 debate.

EQUALITIES

Background
251. The Scottish Government prepared an equality impact assessment (EQIA) for the Bill.

252. The public sector equality duty requires that equality considerations are integrated into all the functions and policies of Scottish Government Directorates and Agencies.\textsuperscript{183} The Committee welcomes the fact that the Scottish Government completes an EQIA for every Bill it introduces to the Parliament.

253. The EQIA outlines, in some detail, the relevance of the Bill in the context of age, disability, gender, sexual orientation, gender reassignment, race, and religion and belief.

254. The Committee noted that the EQIA was informed by the consultation process on a draft bill conducted by the Scottish Government and by the deliberations of a Self-directed Support National Reference Group, which contributed to the shaping of the Bill proposals between 2008 and 2010.

255. The Committee also noted, however, that in relation to some protected characteristics (religion and belief, sexual orientation and gender reassignment) the Scottish Government does not currently collect data about recipients of direct payments or others forms of self-directed support. The Committee welcomes the commitment given by the Scottish Government to do so in future and to review and update the EQIA when this evidence is available.

256. More generally, the Committee considers that in order to enhance the ability of the Scottish Parliament to scrutinise the potential equality impacts of primary legislation, in future an EQIA should become a formal accompanying document to every bill.

Conclusion
257. The Committee therefore recommends that the Scottish Government should work with the Scottish Parliament to consider the practical steps required to implement this change.

\textsuperscript{182} Minister for Public Health. Written submission, 6 June 2012.
OVERALL CONCLUSION

258. The Committee welcomes efforts to encourage an increase in the number of people who are given the opportunity to exercise choice and control over their own care and support. To date, take up of self-directed support in Scotland, principally through the mechanism of direct payments, has been extremely slow.

259. The Committee has recognised in this report that independent living, in which all citizens have the same freedom, choice, dignity and control in their lives, is at the heart of what this Bill is striving to achieve.

260. From the evidence it has received, the Committee is convinced that a legislative approach is now required in order to drive forward the implementation of self-directed support in its various forms across Scotland.

261. The Committee acknowledges that implementation will present significant challenges for service users and service providers alike; individuals and their carers will require information and advice in order to make informed choices about their care and support; local authorities will need to redesign services to become more flexible and responsive to people’s needs and wishes; and independent and voluntary sector providers will need to adjust to a market for social care in which many more individuals purchase their own bespoke care packages. Despite these challenges, the Committee considers that self-directed support is a policy which should be promoted and progressed.

262. In conclusion, therefore, the Committee recommends to the Parliament that the general principles of the Bill be agreed to.
COMMONLY USED ACRONYMS

Note – All acronyms are fully explained when first mentioned in the text of the Report. This list is provided for ease of reference.

ADSW – Association of Directors of Social Work

AWI Act – Adults with Incapacity (Scotland) Act 2000

CCPS – Coalition of Care and Support Providers in Scotland

EQIA – Equality Impact Assessment

ILIS – Independent Living in Scotland

MWC – Mental Welfare Commission

OPG – Office of the Public Guardian

PVG – Protecting Vulnerable Groups

SASW – Scottish Association of Social Work

SCCYP – Scotland’s Commissioner for Children and Young People

SCLD – Scottish Consortium for Learning Disability

SDS – Self-directed Support

SDSS – Self Directed Support Scotland

SIAA – Scottish Independent Advocacy Alliance

SLC – Subordinate Legislation Committee

SPAEN – Scottish Personal Assistants Employers Network

SSSC – Scottish Social Services Council
ANNEXE A: EXTRACT FROM MINUTES OF THE HEALTH AND SPORT COMMITTEE

12th Meeting, 2012 (Session 4)

Tuesday 27 March 2012

Social Care (Self-directed Support) (Scotland) Bill (in private): The Committee considered its approach to scrutiny of the Bill at Stage 1 and agreed its programme of oral evidence taking.

15th Meeting, 2012 (Session 4)

Tuesday 8 May 2012

Social Care (Self-directed Support) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

David Williams, Assistant Director Social Care Services, Glasgow City Council;

John Alexander, Director of Social Work, Dumfries and Galloway Council;

Janet Spence, Programme Manager (Modernisation and Quality Assurance), Highland Health and Social Care Partnership;

Dr Julie Ridley, Project Lead of SDS Test Sites Evaluation Team, Senior Research Fellow, University of Central Lancashire;

Professor David Bell, Professor of Economics, University of Stirling;

Ron Culley, Chief Officer, Health and Social Care, COSLA;

Andy Martin, Manager of Adult and Community Care Services, East Dunbartonshire Council;

Elaine Torrance, Acting Director of Social Work, Scottish Borders Council.

16th Meeting, 2012 (Session 4)

Tuesday 15 May 2012

Social Care (Self-directed Support) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Duncan Mackay, Head of Social Work Development, North Lanarkshire
Council; Association of Directors of Social Work;
Ruth Stark, Social Worker and Manager, Scottish Association of Social Work;
Ellen Hudson, Associate Director, Royal College of Nursing Scotland;
David Cumming, Director of Operations (Programming, Co-operation & Registration), and Professor Frank Clark, Chair of the Board, Care Inspectorate;
Sandra McDonald, Public Guardian, Office of the Public Guardian;
George Kappler, Deputy Chief Executive, Mental Welfare Commission for Scotland;
Adrian Ward, Convenor of Mental Health and Disability Committee, The Law Society of Scotland.

17th Meeting, 2012 (Session 4)
Tuesday 22 May 2012

Social Care (Self-directed Support) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Dee Fraser, Programme Manager Providers & Personalisation, Coalition of Care and Support Providers in Scotland;
Ranald Mair, Chief Executive, Scottish Care;
Peter Brawley, Director - Manager, Scottish Personal Assistant Employers Network;
Noni Cobban, Vice-President, UK Home Care Association;
Angela Henderson, National Local Area Co-ordination Development and Policy Manager, Scottish Consortium for Learning Disability;
Pam Duncan, Policy Officer, Independent Living in Scotland project;
Brian Houston, Associate Director Children’s Services, Barnardo’s Scotland;
Florence Burke, Director for Scotland, The Princess Royal Trust for Carers in Scotland (part of Carers Trust);

Callum Chomczuk, Senior Policy and Parliamentary Officer, Age Scotland;

Aidan Collins, Policy Officer, Scottish Association for Mental Health;

Jim Pearson, Deputy Director Policy, Alzheimer Scotland;

18th Meeting, 2012 (Session 4)

Tuesday 29 May 2012

Social Care (Self-directed Support) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Neil McCarthy, National Development Worker, People First Scotland;

Margaret Cassidy, Direct Payment User;

Omar Haq, Service User;

Michael Matheson, Minister for Public Health, Jean Maclellan, Head of Adult Care and Support Division, and Craig Flunkert, Bill Team Leader, Scottish Government.

20th Meeting, 2012 (Session 4)

Tuesday 19 June 2012

Social Care (Self-directed Support) (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to, and the Committee agreed to consider a revised draft, in private, at its next meeting.

21st Meeting, 2012 (Session 4)

Tuesday 26 June 2012

Social Care (Self-directed Support) (Scotland) Bill (in private): The Committee considered a revised draft Stage 1 report. Various changes were agreed to, and the report was agreed for publication.
ANNEXE B: ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

15th Meeting, 2012 (Session 4) Tuesday 8 May 2012

Written Evidence

Glasgow City Council
Dumfries and Galloway Council
COSLA
East Dunbartonshire Council
Scottish Borders Council

Oral Evidence

Glasgow City Council
Dumfries and Galloway Council
Highland Health and Social Care Partnership
University of Central Lancashire
University of Stirling
COSLA
East Dunbartonshire Council
Scottish Borders Council

Supplementary Written Evidence

Highland Health and Social Care Partnership
COSLA
Glasgow City Council

16th Meeting, 2012 (Session 4) Tuesday 15 May 2012

Written Evidence

Association of Directors of Social Work
North Lanarkshire Council
Royal College of Nursing Scotland
Care Inspectorate and Healthcare Improvement Scotland
Office of the Public Guardian
Mental Welfare Commission for Scotland
The Law Society of Scotland

Oral Evidence

Association of Directors of Social Work
North Lanarkshire Council
Scottish Association of Social Work
Royal College of Nursing Scotland
Care Inspectorate
Office of the Public Guardian
Mental Welfare Commission for Scotland
The Law Society of Scotland
Supplementary Written Evidence
Care Inspectorate
Scottish Association of Social Work

17th Meeting, 2012 (Session 4) Tuesday 22 May 2012

Written Evidence

Coalition of Care and Support Providers in Scotland
Scottish Care
Scottish Personal Assistant Employers Network
Scottish Consortium for Learning Disability
Independent Living in Scotland project
Barnardo's Scotland
The Princess Royal Trust for Carers in Scotland (part of Carers Trust)
Age Scotland
Scottish Association for Mental Health

Oral Evidence

Coalition of Care and Support Providers in Scotland
Scottish Care
Scottish Personal Assistant Employers Network
UK Home Care Association
Scottish Consortium for Learning Disability
Independent Living in Scotland project
Barnardo's Scotland
The Princess Royal Trust for Carers in Scotland (part of Carers Trust)
Age Scotland
Scottish Association for Mental Health
Alzheimer Scotland

Supplementary Written Evidence

Scottish Care

18th Meeting, 2012 (Session 4) Tuesday 29 May 2012

Written Evidence

People First Scotland
Oral Evidence

People First Scotland
Margaret Cassidy, Direct Payment User
Omar Haq, Service User
Scottish Government

Supplementary Written Evidence

Margaret Cassidy, Direct Payment User
Scottish Government
ANNEXE C: LIST OF OTHER WRITTEN EVIDENCE

Aberdeen City Council
Aberdeenshire Council
Action on Hearing Loss
AIMS Advocacy
Angus Council on Social Work and Health
Buchanan R (individual)
Camphill Scotland
Capability Scotland
Carers Scotland
Children in Scotland
City of Edinburgh Council
Coalition of Carers in Scotland
Consumer Focus Scotland
CrossReach
Deafblind Scotland
Dundee City Council
East Ayrshire Scotland
East Renfrewshire CHCP
Enable Scotland
Equality and Human Rights Commission
Falkirk Council
Fife Council
Getting There
Glasgow Centre of Inclusive Living
Glasgow Personalisation Network
Hayfield Support Services
HUG Action for Mental Health
In Control Scotland
Inclusion Scotland
Independent Advocacy Perth & Kinross
Independent Age
Inverclyde Council
Johnston R (individual)
Joint Submission - National Carers Organisations
Learning Disability Alliance Scotland Ltd
Legislation Governance group of NHS Greater Glasgow and Clyde
Long Term Conditions Alliance Scotland (LTCAS)
Loretto Care
Macmillan Cancer Support
McCarthy Stone
Moray Council
Multiple Sclerosis Society
NHS Ayrshire & Arran
NHS Education for Scotland
NHS Fife
NHS Greater Glasgow and Clyde
NHS Lothian
Outside the Box
PAMIS
Penumbra
Perth and Kinross Council
Quarriers Adult Disability
Renfrewshire Council Social Work
Royal College of Psychiatrists
Scotland’s Commission for Children and Young People
Scottish Care
Scottish Council on Deafness
Scottish Disability Equality Forum
Scottish Human Rights Commission
Scottish Independent Advocacy
Scottish Social Services Council
Self Directed Support Scotland
Sense Scotland
Shetland Islands Council and NHS Shetland
Slasberg C (individual)
South Ayrshire Council
South Lanarkshire Self-Direct Network
Steven C (individual)
Stirlingshire and Clackmannanshire Join Social Services
Stobart A (individual)
The National Deaf Children’s Society
The Richmond Fellowship Scotland
The Stroke Association
Turning Point Scotland
UNISON
VOCAL Voice of Carers Across Lothian
West Dunbartonshire CHCP
West Lothian Council
ANNEXE D: NOTE OF DISCUSSION SESSIONS BETWEEN SERVICE USERS, CARERS AND MEMBERS FROM HEALTH AND SPORT COMMITTEE

The note of the discussion session between service users and Members from Health and Sport Committee can be found on the Scottish Parliament’s website at the following webpage:
http://www.scottish.parliament.uk/S4_HealthandSportCommittee/General%20Documents/Discussion_between_service_users_and_MSPs_from_Health_and_Sport_Committee.pdf

The note of the discussion session between carers and Members from Heath and Sport Committee can be found on the Scottish Parliament’s website at the following webpage:
http://www.scottish.parliament.uk/S4_HealthandSportCommittee/General%20Documents/Discussion_between_carers_and_MSPs_from_Health_and_Sport_Committee(1).pdf
ANNEXE E: LETTER FROM FINANCE COMMITTEE

The Finance Committee letter to the Health and Sport Committee regarding the Social Care (Self-directed Support) (Scotland) Bill can be found on the Scottish Parliament’s website at the following webpage:

ANNEXE F: REPORT BY THE SUBORDINATE LEGISLATION COMMITTEE

The Subordinate Legislation Committee report on the Social Care (Self-directed Support) (Scotland) Bill can be found on the Scottish Parliament’s website at the following webpage:
http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/51149.aspx
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.