



HEALTH AND SPORT COMMITTEE

AGENDA

18th Meeting, 2012 (Session 4)

Tuesday 29 May 2012

The Committee will meet at 10.00 am in Committee Room 1.

1. **Social Care (Self-directed Support) (Scotland) Bill:** The Committee will take 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;

and then from—

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

2. **Annual report:** The Committee will consider a draft annual report for the parliamentary year from 11 May 2011 to 10 May 2012.

Douglas Wands
Clerk to the Health and Sport Committee
Room T3.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5210
Email: douglas.wands@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda Item 1

| | |
|---|-------------------|
| Equality Impact Assessment of Social Care (Self-directed Support) (Scotland) Bill | HS/S4/12/18/1 |
| Letter from Finance Committee | HS/S4/12/18/2 |
| Subordinate Legislation Committee Report | HS/S4/12/18/3 |
| Supplementary Evidence Coalition of Care and Support Providers in Scotland | HS/S4/12/18/4 |
| Supplementary Evidence Highland Health and Social Care Partnership | HS/S4/12/18/5 |
| Supplementary Evidence Care Inspectorate | HS/S4/12/18/6 |
| Supplementary Evidence Scottish Care | HS/S4/12/18/7 |
| Supplementary Evidence COSLA | HS/S4/12/18/8 |
| PRIVATE PAPER | HS/S4/12/18/9 (P) |

Agenda Item 2

| | |
|---------------------|----------------|
| Draft Annual Report | HS/S4/12/18/10 |
|---------------------|----------------|

Social Care (Self-directed Support) (Scotland) Bill

Note from Clerk and Supplementary evidence from COSLA

Following oral evidence on 8 May, COSLA has provided further information regarding its assessment of the potential financial impact of the Bill.

Attached is COSLA's supplementary evidence including the quantitative survey proforma COSLA used to collate and aggregate the potential costs of the SDS bill, along with its qualitative analysis. COSLA has explained that it has not provided a breakdown of the quantitative analysis because it does not have permission to share this information from its member councils. However, it has informed us that COSLA's calculations are based on a response from its members, which were aggregated to produce a median figure.

COSLA wished to repeat the caveats expressed to the Committee, namely, that it is very difficult to accurately estimate the costs that will arise from the changes prescribed by the Bill: the timing and extent of shifts in commissioning arrangements, administrative costs, and dual running costs are partly dependent of the choices individuals make under SDS.

COSLA states that those caveats expressed, the £23m identified by the Scottish Government falls far short of even its most conservative estimates. COSLA believes that whilst it is difficult to fully estimate the exact cost for all Councils, from the information provided, even the lowest estimate for each of the cost areas outlined above over three years would total just over £50m nationally. COSLA states that 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. COSLA believes that this is very different to the actual level of funding which has been provided.

Supplementary information from COSLA

Self-Directed Support – Potential Financial Impact

1. Cost Variations

Evidence from England offers little insight as this has tended to centre around direct payment levels, which are not a good measure of SDS uptake (given that people may choose one of the three other SDS options). Furthermore, England has a more developed and diversified social care market, due to policy imperatives around externalisation and the growth of the private sector, which have either not applied to, or not had the same traction in, Scotland. Such externalisation tends to result in more people opting for direct payments – mainly because in-house services are depleted, the market has had time to develop, and commissioning arrangements have had time to develop across this market.

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.

Our survey showed that councils are all at different stages, and anticipate varying levels of costs. This is to be expected and is connected to both their assumptions about uptake levels, and their different service infrastructures. The balance between in-house, commissioned, and buildings-based services is a key driver here, with the shift towards spot purchasing and de-commissioning of both in-house and external provision, incurring three main types of costs:

- A) Costs related to withdrawing from existing arrangements – e.g. redundancy and/or TUPE costs, early termination penalties for block contracts
- B) Costs related to new contracting arrangements – e.g. the admin and finance burden will increase as staff move to dealing with a higher number of smaller payments and contracts, including new spot purchasing and framework agreements
- C) Costs related to maintaining existing services until they can be closed or scaled-down (dual running costs) e.g. meeting fixed overheads for services running below capacity, maintenance costs for buildings until alternative uses can be found

As the shape of local services vary, so do councils' estimates of costs in these three areas.

2. Identifying costs arising from the Bill duties

There is a need to be clear about the costs we see as arising from the specific duties in the Bill itself, versus costs that will arise through implementing the longer-term strategy. The main duties relate to:

- i) The duty to offer the four options below, and then 'give effect' to an individuals' choice
 - Direct payment
 - Direction on an available budget
 - Council-arranged services
 - A mixture of these arrangements
- ii) A duty to follow guiding principles on conducting social care assessments and providing people with the above four options
- iii) A duty to involve natural networks, or 'circles of support', in making initial decisions for those who lack capacity and managing support thereafter
- iv) A duty to offer carers the self-directed support options, where councils have already decided to support carers (i.e. the Bill does not introduce a duty to provide support to carers)

Assessment, review and administration costs will rise as a result of the new duties. In order to offer these options, and then be able to give effect to an individuals' choice, including involving 'circles of support', councils will need to have a number of systems in place. Costs arise from developing new systems and processes, and from deploying them, with many of these processes requiring more staff time. This will give rise to different types of costs that can be seen as directly arising from the Bill:

Direct payments

- Additional capacity for the administration of DPs will be required. Although councils should already have systems for making direct payments in place, the Bill will increase the *volume* of DPs, and therefore admin, finance and audit costs.

Assessment and review

- Assessment, resource allocation, and review processes will have to be reviewed to ensure they adhere to the guiding principles the Bill will introduce. In some cases, new systems, guidance, training etc will need to be developed and implemented as a result
- There will be an increase in the *volume* of SDS assessments as these are offered to all new clients, and other client groups are reviewed. Where a council is also supporting a number of carers, the Bill duty requiring councils to also offer them the SDS options, means that carers will be added to the total number of clients requiring SDS assessments/reviews. There has also been some concern that the Bill will lead to increases to the total client base, over and above that expected to arise from demographic change, due to direct payments encouraging more people to seek a service. Prof David Bell

has dubbed this the ‘woodwork’ effect, which he highlights as having had a particular impact in the Netherlands. Financial provision needs to be made for these increases, or further consideration needs to be given to defining eligibility

- There will be an increase in the *time* care managers need to spend with clients. There will be ‘spikes’ across key parts of the care management process – at initial assessment (to explain SDS, explore the four options and support the decision-making); when allocating resources (to go through the resource allocation system and deal with any concerns, complaints, or appeals); when purchasing and arranging services from a more diversified market (either on a client’s behalf, or supporting them to do so); when reviewing packages and re-configuring as necessary (this may include repeating some of the stages already outlined)
- Taken together, these increases in volume and time, lead to a requirement for increased capacity (mostly, but not exclusively, at Care Manager level)

3. The cost of care

Providing highly personalised services through spot-purchasing or individual contracts and delivering them in individual settings, can be more expensive than providing more standardised care on the ‘one-to-many’ model of buildings-based services. These increases to the cost of care need to be met through increased funding, or there is a risk the level of care that can be provided will reduce.

The unit costs of externally purchased care are likely to rise, leading to a requirement for increased funding or a reduction in the levels of care provided. Direct payments (and SDS overall) are not considered to be cost-neutral. Professor David Bell has emphasised that implementing SDS will require a move away from block contract and framework contract models, to spot contracts, and that these spot contracts will be more costly – both in terms of the set-up costs, and the service price. Therefore the same Individual Service Budget may not stretch as far as it did before. These increased costs either need to be met through councils making cuts to other services, or additional funding being needs to made available to allow councils to ‘top up’ care budgets to compensate. If neither of these options is possible, social care clients may be forced to accept a reduction in the hours of care their budget can purchase when their level of need has not changed. This is not an issue that can be dealt with through bridging finance. These increased unit costs will be a long-term feature of the contracting arrangements required to ‘give effect’ to individuals’ choices in respect of the four options the Bill introduces.

4. Bridging finance

Fixed running costs for in-house and buildings-based services will need to be met until services can be down-sized or closed. As people take up the range of options that the Bill will require councils to offer, there will be a reduced requirement for in-house services. This will lead to obverse economies of scale operating until natural staff turnover, redundancy or TUPE arrangements reduce overheads in line with the reduction in clients. Until this point, the service will be running inefficiently, with the unit cost of care going up. Again, this leads to the same question of who

meets these costs and whether they are passed on to social care clients. Similar issues arise in relation to buildings-based services, however, even once a service has been closed, councils will need to continue to meet maintenance costs until the building can be sold or an alternative use found.

Self Directed Support - consultation on financial memorandum and potential costs

[illegible]

[illegible]

**Social Care (Self-directed Support) Bill:
Equality Impact Assessment (March 2012)**

| | |
|------------------------------|---|
| Policy Title | Social Care (Self Directed Support) (Scotland) Bill |
| Strategic Outcome | Healthier |
| Directorate-General | DG Health and Social Care |
| Directorate or Agency | Health and Social Care Integration |
| Division | Adult Care and Support Division |
| Branch | Self-directed Support |
| Date | March 2012 |

Step 1: Define the aims of your policy

What is the purpose of Self-directed support (SDS) is a term that describes the ways in the proposed policy (or which individuals and families can have informed choice about changes to be made to the way support is provided to them. It has generally been used the policy)?

to describe the delivery of social care. If enacted the Bill would help to increase the uptake of self-directed support through:

- introducing the language and terminology of self-directed support into statute;
- providing a clear legislative framework, imposing firm duties on local authorities, setting out the options available to citizens, making it clear that it is the citizen's choice as to how much control they want to have;
- providing a discretionary power to councils to provide support to carers following a carer's assessment and;
- consolidating, modernising and clarifying existing laws on direct payments (DPs).

Who is affected by the People in receipt of services under Section 12A of the Social policy or who is Work (Scotland) Act 1968 ("the 1968 Act"), Section 22 -24 of the intended to benefit from Children (Scotland) Act 1995 and people who receive support the proposed policy and as unpaid carers under this Bill.
how?

This includes (but is not exclusive to) children and adults with disabilities, people with mental ill health and older people. It is intended that they will benefit from the positive outcomes of self-directed support which include: greater flexibility, choice and control in care arrangements, better quality care and a more independent lifestyle.

In 2011 63,458 people in Scotland received home care services, of whom 21,379 were male and 42,079 female. Numbers receiving these services by client groups were age 33,005 people; physical disabilities 16,568; learning disabilities 4,266; dementia 3,358; mental health problems 2,766; people in other vulnerable groups 2,411; and not known 1,084. (source: National statistics; Home Care Services, Scotland, 2011; table 2)

How have you, or will The Scottish Government intends to bring forward regulations you, put the policy into and statutory guidance to support the final Act. practice, and who is or The delivery of the legislation would be mainly through local will be delivering it?

authorities. However health boards will also have a significant role to play in cases where a self-directed support package includes health monies. Providers of care and support have a key role to play in ensuring that self-directed support values and principles translate into real choice and control in the delivery of support and not solely in the decision on one or other mechanism during assessment.

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

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

How does the policy fit This policy helps to deliver the independent living agenda. It into our wider or related also contributes to the wider personalisation agenda and to policy initiatives? shifting the balance of care out of the hospital and closer to the patient's home.

Self-directed support addresses several of the Scottish Government's key themes. The type of care and support packages that can be delivered via self-directed support can help to prevent the deterioration of an individual's physical and mental ill health, contributing to a Healthier Scotland. It will also contribute to a Fairer and Wealthier Scotland as self-directed support can be used to support a person into employment, training and education.

The policy also contributes to meeting a National Indicator: "Improve support for people with care needs".

The policy is also in accordance with the conclusions of the Christie Commission (June 2011) regarding the future of public service delivery in Scotland.

Have the resources for Yes
your policy been
allocated?

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

Age Yes
Evidence Scotland's population is ageing. This is evident by the

decrease in the population aged under 16 (-7 per cent) between 2000-2010 compared with increases in the populations aged 60-74 (+13 per cent) and those aged over 75 (+14 per cent). (The Registrar General's Annual Review of Scotland's Population - 2010)

The Scottish Government is aware that older people account for a significant minority of direct payment users in Scotland, according to the latest statistics 33% of direct payment recipients are aged 65 and over (National Statistics, Self-directed Support (Direct Payments), Scotland, 2011) However that it is a small number in terms of the overall number of older people receiving social care who could potentially benefit from self-directed support.

Statistical data on age and self-directed support is available in relation to direct payments only, though this includes statistical data on the age of direct payment recipients. Data collection is currently being reviewed (as of July 2011) by a group comprised of colleagues from analytical services, local authority officials and other stakeholders. The group is looking at ways of collecting data on all forms of self-directed support.

The Scottish Government commissioned a review of self-directed support in 2008. The review involved case study participants from every age group and found that there were benefits older people in maintaining a lifestyle that involves a sustained income, social networks and / or learning opportunities (Tony Homer and Paula Gilder, A Review of Self-directed Support in Scotland, 2008).

In 2010 Alzheimer Scotland published research into personalisation and dementia which found that when empowered to direct their own support individuals and their families can arrange more personalised support that better meets their outcomes (Alzheimer Scotland, Lets Get Personal - Personalisation and Dementia, 2010.)

In 2011 the Scottish Government published an evaluation of 3 self-directed support test sites.

There is more consideration of evidence relating to age in section 4.

Consultation

A Self-directed Support National Reference Group which had representation from key interests contributed to the shaping of the Bill proposals between 2008 and 2010. From 2010 a Bill Steering Group was established to advise on the development of the Bill. Scottish Government officials undertook a number of activities to inform the Bill. This included engagement with

most local authorities and a number of user led and third sector organisations. There was an initial consultation on the Bill's proposals between March and June 2010. There followed a second consultation on a draft Bill between December 2010 and March 2011. Responses came from groups representing older and younger people. Consultation events were also held in partnership with organisations including Age Scotland and Alzheimer Scotland.

Disability

Yes

Evidence

The Scottish Government's 2008 review of Self Directed Support involved case study participants from each disability client group. A large majority of SDS clients and their informal carers had positive experiences of using their SDS funding to directly purchase their support and employ Personal Assistants.

Statistical data is available on direct payments only, though this includes data on the disabilities of direct payment recipients. Data collection is currently being reviewed so that information on other forms of self-directed support can be recorded.

The statistical data shows that 40 per cent of people receiving Self-directed Support (Direct Payments) had a physical disability and 26 per cent had a learning disability. A further 3 per cent had both a physical and a learning disability. (National Statistics, Self-directed Support (Direct Payments), Scotland, 2011).

There are also several works of published literature relating to this groups' experience of self-directed support, some of which are considered in Step 4 of this assessment.

Consultation

A Self-directed Support National Reference Group, which had representation from key interests, contributed to the shaping of the Bill proposals between 2008 and 2010. Scottish Government officials undertook a number of activities to inform the Bill, including engagement with representative disability organisations. There was a large response from disability organisations to both the consultation on Bill proposals and the consultation on a draft Bill. Responses came from organisations representing every disability client group. Over the course of the two consultations events were held in partnership with several voluntary organisations that represent the interests of disabled people from different client groups.

Gender (including pregnancy and maternity)

Yes

Evidence

The Scottish Government collects statistical data on the

numbers of men and women accessing direct payments. Data collection methods are currently being reviewed so that data on other forms of SDS can be collected.

In response the public consultation on a draft Bill two respondents suggested that any impact would be greater on women because they comprise a greater portion of the social care workforce including unpaid carers. Neither respondent indicated that the impact would be negative and one respondent said that in the case of section 5 of the draft Bill (support for carers) the impact on women will be positive.

Consultation

A Self-directed Support National Reference Group which had representation from key interests contributed to the shaping of the Bill proposals between 2008 and 2010. After the Reference Group was wound up the Bill Steering group advised on the development of the Bill. Scottish Government officials undertook a number of activities to inform the Bill. This included engagement with most local authorities and a number of user led and third sector organisations. There was an initial consultation on the Bill's proposals between March - June 2010. There followed a second consultation on a draft Bill between December 2010 and March 2011.

Lesbian, Gay, Bisexual & Yes Transgender

Evidence

The Scottish Government does not currently collect data on the sexual orientation of direct payment recipients. Data collection on self-directed support is currently being reviewed to see how robust information on every protected characteristic can be collected.

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

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

More evidence on the experiences of people who share this protected characteristic are considered in Step 4.

Consultation

A Self-directed Support National Reference Group which had representation from key interests contributed to the shaping of the Bill proposals between 2008 and 2010. Scottish Government officials undertook a number of activities to

inform the Bill. This included engagement with most local authorities and a number of user led and third sector organisations. There was an initial consultation on the Bill's proposals between March and June 2010. There followed a second consultation on a draft Bill between December 2010 and March 2011.

Race

Yes

Evidence

The Scottish Government collects data on the number of direct payment recipients categorised by different ethnic groups. This information was provided for 83% of all direct payment recipients. Figures for 2010 show that 98% of recipients are white and 1% are Asian, the other categories each accounted for less than 1% of DP recipients. This information will be included in future publications subject to there being no disclosure issues. The Government recognise that more robust evidence is needed and should be addressed by research to assist policy development and a review group has been meeting regularly since July 2011 to consider how self-directed support is monitored.

Consultation

A Self-directed Support National Reference Group which had representation from key interests contributed to the shaping of the Bill proposals between 2008 and 2010. Scottish Government officials undertook a number of activities to inform the Bill. This included engagement with most local authorities and a number of user led and third sector organisations. There was an initial consultation on the Bill's proposals between March and June 2010. There followed a second consultation on a draft Bill between December 2010 and March 2011. During the initial consultation officials held an event in partnership with the organisation BEMIS (Black and Ethnic Minority Infrastructure Scotland) to gather evidence of the views of people from minority ethnic communities.

Religion & Belief

Yes

Evidence

The Scottish Government and most local authorities do not collect data on the religions and beliefs of SDS recipients. This will change as local authorities begin collecting this information in accordance with the legal duties deriving from the Equality Act 2010. This information will then be collated in national statistics by the Scottish Government.

Consultation

A Self-directed Support National Reference Group, which had representation from key interests, contributed to the shaping of the Bill proposals between 2008 and 2010. Scottish Government officials undertook a number of activities to inform the Bill. This included engagement with most local authorities and a number of user led and third sector organisations. There was an initial consultation on the Bill's proposals between March and June 2010. There followed a second consultation on a draft Bill between December 2010

and March 2011.

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

| | |
|--|--|
| Age | Yes |
| Evidence | There is evidence on the diverse needs of this group as set out in the answer to the previous step and considered further in step 4. There is representation from organisations that represent the interests of older people and children and families respectively on the SDS Bill Steering Group. The Scottish Government regularly seeks the views of this client group through a number of organisations and works with them to help promote the benefits of SDS. From this engagement the Scottish Government is aware that the benefits of SDS can be enjoyed by people from every age group. There is some evidence (as set out in step 4) that some older people may experience particular problems if they are not supported to make decisions around SDS. However the issue of the availability of support is a priority for the implementation of the SDS strategy and activity in this area has already commenced. Because of this it is not seen as reason to delay the introduction of the SDS Bill. |
| Disability | Yes |
| Evidence | <p>This group is also represented on the SDS Bill Steering Group. The Scottish Government through the Steering Group will regularly seek their views through a number of organisations and work with them to help promote the benefits of SDS.</p> <p>The Scottish Government will continue to add to the body of evidence that they have on the needs/experiences of this group. However the Scottish Government has concluded that it has sufficient information to progress with the policy. Consideration of some of that evidence is set out in Step 4.</p> |
| Gender (including pregnancy and maternity) | Yes |
| Evidence | <p>The Scottish Government collects statistics on the gender of direct payment recipients. There have been reviews of SDS but gender has never been raised as an issue. This suggests the policy may not have a negative impact on either gender group. This is supported by our national statistics which shows proportionate numbers of men and women opting to receive a direct payment. Two responses to the consultation on a draft Bill raised the point that any impact (positive or negative) would be greater on women because they form a disproportionately large share of the paid and unpaid care workforce.</p> |

Lesbian, Gay, Bisexual & No
Transgender

Evidence There is no specific data collected by the Scottish Government on the sexual orientation of SDS recipients. Scottish Government data collection for self-directed support is currently being reviewed by colleagues from the analytical services division in conjunction with officials from local authorities to ensure that information on each protected characteristic is obtained.

Race

No

Evidence The Scottish Government has some statistical data on the number of people receiving direct payments categorised by race. It is recognised that more robust data is needed to assist policy development in the future. Scottish Government data collection for self-directed support is currently being reviewed by colleagues from the analytical services division in conjunction with officials from local authorities to ensure that information is obtained for each protected characteristic.

Religion & Belief

No

Evidence There is no specific data collected by the Scottish Government on the religions and beliefs of SDS recipients. This should be addressed in further research to assist policy development. Scottish Government data collection for self-directed support is currently being reviewed by colleagues from the analytical services division in conjunction with officials from local authorities.

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

Age

There is evidence which suggests that this policy impacts positively on people from every age group. The Bill will apply both to children (receiving support under section 22 or the Children (Scotland) Act 1995) and adults (receiving support under Section 12A of the Social Work (Scotland) Act 1968, together with carers of all ages.

The research commissioned by the Scottish Government in 2008 took into account the views of people from a range of ages including children, adults and the elderly. The research found that clients from every age group could benefit from the positive outcomes of self-directed support.

In 2010 Alzheimer Scotland published research into

personalisation and dementia which found that when empowered to direct their own support individuals and their families can arrange more personalised support that better meets their outcomes.

Older people make up 32% of direct payment recipients. However this constitutes a small percentage of the overall number of social care service-users from this client group. Similarly, in relation to children available anecdotal evidence and findings from the 2008 review of barriers to self-directed support, indicate that children are under-represented as a client group for self-directed support.

An English survey into people's experiences of personal budgets (Chris Hatton and John Watters, The National Personal Budget Survey, June 2011) found that the majority of older participants in the study reported that several aspects of their lives improved since taking personal budgets (participants were asked to rate their experience of how things had changed in such areas as their support, independence, physical and mental health etc). In all of the aspects asked about in the survey a majority of respondents reported a change of "much better" and "better" or in some cases "no difference". In each instance the numbers of older people reporting that their lives had changed for "worse" or "a lot worse" was less than 10%.

There is evidence that the responsibilities arising from SDS could have a disproportionately negative impact on older people if they do not have access to appropriate support. An Individual Budget Pilot Programme led by the Department of Health working closely with the Department for Work and Pensions, and Communities and Local Government was conducted in 2006-2007 and involved 13 local authorities in England. The IBSEN Evaluation of the Individual Budget Pilot Programme (2008) found that whilst older people could benefit from increased independence and better quality care through a personal budget arrangement, these positive impacts could be offset by the negative impacts on mental well-being which could result from making changes to established support arrangements. (IBSEN p238)

Disability

There is evidence which suggests that this policy impacts positively on disabled people of every client group. The Scottish Government review of self-directed support found that it enhances quality of life by giving people greater independence and by helping to increase their social participation.

In both consultations, there was overwhelming support for the

Bill's proposals from groups representing disability client groups.

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

It's clear that the Bill will have a particularly high impact on protected characteristic of disability and so it is worth considering the evidence of the impact on the various subgroups.

Learning disability:
In 2008 Review commissioned by the Scottish Government several of the participants had a learning disability (most of whom also had a physical disability). The researchers were unable to identify any needs specific to people with learning disabilities which would lead them to experience difficulties that other groups would not.

An English survey into the experiences of people living with personal budgets authored by In Control, Lancaster University and the Centre for Disability Research found that the experiences of adults with learning disabilities were broadly positive.

The survey participants were asked to rate their experience as it related to different aspects of their lives (Being in control support, Being independent, Mental wellbeing etc.) The results to the survey showed very high rates of satisfaction. In all aspects considered by the survey the majority of respondents with learning disabilities reported that their lives were "better" or a "lot better". (Chris Hatton and John Watters, The National Personal Budget Survey, June 2011).

The IBSEN Evaluation of an Individual Budget Pilot found that adults with learning disabilities were significantly more likely to feel greater control in their daily lives than a comparison group of users of arranged services. (IBSEN p75)

On the other hand the same evaluation noted that adults with learning disabilities and their families experienced more stress and difficulty in arranging their personal budgets. They also found in some cases that this was exacerbated where the personal budget arrangement allowed for the overall value of the individuals support to be decreased. A current priority of

the SDS Strategy Implementation is to develop a more efficient sustainable and joined up approach to SDS support, at local and national level, suitable for all client groups.

The Scottish Government was also aware from consultation activity that some carers are concerned that the Bill and consequent increase in people directing their support will lead to a negative impact on adults with learning disabilities. The Scottish Government has been advised by individual carers that adults with learning disabilities have a particular need for services provided by day centres and that a wider uptake of SDS resulting from the proposed legislation could make it harder for these individuals to access these services. They argue this is because the number of day services to choose from will fall as the number of individuals opting to direct their support increases; and secondly because during the budget allocation process councils will assess people as requiring lower levels of funding with the result that families cannot afford the day service of their choice.

The decommissioning of services and the setting of individual budgets by local authorities is not an impact of the Bill's provisions, but it is certainly important to note in this assessment. There is activity in this area through the implementation of the National Strategy and the Scottish Government is currently working with local authorities, providers and support organisation to encourage the provision of a range of appropriate services for SDS users to choose from and will be considering how to build on outcomes-focussed assessment in the near future.

Mental health:
In the National Personal Budget Survey mentioned above there were similarly high rates of satisfaction reported by users of personal budgets who have mental ill health. It is especially noteworthy that around 70% of respondents who suffered from mental ill health reported that their mental wellbeing improved since using a personal budget.

The 2008 IBSEN the evaluation suggests this group reported more positive outcomes in overall wellbeing than other groups because Individual Budgets offered a greater range and flexibility of support arrangements than were available through standard services. This was seen to particularly suit people with mental ill health who have diverse needs and variable conditions. The study however was keen not to generalise because the numbers of people with mental ill health using individual budgets are very low.

Physical disabilities:
Again the personal budget survey demonstrated that the

participants with physical disabilities experienced a positive change in several aspects of their lives as a result of the personal budget arrangement. In the IBSEN evaluation suggested that people with physical disability or sensory impairment were likely to experience better outcomes in particular they were expected to receive a higher quality of care than through traditional arranged services.

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

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

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

Lesbian, Gay, Bisexual & Transgender (LGBT) Data on the sexual orientation of Direct Payment recipients is not collected centrally. Anecdotal evidence indicates that lesbian, gay, bisexual and transgender people may particularly benefit from the continuity of care that a self directed arrangement can have. This is supported by the report by the Commission for Social Care Inspection in England referred to in Section 2.

Whilst there is little evidence about this group's experience of SDS there is strong evidence that LGBT people are more likely to experience discrimination when using social care services (CSCI, 2008, Putting People First: equality and diversity matters). Having choice over services is therefore likely to be a positive benefit for LGBT people. Moreover there is evidence, particularly in the case of LGBT individuals who are older or have mental ill health, that fear of discrimination is major factor in delaying seeking support. (Carr, S., Seldom heard or frequently ignored? LGB perspectives on mental health services, 2008) and (Ward,R et al, Don't look back? Improving health and social care service delivery for older LGB users, 2011)

There is no expectation that the policy would have an adverse impact on this group.

Race

The Scottish Government collects data on the number of direct payment recipients categorised by different ethnic groups. This information was provided for 83% of all direct payment recipients. Figures for 2010 show that 98% of recipients are white and 1% are Asian (with the other categories accounting for less than 1% each). This information will be included in future publications subject to there being no disclosure issues.

Data collection is currently being reviewed by our analytical services department in conjunction with local authorities.

The Social Care Institute for Excellence in England identified barriers to black and minority ethnic service users accessing direct payments, including difficulties in recruiting personal assistants who are able to meet the cultural, linguistic and religious requirements of individuals, confusion over the relatives' rules and the meaning of 'independent living.' However this is not seen as a negative impact of the policy or Bill because individuals would have less choice about the cultural, linguistic and religious requirements of individuals employed by the council in more traditional forms of service. However the Government acknowledges that having a diverse workforce to choose from is important if SDS is to be available to all and activity in this area is being taken forward through the implementation of the National Strategy.

Scottish Government guidance on self-directed support (2007) already advises that appropriate services such as translators, trained care managers and service providers, targeted local support, and Personal Assistants will all be necessary as part of mainstreaming self-directed support.

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

Religion & Belief

There may be particular benefits for people who hold certain religions or beliefs. For instance, a person may benefit from employing a PA who spoke a particular language, were it is difficult for a council to provide a service in this way.

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

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

| | |
|--|----|
| Age | No |
| Disability | No |
| Gender (including pregnancy and maternity) | No |
| Lesbian, Gay, Bisexual & Transgender | No |
| Race | No |
| Religion & Belief | No |
| Comments | |

Step 6: Does your policy provide the opportunity to promote equality of opportunity or good relations?

| | |
|--|---|
| Age | Yes |
| Evidence | This Bill promotes equality of opportunity for older people. Evidence strongly suggests that self-directed support encourages the wider participation of older people in public life. By enabling more older people to live independently in their communities, it will also facilitate good relations with other groups. |
| Disability | Yes |
| Evidence | The Bill promotes equality of opportunity for disabled people. Evidence strongly suggests that self-directed support encourages disabled people from every client group to participate in public life. It can also be used to support people in to work and education. By enabling more people from every client group to direct their own support, this policy will facilitate good relations within and outwith the client group. |
| Gender (including pregnancy and maternity) | Yes |
| Evidence | The Bill promotes equality of opportunity for all people in receipt of Social Care Services. There is no discernable advantage or disadvantage to people of different gender. |
| Lesbian, Gay, Bisexual & Transgender | Yes |
| Evidence | The Bill promotes equality of opportunity for all people in receipt of Social Care Services. There is no discernable disadvantage to people of different sexual orientations or for individuals who have undergone, or are undergoing, gender reassignment. Evidence considered in Step 4 suggests that having a choice of services may reduce discrimination for LGBT people. |
| Race | Yes |
| Evidence | The Bill promotes equality of opportunity for all people in receipt of Social Care Services including people from black |

| | |
|-------------------|--|
| | and minority ethnic communities. |
| Religion & Belief | Yes |
| Evidence | The Bill promotes equality of opportunity for all people in receipt of Social Care Services. There is no discernable advantage/disadvantage to people from different faiths or none. |

Step 7: Based on the work you have done – rate the level of relevance of your policy

| | |
|--|--------|
| Age | High |
| Disability | High |
| Gender (including pregnancy and maternity) | Medium |
| Lesbian, Gay, Bisexual & Transgender | Medium |
| Race | Medium |
| Religion & Belief | Medium |

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

| | |
|--|---|
| Age | No |
| Disability | No |
| Gender (including pregnancy and maternity) | No |
| Lesbian, Gay, Bisexual & Transgender | Yes |
| Race | Yes |
| Religion & Belief | Yes |
| Comments - Yes | There is not sufficient evidence on the effects of this policy on people of different sexual orientation, race or religion and beliefs at this time, however what evidence there is points to a positive impact on these groups. The EQIA should be reviewed and updated when this evidence is available. |
| Comments - No | There is sufficient evidence on the effects of the policy on people with disabilities, people of different age groups and people of different gender to make an equality impact assessment at this time. However the assessment will be reviewed as and when the policy is reviewed or amended. |

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

| | |
|----------|--|
| Comments | An SDS Bill Steering Group was established in August 2010 to advise on the Bill's proposals. The Group will continue to exist until the decision is reached in Parliament whether or not to enact the Bill. The equality impact of this Bill is likely to be |
|----------|--|

considered as part of parliamentary scrutiny. If the Bill is enacted the national development of SDS will continue to be monitored by the National Strategy Implementation Group. Both the Bill Steering and Strategy Implementation Groups are aware that they must consider possible equality impacts in their considerations of the policy.

Officials will continue to liaise with the Scottish Government Equality Unit on this policy.

As mentioned at various points during this assessment, the Scottish Government's data collection for self-directed support is currently being reviewed. A review group comprised of Analytical Services Division (ASD) officials, local authority officials and other stakeholders was convened in July 2011 and meets regularly to discuss ways of collecting data across all equality groups and of collecting information on all forms of self-directed support. This information will allow us to more effectively monitor the impact of new legislation across all the protected characteristics.

The SDS Bill will be assessed for equality impact as and when it is reviewed or substantially amended.



The Scottish Parliament
Pàrlamaid na h-Alba

Finance Committee
Convener: Kenneth Gibson MSP

Duncan McNeil MSP
Convener
Health and Sport Committee
The Scottish Parliament
Edinburgh, EH99 1SP

18 May 2012

Dear Duncan,

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

The Finance Committee gave consideration to the above at its meeting on 9 May 2012 when it took oral evidence from the Scottish Government Bill team. I am aware that your Committee began its Stage 1 consideration on 8 May and that you plan to publish your Stage 1 Report before the summer recess.

There were a number of points discussed with the Bill team ([Official Report 9 May 2012](#)) and I hope these are of interest and use to your Committee in its examination of the Bill. These may be matters which you wish to raise with the Minister for Public Health when you take oral evidence from him later this month.

As you know, our role is to scrutinise the financial implications of all Bills introduced in the Parliament. The Financial Memorandum (FM) must distinguish separately costs that would fall on—

- (a) the Scottish Administration (i.e. the Executive, in the broad sense of Ministers, departments and agencies);
- (b) local authorities; and
- (c) other bodies, individuals and businesses.

It must set out the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise, best estimates of the timescales over which such costs would be expected to arise, and an indication of the margins of uncertainty in such estimates.

Our approach to considering the FM was to invite a number of organisations, including all 32 local authorities, to respond to a series of specific questions. That we did on 7 March and we received responses from nine local authorities and from COSLA. These responses are published on our website:

www.scottish.parliament.uk/S4_FinanceCommittee/General%20Documents/Web_version_of_all_responses.pdf

As you know, the Scottish Government considers that self-directed support will be 'cost-neutral' in the long term and that there is 'not expected to be a long term demand for increased funding within the local government finance settlements arising from this new framework of choice' (paragraph 83 of the FM).

There was much discussion at our meeting on the level of funding which the Scottish Government will make available to local authorities for transformation. This was the main issue raised in the local authority and COSLA responses. Views were expressed that the funding is not enough and should be available over a longer period. 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 Bill's provisions.

The methodology underpinning this figure is dealt with at Table 2 and paragraph 106 of the FM. The Scottish Government has used three local authorities to determine the level of funding to be made available. One point to make here is that it would have been more helpful had a larger and more geographically dispersed and diverse number of local authorities been used rather than only three, all from the central belt and with two of these being our largest cities.

There was much discussion on the concerns raised that this £23 million will be insufficient. In particular, COSLA stated (paragraphs 11 and 12) in its written submission—

'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.

These estimates are of course subject to the limiting factors outlined earlier and COSLA is in no way presenting these figures as definitive. What we do wish to

highlight however, is the level of disparity between even our most conservative estimates and the resource being made available.

COSLA did not produce a methodology or breakdown of what the level of transformation funding should be. I am aware that you have requested COSLA to provide your Committee with information on this issue and I hope that will add clarity to its position and give foundation to its estimate. The Bill team did say it had requested such information on a number of occasions in order to establish how the estimated £90 million came about. It also stated that the COSLA estimate may well include a number of elements which are not within the £23 million and for which funding may be provided elsewhere. There is therefore a degree of uncertainty around this.

The Committee therefore recommends that the lead committee explores further why such a significant disparity exists between these two estimates.

The Scottish Government supplied us with a breakdown of how this £23 million will be allocated to local authorities and a copy of this is attached. The point was made about the number of variables which must be considered. An example was given with respect to East Ayrshire Council which, in its written submission, sets out its estimates over the three year period but which are lower than the funding which it is to receive from the Scottish Government in each year. There is therefore clearly a need for detailed communication now and in the coming months, between the Scottish Government and each local authority and COSLA, to determine where each local authority is in the shift towards self-directed support and establish what funding is actually needed and for what precise purpose. This may be something which the Minister can update the Committee on.

While the Scottish Government has outlined its approach to preparing the FM, and it has drawn on the University of Stirling research, the Reid Report of 2003, and the University of Kent research, we must recognise the gap between its estimate and that of COSLA and of the local authorities (whatever these are). It is important that the Scottish Government's estimated costs are as informed and precise as possible, particularly since any additional transformation costs would need to be covered from within local authority budgets.

In addition to the actual amount of funding to be made available, concerns were expressed as to the period over which funding will be provided. For example, Scottish Borders Council considers there will be a 'substantial cost implication over at least 6 years'. As stated above, the Scottish Government will provide funding across the years 2012-13 to 2014-15. COSLA highlighted this issue in its submission—

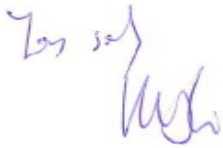
'Whilst COSLA recognises that SDS may deliver savings over the longer term, the SDS strategy is a 10 year vision. Whilst resources have been provided to support the next 3 years, it is clear that both changes to culture and associated infrastructure often take time to emerge, and will require resources to support the necessary changes. Given the Bill places new duties on Councils, it is difficult to estimate what level of savings may be realised going forward. Whilst the Scottish Government have made it clear that the level of resources which

are currently provided are for the next Spending Review only, there will be a need to consider any future anticipated resources going forward.'

Again, this disparity may be an issue you wish to raise with the Minister.

I do hope this information is useful to your Committee. Should you wish to discuss, please do get in touch (alternatively, your clerks can discuss with Finance Committee clerks).

Yours sincerely

A handwritten signature in purple ink, appearing to read 'Ken Gibson', with a stylized flourish below the name.

Kenneth Gibson MSP
Convener

Appendix

Self-directed Support: Transformation funds to local authorities 2012/13 – 2014/15

In 2011/12, £1.12m was distributed to local authorities at a flat rate of £35,000 each. The Financial Memorandum to the Social Care (Self-directed Support) (Scotland) Bill identified a further £23m to support transformation within local authorities over the next 3 years - £6m in 2012/13, £11m in 2013/14 and £6m in 2014/15. At the time of writing the Memorandum, the Government was still in negotiation with COSLA about how that resource would be allocated. A formula has now been agreed and approved by the Minister for Public Health and the COSLA leadership, and the Government has commenced distributing the money for 2012/13.

The funding will be divided as follows:

- a flat rate of £50,000 per local authority per year; and
- the remainder to be divided up using a formula based on existing Social Work Grant Aided Expenditure (GAE) lines relating to older people and adults with community care needs plus 12% of the GAE lines relating to children and families.

The flat rate £50,000 per year is in recognition of the need for a properly resourced Implementation Manager in each local authority and also creates a minimum amount per local authority.

The distribution of the remainder of the funding follows a similar approach to that used for the allocation of the Older People's Change Fund and therefore avoids creating a new distribution process for what is short-term funding. The formula gives a weighting of 100% to lines relating to older people and adults with community care needs, in recognition that SDS will apply to the majority of people in these groups. In relation to children and families, the Bill will mainly apply to children and young people with a disability and their carers. However, there are no specific GAE lines for this group. Statistics suggest that 12% is the best estimate for children and young people with a disability as a proportion of the groups covered in children and families' GAE lines. This is therefore applied as the weighting for these lines.

Overall, this results in a distribution of funding as set out below:

| | 2012/13 | 2013/14 | 2014/15 |
|------------------------------|-----------|-----------|-----------|
| Aberdeen City | £ 226,440 | £ 426,000 | £ 225,560 |
| Aberdeenshire | £ 234,360 | £ 445,740 | £ 236,560 |
| Angus | £ 151,640 | £ 268,080 | £ 152,520 |
| Argyll and Bute | £ 136,680 | £ 235,180 | £ 136,680 |
| Clackmannanshire | £ 88,280 | £ 131,780 | £ 88,720 |
| Dumfries and Galloway | £ 194,760 | £ 359,260 | £ 195,640 |
| Dundee City | £ 187,720 | £ 343,280 | £ 186,840 |
| East Ayrshire | £ 152,960 | £ 269,960 | £ 152,520 |

| | | | |
|----------------------------|--------------------|--------------------|--------------------|
| East Dunbartonshire | £ 130,520 | £ 222,020 | £ 130,960 |
| East Lothian | £ 130,080 | £ 222,020 | £ 130,960 |
| East Renfrewshire | £ 121,720 | £ 204,160 | £ 122,160 |
| Edinburgh, City of | £ 452,160 | £ 909,160 | £ 452,160 |
| Eilean Siar | £ 75,960 | £ 104,520 | £ 75,520 |
| Falkirk | £ 170,560 | £ 307,560 | £ 170,560 |
| Fife | £ 358,880 | £ 710,820 | £ 360,200 |
| Glasgow City | £ 579,760 | £ 1,168,600 | £ 567,440 |
| Highland | £ 233,920 | £ 446,680 | £ 237,000 |
| Inverclyde | £ 126,120 | £ 211,680 | £ 125,240 |
| Midlothian | £ 115,120 | £ 190,060 | £ 115,560 |
| Moray | £ 123,480 | £ 207,920 | £ 123,920 |
| North Ayrshire | £ 169,680 | £ 305,680 | £ 169,240 |
| North Lanarkshire | £ 299,480 | £ 583,920 | £ 299,920 |
| Orkney Islands | £ 66,280 | £ 84,780 | £ 66,280 |
| Perth and Kinross | £ 186,840 | £ 344,220 | £ 188,600 |
| Renfrewshire | £ 189,480 | £ 347,980 | £ 189,480 |
| Scottish Borders | £ 150,760 | £ 265,260 | £ 150,760 |
| Shetland Islands | £ 67,600 | £ 87,600 | £ 68,040 |
| South Ayrshire | £ 160,880 | £ 286,880 | £ 160,880 |
| South Lanarkshire | £ 304,760 | £ 596,140 | £ 306,520 |
| Stirling | £ 121,720 | £ 204,160 | £ 122,160 |
| West Dunbartonshire | £ 129,200 | £ 217,320 | £ 127,440 |
| West Lothian | £ 161,320 | £ 290,640 | £ 163,960 |
| | £ 5,999,120 | £10,999,060 | £ 6,000,000 |



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

29th Report, 2012 (Session 4)

Social Care (Self-directed Support) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 8, 15 and 22 May, the Subordinate Legislation Committee considered the delegated powers provisions in the Social Care (Self-directed Support) (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Health and Sport Committee as lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government has provided a Delegated Powers Memorandum (DPM)¹ setting out the need for the delegated powers, how they may be exercised and the choice of procedure applicable to their exercise.

3. Scottish Government officials also provided oral evidence to the Committee at its meeting on 15 May 2012. The *Official Report* of the meeting is available on the Parliament website.²

OVERVIEW OF THE BILL

4. The Social Care (Self-directed Support) (Scotland) Bill was introduced in the Parliament on 29 February 2012 by Nicola Sturgeon MSP. It is a Government Bill which makes provision about the manner in which local authorities provide certain support and services. In particular, it is intended to provide individuals who require those services with the power to direct the way in which they receive them. The Bill applies to both adult and child social care.

5. Local authorities presently have duties to promote social welfare, as laid down in Part II of the Social Work (Scotland) Act 1968 (“the 1968 Act”). In particular, this includes assessing whether individuals to whom they owe a duty

¹ Social Care (Self-directed Support) (Scotland) Bill. Delegated Powers Memorandum. Available at: [http://www.scottish.parliament.uk/S4_Bills/Social%20Care%20\(Self%20directed%20Support\)%20\(Scotland\)%20Bill/DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Social%20Care%20(Self%20directed%20Support)%20(Scotland)%20Bill/DPM.pdf)

² Scottish Parliament Subordinate Legislation Committee, *Official Report*, 15 May 2012. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7026&mode=pdf>

under the 1968 Act are in need of community care services, and providing services to meet those needs.

6. Local authorities also have a duty to promote the welfare of children in their area who are in need by providing services appropriate to those children's needs, under sections 22 to 24 of the Children (Scotland) Act 1995 ("the 1995 Act").

7. The Bill does not replace these duties. However, it does set out a number of principles which local authorities must have regard to in exercising their functions under Part II of the 1968 Act, sections 22 to 24 of the 1995 Act and under the Bill itself.

8. The starting point is that individuals must have as much involvement in the assessment of their needs and in the provision of support or services to them as they wish (section 1(2)). Local authorities are required to provide any reasonable assistance to enable individuals to express a view and to make an informed choice in choosing an option for "self-directed" support (section 1(3)). Local authorities are also obliged to collaborate with individuals in assessing their needs and providing support and services (section 1(4)).

9. The central element of the Bill is that individuals are to be given a choice as to how the services which they need are delivered to them. There are four options for self-directed support established by the Bill:

- 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 the 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.

DELEGATED POWERS PROVISIONS

10. The Committee considered each of the delegated powers provisions in the Bill.

11. The Committee determined 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.

12. The Committee's comments and, where appropriate, recommendations on the other delegated powers are detailed below.

Section 12 – Power to modify section 3

| | |
|---------------------------------|-------------------------------|
| Power conferred on: | the Scottish Ministers |
| Power exercisable by: | regulations |
| Parliamentary procedure: | affirmative procedure |

Background

13. 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.

14. Section 3 lists the options for self-directed support made available under the Bill. The supported individual is to be offered a choice of these options, and sections 4, 6 and 7 make provision about making that choice of support for adults, adult carers and children respectively.

Breadth of the power

15. It appeared to the Committee that the power in section 12 would enable the Scottish Ministers to make any modification to section 3 that they saw fit. It accordingly asked the Ministers to explain why such a broad power was considered to be necessary, and whether consideration had been given to limiting its scope. The Scottish Government officials advised the Committee that:

“ensuring flexibility and future proofing the range of options that is available to individuals were the main reasons behind including in the bill the power to modify the options.”³

16. They further explained that:

“The power in section 12 could have been drawn differently. For example, it could have allowed ministers to vary, remove or add an option. What it does is allow ministers to modify section 3 ...

The power is wide, but a narrower drawing up of it would have amounted to the same thing.”⁴

17. The officials subsequently confirmed to the Committee that it was not this present administration’s policy intention to use the power in section 12 to restrict the choice available to individuals. The Scottish Government’s legal adviser offered the opinion that:

“we are open to suggestions about how the power might be drawn more narrowly to achieve the aim. However, if, say, the power were drawn so that options could be added or removed, all the options could just be removed. It is simply theoretical. The Parliament could refuse to agree to regulations under the affirmative procedure. If a future Government with different

³ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 415.

⁴ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 417.

intentions with regard to the use of the power rejected the original intentions, the Parliament could refuse it.”⁵

18. The Committee recognises that the intention of the Scottish Ministers in seeking this power is to ensure that the Bill contains sufficient flexibility to allow it to be adapted to innovations in social work practice. In principle, it accepts that it may be reasonable to delegate power for that purpose, were the power to be exercised solely as this administration appears to propose.

19. However, it continues to have concerns in relation to the breadth of this power. Although the Scottish Government officials spoke of using the power to amend the definitions of the existing options specified in the Bill⁶, they accepted that it might be used to add new options in the future. They appeared to suggest, at least hypothetically, that however the power was framed it might be used to remove options and so to restrict the effectiveness of the choices available to individuals.

20. Given that section 3 of the Bill is recognised by the Scottish Government as one of its core provisions, and that the principle of choice in the delivery of services is central to the Bill, the Committee does not expect to see this power exercised so as to remove individuals’ ability to choose among the options. It observes that specific powers to restrict choice are to be found in sections 13 and 21 of the Bill. The Committee continues to be concerned that the entire policy and purpose of the Bill might be defeated by the making of regulations under section 12 so as to remove the element of choice. It accepts that this is in no way the policy of the present administration. However, given the significance of this matter, it suggests that the Scottish Government may wish to consider whether the power can be revised so as to provide that it cannot be used to remove the element of choice by reducing the options in section 3 to a single option.

Parliamentary procedure

21. As this power appeared to the Committee to be a particularly significant one, it explored with the Scottish Government why it considered the affirmative procedure to provide a sufficient level of parliamentary scrutiny. In particular, it wished to establish whether consideration had been given to a form of super-affirmative procedure to ensure an opportunity for detailed consultation on any draft regulations. In response, the Scottish Government’s legal adviser stated:

“It is a similar story to the one that you heard from the bill team for the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill. The options had been widely consulted on prior to the bill’s introduction. I assure you that there are no plans to use the power at present, and that any making of regulations would be done with extensive consultation with stakeholders.”⁷

22. The position adopted by the Scottish Government appeared to be that it views super-affirmative procedure as entailing detailed consultation followed by

⁵ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 418.

⁶ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 416.

⁷ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 417.

the affirmative procedure, and as it already proposes to consult then a form of super-affirmative procedure would not go any further.⁸

23. The Committee does not consider that it is accurate to draw parallels between the parliamentary procedure applicable to the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill and the procedure applicable to this power. The Scottish Government's legal adviser on that Bill informed the Committee that:

"The Scottish Government will consult on regulations before it makes them. Indeed, there will be a **statutory obligation** to consult the Convention of Scottish Local Authorities and such other bodies as ministers think appropriate."⁹ *[emphasis added]*

24. The Committee contrasts that with the position in relation to section 12, where there is no such statutory requirement to consult. While the Committee welcomes the stated intention of the Scottish Ministers to consult voluntarily before exercising the section 12 power, it observes that statutory consultation with prescribed bodies is, on the face of it, a greater safeguard on the exercise of the power.

25. Having considered the example of the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill, the Committee considers that the Government ought to include a similar statutory consultation requirement in section 12. It takes the view that, in particular, the Government should consult local authorities (or representative bodies such as COSLA), as well as organisations appearing to represent the interests of individuals to whom the Bill applies.

26. The Committee draws the power in section 12 to the attention of the lead Committee as it considers it to be particularly broad in its scope, and observes 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.

27. The Committee accordingly recommends 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.

28. The Committee considers 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 Committee would be content that the regulations are subject to the affirmative procedure.

⁸ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 419.

⁹ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 410.

Section 13 – Power to make further provision about direct payments

| | |
|---------------------------------|-------------------------------|
| Power conferred on: | the Scottish Ministers |
| Power exercisable by: | regulations |
| Parliamentary procedure: | negative procedure |

Background

29. Section 13 allows the Scottish Ministers to make further provision via subordinate legislation about direct payments, and section 13(2) sets out a non-exhaustive list of ways in which this power may be exercised. In their Delegated Powers Memorandum, the Scottish Ministers characterise the purposes for which section 13 might be exercised as being largely technical. Section 13(2)(a) enables the Scottish Ministers to specify descriptions of persons who are ineligible for direct payments and section 13(2)(b) enables them to specify circumstances in which the right to choose to receive direct payments need not be offered.

Parliamentary procedure

30. It appeared to the Committee that provision under section 13(2)(a) and (b) would be substantive and would go beyond the merely technical. Accordingly, it asked the Scottish Government officials to explain why it was considered that the negative procedure provided a sufficient level of parliamentary scrutiny for regulations of that nature.

31. The Scottish Government officials advised the Committee that this power derived from the existing provisions in relation to direct payments which are to be found in section 12B of the 1968 Act. They highlighted that regulations under section 12B may similarly restrict access to direct payments and that those regulations are subject to the negative procedure. They further indicated that it was intended to carry forward the existing regulations following the Bill's enactment, although consultation would take place and the form might be different¹⁰. For these reasons, the Scottish Ministers considered that the negative procedure was appropriate.

Comment

32. The Committee does not consider that the adoption of a particular procedure in relation to an earlier delegated power is necessarily determinative of the appropriate procedure to be adopted in relation to section 13. It notes that section 12B of the 1968 Act was inserted in 1996, and that the approach to delegated powers adopted by Parliament at that time may not necessarily be the approach favoured by the Scottish Parliament nowadays.

33. However, the Committee accepts that it is not the Scottish Ministers' intention to innovate substantially in relation to restrictions on access to direct payments, and indeed officials suggested that the Bill would "carry on" the existing

¹⁰ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 420.

regulations¹¹. In these circumstances, the Committee accepts that it is appropriate that this power is subject to the negative procedure.

34. The Committee is satisfied in principle with the power in section 13, and that it is subject to the negative procedure.

Section 19 – Guidance and directions

| | |
|---------------------------------|-----------------------------------|
| Power conferred on: | the Scottish Ministers |
| Power exercisable by: | guidance/directions |
| Parliamentary procedure: | no parliamentary procedure |

Background

35. When read with section 53 of the Scotland Act 1998, section 5(1) of the 1968 Act provides that local authorities are to perform their functions under the 1968 Act and their functions under Part II of the 1995 Act under the general guidance of the Scottish Ministers. Section 19(a) amends section 5(1) to extend the Ministers' powers to issue guidance to include guidance on functions conferred by the Bill.

36. Similarly, section 5(1A) of the 1968 Act provides that the Scottish Ministers may issue directions to local authorities as to the manner in which they exercise the functions conferred upon them by a number of Acts listed in subsection (1B). Section 19(b) adds the Bill to that list so that the Ministers may issue directions in relation to it.

Comment

37. The Committee considers that delegating powers to issue guidance and directions of this sort is, in the circumstances, appropriate. However, it notes that neither guidance issued under section 5(1) nor directions issued under section 5(1A) of the 1968 Act are subject to any form of parliamentary procedure. Nor does the 1968 Act require their publication in any other form. It accordingly welcomes the fact that the Scottish Ministers have convened a group of interested persons to assist in the development of the statutory guidance and delegated legislation necessary to implement the Bill.

38. The Committee accordingly finds the powers inserted into section 5 of the Social Work (Scotland) Act 1968 by section 19 to be acceptable in principle, and is content that they are not subject to any parliamentary procedure as this reflects the existing position under section 5(1) and 5(1A) of the Social Work (Scotland) Act 1968.

¹¹ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 420.

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

| | |
|---------------------------------|--|
| Power conferred on: | the Scottish Ministers |
| Power exercisable by: | regulations |
| Parliamentary procedure: | affirmative procedure when being exercised in conjunction with sections 12 and 21, and negative procedure when being exercised in conjunction with section 13 |

Background

39. 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.

40. The Committee was concerned that, in a Bill which contains only three substantive delegated powers, and which includes standalone powers to make ancillary provision by order, it was difficult to identify an obvious need for this power. This concern was fortified by the fact that two of the substantive powers (sections 12 and 21) of themselves contained specific powers to make ancillary provision. It accordingly sought further information from the Scottish Government on the interaction of this power with the specific powers in sections 12(b) and 21(2).

41. The Scottish Government indicated that the existence of those specific powers did not, in its view, prevent the exercise of the section 20(1)(b) power in conjunction with the powers in section 12 or 21. When asked why this was considered necessary, its legal adviser commented:

“It is not possible to speculate without knowing the terms of any changes to section 3. As I said, the specific power in section 12(b) would be used to amend the bill consequentially. If another amendment were needed to a further enactment—say, regulations regarding direct payments—we could use the power in section 20(1)(b) to make a consequential change there. However, we cannot speculate without knowing”.¹²

Comment

42. It appears to the Committee that the ancillary powers provisions of the Bill are complex, and it is not apparent why this degree of complexity is required. It observes that regulations under section 12, which of themselves are of a significant nature, might contain wide-ranging ancillary provision made under a combination of section 12(b) and 20(1)(b).

43. To the extent that section 20(1)(b) might be exercised in conjunction with section 13, the Committee accepts that it enables the Scottish Ministers to make ancillary and transitional provision in the same instrument as the related substantive provisions, and acknowledges that this may improve transparency and

¹² Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 419.

clarity for the end user. It is less clear to the Committee that a situation whereby the ancillary provisions in section 12(b) or 21(2) might be combined with further ancillary provisions in section 20(1)(b) does anything to promote transparency or clarity.

44. The Committee accordingly recommends 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.

45. As the procedure which applies to the exercise of this power will be determined by the procedure applicable to the principal power being exercised, the Committee considers this to be acceptable in principle.

Section 21 – Power to modify application of Act

| | |
|---------------------------------|-------------------------------|
| Power conferred on: | the Scottish Ministers |
| Power exercisable by: | regulations |
| Parliamentary procedure: | affirmative procedure |

Background

46. 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.

47. Section 4(2) requires local authorities to give supported adults the opportunity to choose one of the options for self-directed support listed in section 3, unless the authority considers the supported adult ineligible to receive direct payments. Section 7(2) places a similar obligation upon local authorities in respect of supported children or a member of a supported child's family to whom services are to be provided under section 22 of the 1995 Act.

48. Where regulations disapply section 4(2) or 7(2), section 21(2)(a) provides that the person may also be deemed to have chosen Option 3, and section 21(2)(b) provides that the regulations may disapply or modify any other section of the Bill.

Interaction with section 13

49. It appeared to the Committee that the powers in this section and in section 13(2)(a) and (b) were intended to be used in a similar way, to restrict the choice available to individuals. It accordingly asked the Scottish Government to explain why both powers were necessary and the criteria it would apply to determine which power ought to be exercised in any given case.

50. The Scottish Government officials made it clear that section 21 potentially has a much greater impact on the operation of the Bill than section 13. They stated:

“Any way in which section 21 was used would say, “You have no choice. In these circumstances, the local authority will provide the services as the local authority sees fit.” However, sections 13(2)(a) and 13(2)(b) would be able to restrict the choice and to say, “You have a choice, but your choice is between options two and three and option four”.¹³

51. They went on to specify that the section 21 powers were only intended to be deployed to remove any element of choice, and that they would not be used to restrict access to a particular option.

52. The Committee notes the Scottish Government’s position, and accepts that in principle it is appropriate to make a distinction between these powers based on their intended use.

Circumstances in which the power might be exercised

53. The Committee was concerned to note from the Delegated Powers Memorandum that, when the Bill was introduced, the Scottish Government did not know what the section 21 power would be used for. In particular, it was concerned that the DPM at paragraph 24 recorded that there were divergent views within the Scottish Government on that point. It accordingly asked whether those views had been reconciled, and whether the Scottish Government could advise as to the circumstances in which the power might be exercised.

54. The Scottish Government officials gave two examples of circumstances where the power might be deployed. It might be used in relation to child protection services which local authorities delivered in reliance on their powers to promote the welfare of children in need in terms of section 22 of the 1995 Act (as distinct from their child protection functions under other sections of that Act, to which the Bill does not apply). Officials also appeared to envisage its use where Option 2 was not considered appropriate:

“In relation to option 2 in the bill, which is not the direct payments option, there have been discussions with consultees around some of the recipients of social care who are at the outside edges of those whom social work departments support—people whose need arises from homelessness, drug addiction or alcohol addiction. The sector may not be ready to respond to the increased flexibility of option 2—the individual service fund option—in the short term, at least. Therefore, it was felt that a power to modify the application of the act was necessary”.¹⁴

55. The Committee accepts that, in some circumstances, such as those mentioned in paragraph 54 above, it might be necessary to disapply the element of choice. It notes, however, that there is an inconsistency between the position adopted in paragraph 51 above and the suggestion that it might be appropriate to deploy section 21 where Option 2 (rather than Option 1) was felt to be inappropriate. It accordingly suggests that the Scottish Government may wish to clarify whether it considers it necessary to remove the element of choice entirely in

¹³ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 421.

¹⁴ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Cols 420-421.

respect of persons whose need arises from homelessness, drug addiction or alcohol addiction, or whether it is merely Option 2 which is not appropriate for those persons. If it is the latter, 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.

Operation of the power

56. The Committee sought additional information in relation to three aspects of the way in which the power is intended to operate.

57. As section 21(1) provides only for the disapplication of subsection (2) of sections 4 and 7, it sought clarity on the position in relation to the remainder of sections 4 and 7 should subsection (2) be disappplied. The Scottish Government advised that, in its view, any other provisions in sections 4 and 7 would be disappplied by necessary implication if subsection (2) were disappplied.¹⁵

58. The Committee notes this explanation, although it does not consider the position to be entirely free from doubt. It considers it at least arguable that, if section 4(2) or 7(2) is disappplied, then the supported person has not made a choice in pursuance of that subsection or subsection (3)(b), and accordingly is deemed to have chosen Option 3 by virtue of subsection (4). As competing interpretations appear to be open, the Committee recommends that the Scottish Government consider whether the drafting of the section 21 power could be clarified so as to put the matter beyond doubt.

59. The Committee observed that, although sections 4, 6 and 7 were in very similar terms, the section 21(1) power could not be used to disapply section 6 (which relates to the choice to be given to adult carers). It sought an explanation as to why carers fell to be treated differently. The Scottish Government confirmed that this was an intentional omission, on the basis that the principal powers to provide support to adults (section 12 of the 1968 Act) and to children (section 22 of the 1995 Act) were “enormously wide”¹⁶. By contrast, the power to provide support to adult carers is contained in the Bill itself and it is a limited power. The officials advised that, while circumstances could be envisaged where the power might be needed in connection with sections 4 and 7, it was not possible to justify extending it to section 6 as no such circumstances were envisaged.¹⁷

60. The Committee notes the position, and observes that the omission does not in any way prejudice adult carers, who appear in fact to have a greater degree of protection than others who are entitled to a choice under the Bill.

61. Section 21(2)(b) provides that regulations made under section 21(1) may include provision disapplying or modifying any other section in the Bill. On the face of it, this power enables the Scottish Ministers to disapply or modify the Bill essentially as they see fit, if they disapply either section 4(2) or 7(2). It accordingly asked the Scottish Government to explain the basis upon which the supplementary power in section 21(2)(b) is intended to be exercised.

¹⁵ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 422.

¹⁶ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 423.

¹⁷ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 423.

62. The Scottish Government suggested that the power might be used to disapply section 8, which relates to the provision of information by local authorities. The Scottish Government's legal adviser said:

"It would be sensible to disapply local authorities' duty to provide information on choices if somebody did not have a choice."¹⁸

63. The Committee agrees that that would be a sensible approach. However, it observes that, in terms of section 8(1), section 8 only applies where "a local authority gives a person an opportunity to choose one of the options for self-directed support." It appears to the Committee that no such opportunity will be given if section 4(2) or 7(2) has been disapplied, and so section 8 will not apply. Making provision to disapply section 8 in regulations would accordingly seem to be otiose.

64. As sections 9 to 11 of the Bill will similarly apply only where a local authority has given a person an opportunity to choose one of the options, the Committee suggests that the Scottish Government give further consideration to whether the power in section 21(2)(b) is in fact necessary, particularly given that it enables the modification or disapplication of any provision of the Bill and is accordingly of a particularly significant nature.

65. As an example of the breadth of potential provision which might be made under section 21(2)(b), the Scottish Government was asked whether it might be used to disapply section 6(2), notwithstanding the previously-stated intention that section 6(2) be protected from the principal power to disapply contained in section 21(1). The Scottish Government's legal adviser replied:

"It certainly has not crossed my mind that that would be the intention. It would be for Parliament to decide, but that would clearly be a strange use of the power."¹⁹

66. Whether or not it might represent an unusual exercise of the section 21(2)(b) power, the Scottish Government appears to accept that the power could be used to controvert its intention to prevent the disapplication of the right of carers to make a choice. The Committee accordingly suggests that, if the Scottish Government remains of the view that the power is necessary, the Government should consider whether it is necessary to take a power to modify *any* provision of the Bill, or if it could feasibly identify provisions which should be protected from modification using this power.

Parliamentary procedure

67. As with section 12, this power appeared to the Committee to be a particularly significant one. It therefore explored again with the Scottish Government why it considered the affirmative procedure to provide a sufficient level of parliamentary scrutiny, and whether super-affirmative procedure had been considered. The Scottish Government took the view that there was nothing to distinguish this power from section 12. It confirmed its earlier position, i.e. that the reasoning given in

¹⁸ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 423.

¹⁹ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 423.

relation to the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill applied similarly in relation to this power.

68. As reported at paragraph 23 above, the Committee does not consider this to be an accurate comparison. Again, there is no statutory consultation requirement in section 21. It considers the section 21 power to be equally as significant as the section 12 power, if not more so. Accordingly, while it welcomes voluntary consultation, it is of the view that a statutory obligation to consult would constitute a greater safeguard when proposing to exercise a power which would preclude any element of choice.

69. The Committee accepts that the power in section 21(1) to disapply section 4(2) or 7(2) of the Bill is, in principle, appropriate.

70. However, the Committee recommends 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.

71. The Committee also recommends 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.

72. The Committee does 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.

73. The Committee calls 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.

74. Given that it appears to be intended that certain sections of the Bill, such as section 6(2), should not be modified, the Committee invites 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.

75. The Committee also considers 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 Committee would be content that the regulations are subject to the affirmative procedure.

Section 24 – Ancillary provision

| | |
|---------------------------------|---|
| Power conferred on: | the Scottish Ministers |
| Power exercisable by: | order |
| Parliamentary procedure: | affirmative procedure where making textual amendments to primary legislation, and otherwise negative procedure |

Background

76. 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.

Comment

77. The Committee accepts that circumstances may arise which would necessitate adjustments of the nature permitted by this power. It does not think it would be an effective use of parliamentary time to require matters of a technical or minor nature, and which are bound up with giving effect to the provisions in this Bill (as distinct with being used for some wider purpose), to be dealt with by means of further primary legislation.

78. Nevertheless, to the extent that this power enables textual changes to be made to primary legislation, the Committee considers that it is important that an appropriate level of parliamentary control is applied to that process. It therefore agrees that the affirmative procedure should apply in such circumstances. Similarly, the Committee considers that in other circumstances it is reasonable that the negative procedure should apply.

79. The Committee did not consider it to be entirely clear whether an order under section 24 may modify the Bill itself, despite the provision in section 24(2) that an order may modify “any enactment”. It has recently scrutinised delegated powers where the matter has been put beyond doubt in the Bill, for example in section 121(2) of the Police and Fire Reform (Scotland) Bill. The Committee accordingly asked the Scottish Government to explain whether it was intended that this Bill could itself be modified by order under section 24.

80. The Scottish Government did not offer a view on whether it would be possible to modify the Bill using the power in section 24, but it did clarify that it is not its intention to do so. The Committee considers that the present administration’s intentions cannot be determinative of the matter when the power will appear on the statute book until it is repealed, and so will be available to any future administration. The Scottish Government went on to make it quite clear that it considers the wording used in the Police and Fire Reform (Scotland) Bill to achieve clarity to be unnecessary, as it has no intention to use the power in that way.

81. The Committee respects the Scottish Government's intentions in relation to this power. However, if there is no intention that the power should be used in that way, then the Committee considers that it could be revised so as to state expressly that the power does not extend to modification of the Bill itself. In that respect, it would represent the mirror image of the Police and Fire Reform (Scotland) Bill's wording, which contains express provision to put it beyond doubt that the equivalent provision *did* extend to modification of that Bill. The Committee suggests that the Scottish Government reconsider this matter in the interests of clarity.

82. Subject to the following recommendation, the Committee is satisfied in principle with the power in section 24, and that it is subject to the affirmative procedure when making textual amendments to primary legislation, and otherwise to the negative procedure.

83. The Committee recommends 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.

Section 25 – Transitional provision etc.

| | |
|---------------------------------|-------------------------------|
| Power conferred on: | the Scottish Ministers |
| Power exercisable by: | order |
| Parliamentary procedure: | negative procedure |

Background

84. 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.

Comment

85. Again, the Committee accepts that circumstances may arise which necessitate adjustments of the nature permitted by this power, and it does not think it would be an effective use of parliamentary time for matters of a technical or minor nature, which are bound up with giving effect to the provisions in this Bill (as distinct with being used for some wider purpose), to be dealt with by means of further primary legislation.

86. However, this power, although subject to the negative procedure, may be used to modify any enactment. Unlike the power in section 24, there is no requirement that the affirmative procedure will apply when making textual amendments to primary legislation. As the Scottish Government's Delegated Powers Memorandum did not provide any explanation as to why negative procedure is considered appropriate in these circumstances beyond a bare reference to "similar ancillary powers in other Bills", the Committee explored the matter further with Scottish Government officials. The Scottish Government's legal adviser stated:

“I had thought that it was general practice that such revisions would be subject only to negative procedure, because I cannot think of ways in which transitional or transitory provisions would modify the text of primary legislation.”²⁰

87. The Committee accepts that this may well be the case. However, section 25(2) expressly provides that an order under section 25(1) “may modify any *enactment*.” Regardless of whether the circumstances can be presently envisaged, section 25 as it stands would confer the power to make transitional or transitory provisions which modify the text of primary legislation. It accordingly appears to the Committee that section 25(2) is either unnecessary, insofar as it relates to primary legislation, or it should be subject to the affirmative procedure in the same way as the section 24 power is when it is used to textually amend primary legislation.

88. The Committee observes that the powers in section 25 are very similar to those in section 122 of the Police and Fire Reform (Scotland) Bill. In the Committee’s report on the delegated powers in that Bill, it recommended that, as the power *might* be used to amend primary legislation, it ought to be subject to the affirmative procedure when used to do so. In the Cabinet Secretary’s letter to the Convener dated 30 April 2012, the Scottish Government acknowledges the merits of a consistent approach when textual modifications are being made to primary legislation. It has accordingly undertaken to lodge a Stage 2 amendment to make section 122 subject to the affirmative procedure when textually amending primary legislation.

89. The Committee reaffirms its view that a delegated power which permits the textual amendment of primary legislation is a significant matter, no matter how unlikely it is that it will be exercised for that purpose. It accordingly has a particular interest in ensuring that the Parliament has an appropriate level of scrutiny in relation to its exercise. Indeed, if the exercise of the power textually to amend primary legislation is considered to be unusual or rare then the Committee considers that this could be said to strengthen the appropriateness of the affirmative procedure being applied to ensure that the Parliament is adequately alerted to those unusual events.

90. Separately, and as with section 24, the Committee did not consider it to be entirely clear whether an order under section 25 might modify the Bill itself, despite the provision in section 25(2) that an order may modify “any enactment”. As section 24(2) and 25(2) are identical, the Committee adopts its reasoning in relation to section 24 in respect of section 25.

91. Subject to the following recommendation, the Committee is satisfied in principle with the power in section 25.

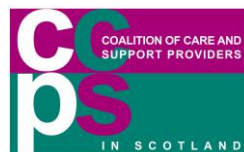
92. The Committee recommends that the Scottish Government consider whether section 25(2) might be revised so as to put it beyond doubt that the power in section 25 may not be used to modify the Bill itself.

²⁰ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 427.

The Committee recommends 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.

Social Care (Self-directive Support) (Scotland) Bill

Supplementary Evidence from Coalition of Care and Support Providers Scotland



Contents

| | |
|--|---|
| 1. How will SDS improve outcomes for people and how will we monitor this effectively? | 2 |
| Providers and outcomes..... | 2 |
| From the individual to the national | 2 |
| The individual as purchaser | 3 |
| Commissioning for SDS | 3 |
| Reporting effectively- learning from discretionary funders..... | 3 |
| 2. What are the implications for local authorities of the disaggregation of services? | 4 |
| Implications for Local Authorities and Providers..... | 4 |
| Disaggregation- costs..... | 4 |
| Effective decommissioning..... | 4 |
| 3. Is the difference in hourly rates due to better terms and conditions in the public sector ? | 6 |
| Other key findings | 6 |
| Why this is cause for concern | 6 |

1. How will SDS improve outcomes for people and how will we monitor this effectively?

The move from an inputs (hourly rate, numbers of staff etc.) driven system to one focussed on the difference that support makes to a person (outcomes) is very much welcomed by providers. It is estimated that reporting and monitoring costs the Scottish voluntary sector approximately £450 million pounds a year¹ and still not everyone in the system is getting the information they need about outcomes for people.

Providers and outcomes

When providers talk about social care outcomes in the general sense it is not simply about specific tools or approaches (for example Talking Points or SROI) but an overall mindset of investigation and improvement- asking “what works for the people we support?”

Despite previous witnesses maintaining that social care in general, and providers in particular are weak in this area there are many examples of excellent outcomes based approaches in the sector. These include systems that collate individual outcomes into a picture of the effectiveness of the organisation. Examples of providers with innovative systems and outcomes approaches include the Cyrenians, Penumbra and Includem.

From the individual to the national

One of the difficulties with the current outcomes based approach in SDS is that it is only one part of the picture- it focuses on a single tool (Talking Points) and only **one part of the chain of outcomes from the personal to the national** (See below for a very simplified example of a chain of outcomes.)

| Level of outcome | Person | Provider | Commissioner | Local authority | National |
|---------------------|---------------------------|---|---|--|---------------------------------|
| Example outcome | “I feel less lonely” | The people we support are more connected to their communities | People in my area are more connected to their communities | “Increase self- help and the promotion of independence in the community” | We live longer, healthier lives |
| Collecting the data | Outcomes based assessment | Provider’s own systems | Local authority data collection measuring progress. | | SOA indicator reporting |

Providers would welcome the opportunity to communicate how they support people towards their outcomes and commissioners would also welcome knowing more about provider outcomes as this would support the development of effective commissioning strategies.² The current input driven system makes this difficult to do- SDS gives us a good opportunity for change.

¹ This figure is a conservative estimate of spend as the study looked at both discretionary funding and statutory reporting.

Heady, L and Rowley, S (2008) *Turning the Tables- Putting Scottish Charities in Charge of reporting*
http://www.philanthropycapital.org/publications/improving_the_sector/improving_charities/turning_the_tables.aspx

² IRIS/P&P events on commissioning for outcomes (2011)
<http://www.iriss.org.uk/project/commissioning-outcomes>

The individual as purchaser

People making choices under SDS will need accessible information about effectiveness (how well the provider supports people to meet their goals/aspirations) and quality (whether supported people feel respected, supported, allowed to take risks etc.) This will therefore shift the information flow from the current situation of provider to commissioner to provider to individual.

Clearly the local authority will need monitoring information (how the money is spent) and information about service types, activities and numbers to inform the needs analysis part of the commissioning cycle. Outcomes don't function on their own they need inputs and activities to make them happen.

Commissioning for SDS

Providers identify commissioning as one of their primary challenges in delivering quality care and support. Characteristics of an SDS „ready“ commissioning strategy include good outcomes measurement approaches alongside effective needs analysis; cost transparency and a broad approach to the range of services that could potentially meet individual's needs.³

IRISS and P&P are running a small demonstration project with Falkirk council and a group of foster care providers to explore how commissioning can become more outcomes focussed. Falkirk has taken a co-produced approach from an early stage- working to the principles of public social partnership (PSP) and we would encourage local authorities to consider this approach.

Reporting effectively- learning from discretionary funders

Recent work by Evaluation Support Scotland and Scotland Funders" forum drew together best practice on effective, proportionate reporting. The report found that for reporting and monitoring to effectively attention needs to be given to building good relationship between providers and local authorities; asking the right questions; requiring proportionate evidence and communicating effectively.

More detail is available at:

<http://www.evaluationsupportscotland.org.uk/HarmonisingReportingWorkingGroupReport.pdf.pdf> or from ESS' Policy and Development Manager Patty Lozano- Casal patricia@evaluationsupportscotland.org.uk

³ Audit Scotland (2012) Commissioning Social Care http://www.audit-scotland.gov.uk/docs/health/2012/nr_120301_social_care.pdf and DoH (2010) Practical Approaches to Market and Provider Development http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_121670.pdf

2. What are the implications for local authorities of the disaggregation of services?

The uptake of Self Directed Support by large numbers of service users may lead to major changes in traditional service provision. This will affect both local authorities and third sector providers who may find that some of their services become unviable or null and void.

It is already the case that when service users are offered choice about the services and support they receive, many may opt for more individualised and community based support services. This could result in the sustainability of existing traditional „building based“ services (such as Day Centres) no longer being a viable option.

If large numbers of service users, who have previously not been given any choice other than the local day centre, are offered a wider choice of community based one to one support, learning and volunteering opportunities, or leisure activities, many may choose these more personalised forms of support.

Implications for Local Authorities and Providers

- Disaggregation of services may result in a **change in the workforce** as support staff are required to take up community based support roles.
- Local authorities may have to **contract out existing support services**, currently provided in house by Day Centre staff, to other support providers.
- **Cost implications** – the move to less building based services should reduce costs for local authorities, but will the additional resources be allocated directly to supporting service users?
- **Decommissioning** focuses the spend on activities and support for service users rather than on the building

Disaggregation- costs

We recognise that there are costs associated with buildings based services that may be saved on individualisation of the budget e.g. heating, lighting, maintenance, rent and some staffing costs. Local authorities then argue that an individual's budget for e.g. day services could therefore be smaller as they will not need to pay these additional costs for community based services. While this is logical we would argue local authorities must:

- Be transparent about the service, building and staffing costs involved.
- Be transparent about what an individual's budget and how the calculation is arrived at.
- Ensure that the person's budget is sufficient to enable them to have real choice in the market- not have to take the cheapest support on offer due to lack of resource.

Effective decommissioning

„Together with an increasingly articulate network of service users, the team redesigned a more effective, personalised alternative to institutional care. They worked hard to demonstrate the inadequacies of the current approach and the opportunities in the new. Bit by bit they built a coalition of support for decommissioning the day centres and finding more effective, community-based solution, that would allow people more choice, control and independence.’

The Nesta Trust carried out research on the decommissioning of services in consultation with 200 public sector leaders: **‘The Art of Exit: tackling the challenge of decommissioning in public services’** which identified the following issues around decommissioning:

- Decommissioning in house services requires changes in internal practice and management, careful planning and should be done in co-production with service users. The process of decommissioning should follow the following stages:
 1. Engage and Understand the needs and aspirations of service users
 2. Create a vision of flexible, community based support services
 3. Formalise and scale – identify and redirect spending from day centres towards activities.
- Decommissioning of building based services focuses the spend on activities and support for service users. There is a positive **shift from service led commissioning to user led commissioning**.

Full report: Art of Exit – Nesta, published March 2012
<http://www.nesta.org.uk/library/documents/ArtofExit.pdf>

3. Is the difference in hourly rates due to better terms and conditions in the public sector?

This study assessed the impact of public funding constraints over a four year period on terms and conditions for the third sector workforce. The headline finding was that

Respondents reported there were **no elements of public sector pay and conditions that were currently universally available to voluntary sector employees.**

Other key findings

- Over the last three years organisations suffered job losses and widespread pay freezes, with a minority resorting to pay cuts. Other cuts to terms and conditions included pensions, sick leave entitlement and unsocial hours payments. The bulk of these cuts predominantly fell on women.
- Further changes to terms and conditions, training, skills mix are anticipated over the next two years, leading to the possible **eradication of any link with public sector employment conditions among respondents.**
- The **creation of two or three tier workforces** in the sector threatens future problems with **recruitment, retention and labour mobility.**
- Organisations continue to **receive favourable Care Commission (now Care Inspectorate) reports**, but there were emerging concerns over future service quality as respondents struggled to sustain innovation, service user engagement and persuade workers to engage in additional unpaid work.
- Thirty-six percent of organisations had seen a decrease in their annual turnover in the last three years. Over half of respondents had reported no cost of living increases in their contracts (68%) or their grants (98%) in the last financial year.
- Some organisations were moving away from close partnership relations with funders. Organisations reported increases in competition, decreased security in certain income streams, the loss of services during tenders, **a greater emphasis on cost over quality in deciding contracts and the loss of close personal contacts within local authorities.**

Why this is cause for concern

While we are not taking issue with the fact that local authorities face difficult spending decisions a relentless downward pressure on rates for social care has significant effects on terms and conditions for voluntary sector staff. Our concerns are that this leads to problems with:

- A „perfect storm“ for staff- reduction in their pay and conditions alongside greater demands brought by SDS (fragmented working hours, increased flexibility, additional skills development etc...)
- Recruitment, retention and labour mobility
- sustaining a viable, diverse market (which is at the core of real choice for supported people- particularly those using Option 2 of the bill)
- Quality of service- ever decreasing rates mean eventually that something will have to give and Providers are concerned that this will be the quality of care.

This is why we would like to see a duty on local authorities to **pay reasonable rates reflecting the actual cost of delivering quality care and support** within the SDS framework.

Full report Cunningham, I (2011) Employment Conditions in the Scottish Social Care Voluntary Sector: Impact of Public Funding Constraints in the Context of Economic Recession University of Strathclyde/CCPS
<http://www.ccpscotland.org/assets/files/Employment%20Conditions%20Report.pdf>

Social Care (Self-directed Support) (Scotland) Bill

Supplementary Evidence Highland Health and Social Care Partnership

THE HIGHLAND HEALTH AND SOCIAL CARE PARTNERSHIP AT ITS FIRST EVIDENCE SESSION ON 8 MAY 2012

1. SPECIFIC NUMBERS OF SELF DIRECTED SUPPORT (SDS) PACKAGES INCLUDING DIRECT PAYMENTS

As was suspected, the Highland test site kept incomplete information about the total numbers of individuals who enquired about or who were assessed for assistance and the number of these enquiries that then resulted in the award of an SDS package. We are now exploring ways in which we might be better able to capture the breadth and depth of that information.

For information, I have enclosed figures relating to the numbers of new SDS packages awarded during the test site period (1 April 2009 – 31 March 2011) and from 1 April 2011 – 22 May 2012 at Appendix A. This highlights a move from the award of traditional Direct Payments to the new SDS packages.

In addition, this quote is taken from the evaluator's report of the test site:

Information supplied by The Test Site shows that in addition to those that did pursue SDS a further 101 cases either sought information about SDS options or were proactively advised of the option as a result of a focus on Young Adults in Transition. With 40 proceeding, that equates to 28% of those to whom SDS was promoted or who considered in the end pursued it. Unfortunately, whilst additional information is available in respect of a small number of cases, we do not have a comprehensive breakdown of why potential service users chose not to pursue SDS.

However, amongst the 101 that did not pursue an SDS approach, seven (7%) were recorded as taking up a Direct Payment instead. Although it is assumed these other service users did not have an SSAQ / outcome based award, it is appropriate to record them as having achieved some degree of personalisation. In which case of a total of 141 cases who were in contact with the SDS team, one third (33%), secured either a Direct Payment through SDS or separately.

44 of those who did not pursue SDS / DP were recorded as school leavers; this compares with 24 who did, made up of:

- 15 young people who were recorded as either receiving an on-going SDS package as part of the 1st or 2nd tranche of school leavers, or
- 7 who received a one off SDS payment but were recorded as „supported at school“, or
- 2 who were recorded as school leavers but received a Direct payment , which was not recorded as SDS based

This appears to indicate that were there was active promotion to the school population this led to higher levels of take up than amongst the wider group of enquirers. One third (33%) of school leavers pursued an SDS approach, rising to 35% if the two additional DP"s are included. This compares to 25% of enquiries proceeding to SDS – rising to 32% if the additional five additional („non SDS“) DPs are taken into account. However, one stakeholder observed that the reason for the higher take up of SDS amongst school leavers may have been due to a dearth of alternative options.

The reasons for the higher take up of SDS amongst school leavers are not known. There may have been several reasons including:

- Being a priority for the Test Site, school leavers might have received more focussed attention and support than other enquirers
- As many enquiries appear to have come from Social Workers, it is possible that they were only gathering information about possible options, which they had yet to explore with the service user.

Although not strictly comparable, other research in respect of Direct Payments may give some insights as to why clients did not take up SDS. The Test Site"s October 2010 quarterly monitoring form reports the findings of a survey of 292 people offered a Social Work service during May – June 2010, asking if they were offered a Direct Payment and, if they declined why they did so. There was a 35% response rate:

- 62% said they were not aware of the Direct payment option and
- 29% that they were offered a DP but declined.

Our earlier baseline study found that there were doubts as to whether all Social Work staff were adequately informing service users of their right to Direct Payments, if at all. These figures appear to confirm this as a continuing issue.

Of those that reported declining a DP (18):

- 39% felt they could not cope with the added responsibilities of managing a DP
- 11% said they trusted and preferred Highland Council"s services
- 11% said they had had a DP before and had ended this to choose more traditional service provision
- 6% had had a Direct payment turned down

2. ACCELERATED DISCHARGE FROM HOSPITAL

The main focus of the SDS test site activity was on transitions i.e. as young people are moving into adulthood. However, there was a secondary focus on accelerated discharge from hospital and this concerned making available SDS packages of care to elderly patients in one of Highland"s community hospitals, the primary objective being to avoid delayed discharge.

Unfortunately, the hospital-based project was unsuccessful and only one SDS package was awarded. There were a number of reasons for the failure and again,

the evaluator's report discusses this aspect of the test site, highlighting the following as key issues: lack of leadership and strategic planning, competing priorities in the hospital in relation to change activity; resistance by health staff. Timing was clearly an issue here as was the relatively short space of time available for implementation of this part of the project.

It is recognised that there needs to be a major shift in culture and mind-set within social work and social care so it is not surprising to see the same within the NHS, where staff do tend to more naturally take on a more paternalistic, "doing for people" approach and sometimes struggling with enabling people to take assessed risks. To address this, we have now seconded nurses into our SDS Team and they are working within hospitals and communities to raise awareness of SDS amongst health managers and staff.

3. REASSESSMENT AND APPEALS

There were no new or additional systems and processes for reassessment or appeals put in place for the period of test site. Hence existing routes for reconsideration were accessible. These were basically as follows: where a service user is unhappy about a decision to award a package or the amount of that package, the matter is escalated firstly to the Team Manager and then on to the Area Manager; thereafter where an individual continues to be unhappy, there is recourse to appeal through the Highland Care Charge Review Group, a panel of officers comprising social work, health, finance and legal expertise. During the course of the test site activity, there were no referrals to the HCCRG on matters relating to SDS or DPs.

4. ADVOCACY

In Highland, there is good availability of independent individual, citizen and collective advocacy and at the time of the test site activity, a range of advocacy services were available, having been commissioned jointly by the Highland Council and NHS Highland. Hence there was no need to commission a specific service to support SDS.

Part of the test site activity involved intensive training for advocates, notably advocates providing individual advocacy and carers' advocacy. We have continued to have good relationships with advocacy service providers and are currently engaged with the Stroke Association in their Advocacy and Self-directed Support Project.

5. SUPPORT FOR CARERS

A service user and carer network was established during the course of the test site and this was viewed positively and was well used. Subsequently, the SDS Team has recognised the value of this approach and is being more proactive in engagement with service users and carers, exploring different ways of achieving this. One way is for „Community Connectors" to play a key role with service users who have a learning disability and their families. The need to build community capacity is very much part of this.

Appendix A

| Year | Quarter | DP Adults | DP Children | SDS Adults | SDS Children |
|----------|---------|-----------|-------------|------------|--------------|
| 2009/10 | 1 | 10 | 3 | 0 | 0 |
| 2009/10 | 2 | 8 | 1 | 0 | 0 |
| 2009/10 | 3 | 3 | 0 | 0 | 0 |
| 2009/10 | 4 | 9 | 1 | 0 | 0 |
| 2010/11 | 1 | 10 | 0 | 1 | 0 |
| 2010/11 | 2 | 15 | 4 | 3 | 0 |
| 2010/11 | 3 | 13 | 1 | 0 | 0 |
| 2010/11 | 4 | 11 | 3 | 3 | 0 |
| 2011/12 | 1 | 11 | 0 | 20 | 0 |
| 2011/12 | 2 | 0 | 0 | 16 | 0 |
| 2011/12 | 3 | 0 | 0 | 5 | 5 |
| 2011/12 | 4 | 0 | 0 | 5 | 4 |
| 2012/13 | 1* | 0 | 0 | 4 | 1 |
| Totals : | | 90 | 13 | 57 | 10 |

Numbers of Direct Payments and Self Directed Support packages April 2009 – May 2012

* NOTE: Partial quarter – period relates to 1 April – 22 May 2012

Social Care (Self-directed Support) (Scotland) Bill

Supplementary Evidence Care Inspectorate

The Care Inspectorate has checked the availability of advocacy when it carried out initial scrutiny level assessments (ISLA risk assessments – 28 done at May 2012). We convened focus groups of service users when carrying out the risk assessments and we asked the service users about access to advocacy services and their experiences of advocacy, if they had benefited from this service. By way of example, the information below is what we received from one council – East Lothian Council – at the ISLA risk assessment stage.

Advocacy

Adults

| Provision of advocacy for adults (2011) | |
|---|---|
| Partners in advocacy | <ul style="list-style-type: none"> • One-to-one service to a total 20 people • 25 people receive group advocacy • From Jan 11 to June 11, 63 service users received a service |
| The Consultation & Advocacy Promotion Service (CAPS) | <ul style="list-style-type: none"> • No people using individual service – 173 • New referrals – 87 • People detained under Mental Health (S) Act 2003 - 25 |

East Lothian adult social care worked in partnership with The Edinburgh Advocacy Representation Service (EARS), which delivered an advocacy service to all four of the Lothian councils. The latest EARS annual report (submitted) stated there were tentative plans to merge the services for East Lothian Council and Midlothian Council.

Children

The comprehensive report from the East Lothian Who Cares worker was submitted as evidence. The worker delivered an advocacy service to a range of vulnerable children and young people e.g.

- children whose names were on the child protection register
- children with disabilities
- children who were looked after

Social Care (Self-directed Support) (Scotland) Bill

Supplementary Evidence Scottish Care

Further to the evidence session on Tuesday 22nd May 2012, I am writing to flag the need for further dialogue around the application of SDS to Residential Care for Older People

1. The proposed legislation brings Residential Care fully within the scope of SDS and Direct Payment. At present, Direct Payment applies only to Short Break stays in Residential Care. Long Term Care for Older People currently comes under the National Care Home Contract, for those who are publicly funded. Self-Funders, in the main, have part of their care costs offset by the Free Personal and Nursing Care Allowance.
2. Whilst we are in absolute agreement that the principles of SDS, allowing people to have control over their care package, should apply equally to all groups of service users, including those requiring Care Home provision, we have some reservations about the use of Direct Payments.
3. Existing legislation and regulation already gives the right to the choice of Care Home to all service users. Giving someone Direct Payment would not add to this. Nor, if someone is assessed as specifically requiring a full-time Residential Care package, can they really use Direct Payment to make alternative arrangements of their own.
4. Because Councils purchase Residential Care for Older People at a heavily discounted rate under the National Care Home Contract, and for the most part Self-Funder Rates are higher, use of Direct Payment might well end up costing people more.
5. The majority of people currently receiving publicly funded care home provision have high levels of need and are mainly in their last 2 years of life. Correctly, the care they receive should reflect their choices and wishes as far as these can be determined, but this may not be a point at which most people would want the added burden of making their own care arrangements.
6. In the context of greater Health and Social Care Integration, and the emphasis on Shifting the Balance of Care, more use may be made of Care Homes as an alternative to hospital for Intermediate Care, Specialist Dementia Care and Palliative and End of Life Care. The inclusion of Health purchased/funded care as part of SDS will also need to be clarified.
7. As with other care provision, the cost of Council run care home provision is significantly higher than corresponding purchased care. We need to create a level playing field so that anyone having a care budget, real or virtual, has equal purchasing power.

Social Care (Self-directed Support) (Scotland) Bill

Note from Clerk and Supplementary evidence from COSLA

Following oral evidence on 8 May, COSLA has provided further information regarding its assessment of the potential financial impact of the Bill.

Attached is COSLA's supplementary evidence including the quantitative survey proforma COSLA used to collate and aggregate the potential costs of the SDS bill, along with its qualitative analysis. COSLA has explained that it has not provided a breakdown of the quantitative analysis because it does not have permission to share this information from its member councils. However, it has informed us that COSLA's calculations are based on a response from its members, which were aggregated to produce a median figure.

COSLA wished to repeat the caveats expressed to the Committee, namely, that it is very difficult to accurately estimate the costs that will arise from the changes prescribed by the Bill: the timing and extent of shifts in commissioning arrangements, administrative costs, and dual running costs are partly dependent of the choices individuals make under SDS.

COSLA states that those caveats expressed, the £23m identified by the Scottish Government falls far short of even its most conservative estimates. COSLA believes that whilst it is difficult to fully estimate the exact cost for all Councils, from the information provided, even the lowest estimate for each of the cost areas outlined above over three years would total just over £50m nationally. COSLA states that 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. COSLA believes that this is very different to the actual level of funding which has been provided.

Supplementary information from COSLA

Self-Directed Support – Potential Financial Impact

1. Cost Variations

Evidence from England offers little insight as this has tended to centre around direct payment levels, which are not a good measure of SDS uptake (given that people may choose one of the three other SDS options). Furthermore, England has a more developed and diversified social care market, due to policy imperatives around externalisation and the growth of the private sector, which have either not applied to, or not had the same traction in, Scotland. Such externalisation tends to result in more people opting for direct payments – mainly because in-house services are depleted, the market has had time to develop, and commissioning arrangements have had time to develop across this market.

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.

Our survey showed that councils are all at different stages, and anticipate varying levels of costs. This is to be expected and is connected to both their assumptions about uptake levels, and their different service infrastructures. The balance between in-house, commissioned, and buildings-based services is a key driver here, with the shift towards spot purchasing and de-commissioning of both in-house and external provision, incurring three main types of costs:

- A) Costs related to withdrawing from existing arrangements – e.g. redundancy and/or TUPE costs, early termination penalties for block contracts
- B) Costs related to new contracting arrangements – e.g. the admin and finance burden will increase as staff move to dealing with a higher number of smaller payments and contracts, including new spot purchasing and framework agreements
- C) Costs related to maintaining existing services until they can be closed or scaled-down (dual running costs) e.g. meeting fixed overheads for services running below capacity, maintenance costs for buildings until alternative uses can be found

As the shape of local services vary, so do councils' estimates of costs in these three areas.

2. Identifying costs arising from the Bill duties

There is a need to be clear about the costs we see as arising from the specific duties in the Bill itself, versus costs that will arise through implementing the longer-term strategy. The main duties relate to:

- i) The duty to offer the four options below, and then 'give effect' to an individuals' choice
 - Direct payment
 - Direction on an available budget
 - Council-arranged services
 - A mixture of these arrangements
- ii) A duty to follow guiding principles on conducting social care assessments and providing people with the above four options
- iii) A duty to involve natural networks, or 'circles of support', in making initial decisions for those who lack capacity and managing support thereafter
- iv) A duty to offer carers the self-directed support options, where councils have already decided to support carers (i.e. the Bill does not introduce a duty to provide support to carers)

Assessment, review and administration costs will rise as a result of the new duties. In order to offer these options, and then be able to give effect to an individuals' choice, including involving 'circles of support', councils will need to have a number of systems in place. Costs arise from developing new systems and processes, and from deploying them, with many of these processes requiring more staff time. This will give rise to different types of costs that can be seen as directly arising from the Bill:

Direct payments

- Additional capacity for the administration of DPs will be required. Although councils should already have systems for making direct payments in place, the Bill will increase the *volume* of DPs, and therefore admin, finance and audit costs.

Assessment and review

- Assessment, resource allocation, and review processes will have to be reviewed to ensure they adhere to the guiding principles the Bill will introduce. In some cases, new systems, guidance, training etc will need to be developed and implemented as a result
- There will be an increase in the *volume* of SDS assessments as these are offered to all new clients, and other client groups are reviewed. Where a council is also supporting a number of carers, the Bill duty requiring councils to also offer them the SDS options, means that carers will be added to the total number of clients requiring SDS assessments/reviews. There has also been some concern that the Bill will lead to increases to the total client base, over and above that expected to arise from demographic change, due to direct payments encouraging more people to seek a service. Prof David Bell

has dubbed this the 'woodwork' effect, which he highlights as having had a particular impact in the Netherlands. Financial provision needs to be made for these increases, or further consideration needs to be given to defining eligibility

- There will be an increase in the *time* care managers need to spend with clients. There will be 'spikes' across key parts of the care management process – at initial assessment (to explain SDS, explore the four options and support the decision-making); when allocating resources (to go through the resource allocation system and deal with any concerns, complaints, or appeals); when purchasing and arranging services from a more diversified market (either on a client's behalf, or supporting them to do so); when reviewing packages and re-configuring as necessary (this may include repeating some of the stages already outlined)
- Taken together, these increases in volume and time, lead to a requirement for increased capacity (mostly, but not exclusively, at Care Manager level)

3. The cost of care

Providing highly personalised services through spot-purchasing or individual contracts and delivering them in individual settings, can be more expensive than providing more standardised care on the 'one-to-many' model of buildings-based services. These increases to the cost of care need to be met through increased funding, or there is a risk the level of care that can be provided will reduce.

The unit costs of externally purchased care are likely to rise, leading to a requirement for increased funding or a reduction in the levels of care provided. Direct payments (and SDS overall) are not considered to be cost-neutral. Professor David Bell has emphasised that implementing SDS will require a move away from block contract and framework contract models, to spot contracts, and that these spot contracts will be more costly – both in terms of the set-up costs, and the service price. Therefore the same Individual Service Budget may not stretch as far as it did before. These increased costs either need to be met through councils making cuts to other services, or additional funding being needs to made available to allow councils to 'top up' care budgets to compensate. If neither of these options is possible, social care clients may be forced to accept a reduction in the hours of care their budget can purchase when their level of need has not changed. This is not an issue that can be dealt with through bridging finance. These increased unit costs will be a long-term feature of the contracting arrangements required to 'give effect' to individuals' choices in respect of the four options the Bill introduces.

4. Bridging finance

Fixed running costs for in-house and buildings-based services will need to be met until services can be down-sized or closed. As people take up the range of options that the Bill will require councils to offer, there will be a reduced requirement for in-house services. This will lead to obverse economies of scale operating until natural staff turnover, redundancy or TUPE arrangements reduce overheads in line with the reduction in clients. Until this point, the service will be running inefficiently, with the unit cost of care going up. Again, this leads to the same question of who

meets these costs and whether they are passed on to social care clients. Similar issues arise in relation to buildings-based services, however, even once a service has been closed, councils will need to continue to meet maintenance costs until the building can be sold or an alternative use found.

Self Directed Support - consultation on financial memorandum and potential costs

[illegible]

[illegible]



The Scottish Parliament
Pàrlamaid na h-Alba

Health and Sport Committee

Draft Report on Annual Report 2011-2012

Remit:

The remit of the Health and Sport Committee is to consider and report on matters relating to 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:

Duncan McNeil (Convener)
Jackson Carlaw (until 2 May 2012)
Bob Doris (Deputy Convener)
Jim Eadie
Mary Fee (until 22 December 2011)
Richard Lyle
Fiona McLeod
Nanette Milne (from 2 May 2012)
Gil Paterson
Mary Scanlon (until 16 November 2011)
Richard Simpson
Drew Smith (from 22 December 2011)

Committee Clerking Team:

Clerk

Dougie Wands

Senior Assistant Clerk

Rodger Evans

Assistant Clerk

Rebecca Lamb

Committee Assistant

Andrew Howlett (until 2 April 2012)

Myra Leckie (from 2 April 2012)

The Committee reports to the Parliament as follows—

1. This report covers the work of the Health and Sport Committee during the Parliamentary year from 11 May 2011-10 May 2012.

Reports and inquiries

Regulation of care inquiry

2. The Committee's first inquiry of the parliamentary session was on the regulation of care for older people. The inquiry was launched in the wake of high profile events in the care sector and sought to investigate the regulatory regime and ascertain whether safeguards were robust enough.

3. The Committee received over 70 written submissions in response to its call for views on the inquiry. The programme of oral evidence included Lord Sutherland, the Chief Executive of the Care Inspectorate, and the Cabinet Secretary for Health, Wellbeing and Cities Strategy. It also held informal meetings with service users and carers to gather their views and experiences of the regulatory system.

4. The Committee reported its [findings](#) on 29 November 2011.

5. While it found that the current regulatory system was sufficiently rigorous to identify care services for older people which were failing to deliver high quality care, the Committee made several recommendations regarding the regulation of the care workforce and the Care Inspectorate's inspection process, which included a call for a review of the National Care Standards.

6. A [debate](#) on the Committee's report and the Scottish Government's response was held on Wednesday 7 March 2012.

Budget scrutiny

7. The Committee [reported](#) to the Finance Committee on its scrutiny of the draft budget 2012-13 and spending review 2011 in November 2011.

8. It agreed that integration and prevention were strategic priorities for the development of the NHS in Scotland.

9. The Committee stated that it wished to revisit the progress on preventative spending more systematically over the course of the spending review, and for the duration of this Parliamentary session.

10. Its report to the Finance Committee concluded that the settlement for health and sport had been generous but it was beholden on all involved in these two sectors to demonstrate that in return they have placed quality and efficiency at the heart of their thinking.

11. The Scottish Government's response to the Committee's report can be read [here](#).

12. A more general issue for the Committee was a concern that the budget document continued to cover national spending on health in detail but did not provide detail on how health boards will use over £8 billion.

13. To this end, and building on work undertaken by the previous Committee, a questionnaire was circulated to all NHS boards in January 2012, following which oral evidence from specific boards was heard on [1 May 2012](#).

14. A report of that scrutiny will be published before the summer recess of 2012 and the information will feed into the Committee's scrutiny of the draft budget to be published by the Scottish Government in autumn 2012.

Integration of Health and Social Care

15. The Committee conducted a short inquiry into Scottish Government plans for the integration of health and social care in which it took oral evidence at its meetings on 6, 13 and 20 March 2012.

16. It published its [report](#) on 4 May 2012.

17. The Committee presented its findings to the Scottish Government as a contribution to the consultation process and will use them to scrutinise any future legislation.

Evidence session on Sport

18. On [13 December 2011](#) the Committee held an evidence session on Ministerial priorities with the Minister for Commonwealth Games and Sport.

19. The issues that arose included: investment in sport, preparations for the Commonwealth Games, the legacy of the Games, the role of sport in context of the preventative spending agenda, development of sport at a local level including the role of community sports hubs, how to encourage and maintain physical activity from childhood on, and a national audit of sporting facilities.

20. The remit of an inquiry to be held in September 2012 into a sport-related issue was under consideration at the time of going to press.

Bills and other legislative matters

Alcohol (Minimum Pricing) (Scotland) Bill

21. The Bill was introduced in the Scottish Parliament on 31 October 2011. The Committee was designated as lead committee in consideration of the Bill at Stage 1.

22. The main purpose of the Bill is to introduce a minimum price of alcohol below which alcohol must not be sold on licensed premises. For further information on the Bill and its accompanying documents, see the [Alcohol \(Minimum Pricing\) \(Scotland\) Bill](#).

23. The Committee issued a call for [written evidence](#) on 12 December 2011.

24. It took oral evidence at meetings on 10, 17, 24 and 31 January and [published its report](#) on 7 March 2012. The [evidence](#) the Committee heard at one of its two

meetings on 10 January 2012 included a video conference link-up with Professor Timothy Stockwell of the University of Victoria in British Columbia, Canada.

25. Stage 2 proceedings took place on [1 May 2012](#). Two amendments were agreed to; one regarding a “sunset clause”, the other addressing evaluation.

26. Stage 3 fell outside the timeframe of this annual report.

Social Care (Self-directed Support) (Scotland) Bill

27. The Bill was introduced on 29 February 2012. The Committee was designated as lead committee in consideration of the Bill at Stage 1.

28. The main provisions of the Bill relate to the arranging of care and support in order to provide a range of choices to individuals as to how they are to be provided with their support. For further information, see [Social Care \(Self-directed Support\) \(Scotland\) Bill](#).

29. The Committee issued a call for [written views](#) which closed on 24 April. More than 100 submissions were received.

30. Oral evidence at Stage 1 was heard during May 2012.

Legislative Consent Memorandums

31. The Committee was designated as lead committee for scrutiny of the Legislative Consent Memorandum on the Welfare Reform Bill (UK Parliament legislation). You can read more about the Committee’s work on this, including written and oral evidence, [here](#).

32. The Committee published its [report](#) on 8 December 2011.

33. The [Scottish Government wrote to the Committee](#) on 21 December 2011.

34. The Scottish Parliament debated a Legislative Consent Motion on the Welfare Reform Bill on [22 December 2012](#).

35. The Committee also considered a Legislative Consent Memorandum on the London Olympic and Paralympic Games (Amendment) Bill (UK Parliament legislation).

36. The Committee published its [report](#) on 27 September 2011.

Scottish Statutory Instruments

37. The Committee scrutinised 29 instruments, of which eight were considered under the affirmative procedure and reports were published.

38. The remainder were considered under the negative procedure.

Equalities

39. The Committee continued to recognise the importance of being inclusive in its work. For example, as part of its inquiry into regulation of care, as well as taking evidence from representative groups, the Committee engaged directly with service

users holding informal meetings in Glasgow and Edinburgh to explore their experiences.

40. It sought to ascertain information on equalities in the health context via a question to NHS boards anent budget allocations for 2012-13.

41. The Committee heard evidence on the Alcohol (Minimum Pricing) (Scotland) Bill from Andrew Deans, Convener of the Youth Parliament's Health and Wellbeing Committee.

42. It also looked to widen its reach to interested parties beyond the "usual suspects" by being the first Committee in the Scottish Parliament to have a Twitter account and regularly tweet Committee news, views and developments. Follow [@SP_HealthSport](#) if you wish to keep up to date with the Health and Sport Committee on Twitter.

43. Taking evidence on the first annual report of the Scottish Government's child poverty strategy, the Committee heard from the Minister for Public Health at its meeting on [17 April 2012](#). The Committee will return to scrutiny of the strategy over the course of the parliamentary session, reviewing and reporting on the strategy's progress.

44. The Committee's clerking team are represented on the Scottish Parliament's Equality Advisory Group, a body established in 2011 to ensure that the Parliament, in everything it does, takes account of the needs of the wider community, in terms of access and participation; and in delivering a successful corporate strategy for equality. The Group's membership includes representatives of a number of external bodies in the equalities field.

Other activities

Petitions

45. The Committee considered and completed a petition on the safety of silicone breast implants.

46. It agreed to write to the Scottish Government and the Medicines and Healthcare products Regulatory Agency requesting to be kept informed of any updates on this subject.

47. Subsequently, the Committee took evidence on the specific issue of PIP implants from the Scottish Independent Hospitals Association, Spire Murrayfield Hospital, Nuffield Health, the Cabinet Secretary for Health, Wellbeing and Cities Strategy, and the Chief Medical Officer.

48. It considered a petition on deep vein thrombosis (DVT) and, given a range of recent work on the subject, wrote to the Scottish Government to request updates on the patient guidance information regarding DVT.

49. The Committee also considered three petitions on orphan diseases and individual patient treatment requests (IPTRs).

50. It took evidence on orphan diseases and IPTRs from Rare Disease UK, the Association for Glycogen Storage, and PNH Scotland, and wrote to the Scottish Government and to the Scottish Medicines Consortium (SMC) for clarification of their position.

51. The Committee will be looking at the work of the SMC and the IPTR process in a wider context in the autumn.

European Policy

52. The Committee considered the European Commission Work Programme regarding health policy on [7 February 2012](#) and agreed to write to the Scottish Government to seek its position on the revision of the Tobacco Products Directive, and the package of innovation in health in respect of medical devices.

53. It also agreed to monitor findings from the European Innovation Partnership on Active and Healthy Ageing.

54. At its meeting on [17 April 2012](#), the Committee considered the Proposal for Amending the Transparency Directive Regulating the Pricing of Medical Products for Human Use and their Inclusion within the Scope of National Health Insurance Systems, which raised issues in relations to subsidiarity.

55. The Committee agreed to write to ascertain the Scottish Government's position and to monitor the progress of the proposal.

Meetings

56. The Committee met 33 times during the Parliamentary year. Five meetings were held entirely in private and 29 meetings included items in private.

57. The main reasons for taking business in private were to consider draft reports and to discuss work programme matters.